

Examining the Non-State Role in International Governance

Eric Dannenmaier

Submitted in partial fulfillment of the
requirements for the degree of
Doctor of the Science of Law
in the School of Law

COLUMBIA UNIVERSITY
2013

© 2013
Eric Dannenmaier
All rights reserved

ABSTRACT

Examining the Non-State Role in International Governance

Eric Dannenmaier

This dissertation focuses on the role of non-state actors in international lawmaking and institutions. People increasingly participate in international governance through a range of organizations and institutions yet their access remains contested and tentative; often described as an accommodation but not a right. Citizens may be sovereign at home, but they lack standing at international law. I examined multiple cases where participation has become part of the machinery of international lawmaking – from regional agreements in Europe and the Americas to global accords addressing climate change. Each case shows the assertion of popular will within a governance framework constructed and managed by states. My findings thus reveal a paradigm of state architects and executors that accommodates non-state actors as collaborators and animators. This paradigm challenges the idea that state sovereignty is absolute and impervious without rejecting state dominion outright. Within a broader scholarly discourse that often presents a binary choice – either states are sovereign (leaving people with no real place in international lawmaking) or people are sovereign (leaving the international system assailable for its conspicuous democracy deficit) – my findings suggest a hybrid approach that reinforces the authority of states while making meaningful space for non-state actors. International governance thus gains some of the value of democratic, participatory models in a way that enhances rather than disrupts the existing international legal system.

TABLE OF CONTENTS

Chapter 1 Introduction	1
<i>Origins of Sovereignty</i>	10
<i>The Expanding Role of Non-state Actors</i>	12
<i>Three Pieces</i>	17
A European Commitment to Environmental Citizenship	18
Head of State and Government Summits	19
Non-State Access to Global Climate Change Governance	20
<i>Unifying Themes</i>	21
<i>Findings</i>	23
Chapter 2 A European Commitment to Environmental Citizenship: Article 3.7 of Aarhus and Public Participation in International Forums	27
<i>Introduction</i>	27
<i>International Governance and the Debate Over Non-State Actors</i>	30
The Role of Non-State Actors in Lawmaking	31
Normative Claims about Public Participation	33
The Move to Engage Non-State Actors	36
The Importance of Public Participation in International Environmental Law	37
<i>The Aarhus Convention</i>	39
‘Environment for Europe’ Process and Public Participation	40
Drafting Aarhus	43
<i>Promoting Principles of the Aarhus Convention beyond the State: Article 3.7</i>	48
Normative and Positive Implications of Article 3.7	58
Methodological Implications of Article 3.7	59
<i>Implementing Article 3.7: The Almaty Guidelines</i>	61
Development of the Guidelines	61
Scope of the Guidelines: Revisiting Forums Comprised of Non-Parties	63
Content of the Guidelines	66
<i>Implementing the Almaty Guidelines</i>	72

<i>Questionnaire Responses</i>	75
<i>Conclusion</i>	81
Chapter 3 Lawmaking on the Road to International Summits	86
<i>The Debate Over Non-State Access</i>	87
<i>Summits as an Entry Point</i>	95
<i>The Summit Phenomenon</i>	106
<i>A Brief History of Inter-American Summits</i>	112
<i>Non-State Access to Inter-American Summits</i>	121
<i>Commitments to Democratic Governance and Public Participation</i>	133
Miami (1994)	133
Santa Cruz (1996)	136
Santiago (1998)	137
Quebec City (2001)	139
Monterrey (2004)	142
Mar del Plata (2005)	143
Port of Spain (2009)	144
<i>Commitments to Democracy: Four Case Studies</i>	147
Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making (ISP)	150
Inter-American Democratic Charter (IADC)	156
FTAA Negotiations	167
NGO Accreditation Rules for the OAS	175
<i>Jurisgenerative Potential of Summits</i>	183
<i>Conclusion</i>	195
Chapter 4 The Role of Non-state Actors in Climate Compliance	200
<i>Introduction</i>	200
<i>Access as an Emerging International Norm</i>	204
<i>Climate Access Commitments to Date</i>	213
<i>Emerging Access Post-Kyoto</i>	219

The Non-State Role in Cooperative Action	220
The Non-State Role in Compliance with Further Commitments	221
<i>Climate Compliance through Non-Climate Mechanisms</i>	223
International Financial Institutions (energy financing)	224
International Economic Cooperation Institutions	229
Human Rights Bodies	232
World Heritage Sites	236
Convention on Biological Diversity	242
<i>Domestic Institutions</i>	243
<i>Conclusion</i>	245

ACKNOWLEDGMENTS

I am indebted to the Chair of my Dissertation Committee, Professor Lori Fisler Damrosch, for deepening my exploration of international law and inspiring this work. I have greatly appreciated her perspective and counsel. I also owe a debt to Professor Michael Doyle, who guided my understanding of international governance models and brought an important interdisciplinary perspective to my work, as well as Professor José Alvarez, who stressed my obligations as a scholar rather than a mere observer of international law. I also wish to thank Professor Mark Barenberg, who organized the doctoral workshops that offered broader me insights into legal scholarship and who slogged through my final project with patience and perspective. I cannot fail to thank, as well, Sylvia Polo, who directs Graduate Legal Studies at Columbia; Ellen Chapnick, Columbia's Dean for Social Justice Initiatives; and Professor Edward Lloyd, who directs Columbia's Environmental Law Clinic. They have been friends and tireless supporters.

Each of the three chapters that make up the substance of this work was developed through different research processes and relied on the support of additional friends, colleagues, editors and publishers.

Chapter two, A European Commitment to Environmental Citizenship: Article 3.7 of Aarhus and Public Participation in International Forum was published as Eric Dannenmaier, *A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums*, 18 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW

32-64 (Oxford University Press) (2007). This chapter grew in part out of my membership in the expert group that prepared an initial draft of the Almaty Guidelines on the Implementation of Article 3.7 of the Aarhus Convention during consultations with the Aarhus Secretariat in 2004–5, and I wish to acknowledge my debt to the Aarhus Secretariat in Geneva for producing the data upon which part of the piece relies, and to its director, Jeremy Wates, for his insights on the early history of the Aarhus Convention and for inviting me to be part of the working group that developed guidelines to implement Article 3.7. I also wish to thank Emily Slaten and Danielle Tucker for assistance in coding the Aarhus data, David Hunter and his fellow editors at the Yearbook for comments on early drafts, and Stacy Belden at OUP for editorial support.

Chapter three, Head of State and Government Summits was published as Eric Dannenmaier, *Lawmaking on the Road to International Summits*, 59 DEPAUL L. REV. 1-68 (2009). Professors Lori Fisler Damrosch, Mark Barenberg, and José Alvarez, along with participants in Columbia Law School’s Doctoral Workshop, offered valuable comments on early drafts of this piece. I am grateful for their insights. I also benefitted from comments offered during presentations to the law faculties at the Indiana University Robert H. McKinney School of Law, the University of Illinois and the University of New Mexico, as well as the editorial assistance of Emily Slaten, and the work of the editors and staff of the DePaul Law Review.

Chapter four, Non-State Access to Global Climate Change Governance was published as Eric Dannenmaier, *The Role of Non-State Actors in Climate Compliance*, in Jutta Brunnée, et al., eds., *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME*, 149-77 (Cambridge University Press) (2012). Some of the underlying research for this chapter was presented at the Second UNITAR/Yale Conference on Environmental Governance and Democracy at Yale Law School in September 2010, and I wish to thank organizers of and participants in that conference for their comments and insights. Some of the case studies of non-state actors pursuing climate compliance through “non-climate” multilateral environmental agreements discussed are separately published in a more extended form as part of Eric Dannenmaier, *Constructing Transnational Climate Regimes*, in Handl & Zekoll, eds., “EXTRATERRITORIALITY”: *TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION* (2012). My friend and former colleague Professor Gunther Handl of Tulane Law School offered important guidance in framing and analyzing those case studies. I am also indebted to Kelly Poole, Stephanie Boxell, and Melissa Buckley for their editorial assistance, and to the editors of the Cambridge volume for invaluable insights and perspective on this chapter in earlier draft form.

Finally, and yet foremost, I owe a debt beyond measure to my wife Maria Eugenia Brockmann Dannenmaier, who supported me in all aspects of this work. From applying to Columbia’s graduate program to moving from New Orleans

forty days ahead of Katrina's landfall, to the process of research, writing, & cetera over many years, she has been my constant partner and inspiration.

A Note Regarding References and Editorial Style

Because each of the three substantive chapters that follow was published separately, the references in the footnotes accompanying each chapter are designed to stand alone. This has resulted in some minor duplication of references between chapters. Works of common relevance, for example, are fully cited where relevant in each chapter and cross-referenced internally within each chapter. Some introductory material laying theoretical foundations in each chapter (for example, discussion of the context for this work in legal and academic literature) is also somewhat redundant. In addition, the editorial style of each publication (two publishing houses and one law review) varied in minor detail (for example the citations "see, e.g.," and "id." in a US law review were "see, for example," and "ibid." in Oxford's yearbook). Because each chapter does stand alone, I thought it better to retain these minor features than to restructure and make uniform all chapters and destroy their independent integrity.

A Note Regarding British English

Chapters two and four were published in British texts, and were thus written in British English. This has resulted in minor spelling variations from United States English. I have elected to retain these minor differences where present in these chapters in order to preserve the character of each chapter as published.

DEDICATION

To Mauge y los chicos.

CHAPTER 1 INTRODUCTION

My dissertation research has focused on the role of non-state actors in international lawmaking and international institutions.¹ They increasingly participate directly in international governance, yet this access remains contested and tentative; it is seen as an accommodation but not a right. Non-state actors may be sovereign at home, but they lack standing on the international stage. This raises both theoretical and practical questions.

As a theoretical matter, the increasing participation of non-state actors challenges traditional ideas of state sovereignty in international law which have been more concerned with defining territorial authority and ordering horizontal, inter-state, relations than responding to the nuances of vertical relationships and domestic polities. Non-state actors present both horizontal and vertical challenges to dominant conceptions of relations among sovereign states. Participatory processes align with Locke's prescription that "all peaceful beginnings of government have been laid in the consent of the people,"² but popular consent has little to do with historical ideas of sovereignty in international law. Some even argue that greater participation is anti-democratic because it challenges the authority asserted in external relations by state leaders (at least those who are

¹ Throughout my work, I use the term 'non-state actor' in its broadest sense to include individual actors, organizations, communities, groups, and associations that do not directly represent the state, but instead project public views into international discourses. A more complete definition is offered in my individual pieces.

² John Locke, *SECOND TREATISE OF CIVIL GOVERNMENT*, chapter 8 section 112 (1690).

democratically elected).³ These skeptics contend that states are the only meaningful unit for projecting national will and shaping transboundary laws and institutions; thus, states should be the exclusive actors in making and implementing international law. My work rejects this contention and advances an argument that ideals of popular consent are important in international lawmaking and that the participation of non-state actors can advance those ideals.⁴

As a practical matter, the increasing role of non-state actors challenges institutional frameworks that seek to reach consensus, assure legitimacy, and promote compliance. Consensus among states that must exercise their mutual will to make new law is a complicated goal made more so with the introduction of seemingly limitless, diverse voices of various ambitions, expertise, tactics, and influence. The difficulty of achieving consensus or majoritarian resolution on any issue among a global population surpassing six billion individuals would exceed the capacity of even the most innovative constitutional framer – so any hope of universal suffrage or direct representation would seem utopic. Yet my research suggests that some models of non-state access show promise by increasing the

³ See, e.g., John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 215-218 (2000) (allowing civil society's "intrastate advocates to reargue their positions" in international forums "raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided."), Kenneth Anderson & David Rieff, *'Global Civil Society': A Sceptical View*, in GLOBAL CIVIL SOCIETY 26, 37 (Helmut Anheier et al. eds., 2005) (the authors "argue that the 'democracy deficit' of the international system is buttressed rather than challenged by the global civil society movement").

⁴ See *infra* notes 22-24 and accompanying text.

scope of participation and thus advancing principals of republicanism and deliberative democracy. Some states, and some scholars, question a process that engages “outsiders” in the first place on the theory that states are the only legitimate transboundary actors. On this point my work shows that the presence of these actors can strengthen legitimacy⁵ through mechanisms that further the domestic internalization of international norms.⁶ As for compliance, the likelihood that states and their citizens will keep promises and obey international rules is promoted where monitoring is expanded and opportunities for redress are increased. Domestic implementation is more likely to be embraced by constituencies that help to shape international outcomes and can thus play a more direct and enthusiastic role in integrating those outcomes within domestic institutions.⁷

⁵ See e.g., Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (arguing that nations are more likely to obey laws with a high degree of perceived legitimacy, and that legitimacy is reinforced by elements of “determinacy, symbolic validation, coherence, and adherence”)

⁶ See e.g., Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183-86 (1996) (discussing transnational legal process as the “theory and practice of how public and private actors ... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”).

⁷ See, e.g., Abram Chayes & Antonia Handler Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (advancing a “managerial” model of treaty compliance that relies on a continuing dialogue between the parties, international officials, and NGOs).

In the end, the main challenge to the increasing role of non-state actors might be the interstate system itself. A system that emerged from decades of war, has been reinforced through more than 350 years of violent conflict and compromise, and is projected by a vast institutional framework that seeks to assure peace, deliver essential services, fund development, and facilitate dialogue on issues of multilateral and global concern is not easily displaced. Yet I have found, as have others, that international institutions are not impermeable.

My dissertation research has involved the close analysis of emerging models of non-state participation in the state-sovereign system. I studied the influence of non-state actors on a European Convention promoting more democratic environmental decision-making;⁸ the role of non-state actors in shaping agendas and outcomes of head of state / head of government summits;⁹ and the multiple avenues that non-state actors have found to shape and deploy international institutions in response to global climate change.¹⁰ Each of these projects resulted in a publication describing alternative approaches to non-state access and analyzing these approaches in light of the literature on public participation in international law.

My findings further the work of scholars, including Philip Alston, Steve Charnovitz, Peter Haas, David Hunter, Michele Prieur, and Anne-Marie

⁸ See *infra* note 25 and accompanying text.

⁹ See *infra* note 26 and accompanying text.

¹⁰ See *infra* note 27 and accompanying text.

Slaughter, who have documented and evaluated non-state actor participation in multilateral contexts. Their conclusions, and my own findings, are relatively straightforward: non-state actors are actively – and increasingly – shaping international legal institutions and outcomes. But the broader context of this phenomenon defies a straightforward conclusion about its impact on international law and institutions. Non-state participation in international lawmaking remains contested and non-state actors are only granted standing to participate in limited circumstances. Any claims of a right to participate or forecasts of a shift in sovereign authority would be premature.

I view this phenomenon – an increasingly engaged global polity that has no sovereign standing – as a paradox. The idea of popular sovereignty that catalyzed political philosophy and constitutional reform from the sixteenth and seventeenth centuries to the present is essentially absent from (even antithetical to) frameworks for international law that emerged from roughly the same era. Resistance to public participation by states engaged in international decision-making seems even more paradoxical in recent decades as democratic models have been increasingly projected and embraced by many of the same states. The idea of popular sovereignty as a basis for legitimate authority has become a core principle in the discourse on domestic governance while barely penetrating the discourse on international governance.

The origin of this paradox is elusive. One can speculate that national and international political projects appeared to be sufficiently distinct in the

seventeenth and eighteenth centuries that the divergence drew little attention. While a constitution could be structured to advance democratic institutions at a national level, projecting such institutions across much greater distances, geographically and culturally, was far less realistic; perhaps unimaginable. It is also possible that the practical limits of collective violence reinforced the pursuit of alternative national and international models. A modest number of citizens could win a capital by storming a bastille, but only more aggregated power could project sufficient force to claim and retain sovereignty at great geographic distance. Saltwater colonialism demanded a king, a trading company, or a Pope (often all three).¹¹

Whatever the reasons, two very divergent views of sovereignty – its locus and means of expression – emerged as sovereign theories separately informed national constitutions and international relations. But there is reason to believe that those models may be converging. An international polity – something hard to imagine even as recently as the United States founding period – began emerging in the nineteenth and twentieth centuries to contest the legality of international slave trading and to promote new rules for the conduct of war and new norms for

¹¹ This nomenclature is European, but the principle would seem to apply equally to caliph, pharaoh, khan, or shaman.

the rights of workers,¹² and it has since become increasingly active in international institutions and international lawmaking.

My project has been to examine the increasing role of non-state actors in what might be characterized as a growing international civil society. My work is situated within the context of the transboundary network arguments and theories presented by Anne Marie Slaughter, Margaret Keck, Kathryn Sikkink, Peter Haas, Robert Keohane, and Joseph Nye, among others. I believe that I am adding to that body of work with detailed case studies (similar to Haas' work on "epistemic communities"¹³ and building on Slaughter's examples of NGO participation¹⁴) showing that non-state actors – through networks and inter-state institutions – promote rule convergence, strengthen compliance, and facilitate information exchange. I have documented non-state participation that achieves a degree (although modest) of positive recognition (which might be a step in the direction of the legal personality question, but has meaning beyond that context).

Where I believe my work challenges, and would thus revise or supplement, existing transboundary network theory is in the location of sovereignty. Slaughter starts from the almost universally-accepted premise that

¹² See, e.g., Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 MICH. J. INT'L L. 183 (1997). See also *infra* note 22 and accompanying text.

¹³ Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 INT'L ORG. 1, 27 (1992).

¹⁴ Anne Marie Slaughter, A NEW WORLD ORDER (2004).

sovereignty is located in the state and then examines its disaggregation – discussing mechanisms and norms to guide power sharing within the existing international system. I argue, in contrast, that sovereignty should initially be located in the public rather than the state. Instead of proceeding to the (not illogical) conclusion that this favors a move toward a global parliament¹⁵ or some other transnational government form, I am comfortable working within the existing - and evolving - state system.

I examine and, from a normative perspective, promote democratic changes in governance rather than government. I argue that organic power (sovereignty) isn't being “shared” among international institutions (which is, I think, how Slaughter sees it) but rather loaned, or placed in “trust,” by the *demos*. I realize this is a construct rather than pragmatic description, but I think the construct is sufficient to achieve my normative goals. This leads me to some of the same conclusions Slaughter reaches regarding mechanisms and norms, but with important differences that embrace features we associate more with domestic democracies than international institutions.

My starting point for sovereignty – in the *demos*, not the state – also has potential implications for dealing with non-state actors behaving outside responsible polities we associate with civil society. Could one argue that transboundary actors who project violence and reject civil institutions and

¹⁵ See e.g., Richard Falk and Andrew Strauss, “Toward Global Parliament,” FOREIGN AFFAIRS, Jan/Feb 2001, 80, 1.

international political processes have not earned political recognition or legal protection from the institutions they reject?¹⁶ What about state leaders who assert territorial sovereignty without engaging and representing the population that dwells within that territory? If sovereignty resides in the people, then what duty does the international system owe to states that claim sovereignty apart from their people, or states that expressly dictate to their people? These questions are beyond the scope of my work, but they might be seen to emerge as a consequence of rethinking the locus of sovereignty in international law.

Within this broader contest, my work leads me to conclude only that non-state actors can and should assume a greater oversight role (through mechanisms that balance, perhaps even check, state power) along with information-sharing and norm-integrating functions (both external and internal to the state). This is what some of the mechanisms I've described are beginning to achieve (albeit crudely and preliminarily) and my prescription might be characterized as more of the same – but more explicitly embraced within the international system and more grounded in the idea of popular sovereignty. Perhaps popular sovereignty can be seen as something of a *grundnorm* to complement the norms Slaughter offers. I'll have to think about that. I also want to go back and look at your work on the "Liberal Peace and the Challenge of Globalization" where, as I recall, you

¹⁶ Although members and alleged members of these organizations continue to benefit from international human rights norms, the organizations themselves would seem to be perpetual enemies of the international system.

suggested that civil society should have a role in developing norms (if not direct governance).

Origins of Sovereignty

The origin of the *assertion* of sovereignty in human relations is lost in time, but it is not difficult to imagine. Numerous species instinctively assert territorial authority, enforced by individuals, pairs, family units, packs, herds. The human tendency to assert exclusive dominion and control over territory likewise appears instinctive – it has been with us for a long time. At its essence, this is sovereignty. The simple claims “this is mine,” “I was here first,” “stay off my land,” or “I am in charge here” amount to assertions of sovereignty.

The origin of the *idea* of sovereignty is likewise lost in time. Scholars point to its emergence in the western intellectual tradition through models such as the Greek Republic or documents such as the Magna Carta and the Osnabrück and Münster treaties, but these are only artifacts that speak to the emergence of the idea in a particular place and time. They offer no clues to the origin or other iterations of the idea. One can imagine that it coincided with competition for resources among groups that could not directly or consistently reinforce their territorial prerogative with violence. Asserting dominion over distant or multiple landscapes that cannot be monitored to discourage trespass requires the ability to project insights about the potential for violence, and not just violence itself.

The idea of sovereignty is dominion in the abstract. Enforcement threats can be physical as well as incorporeal. Resolving a competition between civil and

spiritual sovereignty, for example, was an important subtext to the 1648 treaties that heralded the Westphalian Peace and ascendance of civil sovereignty in Europe. Yet even as these instruments left some European princes with greater legal control over populations within their territories, the foundation of that control was contested. The Magna Carta had, four hundred years earlier, signaled that internal constituencies would challenge the absolute sovereignty of political leaders (even those who claimed divine right). Later political philosophers and national founding projects would draw upon this document as well as examples from classical Greece and Rome to articulate a broader ideal of “popular sovereignty” that expanded the scope of rights and franchise. This proceeded from the idea that populations are the locus of sovereignty and collectively should control (or at least consent to) their own governance.

Yet the idea of sovereignty that emerged from Westphalia to inform international law and the idea of sovereignty embedded in the political philosophy that informed national founding projects diverged. Somewhere in the political philosophy and diplomatic developments of the period is a distillation of two distinct understandings of sovereignty. They were not, in this historical “moment,” necessarily inconsistent, although some present day scholars and commentators would have us think so. They were, however, distinct ideas (one localized sovereignty, the other disaggregated it) heading in distinctly different directions (one outward, the other inward).

Today we see the results of this divergence in the very different claims about sovereignty made in liberal democratic states and in international law. One proceeds from the consent of the governed and the other from the will of the state. As the governed – through a variety of non-state actors and agents – have increasingly asserted themselves in international law the divergence has gained new importance. A desire to understand this phenomenon provided the starting point for my JSD dissertation, and my work has been designed to explore its relevance as the role of non-state actors in international law has changed over time.

The Expanding Role of Non-state Actors

The role of non-state actors in shaping and implementing international law is expanding on a number of fronts. They increasingly promote treaties, scrutinize international investments, help to shape (and constrain) multilateral trade agreements, and monitor human rights compliance. They are accredited to the United Nations (UN) and other international organizations, file *amicus* briefs before international tribunals, play active roles as “observers” (many would say “lobbyists”) in meetings of states parties to a range of conventions, and even make submissions bearing on state enforcement of domestic law under agreements such as the North American Free Trade Agreement (NAFTA).

In the Centennial edition of the *American Journal of International Law*, Steve Charnovitz traces the history of non-governmental organization (NGO) interactions with states on international issues; he concludes that they “have had a

profound influence on the scope and dictates of international law,” and that their influence is growing.¹⁷ He is not alone in that conclusion. The phenomenon has also been noted by scholars including Philip Alston, José Alvarez, Thomas Franck, Diane Orentlicher, Harold Koh, and Dinah Shelton, among many others. Professors Abram Chayes and Antonia Chayes highlighted the importance of non-state actors to treaty compliance (a central concern of international law scholars) in their 1995 work *The New Sovereignty*, and mechanisms for engagement have only expanded in the intervening decade.¹⁸

Legal theory has not kept pace with practice. While incidents of non-state access to mechanisms of international law increasingly abound – and are increasingly documented – the underlying rationale for engaging non-state actors in international law is still in need of systematic study and clarification. At a 2006 speech to the World Economic Forum in Davos, Switzerland, for example, then-Secretary General of the UN, Kofi Annan, told a plenary session that throughout his term he had been seeking to change “the mindset that sees international relations as nothing more than relations between the States and the United Nations as little more than a trade union for governments.” To “fulfill its vocation and be of use to humanity in the 21st century,” Annan argued, the UN

¹⁷ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006).

¹⁸ Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, *supra* note 7.

must engage “all the new actors on the international scene. That includes the private sector, but it also includes parliamentarians; voluntary, non-profit organizations; philanthropic foundations; the global media; celebrities from the worlds of sport and entertainment; and in some cases, labor unions, mayors and local administrators.”¹⁹ It is interesting to note Annan’s emphasis was on a new “mindset” rather than new law. He pointed to the “utility” of engaging “new actors” rather than a legal interest those actors may have in participation. While one would not expect a senior diplomat to abandon the principle of state primacy in international relations, his appeal reveals the major premise from which most efforts to engage non-state actors proceed; a premise from which it is difficult to construct a durable legal framework for participation.

Emerging practices of engaging non-state actors within the frameworks of multilateral agreements and international forums are also often divorced from legal principle. Moves in recent years to open up processes of the UN, World Bank, the European Union (EU) and the World Trade Organization (WTO), for example, seem to be grounded in a moral sense of *noblesse oblige* rather than legal doctrine. These policy moves are accompanied by instrumental arguments. But in an international system rooted in historical constructs of state sovereignty, claims for opening international lawmaking and compliance processes are rarely

¹⁹ “Annan calls for ‘new mindset’ at UN involving not just governments but people,” UN Newscenter (Jan 6, 2006) available at <http://www.un.org/apps/news/story.asp?NewsID=17305&Cr=economic&Cr1=forum> (last visited January 15, 2012).

rooted in a principled understanding of the intrinsic status of people in international law as the source of sovereignty. As a consequence, legal theory has not offered adequate support for determining the contours of, or justifying limits on, non-state participation at the international level and claims of a “right” to access remain highly contested.

Thus at a time when democracy has become both a battle cry and an increasingly contested phenomenon in international relations, legal discourse on the “democratization” of international law and institutions remains necessarily tentative. In articulating the basis for non-state access to inter-state processes, insufficient attention has been paid to the basic principles that underlie participatory doctrines in constitutional law (rights of speech, association, petition). This has led to a proliferation of standards and practices that satisfy a generalized interest in greater “accountability” or “transparency” (sometimes even “legitimacy”) in international law yet cannot be anchored in any enduring theory of democratic governance.²⁰

²⁰ Some argue that even where international processes are beginning to open up, the lack of a principled framework leave those processes subject to elite capture – moving more toward an international aristocracy than democracy. Key international institutions such as the UN, the World Bank, and the WTO “to date . . . have not articulated a general vision of how best to integrate a public role into international institutions. So in the absence of a planned design, attempts to democratize the international system have been ad hoc, as citizen organizations and economic elites create their own mechanisms of influence.” Richard Falk and Andrew Strauss, “Toward Global Parliament,” *Foreign Affairs*, Jan/Feb 2001, 80, 1.

Instrumental arguments for a greater non-state role in international law leave proponents of greater participation vulnerable to more principled challenges that proceed from nature and identity; challenges that turn on the centrality of state sovereignty. Because international theorists (especially positivists) locate sovereignty in the state, the role of non-state actors is made peripheral, and mechanisms for engaging those actors are viewed as discretionary. By starting from the point of state sovereignty (the tendency of international law) rather than popular sovereignty (the tendency of democratic constitutional theory) access mechanisms are seen as accommodations rather than rights. Where hard lines must be drawn, or where disputes arise, non-state actors simply lack the standing to assert their own standing.

This debility has become even more pronounced, and more paradoxical, in an international field increasingly dominated by nominal democracies. Former interim US Ambassador to the UN, John Bolton, illustrated the point by arguing that non-state actors are overreaching, “crowding” international meeting halls, and “participating as functional equals to nation-states” in a way that is “dramatically troubling for democratic theory.”²¹ Bolton asserted that citizens of democracies have their interest in participatory governance satisfied at the national level and they shouldn’t have a “second bite at the apple” in international

²¹ John Bolton, American Enterprise Institute Conference “Trends in Global Governance: Do They Threaten American Sovereignty? Article and Response: Should We Take Global Governance Seriously?” 1 Chi. J. Int’l L. 205, 216-18 (2000).

fora. For Bolton then, and for others who share his perspective, democratic practices at the international level are essentially anti-democratic.

Three Pieces

To build on the literature concerning the role of non-state actors in international lawmaking and international institutions I took a close look at the history of non-state access to international law in an as-yet unpublished essay, “Chaos and Consent: Non-State Actors in International Governance.”²² That history led me to find that “claims for non-state actor participation in the mechanisms of international governance are increasingly made – and at times, at least, they are meeting with some modest success (defined as access and impact) [but] access is still ad hoc, chaotic, and tenuous.”²³ I concluded that participation “needs to be better anchored in international law through codification, where possible, in the charters of international institutions and the texts of international agreements,” and that “access needs to be better administered – benignly regulated – to maximize the instrumental benefits that can be claimed from access while minimizing the ills that critics seek to underline.”²⁴

²² Eric Dannenmaier, unpublished Essay “Chaos and Consent: Non-State Actors in International Governance,” 100 pages (May 2006).

²³ *Id.* at 98.

²⁴ *Id.*

My more recent research has responded to the needs I identified following that historical review. I have examined non-state access in three distinct areas. Each of these projects resulted in a published article or chapter, and the three pieces are described briefly below.

A European Commitment to Environmental Citizenship²⁵

This piece examined the European commitment to “promote the application of” participatory democratic principles “in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.” Article 3.7 of the 1998 UN Economic Commission for Europe Convention on Access to Information, Access to Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) incorporates this commitment as part of a much broader regional accord aimed at increased public access to environmental matters. While the Aarhus Convention is concerned primarily with participation at a domestic level, Article 3.7 makes a unique promise about state behavior in international forums (understood broadly to include institutions, bodies, secretariats, meetings, and so on). Its origins suggest a concern with whether Europeans can expect their governments to advance the principles of participatory democracy on the international stage and also a concern with the kind of

²⁵ Published at Eric Dannenmaier, *A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums*, 18 *YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 32-64 (Oxford University Press) (2007).

“citizenship” that non-state actors might hope to achieve when engaging international forums on environmental issues. The piece discusses the implications that the Aarhus commitment may have for the normative debate over the appropriate role of non-state actors as active constituents in international lawmaking and the practical debate over how best to engage non-state actors in the work and oversight of international institutions.

Head of State and Government Summits²⁶

This piece examined non-state access to international summits (meetings of heads of state and government) in the context of an ongoing theoretical debate regarding the role of citizens in the sovereign machinery of international governance. Lawmaking, though only a ceremonial fraction of summit meetings themselves, is advanced by planning and implementing summit commitments; in these interstices, non-state actors work to inform outcomes and shape institutional agendas. The piece studies inter-American summits as a case in point, focusing on efforts to advance a regional “democracy agenda” through the catalysis of the summit process. Case studies include a U.S. proposal for a regional public participation strategy, a Peruvian initiative to discourage and respond to coups, and a Canadian measure to increase citizen access to the region’s chief political body. It argues that summits facilitated these initiatives by providing a context for cooperative law-making in which non-state actors played a central role – a key

²⁶ Published at Eric Dannenmaier, Lawmaking on the Road to International Summits, 59 DEPAUL L. REV. 1-68 (2009).

concern for public access proponents. Yet states initiated and managed the process, and heads of state and government ultimately ratified the outcomes, so the public role in shaping outcomes did not threaten state authority – a key concern for access critics. In the debate over the appropriate place for non-state actors in international lawmaking, the piece shows that summits can advance the legitimacy and democracy concerns that, at their core, appear to motivate the competing theoretical positions.

Non-State Access to Global Climate Change Governance²⁷

This piece examined the role of non-state actors in promoting compliance with climate change instruments and finds that their contribution has been substantial. The piece recounts their role in shaping and implementing the formal mechanisms for climate change governance that continue to evolve through agreements and institutions designed by states. It also shows the utility – and creativity – of non-state actors in advancing climate concerns through a number of recent cases where NGOs have advanced climate change concerns before “non-climate” institutions. These cases not only illustrate the ability of non-state actors to promoting climate compliance (even where legal tools are not originally so designed or particularly well suited) but also provide models of how they might be engaged as climate institutions that continue to evolve. I concluded that the

²⁷ Published at Eric Dannenmaier, *The Role of Non-State Actors in Climate Compliance*, in Jutta Brunnée, et al., eds., *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME*, 149-77 (Cambridge University Press) (2012).

positive impact of non-state participation in advancing climate change concerns is an important feature of the evolving climate regime.

Unifying Themes

These dissertation pieces each deal with contexts that have unique features favoring the assertion of popular will. The summits are a relatively new institutional phenomenon with flexible – sometimes ad hoc – decision-making processes that leave substantial openings for non-state entrepreneurs who wished to influence outcomes. The examples I studied were from Latin America during a time of democratic transition where government representatives and broader constituencies were open to experimentalism and expressions of popular will. They were also supportive of moves to reform regional institutions in ways that would reflect their own democratic evolution. The European process of negotiating and implementing the Aarhus Convention likewise occurred in a regional context of democratic transition. The Convention itself was a vehicle to set standards for entrants into the EU from the newly-democratic east, and it reflected the ideals of popular sovereignty both in its terms and its genesis. The provision in Article 3.7 calling for signatories to “promote the application of” the Convention’s principles (which embrace a fully participatory civil society) in international processes “and within the framework of international organizations ...” is extraordinary in the abstract, but more understandable within the context of the political circumstances that animated the Convention. The final example – actually multiple examples – of institutional accommodation for public

participation in the context of addressing climate change is also an area where a motivated public is animated by a global issue that calls for new institutions and new approaches by existing institutions. It is not difficult to see how non-state actors have permeated this broad and fluid creative process.

All of these examples have taken place in a context where transportation and communication are facilitated by historically unparalleled technological advances. Twelve years into the twenty-first century, any literate person with internet access (estimated to be almost one third of the planet's population)²⁸ can instantaneously communicate with any other similarly-situated person anywhere on the planet. Air transport can deliver delegates and participants in any dialogue to almost any population center within 24 hours. Ideas can be published, illustrated, power pointed, video enhanced and delivered in any language at little cost. Empires have been built and sustained on far less efficient commerce, and in the past two decades these means have become available not just to emperors and their agents.

Although I see the examples I studied as useful models of open institutions and processes, they remain limited in impact and scope. The examples represent only a small range of public access mechanisms that are common in democratic states, and they were deployed in ways that can constrain opportunities for input or limit the assimilation of input into final decisions. Also, participation was

²⁸ This estimate is from a variety of sources aggregated by Internet World Stats, *available at* <http://www.internetworldstats.com/stats.htm> (last visited March 5, 2012).

typically by well-funded organizations, experts, or others not broadly representative of affected and interested populations. These are not new challenges for democratic mechanisms, but they might be more easily addressed through permanent and transparent institutions that proceed from a different understanding of the “place” of non-state actors. For example, public comment processes in the international regimes I have studied usually offer no opportunity for response or dialogue. In contrast, notice and comment rulemaking in the United States requires that agencies respond to significant comments and explain changes to (and refusals to change) the proposal following public comment. Finally, the phenomenon I studied is far from universal. For each of the examples I found of non-state access there are many more where inter-state relations proceed without any degree of openness.

Findings

A number of scholars have advanced arguments supporting a greater, perhaps preeminent, role for global citizens in global governance. The arguments represent an extension of the idea of popular sovereignty that helped to shape constitutional projects and give rise to liberal democracies; but an idea that has been historically absent from international legal theory. The idea makes sense within an international legal system called upon to address complex problems that require collaborative solutions transcending state boundaries (especially solutions

that must be embraced by domestic populations).²⁹ A greater non-state role has the potential to strengthen legitimacy and compliance – two central problems in international law – as well as reduce the democracy deficit that itself raises legitimacy concerns. My research offers examples that demonstrate this potential by showing the role non-state actors have played in shaping and implementing international law and animating international institutions.

To show that non-state actors have a growing instrumental role, however, is not to suggest that they are an alternative to the state or that states should lose their standing. I did not set out to prove that there is a “fundamental discontinuity in the international system,”³⁰ or that “states may simply no longer be the natural problem-solving unit,”³¹ and my findings do not presage the dissolution of the Westphalian model or the obsolescence of states. I see, instead, a more modest shift within state-centric international systems to accommodate a public that acts with and through state-sponsored institutions in a cooperative manner.

²⁹ The need for domestic assent and implementation is especially relevant for problems such as climate change, which arise as much from individual behavioral choices as interstate policies.

³⁰ John Gerard Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” (1993) 47 *International Organization*, p 139, at 165 (“The long and the short of it is, then, that we are not very good as a discipline at studying the possibility of fundamental discontinuity in the international system; that is, at addressing the question of whether the modern system of states may be yielding in some instances to postmodern forms of configuring political space.”).

³¹ Jessica T. Mathews, “Power Shift,” *Foreign Affairs* (Jan/Feb 1997) at 55.

My work challenges the idea that state sovereignty is absolute and impervious without rejecting state sovereignty outright. My findings suggest a new paradigm that builds upon a continuing role for sovereign states as architects and executors while accommodating the emergence of non-state actors as collaborators and animators. I have described what may be seen as a hybrid approach to international governance that is more consistent with a notion of common sovereignty and less a reflection of the divergent models of state and popular sovereignty inherited from the seventeenth and eighteenth centuries.

I do not reject the need to rethink international law in terms of a global social contract that proceeds from popular will. But, for now, shifts in international sovereign dynamics are occurring at a practical level, and they are less tectonic. My work highlights models that have reinforced the authority of states even while making space for non-state actors. These approaches thus gain some of the value of participatory governance in a way that is less disruptive of the international system.

My findings also lead me to conclude that the failure to ground international sovereignty in the idea of popular consent has significant disadvantages. The expansion of democratic and deliberative tools in domestic law (such as open meetings acts, notice and comment rulemaking, citizen advisory boards, and freedom of information laws) can be justified by the central idea of citizen sovereignty. These tools have helped to sustain deliberative democratic models even in large and complex states. But the effort to bring

mechanisms such as these to international institutions has no such justification and deliberative approaches thus face greater resistance. Tools of democratic engagement (mechanisms for greater openness, transparency, and participation by non-state actors) are still only tentatively deployed and too often accessible to limited groups of relatively well-financed participants. By proceeding from a different understanding of the locus of sovereignty, international law is by definition more closed to innovations in democratic access that would increase opportunities and broaden the “franchise.” The argument for expanding participatory mechanisms finds less purchase where the public is not seen as having a fundamental right to participate in the first place. This limits the contributions of non-state actors and perpetuates legitimacy and compliance concerns that might be addressed through greater public access to the means of governance.

CHAPTER 2 A EUROPEAN COMMITMENT TO ENVIRONMENTAL CITIZENSHIP: ARTICLE 3.7 OF AARHUS AND PUBLIC PARTICIPATION IN INTERNATIONAL FORUMS³²

Introduction

The idea of a European regional commitment to greater public access in environmental matters grew out of the ‘Environment for Europe’ process, which was inaugurated by the United Nations Economic Commission for Europe (UN ECE) in the context of the region’s early 1990s economic and political transition.³³ The idea gave rise to a regional dialogue on how best to advance environmental citizenship in ECE states,³⁴ and this dialogue produced the Convention on Access to Information, Access to Decision-Making, and Access to

³² This chapter was published as Eric Dannenmaier, *A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums*, 18 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 32-64 (Oxford University Press) (2007). Citations to the material in this chapter should be to that piece. It is available for download from ssrn.com

³³ The United Nations Economic Commission for Europe (UN ECE) was created in 1947 by the UN Economic and Social Council. It is one of five regional commissions of the UN and is devoted to ‘pan-European economic integration [bringing] together 56 countries located in the European Union (EU), non-EU Western and Eastern Europe, South-East Europe and Commonwealth of Independent States (CIS) and North America.’ ‘UNECE in a Nutshell,’ <<http://www.unece.org/oes/nutshell/introduction.htm>>.

³⁴ The term ‘citizenship’ is used in this article not in the narrow sense of a native or naturalized member of a state with defined constitutional rights, duties, and privileges but, rather, in the broader sense of an equal participant in the democratic governance of a political community that can transcend territorial boundaries and may be regional or global in scope.

Justice in Environmental Matters (Aarhus Convention), which opened for signature in Aarhus, Denmark, in June 1998.³⁵

The Aarhus Convention is concerned primarily with participation at a domestic level—essentially a promise by parties to manage their internal environmental affairs more democratically. Yet the Aarhus Convention is not confined to its parties' domestic concerns. Though its genesis is in Europe and most parties are European, the convention's parties deliberately reach out to states and non-state actors from other regions,³⁶ holding the accord out as a model and holding the door open for accession by non-ECE states.

³⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 1998), UN Doc. ECE/CEP/43 (1998), <<http://www.unece.org/env/pp/documents/cep43e.pdf>> [Aarhus Convention].

³⁶ The term 'non-state actor' is used in this article in its broadest sense to include organizations, communities, groups, associations, institutions, and even individual actors (activists, scholars, or private sector entrepreneurs). While there is a tendency to group such actors together under the heading 'non-governmental organization,' 'private voluntary organization,' or 'civil society organization,' the term 'non-state actor' is used here for several reasons. It emphasizes neutrality in terms of the nature of actors' legal form, purpose, and/or objectives. It includes communities and groups, such as indigenous communities and religious groups, who may or may not be organized or have formed an organization in a formal or recognized sense. It embraces individuals, including activists or academics who may act independently of a corporate form—even if they may have an institutional affiliation. It posits access claims by parliamentarians or legislators who are often keenly interested in the international conduct of their home states but who are not, depending on constitutional form, part of the government or the state and who may not be affiliated with the party that, at the time, forms or instructs the government. Finally, it focuses on an essential question in international law—the participation of actors who are not state sovereigns in processes designed by and for states that have traditionally been

The Aarhus Convention also reaches out in another direction. Article 3.7 commits parties to ‘promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.’³⁷ This commitment is a unique feature of a unique international accord. Its provenance suggests a concern with whether Europeans can expect their governments to advance the principles of participatory democracy on the international stage and also a concern with the kind of ‘citizenship’ that non-state actors might hope to achieve when engaging international forums (understood broadly to include institutions, bodies, secretariats, meetings, and so on) on environmental issues.

This article examines the Article 3.7 commitment and asks what implications it may have for two ongoing debates—first, a normative debate over the appropriate role of non-state actors as active constituents in international lawmaking and, second, a more practical debate over how best to engage non-state actors in the work and oversight of international institutions. The article begins by outlining this debate and describing the key positions taken by those

the province of states. The term excludes international or multilateral organizations and institutions that are made up of, or instructed solely by, states (such as UN bodies or convention secretariats) but includes organizations in which states participate but in which non-state actors have a voice and vote (such as World Conservation Union). As this article discusses, it is non-state status that creates objections and obstacles to participation in international forums, and thus the author focuses broadly on non-state actors rather than any one class of actors.

³⁷ Aarhus Convention, *supra* note 35, Article 3.7.

who defend a strengthened role for non-state actors in international law and those who challenge the legitimacy of such a role. It also highlights the relevance of this broader debate for international environmental law in particular. The article then moves to a discussion of the ‘Environment for Europe’ process and the origins of the Aarhus Convention. This section also describes the origins of Article 3.7 and examines some of the normative and practical implications of the commitment to ‘promote the application of’ Aarhus principles in international forums. The next section examines the guidelines for the implementation of Article 3.7, which were developed by the parties and approved at a Meeting of the Parties in Almaty, Kazakhstan, and entitled the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums (Almaty Guidelines).³⁸ It is followed by a discussion on the efforts to implement the Almaty Guidelines. The final section concludes with observations about the effect of Article 3.7 and the commitment to promote the principles of the Aarhus Convention in terms of the normative and practical debates discussed at the outset of the article.

International Governance and the Debate Over Non-State Actors

³⁸ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the Second Meeting of the Parties*, Annex, ‘Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums,’ UN Doc. ECE/MP/PP/2005/2/Add.5 (20 June 2005) [Almaty Guidelines].

As non-state actors have become increasingly engaged in international decision making and international forums, two distinct but inter-related debates have arisen. The first is a normative debate over what role, if any, non-state actors should play in lawmaking and the second is a practical debate (though not without normative implications) over how best to engage them.

The Role of Non-State Actors in Lawmaking

The first debate touches on issues central to conceptions of the sovereign state and challenges ideas inherited from at least the time of the Westphalian peace.³⁹ What order could be found in the chaos of international politics was pinned to the idea of territorially sovereign states as exclusive actors across geographic borders. Positive international law came to depend on state commitments, state custom, and state practice.⁴⁰ Yet a number of theorists have sought to pierce this sovereign veil. While acknowledging the dominant role of states in formal lawmaking, they have argued that the formulation and application of law depends on a far more complex process of interaction among states and non-state actors. These theorists include Harold Koh, who has helped introduce

³⁹ The Treaty of Osnabrück (15 May 1648) ended the Thirty Years' War and the Treaty of Münster (24 October 1648) ended the Eighty Years' War. The treaties involved the Holy Roman Emperor, Ferdinand III of Habsburg, the other German princes, Spain, France, Sweden, and representatives of the Dutch Republic, and advanced principles of territorial sovereignty that are seen today as progenitors of the modern nation state.

⁴⁰ See, for example, Article 38(1) of the Statute of the International Court of Justice. See also Steven R. Ratner and Anne-Marie Slaughter, eds., *Appraising the Methods of International Law*, American Society of International Law Studies in Transnational Legal Policy, no. 36, at 5 (2005).

legal process theory to international law and has emphasized that lawmaking has not only a horizontal dimension (among states and others making up the ‘international community’) but also a vertical dimension, where domestic processes and decisions inform international law and, at the same time, international law helps shape domestic laws and institutions.⁴¹ Margaret Keck and Kathryn Sikkink have emphasized the role of ‘transboundary advocacy networks’ of non-state actors in shaping international law and in using international processes to inform dialogue with their own governments at a domestic level.⁴² Peter Haas has called attention to the ‘epistemic communities’ of scientists and advocates who have helped, for example, to obtain a commitment from countries bordering the Mediterranean Sea to reverse longstanding policies of ecological neglect and injury.⁴³

These scholars, and many others, have described the impact of non-state actors on international law and have helped discredit the idea of detached

⁴¹ Harold Hongju Koh, *Transnational Public Law Litigation* 100 Yale L.J. 2347 (1991); see also Harold Hongju Koh, *Bringing International Law Home* 35 Houston L. Rev. 623 (1998).

⁴² Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, at 1–2 and 121–63 (1998), (describing environmental advocacy networks).

⁴³ Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control* 43 Int’l Org. 3 at 377–403 (1989). The term ‘epistemic communities’ was earlier offered by John Ruggie to describe the communities that form around common policy ideas (what Michele Foucault referred to as “epistemes” through which the political relationships acted out on the international stage are visualized). John Gerard Ruggie, *International Responses to Technology* 29 Int’l Org. 569–70 (1972).

international lawmaking among insular states.⁴⁴ The point is not that international decision making is invariably an open and participatory process⁴⁵ but, rather, that a conception of international law founded on some idea of an impenetrable inter-state process is at odds with reality. International law is appropriately understood as the process, as well as the product, of an international and transboundary discourse among a range of stakeholders.

Normative Claims about Public Participation

⁴⁴ See, for example, Anne Marie Slaughter, *A New World Order* (2004); Steve Charnovitz, Centennial Essay: In Honor of the Tenth Anniversary of the AJIL and the ASIL: Nongovernmental Organizations and International Law 100 *Am. J. Intl. L.* 348 (2006); Daniel D. Bradlow, The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making 16 *Am. U. Int'l L. Rev.* 1531 at 1541–51 (2001); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, The Emergence of Global Administrative Law 68 *Law & Contemp. Probs.* 15 at 23 (2005); and Eric Dannenmaier, Beyond Indigenous Property Rights: The Distinctive Connection of the Dispossessed 86 *Wash. U. L. Rev.* (2008) (forthcoming).

⁴⁵ In fact, many note continuing barriers to access and call for greater openness. See, for example, Charnovitz, *supra* note 44 at 353 (noting that the International Court of Justice remains closed to civil society organization participation); see also Jurij Daniel Aston, *The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House*, 15 *Eur. J. Int'l L.* 943 (2001). Some also note that increased access has not necessarily produced tangible or lasting results. See, for example, David B. Hunter, *Global Networks: The Environment and Trade: Civil Society Networks and the Development of Environmental Standards at International Financial Institutions* 8 *Chi. J. Int'l L.* 437 at 468 and 474 (2008) (pointing out that despite increased civil society organization access, international financial institutions have yet to embrace environmental, human rights, and labour standards, which are at the core of many non-state actor agendas; and noting that progress in 'greening' the World Bank's portfolio 'has been reversed somewhat in recent years as the Bank announced a new 'high risk/high reward' strategy' criticized by many civil society organizations).

While arguments over public participation in international lawmaking are often founded on a descriptive narrative about positive law, a normative component can be found both in their challenge to what international law *is*—they argue that emerging international doctrine can be *seen as law* in part because of its participatory provenance—and in the more explicit claim that this participatory model tells us what law *should be*.⁴⁶ We are told that doctrines emerging from a participatory process are more like law⁴⁷ (more likely to be embraced both internationally and domestically by states and others intended to be bound)⁴⁸ and that doctrines emerging without such a process are in a sense illegitimate (even if they hew to the formal structure of law) both in an instrumental and principled sense.

⁴⁶ See, for example, Nathalie Bernasconi-Osterwalder and David Hunter, *Democratizing Multilateral Development Banks*, in Carl Bruch, ed., *The ‘New Public:’ Globalization of Public Participation*, 151 (2002), <http://www.ciel.org/Publications/Democratizing_MDBs_NewPublic.pdf> (the ‘public’s concern for the lack of democracy in the international financial arena suggests that international financial institutions will continue to lose legitimacy unless they become more transparent and accountable’).

⁴⁷ Legal process theorists emphasize the process of clarifying and securing the ‘common interest’ of the international ‘community.’ See, for example, Siegride Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, in Ratner and Slaughter, eds., *supra* note 40, 47 at 51. Participation by non-state actors is one way of identifying and implementing those interests.

⁴⁸ Thomas M. Franck, *Centennial Essay: The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium* 100 *Am. J. Intl. L.* 88 (2006); and Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

Counter arguments are raised from those who hold to a positivist view of international law and challenge the legitimacy of non-state participation in a process they see as reserved solely for state actors. Former acting US ambassador to the United Nations, John Bolton, for example, asserts that the inter-state dialogue is sacrosanct, basing his arguments, ironically, on what he sees as principles of democracy. He argues that citizens should have only one opportunity to influence their governments and that this opportunity is exclusively in the domestic arena. He complains that opening international processes to non-state actors ‘provides a second opportunity for intrastate advocates to reargue their positions, thus advantaging them over their opponents who are unwilling or unable to reargue their cases in international fora.’⁴⁹ Bolton’s concerns have been echoed by others in government and in academia who appear to view the participation of non-state actors as some sort of intrusion on the sovereign prerogative, which is at best unhelpful and at worst a usurpation of right.⁵⁰ Still others raise questions about the accountability of non-state actors, concerned

⁴⁹ John R. Bolton, *Should We Take Global Governance Seriously?* 1 Chi. J Int’l L. 205 at 217 (2000).

⁵⁰ Kenneth Anderson, Book Review: *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks: A New World Order*. By Anne-Marie Slaughter 118 Harv. L. Rev. 1255 at 1269 (2005); see also Eric Dannenmaier, *Democracy in Development: Toward a Legal Framework for the Americas* 11 Tulane Envtl L.J. 1 at 4, note 7 (Winter 1997) (describing objections of government officials from Latin American states to the participation of non-state actors in regional decision-making processes).

about the potential ties of non-state actors to government and the danger of capture.⁵¹

The Move to Engage Non-State Actors

Against the background of this theoretical debate, non-state actors have made persistent demands for access to international lawmaking and institutions, and these demands have slowly but increasingly been met. Writing for a centennial edition of the *American Journal of International Law* in 2006, Steve Charnovitz catalogued one hundred years of growth in non-state participation, and his work demonstrates the variety and depth of access.⁵² Others have described the same phenomenon.⁵³ While those who seek more open international decision making are not yet satisfied with the present scope of access,⁵⁴ and questions about efficacy and impact remain largely unanswered,⁵⁵ examples of public access to international forums increasingly abound.

⁵¹ See, for example, *Sins of the Secular Missionaries*, *The Economist*, 29 January 2006.

⁵² See Charnovitz, *supra* note 44. See also Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis* 15 *Eur. J. Int'l L.* 907 at 924–7 (2004).

⁵³ See, for example, Michel Prieur, *Etat de l'art des Questions Soulevées par la Participation du Public aux Travaux des Instances Internationales*, study prepared for French Ministry of Environment and Sustainable Development (2006) [copy on file with author]; and Keck and Sikkink, *supra* note 42.

⁵⁴ See, for example, Philip Alston, *Charging for Access to International Law Treaty Information: Time for the UN to Rethink a Perverse Initiative* 12 *Eur. J. Int'l L.* 351 (2001).

⁵⁵ See, for example, Hunter, *supra* note 45 at 474.

These examples are more than simply a collateral or *ultra vires* exercise in accommodation. Aside from offering concrete (and sometimes effective) opportunities for non-state actors to respond to, and shape, international law and institutions, process theorists might argue that the examples in themselves have the potential to create a new normative imperative. Charnovitz has suggested that claims of political philosophers in the eighteenth and early twentieth centuries that ‘states have an obligation to listen to nongovernmental opinion and to take it into account when making decisions affecting other nations ... has become a clearer reality in our time.’⁵⁶ While this argument has appeal, others would counter that the practice of engaging non-state actors is not sufficiently widespread and does not flow from a sense of obligation, or *opinio juris*, and thus cannot be seen as a part of customary law. Yet even if a claim of right is seen as premature, the persistence and formalization of access mechanisms suggest that such a right could, in time, be recognized. Thus, the practical steps to engage non-state actors may be understood to advance a legal basis for public participation even as theoretical challenges remain.

The Importance of Public Participation in International Environmental Law

The theoretical debate and practical progress described earlier have particular relevance for international environmental law because much of the pressure for progress on the environment has originated with non-state actors and

⁵⁶ Charnovitz, *supra* note 44 at 372.

many of the examples of participatory international models emanate from environmental law. Many theorists who argue that international lawmaking is more open and dynamic than admitted by a positivist model use environmental case studies to show that the public is increasingly at the table and that the practice has a measurable impact.⁵⁷ Indeed, the environmental ‘movement,’ along with human rights and labour, is one of the most striking examples of a transboundary concern in international jurisprudence and legal literature.

Aside from the many practical examples of international environmental frameworks that are shaped by non-state actors and make a space for non-state actors, environmental regimes have a strong claim to a transboundary subject matter that responds to the state sovereignty argument advanced by theorists such as Bolton and Anderson. Sovereignty has long been linked, at least since the emergence of nation states, to the idea of territorial integrity.⁵⁸ Environmental law, along with human rights and labour law, faces the dilemma of enacting international frameworks that can legitimately reach into a state territory to apply (or influence a state to apply) a set of universal principles.⁵⁹ International

⁵⁷ See, for example, Keck and Sikkink, *supra* note 42 at 121; and Haas, *supra* note 42.

⁵⁸ See, for example, Philip Allott, *Mare Nostrum: A New International Law of the Sea* 86 Am. J. Int'l. L. 764 (1992) (explaining that within ‘the systematic structure of the international system ... all land territory is linked through the concept of sovereignty to one state system or another. The primary reality is national territorial reality. International reality is a derivative of the primary reality’).

⁵⁹ See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd edition, at 987–1021 (2000).

environmental law is also concerned with transgressions that cross boundaries in a physical as well as moral sense. Its subject matter is often interstate, and, at times (as with oceanic and atmospheric regimes), it is outside the border of any state. Grotius's argument for a *mare liberum*, which is beyond the control of any sovereign state, seems especially apt in many areas of international environmental law, and, even in those instances where immediate physical impacts or activities are localized within a state, the science underlying environmental law often shows that the effects do not remain local. Again, this is an argument about physical as well as moral effect, although questions of timing and causation may be complex.

Thus, if there is any field that may be said to justify a conversation that is not limited to territorially constrained nation-states, environmental law is such a field. This is not to gainsay the transboundary concerns of human rights or labour law but merely to suggest that there is an added physical dimension to environmental questions, which often defies sovereign boundaries, and thus makes doctrine born from theories about national territorial sovereignty particularly vulnerable.

The Aarhus Convention

Against this emerging theoretical debate and the increasing opening of international mechanisms, European Community (EC) countries moved in the 1990s to consolidate regional ideas about access to environmental matters and to create a framework for openness and transparency that could guide EC member

states as well as those states seeking to join the EC in the aftermath of the Soviet Union's breakup.

'Environment for Europe' Process and Public Participation

The idea of a regional commitment to public participation in environmental matters grew out of the 'Environment for Europe' process of regional dialogue on environmental concerns inaugurated in June 1991.⁶⁰ Inaugurated in Prague less than two years after the Berlin Wall fell and barely a year after the fall of authoritarian governments in Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania,⁶¹ the 'Environment for Europe' process combined a new democratic energy from eastern Europe with a broader regional environmental agenda. From the outset, non-state actors, many from newly independent states finding a public voice for the first time, were an integral part of the process. Institutionalizing their participation in environmental matters was an integral objective. The Conclusions of the Conference 'Environment for

⁶⁰ The 'Environment for Europe' process is facilitated by the UN ECE, which serves as a secretariat and is structured as a 'partnership of the member States within the UNECE region, organizations of the United Nations system represented in the region, other intergovernmental organizations, regional environment centres, non-governmental organizations and other major groups.' UN ECE briefing note on the 'Environment for Europe' process, <<http://www.unece.org/env/efe/welcome.html>> [copy on file with author].

⁶¹ On the timing and process of regime change in eastern Europe during this period, see Mark Kramer, *The Collapse of East European Communism and the Repercussions within the Soviet Union (Part 2)* 6 J. Cold War Stud. 3 (2004).

Europe’ in Prague, which were ratified by participating environment ministers,⁶² including the EC’s environment commissioner, ‘emphasised the importance of participation by a well-informed population in the decision-making processes on environmental matters or on matters that may have a significant effect on the environment.’⁶³

Two years later, at its second meeting in Lucerne in 1993, the assembled ministers and representatives issued a declaration, which called for

[t]he elaboration of proposals by the UN/ECE for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision making, and for cost-efficient measures to promote public participation and to provide, in cooperation with the informal sectors, training and education in order to increase the ability of the public to understand the relevance of environmental information.⁶⁴

⁶² Environment ministers from thirty-one countries (including five former Soviet states and the United Soviet Socialist Republic) and the European Community’s (EC) environment commissioner attended, along with government representatives of seven former Soviet states. A number of international organizations, including several UN organs, the North Atlantic Treaty Organization, and the financial institutions such as the European Bank for Reconstruction and Development and World Bank also attended.

⁶³ Conclusions of the Conference ‘Environment for Europe,’ Dobris Castle Czech and Slovak Federal Republic, 21–3 June 1991, at para. 17, <http://www.unece.org/env/efe/wgso/pre-kiev.declar/Dobris_E.pdf> [copy on file with author].

⁶⁴ Environment for Europe Declaration, Lucerne, Switzerland, 30 April 1993, at para. 22.2, <<http://www.unece.org/env/efe/wgso/pre-kiev.declar/Luzern.E.pdf>> [copy on file with author].

At its next ministerial meeting in Sofia, Bulgaria, in 1995, the ‘Environment for Europe’ process highlighted participation in environmental matters:

We believe it is essential that ... States should give the public the opportunity to participate at all levels in decisionmaking processes relating to the environment, and we recognize that much remains to be done in this respect. We call upon all countries in the region to ensure that they have a legal framework and effective and appropriate mechanisms to secure public access to environmental information, to facilitate and encourage public participation, inter alia through environmental impact assessment procedures, and to provide effective public access to judicial and administrative remedies for environmental harm. We invite countries to ensure that in relevant legislation effective public participation as a foundation for successful environmental policies is being introduced.⁶⁵

The Sofia ministerial declaration embraced the ‘Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking’ (Sofia Guidelines), which outline a range of measures that governments should take at a national level to engage the public more fully in environmental matters.⁶⁶ The Sofia Guidelines also call upon participating states

⁶⁵ Declaration by the Ministers of Environment of the Region of the United Nations Economic Commission for Europe, 25 October 1995, at para. 41, <<http://www.unece.org/env/efe/wgso/pre-kiev.declar/Sofia.E.pdf>> [copy on file with author] [Sofia Ministerial Declaration].

⁶⁶ Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking, submitted by the Working Group of Senior Government Officials ‘Environment for Europe’ to the Ministerial Conference Environment for Europe, Sofia, Bulgaria, UN ECE Doc. ECE/CEP/24 (23–5 October 1995), <<http://www.unece.org/env/documents/1995/cep/ece.cep.24e.pdf>> [copy on file with author].

to consider ‘the development of a regional Convention on Public Participation’⁶⁷ with ‘the appropriate involvement of [non-governmental organizations] NGOs.’⁶⁸

It is important to note that the ‘Environment for Europe’ process not only pressed participating states to engage members of the public in environmental matters at the national level, but it also served as a model for participation at the regional level. Participants in the process have emphasized its relative transparency and the collaborative manner in which non-state actors (principally environmental NGOs) were engaged.⁶⁹ The ‘Environment for Europe’ process thus provided an organic model that served as an example of participatory process and offered an opportunity for environmental NGOs to build networks among other NGOs and with their state counterparts. It also gave state officials, particularly those from formerly authoritarian countries, an opportunity to gain confidence with a more open and discursive approach as well as to build relationships with their non-governmental colleagues.

Drafting Aarhus

The Sofia commitment to a regional convention launched a formal process of consultation among governments and non-state actors who were active and highly coordinated. Initial negotiations were held by an ad hoc working group in

⁶⁷ Sofia Ministerial Declaration, *supra* note 65 at para. 47.

⁶⁸ *Ibid.*

⁶⁹ See *ibid.* at para. 48. See also JoAnn Carmin and Stacy D. VanDeveer, EU Enlargement and the Environment: Institutional Change and Environmental Policy in Central and Eastern Europe (2005).

Geneva during June 1996. Twenty of fifty-five ECE countries sent representatives who were joined by about a dozen non-state participants, including six who represented a ‘delegation’ of Environmental Citizens Organizations (ECO).⁷⁰ The ECO participated actively throughout the negotiation process and produced written reports of discussions and outcomes that provide far greater detail than the ‘official’ reports prepared by the ECE Secretariat.⁷¹ Two governments, Poland and the Netherlands, invited ECO members to join their official delegations, and the ECE funded participation by an ECO member from Russia.⁷²

The working group met on ten occasions to negotiate the details of a proposed convention, and the negotiations remained largely an open and

⁷⁰ The chair of the Environmental Citizens Organizations (ECO) delegation, Jeremy Wates, worked for a regional European environmental non-governmental organization (NGO) network, the European Environment Bureau. He was joined by four members from central and eastern European environmental NGOs and one US environmental NGO. See *ECO Report on the First Meeting of the Ad Hoc Working Group on the ECE Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking*, <http://www.participate.org/archive/convention/eco_report_1_text.htm> [copy on file with author]. Wates has since moved to Geneva to become head of the Aarhus Secretariat.

⁷¹ ECO reports often cover discussions and outcomes of issues that are entirely omitted from the official reports. They also provide detail about country negotiating positions and questions raised by country delegations during the course of the process. This level of detail is immensely helpful in reconstructing and understanding the proceedings.

⁷² Slovenia later joined these states in adding NGO representation to its delegation. Cover letter from Jeremy Wates to the *ECO Report from the Fourth Negotiating Session and Preparatory Meetings*, Geneva, 17–21 February 1997, <http://www.participate.org/archive/convention/eco_report_4_text.htm> [copy on file with author].

collaborative process. While an ECO rapporteur characterized as ‘disturbing’ a European Union⁷³ decision to coordinate a regional negotiating position in secret,⁷⁴ non-state actors generally had a high level of participation in negotiating sessions as well as access to delegations outside the sessions in less formal settings. The process seemed to foster interpersonal relations among government representatives and non-state participants, producing a degree of comradeship that may have helped with communications and understanding, despite the sometimes adversarial positions taken.⁷⁵

⁷³ Members of the EU at that time included: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

⁷⁴ Cover letter from Jeremy Wates to the *ECO Report on the Eighth Session of the Public Participation Convention Negotiations*, Rome, 1–5 December 1997, <http://www.participate.org/archive/convention/eco_report_8th_session.htm> [copy on file with author].

⁷⁵ The ECO representative’s cover letter to the eighth working group session includes the following account of an evening out: ‘What is not included in the attached report (because these reports are rather serious documents) is an account of a brilliant (well, we enjoyed it) evening of entertainment that was laid on by the NGOs but with the active participation of government officials. After a dinner generously hosted by the Italian government, we warmed up with a couple of songs on the Convention negotiations ... and then launched into a short play ... on the “73rd session of the Working Group for a Convention on Access to a Bit of Information, a Little Participation of Some of the Public in a Few Decisions, and Access to Square Brackets,” for which the main (in fact only) topic on the agenda was Annex 29 on “The Right of the Public to Know What Officials Have Had for Breakfast” ... And of course, in the spirit of effective participation, appropriate consultations were held with all governmental participants—in other words, they were given their scripts at short notice (during the dessert) with no opportunity to change the text. But in the event, they entered the spirit of it and turned out some star performances. Then we ended the evening with “The Battle Hymn of the NGOs,” in

The working group produced a draft convention presented to the fourth Ministerial Conference ‘Environment for Europe,’ which was held in Aarhus, Denmark, in June 1998. The Aarhus Convention was opened for signature at the close of the conference on 25 June 1998 and entered into force in October 2001.⁷⁶ As of July 2008, there were forty-one parties to the convention.⁷⁷

The Aarhus Convention, as its full name implies, commits state parties to promote ‘[a]ccess to Information, Access to Decision-making, and Access to Justice in Environmental Matters.’⁷⁸ The convention provides that ‘each Party shall guarantee the rights’ of access to information, decision-making, and justice,⁷⁹ and parties agree to ‘take the necessary legislative, regulatory and other

which many of the government officials once again became citizens and sang as loudly as any of us.’ Wates cover letter to the Eighth Session, *supra* note 74. The cover letter then notes a return to normalcy: ‘Of course, next morning we all went back into the trenches and continued the battle. Maybe it was just an evening’s entertainment’ (*ibid.*)

⁷⁶ A current accession table is available from the UN ECE at <http://www.unece.org/env/pp/ctreatyfiles/ctreaty_2007_03_27.htm>. For analysis and insights on the Aarhus Convention generally, see Stephen Stec and Susan Casey-Lefkowitz, *Aarhus Convention: An Implementation Guide* (2000); and Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* 18 *Colo. J. Int’l Envtl. L. & Pol’y* 1 (2007). See also the websites of the European Environmental Bureau, <<http://www.eeb.org/>>, and the European Environmental Citizens Organisation for Standardisation, <http://www.ecostandard.org/>>.

⁷⁷ Accession table, *supra* note 76.

⁷⁸ Aarhus Convention, *supra* note 35.

⁷⁹ *Ibid.* at Article I.

measures' to implement this commitment.⁸⁰ The convention links procedural access rights and the public accountability of governments to the substantive objective of environmental protection.⁸¹ It also links environmental concerns to human rights, recognizing that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.'⁸² And it has been found to have 'had significant influence on the jurisprudence of the European Court of Human Rights.'⁸³ The convention is also credited with an increased role for non-state actors in environmental enforcement matters.⁸⁴

Aarhus Convention parties have negotiated a protocol on the use of pollutant release and transfer registers (PRTR)s (with thirty-nine signatories and nine ratifications),⁸⁵ which creates a binding commitment among parties to establish publicly accessible national inventories of hazardous pollutants released

⁸⁰ *Ibid.* at Article 3.1.

⁸¹ *Ibid.* at Preamble.

⁸² *Ibid.* at Preamble.

⁸³ Alan Boyle, *Human Rights or Environmental Rights? A Reassessment* 18 *Fordham Env'tl. Law Rev.* 471 at 478 (2007).

⁸⁴ See Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* 18 *Colo. J. Int'l Env'tl. L. & Pol'y* 1 (2007).

⁸⁵ See Ratification table at <http://www.unece.org/env/pp/ctreaty_files/cprotocol_2008_07_01.htm>.

at industrial facilities and other sources.⁸⁶ Aarhus Convention parties have also drafted an amendment to the convention that would require ‘early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.’⁸⁷ As of July 2008, there are only sixteen parties to the amendment,⁸⁸ and it has not yet entered into force.⁸⁹

Promoting Principles of the Aarhus Convention beyond the State: Article 3.7

The Aarhus Convention is principally a vehicle for promoting public access at a domestic level, and it is seen as something of a regional baseline in Europe.⁹⁰ Yet despite its European origin, proponents of the Aarhus Convention

⁸⁶ The text of the protocol is available at <<http://www.unece.org/env/pp/prtr/docs/prtrtext.htm>>.

⁸⁷ *Report of the Second Meeting of the Parties*, Addendum Decision II/1, Genetically Modified Organisms adopted at the Second Meeting of the Parties held in Almaty, Kazakhstan, 25–7 May 2005, UN Doc. 2005ECE/MP.PP/2005/2/Add.2 (20 June 2005) at 3, Annex, Article 6 bis 1.

⁸⁸ See Ratification table at <http://www.unece.org/env/pp/ctreaty_files/camendment_2008_06_03.htm>.

⁸⁹ The convention requires amendments to be approved by three-quarters of signatories prior to entering into force. Aarhus Convention, *supra* note 35, Article 14.4. See also the Secretariat website relating to the Genetically Modified Organisms amendment, <<http://www.unece.org/env/pp/gmo.htm>>.

⁹⁰ The EC’s ratification of the convention, for example, was seen as an impetus for central and eastern European states to join the convention. See, for example, Czeslaw Walek, *The Aarhus Convention and Its Practical Impact on NGOs Examples of CEE and*

have often looked explicitly at the possibility of exporting the agreement. Shortly after the Aarhus Ministerial conference in 1998, for example, while the thirty-four member states of the Organization of American States (OAS) were developing their own regional strategy on access to environmental matters, a representative of the Danish government joined an OAS-sponsored workshop in Kingston, Jamaica, to discuss the details of the Aarhus Convention and to promote its adoption in the inter-American system.⁹¹ While Western Hemisphere states have been unresponsive to the invitation to join the Aarhus Convention,⁹² there has been some receptivity among Central Asian states.⁹³

The ECE has also revealed what might be seen as global ambitions for the convention. An ECE *Aarhus Implementation Guide*, which was published in 2000, states ‘[a]lthough regional in scope, the significance of the Aarhus

NIS countries 3(1) Intl J. Not-for-Profit L. (2000), <http://www.icnl.org/journal/v013iss1/ar_walek1.htm> [copy on file with author].

⁹¹ See Agenda of OAS Workshop on Inter-American Strategy for Public Participation in Sustainable Development Decision-Making, Kingston, Jamaica, September 1998 [copy on file with author].

⁹² No Western Hemisphere state has acceded to the convention, and even Canada and the United States, which are members of the ECE, are not signatories to the Aarhus Convention. See UN ECE accession table, *supra* note 76.

⁹³ Turkmenistan ratified the convention in 1999, Azerbaijan in 2000, and Kazakhstan, Kyrgystan, and Tajikistan in 2001. See accession table, *supra* note 76. These states are ECE members and may be motivated by an interest in closer ties to Europe or the possibility of future EC membership, but their accession does suggest some extra-regional interest in the Aarhus Convention.

Convention is global.’⁹⁴ The document notes that the convention is ‘open to accession by non-ECE countries, giving it the potential to serve as a global framework for strengthening citizens’ environmental rights’⁹⁵ and argues that the upcoming ‘2002 Special Session of the United Nations General Assembly marking the 10th anniversary of the Earth Summit would be a timely occasion to examine the relevance of the Aarhus Convention as a possible model for

⁹⁴ *Aarhus Convention: An Implementation Guide*, UN Doc ECE/CEP/72 (2000), <<http://www.unece.org/env/pp/acig.pdf>> [Copy on file with author] [*Aarhus Implementation Guide*].

⁹⁵ *Ibid.* at v (foreword by Kofi A. Annan, secretary-general of the United Nations).

strengthening the application of principle 10 [of the Rio Declaration]⁹⁶ in other regions of the world.⁹⁷

In addition to the extra-regional aspirations of its proponents, the Aarhus Convention itself contains a unique provision that would appear to be a call to a more international ambition. Article 3.7 of the Aarhus Convention provides that

[e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.⁹⁸

⁹⁶ Principle 10 of the Rio Declaration calls for greater access to information, public participation in the process of decision-making, and access to justice in environmental matters. See *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3–14 June 1992), Annex I Rio Declaration on Environment and Development, Principle 10, UN Doc. A/CONF.151/26 (Vol. I) (12 August 1992). Principle 10 provides: ‘Environmental 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’ (*ibid.*). While the Rio Declaration is seen as one of the key outcomes of one of the most important international environmental conferences organized by governments to date, it is interesting to note that Principle 10 is explicit in its call for access ‘at the national level.’ Despite the international character of the Rio Conference and the attention and participation by dozens of NGOs with international agendas, the commitment is domestic in scope.

⁹⁷ *Aarhus Implementation Guide*, *supra* note 94 at v (foreword by Kofi A. Annan, secretary-general of the United Nations).

⁹⁸ Aarhus Convention, *supra* note 35 at Article 3.7.

This provision has its origin in the first draft of the convention, which was produced prior to the first ad hoc working group meeting in Geneva in 1996.

Originally the draft text read:

Each Party shall support the provisions of this Convention in international environmental decision-making processes involving other parties which are not Parties to this Convention.⁹⁹

The final text has two principal modifications. First, the commitment to ‘support the provisions’¹⁰⁰ became in the final version a commitment to ‘promote the principles.’¹⁰¹ The word ‘promote’ may be seen as a synonym for ‘support,’ although it may be a bit more pro-active and may well be interpreted to encourage a degree of active persuasion on the part of states party. At the same time, the promise (even if calling for a degree of salesmanship) now only relates to ‘principles’ rather than ‘provisions’ of the convention. This distinction may be seen as a deliberate weakening of the text, although much of the debate over the language appears to have centred on the propriety of applying provisions aimed at domestic law in the international context. Thus, the change to ‘principles’ gives

⁹⁹ ECE Committee on Environmental Policy, Working Group for the Preparation of a Draft Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, *Report of the First Session*, Geneva, 17–19 June 1996 (Item 3 of the provisional agenda) ‘Draft Elements for the Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, Working Draft,’ UN Doc CEP/AC.3/R.1 (11 April 1996) at Article 2.8, <<http://www.unece.org/env/documents/1996/cep/ac.3/cep.ac3.r1.e.pdf>>.

¹⁰⁰ Ibid.

¹⁰¹ Aarhus Convention, *supra* note 35 at Article 3.7.

some flexibility despite being a less concrete promise. It remains to be seen what difference this distinction makes in practice.

The second modification appears more significant. In the original form, whatever ‘supporting’ the ‘provisions of the Convention’ was understood to mean, it was made clear that parties would have promised this support in processes involving non-parties. The meaning of this language caused some debate, even confusion, as the ECO report of the first meeting of the ad hoc working group details:

The question of international decisionmaking was also discussed ... under Article 2, para. 8, with some delegations puzzled as to why the latter paragraph focussed [sic] on processes involving a mixture of Parties and non-Parties to the Convention, without there being any reference to processes purely involving (at least as decisionmakers) Parties. ECO argued that ‘mixed’ processes as well as processes purely consisting of Parties should be addressed, though in different ways. In the former case, the Convention could only commit Parties to individually act in a certain way; in the latter case, the Convention could possibly go further and commit the international body or process itself. Belgium more or less supported this approach. Several countries (Denmark, UK, Greece) had doubts about applying the concrete provisions in the Convention to international environmental decisionmaking. It was suggested (by the Chair?) that the principles (rather than the provisions) of the Convention should apply, though this is a rather vague term.¹⁰²

¹⁰² ECO Report on the First Meeting of the Ad Hoc Working Group on the Proposed ECE Convention on Access to Environmental Information and Public Participation In Environmental Decisionmaking, Geneva, 17–19 June 1996, at 3, <http://www.participate.org/archive/convention/eco_report_1_text.htm> [copy on file with author]. The official report of the first meeting contains no reference to this discussion. See ECE, Committee on Environmental Policy, Working Group for the Preparation of a Draft Convention on Access to Environmental Information and Public

This discussion presents interesting questions from the standpoint of international law. Does an international forum answerable (through its enabling treaty or otherwise) to a group of states have an obligation to comply with commitments made by each of the states that created and direct the forum? Setting aside questions of whether an international organization might act on such commitments in a manner parallel to a state,¹⁰³ the form in which such an obligation might be transferred or inherited would remain uncertain. Absent explicit language in an organic treaty, or a subsequent protocol, how would the international forum take on the responsibilities of its states parties? Is there any argument that the responsibility might be automatic? Where committed states

Participation in Environmental Decision-Making, Report of the First Session, UN Doc CEP/AC.3/2 (9 July 1996).

¹⁰³ An international forum acts in different ways and in a different sphere than states. Thus, for example, states committed to a non-aggression pact could not necessarily transfer to an international body (even one of their creation and subject to their control) the same commitment in equal measure—not because the commitment was problematic in principle but because the international body would not have the same capacity to act aggressively or curb its potential aggression. Similarly, states that have signed the Kyoto Protocol could not necessarily transfer their obligations to reduce greenhouse gases (GHG) to an international body—again because the body functions differently and controls no territory in which GHGs are produced. That said, such a body might inherit or be given an obligation to minimize its GHG footprint. Of course, in the context of public participation, there is no expectation that an international body would raise armies or regulate industry and, in some ways, transferring participatory models would seem rather straightforward. At the same time, complexities of process, language, scale, and cost—not to mention objections over legitimacy and questions of how access to justice might be secured in an international versus domestic system—do suggest that access and participation are not necessarily parallel propositions when transferred from domestic to international contexts.

make up only a part of an international forum, it seems clear that no obligation would be assumed by the forum automatically, and the question is whether those committed states have an obligation to advance their mutual commitment in the context of the international forum's operations.

These appear to be some of the questions with which negotiators struggled. As the proposed text was discussed at the third negotiating session in December 1996, some state delegations expressed concern about imposing a duty on states to act in a way that could be seen to interfere with the operation of an international forum. The United Kingdom, for example, 'stressed that the parties to this Convention cannot purport to regulate an international meeting under the aegis of another organization.'¹⁰⁴ Russia also reportedly opposed participation in 'international processes (including national policies which will be presented in international fora).'¹⁰⁵ Denmark was said to be 'dragging its heels on the notion of public participation in preparing legislation or in international decisionmaking.'¹⁰⁶ On the other hand, the Netherlands was seen as '[v]aguely supportive of ECOs on

¹⁰⁴ ECO Report on the Third Negotiating Session and Preparatory Meeting of the Working Group on the Proposed ECE Convention on Access to Environmental Information and Public Participation In Environmental Decisionmaking, Geneva, 9–13 December 1996, at 11, <http://www.participate.org/archive/convention/eco_report_3_text.htm> [copy on file with author].

¹⁰⁵ *Ibid.* at 25.

¹⁰⁶ *Ibid.* at 24.

international processes,¹⁰⁷ and other states, including Portugal and Slovenia, continued to broadly support the concept.¹⁰⁸ ECO participants continued to push for the provision.¹⁰⁹

At the sixth negotiation session six months later, changes were made in Article 2.8 of the draft text, and the language that eventually became Article 3.7 was adopted. The ECO reported that

[t]he draft provision in Article 2 (General Provisions) requiring Parties to support the provisions of the Convention in international environmental decisionmaking processes involving parties who are not Party to the Convention was amended, with ‘support the provisions’ changed to ‘promote the principles.’ Also, the restriction to processes ‘involving parties who are not Party to the Convention’ was seen to be illogical and was removed.¹¹⁰

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 25.

¹⁰⁹ *Ibid.* at 21–2.

¹¹⁰ ECO Report on the Sixth Negotiating Session and Preparatory Meeting of the Working Group on the Proposed ECE Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking, Geneva, 7–11 July 1997, at 2, <http://www.participate.org/archive/convention/eco_report_six_text.htm> [copy on file with author]. ECO representatives made another attempt at the meeting to obtain a separate and more definitive commitment from signatories to act under circumstances where an international convention or body is comprised entirely of co-signatories—a move apparently aimed specifically at EU institutions—though the effort was ultimately tabled. The ECO report states that “[t]he ECO coalition proposed a new sub-paragraph covering “international bodies under the control or made up exclusively of Parties.” This wording was included in square brackets following reservations expressed by Netherlands, Denmark, Romania and the European

The final language of Article 3.7 may be seen to reflect a reasonable approach to both the question of whether (and to what extent) international forum obligations can be made parallel to the obligations of the forum's constituent states and also the question of whether any such obligations may transfer automatically.¹¹¹ On the former question, drafters adopted the wording 'promote the application of the principles' instead of the wording of the first draft 'support the provisions' of the convention, and, thus, the language, while more vague, avoids the question of exactly how provisions designed for domestic application might function in the international context. With respect to the latter, once the commitment had shifted to 'promot[ing] the application of principles,' the drafters could safely drop the distinction between circumstances where an international convention, process, or organization was created by, and answered to, only Aarhus signatories and circumstances where non-signatories were also involved. The obligation was no longer one of 'supporting' direct application (with all of the attendant questions of how that could properly be done) but, instead, became

Commission ... The ECOs presented the wording in the plenary but the Chair did not want to open a discussion, asking delegations to take it back to their capitals. (N.B. The wording proposed here was intended to cover EU institutions. It was later put to the ECOs outside the meeting that the EU institutions might not be under the control of the Member States and that a more explicit wording might be needed, either referring directly to the EU institutions or the institutions of economic integration organisations, or to international bodies to which Parties had transferred their authority).' *Ibid.* at 6.

¹¹¹ See footnote 71, *ibid.*, and accompanying text.

an obligation to ‘promote’—an obligation that might be characterized as a *duty of evangelism*.¹¹²

Normative and Positive Implications of Article 3.7

Through the adoption of Article 3.7, parties to the Aarhus Convention appear to have adopted a normative position that non-state actor participation in international environmental decision making is a good thing, not only domestically but also internationally. By making the commitment through a formal convention rather than through a ministerial declaration or statement of principles (which is the more typical form for the expression of participatory rights),¹¹³ this commitment can be seen as a statement of positive law. Thus, Article 3.7 represents a critical point of departure for the continuing theoretical and practical debates described in the first section of this article regarding the propriety of public participation in the international arena. Parties to the Aarhus Convention, which, to date, include forty states plus the EC,¹¹⁴ can be seen to

¹¹² The term ‘evangelism’ is used in the sense of “zealous advocacy of a cause or doctrine.” The Oxford Encyclopedic English Dictionary, 3d. ed. at 485 (1996). The term has a religious connotation which is not meant literally here, though it may offer an interesting metaphor for Aarhus parties’ commitment to promote internationally the environmental democracy that they have embraced domestically.

¹¹³ See, for example, Rio Declaration, *supra* note 96, Principle 10, which promotes access, at the national level, ‘to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making processes [and] effective access to judicial and administrative proceedings, including redress and remedy.’

¹¹⁴ See accession table, *supra* note 76.

have taken a definitive stand on the importance of participatory rights in international matters.

The Aarhus Convention provides a model of environmental citizenship, and Article 3.7 tells us this model is relevant at the international as well as domestic level. The convention thus contradicts the arguments of Bolton and others who would limit citizens in a democratic process to a single, domestic opportunity to speak with their government about environmental matters with international implications. Citizens can also, under the Aarhus Convention, claim a degree of *citizenship* at the international level—speaking with their own government and with other states about environmental concerns and interests.

Methodological Implications of Article 3.7

Article 3.7 not only places parties to the Aarhus Convention in a position that favours a more meaningful democratic process at the international level, but it would also appear to adopt a rather proactive stance in the promotion of this democracy—and in the construction of some form of global environmental citizenship. By resolving that “‘mixed” processes as well as processes purely consisting of Parties should be addressed’¹¹⁵ not by separate obligations for these separate types of processes but, rather, by a more general commitment to

¹¹⁵ See ECO Report on the First Meeting of the Ad Hoc Working Group, *supra* note 102 and accompanying text.

‘promote the application of the principles’ of the Aarhus Convention,¹¹⁶ the parties have offered a model of states working to increase opportunities for more democratic access in any number of ways. This could include, where a process is entirely governed by Aarhus states party, making formal changes to the organic commitments of the institutions or creating access protocols to establish more open and responsive procedures. It could also include, where parties to the Aarhus Convention are a majority of states to a convention or institution, using this majority status to move the forum in a more democratic direction. Where only a few Aarhus parties are participants, they could still make an effort to adopt informal mechanisms (such as including non-state actors in their delegations) even as they promote more formal mechanisms for consideration by the broader forum. Finally, it could include a commitment by Aarhus parties to adapt their foreign policy in matters relating to the environment (including policies that shape participation in trade agreements and international financial institutions as well as multilateral environmental accords) to assure that the state’s own delegations are open and transparent and that the positions taken and votes made by the state are consistent with the principles of the Aarhus Convention.¹¹⁷

¹¹⁶ Aarhus Convention, *supra* note 35 at Article 3.7.

¹¹⁷ The World Trade Organization (WTO), for example, has considered the question of accepting non-state *amicus* briefs before dispute panels and appellate bodies and has largely rejected them. World Trade Organization Dispute Settlement System Training Module: Chapter 9, ‘Participation in Dispute Settlement Proceedings’ <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm>;

This analysis suggests some far-ranging implications for a single sentence in a single regional environmental agreement, but these implications naturally flow from a fundamental decision to see international processes relating to the environment as necessarily participatory and democratic in nature. It is worth noting that this sentence, and this commitment, are a departure from the more domestically focused promise of Rio Principle 10.¹¹⁸ At the same time, they are consistent with, and in many ways a logical extension of, Principle 10.

Implementing Article 3.7: The Almaty Guidelines

Development of the Guidelines

The efforts of Aarhus parties to wrestle with some of the normative and practical implications of Article 3.7 began in earnest four years after the Aarhus Convention was opened for signature, at the first Meeting of the Parties in Lucca,

see also *WTO General Council Slaps Appellate Body on Amicus Briefs* 4(45) ICTSD Bridges (28 November 2000), <<http://www.ictsd.org/html/weekly/story1.28-11-00.htm>>. Yet Article 3.7 could be read as an obligation of Aarhus parties to actively support an interpretation of existing WTO rules to allow such briefs or to vote for a change in rules that would support such an interpretation. Article 3.7 might also (true to the idea of *promoting* rather than simply *supporting*) oblige member states to urge this position on their counterparts and/or fund efforts to educate their counterparts on the benefits of non-state participation in dispute resolution.

¹¹⁸ See discussion, *supra* note 96.

Italy, in October 2002.¹¹⁹ The Lucca Declaration suggested the need for guidelines on implementing Article 3.7,¹²⁰ and the following year the Working Group of the Parties (the intersessional body responsible for the convention's work program) requested that the Bureau of the Meeting of the Parties¹²¹ establish an ad hoc expert group to 'consider the scope, format and content of possible guidelines and the appropriate process for their development.'¹²² The Secretariat invited experts designated by governments, NGOs, relevant international organizations, other UN ECE environmental conventions and multilateral environmental agreements¹²³ to form the ad hoc group, which met during the latter half of 2004 and early 2005 to produce draft guidelines. This draft was

¹¹⁹ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties*, UN Doc. ECE/MP.PP/2/Add.1 (2 April 2004).

¹²⁰ *Ibid.* at para. 31.

¹²¹ The Bureau of the Meeting of the Parties is a body elected at the second Meeting of the Parties in Almaty, Kazakhstan, in May 2005. It is chaired by Hanne Inger Bjurstrøm (Norway) and its current membership includes representatives of the governments of Azerbaijan, Belgium, Italy, Kazakhstan, Latvia, and Poland, along with John Hontelez (European ECO Forum and European Environmental Bureau) as the representative of NGOs.

¹²² ECE, Committee on Environmental Policy, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Working Group of the Parties to the Convention, *Report of the First Meeting*, UN Doc. MP.PP/WG.1/2003/2 (26 November 2003) at para. 47.

¹²³ The expert group was comprised of legal scholars and environmental NGO representatives, including some from the same organizations that had been part of ECO and had participated in the negotiations on drafting the Aarhus Convention. The bracketed language was proposed but not accepted by consensus.

revised by the Working Group of the Parties and submitted to the second Meeting of the Parties in Almaty, Kazakhstan, in May 2005.¹²⁴

Scope of the Guidelines: Revisiting Forums Comprised of Non-Parties

The ad hoc expert group faced some of the same challenges that confronted negotiations over the Aarhus Convention, including questions regarding the manner in which Article 3.7 commitments might be differentiated in forums made up exclusively of states party and those in which non-parties participated. The issue restated is (1) whether Article 3.7 implies a commitment to secure access within international forums comprised entirely of Aarhus parties or comprised of a majority of Aarhus parties; and (2) whether Article 3.7 might impose some sort of duty of evangelism on Aarhus parties in forums where non-parties are also present.¹²⁵ The draft that emerged from a drafting committee formed following the first expert group meeting took a rather ambiguous stance on the former question:

¹²⁴ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the Second Meeting of the Parties*, Addendum, Decision II/4, ‘Promoting the Application of the Principles of the Aarhus Convention in International Forums,’ adopted at the second Meeting of the Parties held in Almaty Kazakhstan, on 25–27 May 2005 [Decision II/4]; and Almaty Guidelines, *supra* note 38 at para. 31.

¹²⁵ An even more intriguing question, whether there is a *de facto* access commitment within forums composed entirely of Aarhus parties (some sort of duty transmitted, *pari passu*, from forum members to the forum) was not addressed by the drafting committee or the broader expert group.

These guidelines are intended [possibly] to determine, [or at least influence,] albeit indirectly, the way in which international access is secured in international forums wholly composed of or controlled by Parties to the Convention.¹²⁶

On the latter question, the drafting committee suggested only that Article 3.7 should ‘provide guidance’ to parties in what might be called ‘Aarhus-minority’ forums—hardly a call one might associate with zealous evangelizing.¹²⁷ The drafting committee also proposed language that suggests both intra- and extra-regional aspirations that are not necessarily bound to parties to the convention, suggesting that the guidelines ‘serve as a source of inspiration’ for ‘interested States’ forums and non-state actors.¹²⁸

The broader expert group accepted this ‘inspiration’ language with only modest changes¹²⁹ but took steps to strengthen the language regarding the role of

¹²⁶ Draft Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, prepared by the Chairman (of the Expert Group) in consultation with the small drafting group established at the first meeting of the Expert Group and with the assistance of the Secretariat (31 October 2004), <<http://www.unece.org/env/pp/ppif/PPIF.Gs.v.310ct.ntc.doc>> at para. 5 [copy on file with author] [Expert Group Drafting Committee October Draft]. Note that the author of this article was a participant in this ‘small drafting group.’

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at para. 2.

¹²⁹ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Working Group of the Parties to the Convention, Fourth Meeting, Geneva, 1–4 February 2005 (Item 11 of the provisional agenda), *Report of the Second Meeting of the Expert Group on Public Participation in International Forums*, Addendum: Draft Guidelines on

Article 3.7 in both Aarhus-minority forums and those composed of, or controlled by, parties. Yet the draft guidelines remained precatory on both counts—stopping well short of a legal obligation to implement Aarhus Convention principles in forums where Aarhus members dominate (an Aarhus majority)¹³⁰ or even in those forums composed entirely of Aarhus parties (Aarhus only):

These Guidelines are intended, through their application, to positively influence the way in which international access is secured in international forums in which Parties and Signatories to the Convention participate. In forums wholly composed of or controlled by Parties to the Convention, these Guidelines are [intended][expected], through their application, to be [more]¹³¹ fully reflected, and to shape the way in which international access is secured.¹³²

Final proposed guidelines were adopted at the fifth meeting of the Working Group of the Parties in May 2005¹³³ and presented for adoption to the

Promoting the Application of the Principles of the Aarhus Convention in International Forums, prepared by the Expert Group with the assistance of the secretariat, UN Doc. ECE/MP.PP/WG.1/2005/8/Add.1 (23 November 2004) at para. 3, <<http://www.unece.org/env/documents/2005/pp/wg.1/ece.mp.pp.wg.1.2005.8.e.pdf>> [Expert Group Final Draft Guidelines] [copy on file with author]

¹³⁰ The term ‘majority’ is used for the sake of simplicity although one might posit a forum where Aarhus parties did not constitute a numeric majority yet were able to dominate or control the agenda, through financing or some other political or economic means.

¹³¹ Here the expert group included a footnote that read: ‘The Expert Group considered that the word “more” would be used in conjunction with the word “expected” but not necessarily in a conjunction with the word “intended.”’ *Ibid.* at para. 2, note 3.

¹³² *Ibid.* at para. 2.

¹³³ The draft guidelines prepared by the expert working group were considered at the fourth meeting of the Working Group of the Parties (1–4 February 2005), at an open-

second Meeting of the Parties to the Aarhus Convention during the following month in Almaty.¹³⁴ The proposed guidelines that emerged from the working group followed the ECE's approach in drafting the Aarhus Convention as they drop the distinction (proposed by the expert group) between forums in which parties participate and those 'wholly composed of or controlled by parties.' The language of the Almaty Guidelines, as proposed by the working group and later adopted, reads simply:

These Guidelines are intended, through their application, to positively influence the way in which international access is secured in international forums in which Parties to the Convention participate.¹³⁵

The Almaty Guidelines also embrace the aspiration of the draft text developed by the expert group that the 'Guidelines may also serve as a source of inspiration to Signatories and other interested States.'¹³⁶

Content of the Guidelines

The Almaty Guidelines generally affirm the instrumental arguments that motivated the Aarhus Convention in the first place, namely that 'access to information, public participation and access to justice in environmental matters

ended Bureau Meeting (28 February–1 March 2005), and at the fifth meeting of the Working Group of the Parties (22–3 May 2005). See narrative of the Aarhus Secretariat provided on its website at <<http://www.unece.org/env/pp/ppif.htm>> [copy on file with author].

¹³⁴ *Ibid.*

¹³⁵ Almaty Guidelines, *supra* note 38 at para. 6.

¹³⁶ *Ibid.* at para.3.

are fundamental elements of good governance at all levels and essential for sustainability'¹³⁷ and that '[p]roviding international access ... generally improves the quality of decision-making and the implementation of decisions.'¹³⁸ They also recognize the need to 'adapt and structure international processes and mechanisms in order to ensure meaningful and equitable international access'¹³⁹ but caution that 'care should be taken to make or keep the processes open, in principle, to the public at large.'¹⁴⁰ The guidelines encourage special measures to ensure balance and equity '[w]here members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence.'¹⁴¹ They also stress that

[p]rocesses and mechanisms for international access should be designed to promote transparency, minimize inequality, avoid the exercise of undue economic or political influence, and facilitate the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support.¹⁴²

These provisions speak directly to the unique challenges of structuring a 'democratic' process in the unique circumstances of international decision making

¹³⁷ *Ibid.* at para. 11.

¹³⁸ *Ibid.* at para. 12.

¹³⁹ *Ibid.* at para. 13.

¹⁴⁰ *Ibid.* at para. 14.

¹⁴¹ *Ibid.* at para. 15.

¹⁴² *Ibid.*

and address the charges of critics who fear the anti-democratic potential of participatory international processes.¹⁴³

The guidelines define ‘international forums’ broadly—without limitation to those controlled by the parties to the Aarhus Convention¹⁴⁴—so they can be read to encourage a proactive approach even in ‘mixed’ forums of parties and non-parties. Provisions on access to information call upon Aarhus parties to ‘encourage international forums to develop and make available to the public a clear and transparent set of policies and procedures on access to the environmental information that they hold in order to make access by the public more consistent and reliable.’¹⁴⁵ A similar call can be found in a provision on access to the process of decision making: ‘Efforts should be made to proactively seek the participation of relevant actors, in a transparent, consultative manner, appropriate to the nature of the forum.’¹⁴⁶ And it can also be found in a provision on access to justice: ‘Each Party should encourage the consideration in international forums of measures to facilitate public access to review procedures relating to any application of the rules and standards of each forum.’¹⁴⁷

¹⁴³ See discussion of Bolton, *supra* note 49 and accompanying text; and Anderson, *supra* note 50 and accompanying text.

¹⁴⁴ Almaty Guidelines, *supra* note 38 at para. 9.

¹⁴⁵ *Ibid.* at para. 19.

¹⁴⁶ *Ibid.* at para. 28.

¹⁴⁷ *Ibid.* at para. 40.

The guidelines advance a range of well-known access mechanisms common to a growing number of domestic legal frameworks—with adaptations relevant to the international context. They call for information to be provided in a timely manner¹⁴⁸ and encourage the designation of information officers.¹⁴⁹ The guidelines create a presumption of access ‘at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation according to transparent and clearly stated standards that are made available, if possible, in advance.’¹⁵⁰ This emphasis on clearly stated standards for decisions to close a process is a feature of domestic systems,¹⁵¹ yet it is not a common element of international processes that often have a more informal and ad hoc approach to participatory rights.¹⁵² The guidelines also encourage broad participation, but they address some of the unique logistical and cost challenges of international access by proposing persons who should be seen as particularly ‘relevant stakeholders’ and thus particularly relevant to be engaged, including:

¹⁴⁸ *Ibid.* at para. 21.

¹⁴⁹ *Ibid.* at para. 22.

¹⁵⁰ *Ibid.* at para. 29.

¹⁵¹ See, for example, section 239 of the Ontario, Canada, Municipal Act, 2001, which requires municipalities to open their council and committee meetings to the public unless they fall within prescribed exceptions. See also *Miller v. City of Tacoma*, 979 P.2d 429 (1999) (a court will narrowly construe the grounds for a closed session in favor of requiring an open meeting under Washington State, United States, open meeting law).

¹⁵² See the discussion later in this article.

- (a) the members of the public who are, or are likely to be, most directly affected;
- (b) representatives of public-interest organizations, such as environmental citizens' organizations; and
- (c) representatives of other interests that might cause, contribute to, be affected by or be in a position to alleviate the problems under discussion.¹⁵³

The guidelines note that restrictions on access if 'necessary and unavoidable for practical reasons ... should take account of the nature and phase of the decision-making process and the form of participation sought, and should aim at ensuring the quality, efficiency and expediency of the decision-making process.'¹⁵⁴ They also address concerns over international accreditation programs that may be used to exclude and caution that

[w]here they are applied, accreditation or selection procedures should be based on clear and objective criteria, and the public should be informed accordingly. Such procedures should be transparent, fair, timely, accountable and accessible, and aimed at securing meaningful and equitable participation, while avoiding excessive formalization.¹⁵⁵

The guidelines also encourage early and open access to documentation relating to meetings of international forums in order to assure that participation is meaningful¹⁵⁶ and encourage the use of technology such as websites to help

¹⁵³ Almaty Guidelines, *supra* note 38 at para. 30.

¹⁵⁴ *Ibid.* at para. 31.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at para. 34.

overcome the burden of document distribution in an international setting.¹⁵⁷ The guidelines address one of the greatest concerns of those working on strengthening participatory mechanisms (at the domestic *and* international level)—namely, the impact of an open and participatory process on decision making and its outcomes—by urging ‘[t]ransparency with respect to the impact of public participation on final decisions [including] the public availability of documents submitted by the public.’¹⁵⁸

The guidelines adopt in many respects the recommendations of the expert group and embrace a range of best practices drawn from national and international experience with public participation. Their principal failing is in the area of access to justice, where the guidelines reject a range of recommendations developed by the expert group through the drafting process relating to ‘[p]ublic involvement in international implementation review [and] [compliance] [and dispute settlement] mechanisms,’¹⁵⁹ including:

[p]roviding for participation of the public in the development of such mechanisms and [in the process of appointing the members of the relevant bodies (e.g. by providing an entitlement to nominate members), as well as] providing for the mechanism to be triggered by submission of petitions or communications, including *amicus curiae* briefs by the public.¹⁶⁰

The expert group also states that

¹⁵⁷ *Ibid.* at para. 36.

¹⁵⁸ *Ibid.* at para. 39.

¹⁵⁹ Expert Group Final Draft Guidelines, *supra* note 129 at para. 54.

¹⁶⁰ *Ibid.*

[a] broad interpretation of the concept of ‘standing’ or its equivalent in the context of international forums in proceedings involving environmental issues could further the objective of the Convention and should be applied.¹⁶¹

All of these suggestions were dropped from subsequent drafts developed by the parties. In their place, the final Almaty Guidelines include a single paragraph that calls on parties to

[e]ncourage the consideration in international forums of measures to facilitate public access to review procedures relating to any application of the rules and standards of each forum regarding access to information and public participation within the scope of these guidelines.¹⁶²

This text lacks the detail of the earlier drafts, which might have been useful in working through the unique problems of access to justice in international environmental matters, though it does retain the outward-looking promotional aspect of the broader text.

Implementing the Almaty Guidelines

As the parties approved the Almaty Guidelines, they also created a Task Force on Public Participation in International Forums (PPIF Task Force) ‘to enter into consultations regarding the Guidelines’ with international forums and to report the results of these consultations to the Aarhus working group.¹⁶³ The

¹⁶¹ *Ibid.* at para. 55.

¹⁶² Almaty Guidelines, *supra* note 38 at para. 40.

¹⁶³ Decision II/4, *supra* note 124 at paras. 5–6.

parties also invited ‘Parties, Signatories, other interested States, non-governmental organizations, interested international forums and other relevant actors’ to comment on the guidelines and on ‘their experience regarding the application of the Guidelines.’¹⁶⁴ The PPIF Task Force and the Secretariat disseminated the Almaty Guidelines and a questionnaire to ninety-seven international forums seeking information about how these forums provide access to information, decision-making processes, and justice.¹⁶⁵ The task force chose these ninety-seven forums from a much larger potential pool on the basis of five criteria:

1. the number of members in a forum (‘a forum containing a larger number of participating States being considered higher priority’);
2. the presence of Aarhus Convention parties in the forum (‘in general, the greater the participation of Aarhus Parties in a forum [based on the number of members and also on the intensity of their involvement], the higher priority that forum should be given for consultation’);
3. the proportion of the forum’s decisions or actions that affect the environment (‘greater emphasis ... on consulting with forums

¹⁶⁴ *Ibid.* at para. 7.

¹⁶⁵ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Working Group of the Parties to the Convention, Sixth Meeting, Geneva, 5–7 April 2006, *Report of the Sixth Meeting Addendum Work Plan, Including Plan of Consultation on the Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums as adopted by the Working Group on the basis of a draft prepared by the Task Force on Public Participation in International Forums*, UN Doc. ECE/MP.PP/WG.1/2006/2/Add.1 (20 June 2006).

for which a sizeable proportion of decisions have environmental impacts’);

4. the potential environmental significance of the forum’s decisions or actions (‘even if only some of a forum’s decisions or actions have environmental implications, these effects may be considerable [thus there is a] priority for consultation to some forums whose decisions or actions have the potential to most significantly affect the environment at the global or regional level’); and
5. the need of the expressed civil society for having greater participation in a particular forum (‘higher priority to those forums in which the public most strongly identifies a need for greater participation.’)¹⁶⁶

It is important to note that the presence of Aarhus Convention parties in a particular forum was only one of these five criteria, and, even in this respect, gauging the ‘intensity of involvement’ was deemed as being just as important as the proportion of Aarhus members. This point reinforces the idea that the Almaty Guidelines are seen as a mechanism to promote participation on an extra-convention or extra-regional basis because the questionnaire was aimed at forums with only passing regard to the number of Aarhus Convention parties involved in the forum. If one returns to the original question of whether Article 3.7 should have deliberately addressed ‘mixed’ forums, the decisions on consultation and follow-up post-Almaty seem to be answering the question affirmatively. This is not to suggest that the implementation plan was proceeding with a view to aggressive salesmanship. To the contrary, the work plan calls for these criteria ‘to be applied in a flexible and integrated manner and subject to each forum’s

¹⁶⁶ *Ibid.* at para. 6(i)-(v).

willingness to engage in the consultation process.’¹⁶⁷ Thus, despite a clear willingness to engage ‘mixed’ forums (and even those with no Aarhus party membership), the work plan acknowledges that ‘[u]ltimately, for any progress to be made, the momentum must come from actors within the forum itself, rather than from external forces.’¹⁶⁸

Questionnaire Responses

The Secretariat received responses from sixty-five of the ninety-seven international forums identified as a ‘priority for consultation.’¹⁶⁹ Of these, fifty-

¹⁶⁷ *Ibid.* at para. 7.

¹⁶⁸ *Ibid.*

¹⁶⁹ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Seventh Meeting of the Working Group of the Parties, Geneva, 2–4 May 2007, Item 5 of the Provisional Agenda Public Participation in International Forums, ‘Synthesis of Responses Received from International Forums to the Written Questionnaire in the Consultation Process on the Almaty Guidelines, UN Doc. ECE/MP.PP/WG.1/2007/L.2 (16 February 2007), at 8 [Questionnaire Response Synthesis]. A complete list of the ninety-seven forums invited to take part in the consultation can be found at ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Sixth Meeting of the Working Group of the Parties to the Convention, Geneva, 5–7 April 2006, *Report of the Sixth Meeting*, Addendum, ‘List of International Forums,’ as adopted by the Working Group on the basis of a draft prepared by the Task Force on Public Participation in International Forums, UN Doc. ECE/MP.PP/WG.1/2006/2/Add.2 (22 June 2006). The list was divided into four groups: global forums; transregional forums; Pan-European forums; subregional European and Central Asian forums; and forums in other regions (including Africa, West Asia, the Americas, and Asia and the Pacific).

two agreed to take part in the consultation process,¹⁷⁰ and forty-eight provided completed responses.¹⁷¹ The questionnaire asks relatively general questions,¹⁷² and the responses were frequently lacking in detail.¹⁷³ The Secretariat prepared synthesis reports highlighting the range of formalized rules and non-formalized practices used by the responding forums.¹⁷⁴ The Secretariat also prepared a

¹⁷⁰ Questionnaire Response Synthesis, *supra* note 169 at para. 9.

¹⁷¹ *Ibid.* at para. 12.

¹⁷² The questionnaire was comprised of five questions:

Please provide any comments on the Guidelines, in view of your forum's own processes, activities and particular characteristics.

Does your forum have any formalized rules or procedures concerning access to information, public participation in decision-making and access to justice in environmental matters? If yes, please provide an overview.

Does your forum have any non-formalized practices concerning access to information, public participation in decision-making and access to justice in environmental matters? If yes, please provide an overview.

Are there any current or future workplans of your forum that may affect the extent of or modalities for access to information, public participation in decision-making and access to justice in environmental matters? If yes, please provide an overview.

In particular, what kind of challenges, if any, has your forum encountered with regard to access to information, public participation in decision-making and access to justice in environmental matters (for example, low involvement of civil society, or practical difficulties in managing public participation)? If appropriate, please provide a description underlining those experiences you think could be most useful to consider when reviewing the relevance and practicality of the Guidelines.' *Ibid.* at para. 6.

¹⁷³ A complete copy of all responses is available at the Aarhus Secretariat website, <<http://www.unece.org/env/pp/ppif-response.htm>> [on file with the author].

¹⁷⁴ These reports are available at <<http://www.unece.org/env/pp/ppif.htm#Synthesispaper>> [on file with the author].

synthesis of ‘current and future work plans,’ ‘challenges’ to engaging the public as identified by respondents, and comments on the Almaty Guidelines.¹⁷⁵ This article will not reiterate all of the findings set forth in the Secretariat’s synthesis papers, although a few observations relevant to this article’s focus on the Aarhus Convention and its commitment to global citizenship are pertinent. A review of the responses reveals that, for the most part, the responding forums profess an interest in improving public access to information and to the process of decision making at an international level. There is also conceptual support for the Almaty Guidelines and the efforts of the PPIF Task Force.

The responses show that access to information is relatively widely available through the use of the Internet, although there are relatively few criteria to identify the range of relevant documents that should be made available, and Internet posting is more of a practice than a mandate. Criteria for the timely provision of relevant documents are also lacking. Access to the process of decision making is still relatively rare, with only a third of respondents indicating that they have a rule or formal procedure specifically giving a voice to non-state actors in their decision-making processes.¹⁷⁶ Less than 20 percent of forums

¹⁷⁵ Ibid.

¹⁷⁶ Examples of forums allowing some speaking rights to non-state actors are the United Nations Environment Programme, the Secretariat to the Convention on Biological Diversity, and the UN ECE Timber Committee (*ibid.*). Many UN bodies indicated that they follow general United Nations Economic and Social Council (UNESCO) guidelines on NGO statements and interventions (*ibid.*).

report that they offer a procedure for written comments.¹⁷⁷ Only one forum reports providing a vote to non-state actors. A number of informal practices to promote participation were noted, but these often appeared to be ad hoc, and commitments to continuing or formalizing these practices were uncertain. With respect to access to justice, only two forums indicated that formal procedures were available to non-state actors,¹⁷⁸ and only one indicated that it had a practice of allowing non-state submissions or petitions relating to its operations.¹⁷⁹

In short, the data show greater expressions of interest and desire than actual applications of participatory models, although these data are only a snapshot of largely self-described rules and practices. While the process of fact gathering through the questionnaire should be seen as an important first step, and the willingness of international forums to respond to the request from the PPIF Working Group and the Aarhus Secretariat is positive, more data are needed.

The questionnaire represents an affirmative effort by the Aarhus Secretariat, operating under an ECE mandate, to implement the parties' commitments to 'promote the principles' of the convention, and it is noteworthy

¹⁷⁷ Examples include the UNESCO World Heritage Centre (on reports regarding site impact), the International Atomic Energy Agency (on draft safety standards), and the Secretariat to the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (in connection with Conferences of the Parties) (*ibid.*).

¹⁷⁸ The International Fund for Agricultural Development and the European Bank for Reconstruction and Development (*ibid.*).

¹⁷⁹ The International Fund for Agricultural Development (*ibid.*).

that this effort is taking place on an extra-regional scale. By simply engaging international forums in the conversation about participatory approaches, the Secretariat and the PPIF Working Group are advancing the principles of the convention, and, by asking questions about policies and practices, they are causing a beneficial degree of self-assessment and self-scrutiny. The answer of these forums to the questionnaire's 'what do you think of the guidelines' question also provides some evidence that the participatory norm is resonating—even if only rhetorically for the present.

The Secretariat and PPIF Working Group took the further step of inviting international forums to examine the questionnaire responses and of discussing the next steps at a meeting entitled *Involving the Public in International Forums dealing with Matters Relating to the Environment*, which was held in June 2007 in Geneva.¹⁸⁰ The meeting offered a further opportunity to promote Article 3.7 and the *Almaty Guidelines* and to discuss challenges that international forums face when seeking to engage non-state actors.¹⁸¹

¹⁸⁰ A provisional agenda for the meeting is available at <<http://www.unece.org/env/pp/ppif/Provisional%20annotated%20agenda%20for%20web%20site%20%2007.06.2007.pdf>> [on file with the author]. A participant list and documents distributed at the meeting are also on file with the author and available at <<http://www.unece.org/env/pp/ppif.htm#Internationalworkshop>>.

¹⁸¹ ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Eighth Meeting of the Working Group of the Parties to the Convention, Geneva, 31 October–2 November 2007, Item 5 of the Provisional Agenda Public Participation in International Forums, *Report of the Meeting of Representatives of International Forums Dealing with*

While these steps arguably fall short of the change needed to make international forums truly open and responsive to the public, they do represent incremental advances in the process of affirming and implementing a normative and positive commitment to more participatory international lawmaking. More rigorous assessment tools are needed for gauging where meaningful access is available ('meaningful' as described by the Almaty Guidelines). These tools could not only provide a better picture of the state of access at present but also offer a baseline against which progress could be measured. Ultimately, any effort to monitor the implementation of Article 3.7 will require measuring changes in access that occur at the international level. It will also require some effort to discern how the regional process sparked by Article 3.7 is affecting any move towards greater access. This 'causal' question may be difficult to answer, but it is worth designing assessment tools that document outreach efforts by Aarhus parties as well as progress towards greater access in international forums. Whether relationships are seen as coincidental or causal may remain subject to debate, but at least some measure of effort and change can be recorded. It would also be interesting to better understand how 'embraced' this regional strategy really is within the international forums and whether there is a sense of appreciation for efforts by European leaders on the issue, or whether resistance

Matters Relating to the Environment, UN Doc. ECE/MP.PP/WG.1/2007/L.8 (24 August 2007), <http://www.unece.org/env/pp/ppif/ece_mp_pp_wg_1_2007_1_8_e.pdf> [on file with the author].

can be seen among non-Aarhus states or within the international forums themselves.

Conclusion

Article 3.7 of the Aarhus Convention, seen in the context of the normative and practical debate over participatory models and citizenship in international law, reveals a European position that favours public participation in making and implementing international law relating to the environment. On the normative debate, concerns over accountability and the ironic argument that more participation may be somehow less democratic are answered in part by a commitment explicitly constructed as a means to *increase* accountability and democratic dialogue. Concerns about the equity of access (whether international forums might be subject to over representation, or even capture, by a small or ‘unrepresentative’ group of civil society actors) <not clear to me?> are addressed in the Almaty Guidelines—but they are treated as a question of how to open the doors of international processes, not whether those doors should be opened in the first place.

Even the normative concern about preserving state sovereignty in the face of public international discourse is answered through continuing state control over final decisions under both the Aarhus Convention and the Almaty Guidelines. Article 3.7 was certainly born of a broad public discourse, but it was debated, edited, and ultimately adopted by states. It was not imposed by the pitchfork-wielding rabble, which seems to haunt the imagination of anti-participation

theorists. In sum, the conversation surrounding Article 3.7 and the Almaty Guidelines did nothing to challenge any state's prerogative to accept or reject any of the arguments made during that conversation.

A normative investment in democratizing international environmental decision making and a willingness to establish a positive (though still modest) legal framework to secure that investment is thus evident in Aarhus 3.7 and the Almaty Guidelines, particularly when viewed in combination with the process that European states followed in developing these instruments. The practical debate over how best to engage a global public in international environmental matters continues, and the challenges of fairness, equity, and meaningful access are highlighted but not resolved by the Almaty Guidelines. Yet the debate is certainly advanced by the guidelines, and the willingness of Aarhus parties to confront practical obstacles rather than recite them as a basis for paralysis is significant.

The long-term effect that this European position on international access may have on the structure and operation of international forums is less certain. Article 3.7 provides impetus for Aarhus parties to promote conceptions and mechanisms of citizenship at the international level, but there are grounds for caution in anticipating the impact they can have. The Working Group of the Parties to the Aarhus Convention reflected caution in planning for consultations on the Almaty Guidelines:

If a forum does decide to be involved, its level of interest and commitment will be fundamental to the success of the process. Ultimately, for any progress to be made, the momentum must come from actors within the forum itself, rather than from external forces.¹⁸²

Whatever distinction this implies between a forum and the ‘actors within’ a forum, Aarhus parties should not view themselves as being ‘external’ to the international forums they create and control, even where they share this control with states that have not acceded to the Aarhus Convention.¹⁸³ In a sense, the debate that began in the working groups that drafted the Aarhus Convention will be played out by each Aarhus state party in each forum to which it belongs.

The effect of Article 3.7 will need to be assessed over time with respect to each of the three kinds of forums that concerned the proponents of Article 3.7: First, forums comprised entirely of Aarhus parties (Aarhus only); second, forums dominated or controlled by Aarhus parties (Aarhus majority); and, finally, those forums in which Aarhus parties do not have the ability to control or direct (Aarhus minority). Though early efforts to draft an explicit distinction among these

¹⁸² ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Sixth Meeting of the Working Group of the Parties to the Convention, Geneva, 5–7 April 2006, *Report of the Sixth Meeting*, Addendum 1, ‘Work Plan, Including Plan of Consultation on the Guidelines on Promoting The Application of the Principles of the Aarhus Convention in International Forums,’ Doc. ECE/MP.PP/WG.1/2006/2/Add.1 (20 June 2006) at para. 7.

¹⁸³ Indeed, the mandate should hold where only a single Aarhus signatory is a party to a forum, although this state’s ability to make a difference will necessarily be discounted.

categories in the context of the Article 3.7 obligation failed, there remain important factual and perhaps legal distinctions that must be tested over time.

With the first category, the question may be asked whether a legal commitment by all of the members of a forum can be seen as a per se legal commitment of the forum itself. With both the first and second, one might ask whether there is an obligation to use control (whether political or economic) to advance, or even impose, the legal commitments of the controlling group. For each of these categories, one might ask about moral as well as legal compulsion. In the final category, the question is whether parties to the Aarhus Convention have embraced some duty to evangelize or spread the ‘good word’ of open democratic process in any forum where they may find themselves. Should (or will) Aarhus parties, for example, take a lead in the controversy over non-state *amicus* briefs before the World Trade Organization and promote a more open process before dispute resolution panels and appellate bodies? Beyond these category-specific questions, because the Aarhus Convention is in its origin a European (at least an ECE) convention, one might ask the broader question of what kind of leadership Europe is willing to show in advancing environmental citizenship and promoting greater democratic participation in international environmental matters.

The existence of Article 3.7 is not a direct answer to these questions, and the Almaty Guidelines do not resolve the broader debate over a normative or positive standard of international citizenship and participation. Yet they offer

evidence to those in search of such a standard, and Aarhus parties committed to the letter and spirit of Article 3.7 can certainly take it as a positive prescription to advance the debate incrementally, forum by forum. In the meantime, if one accepts the views of transboundary and process theorists about the nature of international law and lawmaking, then the efforts of the parties to the Aarhus Convention to determine how (and how effectively) non-state actors are becoming citizens in international forums, and to promote the Almaty Guidelines, can themselves be seen as transformative. And even if one takes a narrower, strictly positivist, view of the law, these efforts may still be seen as some evidence of an ongoing transformation.

CHAPTER 3 LAWMAKING ON THE ROAD TO INTERNATIONAL SUMMITS¹⁸⁴

The rising dispute over greater public access to the machinery of international law features two rival camps, each raising a flag of democracy, and each claiming that the other threatens that flag. They represent competing models of global governance. One camp sees a vital constitutive role for non-state actors in lawmaking. The other views states as exclusive and autonomous international protagonists. Yet despite these polar positions, each claims the mantle of the “more democratic.” This article joins the debate and examines international summits as an emerging phenomenon that offers a potential bridge between the two positions. Summit meetings of heads of state and government are public forums where transboundary constituencies engage state leaders even as those leaders engage one another. Lawmaking, though only a ceremonial fraction of summit meetings themselves, is advanced by planning and implementing summit commitments; in these interstices non-state actors work to inform outcomes and shape institutional agendas. This Article examines the role of non-state actors in summits and asks whether they can be viewed as contributors to the lawmaking process. This Article studies inter-American summits as a case in point, focusing on efforts to advance a regional “democracy agenda” through the catalysis of the summit process. Case studies include a U.S. proposal for a regional public

¹⁸⁴ This chapter was published as *Lawmaking on the Road to International Summits*, 59 DEPAUL L. REV. 1-68 (2009). Citations to the material in this chapter should be to that article. It is available for download from ssrn.com

participation strategy, a Peruvian initiative to discourage and respond to coups, and a Canadian measure to increase citizen access to the region's chief political body. The Article shows that summits facilitated these initiatives by providing a context for cooperative lawmaking in which non-state actors played a central role—a key concern for public access proponents. Yet states initiated and managed the process, and heads of state and government ultimately ratified the outcomes, so the public role in shaping outcomes did not threaten state authority—a key concern for access critics. In the debate over the appropriate place for non-state actors in international lawmaking, the author thus concludes that summits can advance the legitimacy and democracy concerns that, at their core, appear to motivate the competing positions. While summits are not a basis for lasting peace between the camps, they are seen as an emerging mechanism that offers common ground.

The Debate Over Non-State Access

In the ongoing debate about mechanisms through which international law is made and administered, a number of scholars have argued that non-state actors,¹⁸⁵ often acting within networks that include subsidiary state agencies and

¹⁸⁵ The term “non-state actor” is used in this chapter

in its broadest sense to include organizations, communities, groups, associations, institutions, and even individual actors (activists, scholars, or private sector entrepreneurs). While there is a tendency to group such actors together under the heading “non-governmental organization,” “private voluntary organization,” or “civil society organization,” the term “non-state actor” is used here for several reasons. It emphasizes neutrality in terms of the . . . actors’ legal form, purpose, and/or

inter-state institutions, have an important jurisgenerative role.¹⁸⁶ Peter Haas, for example, has described epistemic communities of scientific and policy experts that worked to address problems such as the transboundary pollution of the Mediterranean Sea¹⁸⁷ and threats to the ozone layer.¹⁸⁸ Haas argues that these communities act as “channels through which new ideas circulate from societies to

objectives [Moreover], it focuses on an essential question in international law—the participation of actors who are not state sovereigns in processes designed by and for states that have traditionally been the province of states.

Eric Dannenmaier, A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums, in 18 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 32, 33 n.4 (Ole Kristian Fauchald et al. eds., 2007).

¹⁸⁶ The question of what is jurisgenerative in international law is bound up in a broader theoretical debate about the nature of international law; the importance of processes that give shape to positive legal commitments; and the significance of less formal instruments, institutions, and networks. *See generally* THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2005) (presenting a collection of articles previously published in the AMERICAN JOURNAL OF INTERNATIONAL LAW that explore alternative theoretical frameworks for international law). These questions are explored in greater depth in Part VII of this Article (Jurisgenerative Potential). *See infra* notes 486 to 513 and accompanying text.

¹⁸⁷ *See* Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT’L ORG. 377, 384-87 (1989). The term “epistemic communities” was earlier offered by John Ruggie to describe the communities that form around common policy ideas. *See* John Gerard Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT’L ORG. 557, 569–70 (1975) (analogizing to what Michele Foucault referred to as “‘epistemes,’ through which the political relationships” acted out on the international stage “are visualized”).

¹⁸⁸ *See* Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT’L ORG. 187, 189-96 (1992).

governments as well as from country to country,”¹⁸⁹ and that they are an important means to solve multilateral problems and promote world order.¹⁹⁰

Margaret Keck and Kathryn Sikkink have described how non-state actors work through transnational advocacy networks that “interact with each other, with states, and with international organizations” to “change the behavior of states and international organizations.”¹⁹¹ Keck and Sikkink point to the growing influence of these networks, which they portray as

[s]imultaneously principled and strategic actors, they “frame” issues to make them comprehensible to target audiences, to attract attention and encourage action, and to “fit” with favorable institutional venues. Network actors bring new ideas, norms, and discourses into policy debates, and serve as sources of information and testimony.¹⁹²

¹⁸⁹ Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 INT’L ORG. 1, 27 (1992).

¹⁹⁰ See *id.* at 27–28; see also Emanuel Adler & Peter M. Haas, *Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program*, 46 INT’L ORG. 367, 370-71 (1992) (describing the instrumental value of epistemic communities when promoting greater international coordination and greater affinity between the values and practices of states and the policies advanced through international regimes and institutions).

¹⁹¹ Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders* 1–2 (1998).

¹⁹² *Id.* at 2–3.

While these networks engage government officials in an expansive policy community,¹⁹³ participants are frequently non-governmental, and their agendas reflect the policy priorities of an even broader public.¹⁹⁴

In a 2006 Centennial Anniversary article for the *American Journal of International Law*, Steve Charnovitz traced the history and discussed the relevance of non-state actor contributions to international lawmaking.¹⁹⁵ He concentrated on the participation of non-governmental organizations (NGOs)¹⁹⁶—

¹⁹³ *See id.* at 31. The term “government officials” is used in this Article in a broad sense to encompass a range of senior, mid-level, and junior diplomats and bureaucrats (at each level including career employees as well as political appointees), not just senior officials who may be answering directly to a head of state.

¹⁹⁴ *Id.* at 7–8. Networks comprised principally of governmental officials are also actively engaged in defining international priorities and shaping law outside of the traditional structure and formal hierarchies of foreign ministries. Robert Keohane and Joseph Nye have described “transgovernmental” activity “among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.” Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POL.* 39, 43 (1974). Anne-Marie Slaughter has detailed how these “[n]etworks of government officials—police investigators, financial regulators, even judges and legislators—increasingly exchange information and coordinate activity to . . . address common problems on a global scale.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 1 (2004).

¹⁹⁵ *See generally* Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 *AM. J. INT’L L.* 348 (2006) [hereinafter Charnovitz, *Nongovernmental Organizations*]. Charnovitz has also authored an earlier, more extensive catalogue of non-state actor participation. *See generally* Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT’L L.* 183 (1997) [hereinafter Charnovitz, *Participation*].

¹⁹⁶ Much of the literature on non-state actors deals with non-governmental organizations (NGOs), sometimes consciously distinguished from other actors—universities, think

a dominant species of non-state actor—and argued that they “promote accountability by monitoring what government delegates say and do,” and that they “communicate that information to elected officials and the public.”¹⁹⁷ NGOs, he noted, “help assure that decision makers are aware of the sympathies and interests of the people who will be affected by intergovernmental decisions.”¹⁹⁸ These scholars and others make the case that non-state actors have an increasingly important affirmative role in international governance.¹⁹⁹ They

tanks, business groups, individuals, and for-profit organizations—and sometimes not. As discussed above, this Article is concerned with the broader universe of non-state actors. *See supra* note 185 and accompanying text. Yet NGOs are an important class of non-state actor, and they are frequent protagonists and thus frequently studied, so literature about NGOs is both abundant and relevant to the broader inquiry.

¹⁹⁷ Charnovitz, *Nongovernmental Organizations*, *supra* note 195 at 367.

¹⁹⁸ *Id.*

¹⁹⁹ *See generally, e.g.,* Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?*, in *NON-STATE ACTORS AND HUMAN RIGHTS* (Philip Alston ed., 2005) at 93-111, 111 (examining the legal capacity of NGOs to behave as states do in international law and concluding that there is “much more reason for concern about the negative impact of ‘irresponsible’ governments than about ‘irresponsible NGOs’”); Eric Dannenmaier, *Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*, 27 *FORDHAM INT’L L.J.* 1066, 1115 (2004) (describing a process through which non-state actors engaged negotiators of a regional trade accord in dialogue regarding societal priorities in areas such as the environment, labor, and combating corruption, and concluding that “the principles of participation far outweigh the principles of secrecy when multilateral [trade] policies are [ultimately] applied at the national level”); David Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 *COLO. J. INT’L ENVTL. L. & POL’Y* 1, 38 (1996) (analyzing competing policies of openness and secrecy in international environmental and public health matters, and concluding that rules of limited access at the international

also highlight the normative value and instrumental advantage of an engaged public, and they are sympathetic to, and often proponents of, increasing access to the processes they describe.²⁰⁰

Others contest this scholarship and reject its normative implications. They hold to a more traditional Westphalian idea of international lawmaking that is reserved to autonomous and insular sovereign states. Former Interim Permanent Representative of the United States to the United Nations John Bolton²⁰¹ is a prominent critic of an international governance role for civil society.²⁰² Similarly,

level can undermine the legitimacy of government at the national level in those cases “international institutions are vehicles for domestic policy making in the first instance”).

²⁰⁰ See Charnovitz, *Nongovernmental Organizations*, supra note 195, at (368-72); David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 *CHI. J. INT’L L.* 437, 456–57 (2008).

²⁰¹ Bolton was appointed by President George W. Bush in a recess appointment after Bolton failed to receive confirmation from the Senate, and he served from August 2005 until December 2006. He resigned when his recess appointment would have ended. See Helene Cooper, *Bush Drops Bid to Keep Bolton as UN Envoy*, *INT’L HERALD TRIB.*, Dec. 5, 2006, at 1.

²⁰² See generally John R. Bolton, *Should We Take Global Governance Seriously?*, 1 *CHI. J. INT’L L.* 205, 215-218 (2000) [hereinafter Bolton, *Global Governance*] (allowing civil society's “intrastate advocates to reargue their positions” in international forums “raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided.”); John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 30–31 (2000) [hereinafter Bolton, *Is There Really Law?*] (questioning the conceptual legitimacy of “international ‘civil society’” because it is a “collection of advocacy NGOs” which are “far different” from the “associations that make up domestic ‘civil society’” and challenging the tactics of international NGOs that operate outside of “democratic polities where they have been unsuccessful politically”).

Kenneth Anderson has decried the threat that non-state actors, principally international NGOs, pose to “the sovereignty of democratic states.”²⁰³ Bolton, Anderson, and other critics reject transnational collaboration outside traditional diplomatic channels as an unaccountable, illegitimate, and even undemocratic threat to vital conceptions of sovereignty.²⁰⁴ One key metaphor that Bolton uses

²⁰³ Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 *CHI. J. INT’L L.* 371, 372 (2001); see also Kenneth Anderson & David Rieff, ‘Global Civil Society’: A Sceptical View, in *GLOBAL CIVIL SOCIETY* 26, 37 (Helmut Anheier et al. eds., 2005) (the authors “argue that the ‘democracy deficit’ of the international system is buttressed rather than challenged by the global civil society movement”).

²⁰⁴ See Bolton, *Is There Really Law*, *supra* note 202, at 30–31 (“What actually seems to be happening is that the international NGOs are becoming an alternative to national governments as vehicles for decision-making. In reality, however, it is precisely the detachment from governments that makes such a ‘civil society’ so troubling, at least for democracies.”); Anderson & Rieff, *supra* note 203, at 37; *The Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Advisory Opinion, Separate Opinion of Judge Gilbert Guillaume, 1996 I.C.J. Rep. 216, 287-88 (July 8) (suggesting that the I.C.J. “could have considered declining to respond to the request for an advisory opinion” because the request from the U.N. General Assembly “originated in a campaign conducted by” NGOs, criticizing the “pressure brought to bear” by NGOs, expressing concern over the continued “independence” of governments and intergovernmental institutions in the face of this pressure); Serge Surs, *Vers Une Cour. Pénale Internationale: La Convention de Rome entre les ONG et le Conseil de Sécurité*, 103 *R.G.D.I.P.* 29, 35-36 (expressing concern over the “excessive NGO role” at the 1998 Rome Conference that created the International Criminal Court). In the context of a broader claim about the “problem” that international law is undemocratic, Jed Rubenfeld echoes the concerns of many access critics when he argues,

In the last ten years or so, it became common for internationalists to reply to this problem by pointing to the growing influence of non-governmental organizations (NGO) in international law circles, as if these equally unaccountable, self-appointed, unrepresentative NGOs

when challenging non-state access to international process is a claim that this access provides a “second bite at the apple.”²⁰⁵ Presumably, Bolton means that citizens are provided sufficient domestic access to the formulation of foreign policy, and they should thus leave the table sated, when he asserts that “[c]ivil society’s ‘second bite at the apple’ raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided.”²⁰⁶ A metaphor that portrays democratic discourse as a perishable and finite comestible that is diminished (consumed) rather than strengthened by its participants seems even more profoundly troubling, but an explanation is entirely elided.

While it may seem ironic to charge that making international law more participatory will actually make it less democratic these are nevertheless the terms in which some see the issue. The debate has become more heated as non-state access and the role of NGOs have grown, and it touches on a central problem in international law: the advancement of means for cooperative—and, when needed, coercive—global governance in a system of autonomous sovereign states. State-

somehow exemplified world public opinion, and as if the antidemocratic nature of international governance were a kind of small accountability hole that these NGOs could plug.

Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2018 (2004) (footnote omitted); *see also* Jeremy Rabkin, *International Law vs. the American Constitution*, 55 NAT’L INT. 30, 37 (1999) (“NGOs never have to face voters or bear any sort of accountability.”).

²⁰⁵ Bolton, *Global Governance*, *supra* note 202, at 217.

²⁰⁶ *Id.*

centrism is, for now at least, the system we have. A pragmatist must admit wide latitude to the sovereign prerogative and anticipate its forceful defense. But this Article argues that such latitude should not be seen to irretrievably foreclose the potential of non-state actors to inform, shape, and police international law. Their access to decision-making process is not an assault on state autonomy. In many cases, non-state actors may play a role in lawmaking that access proponents find vital, without threatening the legitimacy and democracy values that they share in common with access critics.

Summits as an Entry Point

This Chapter examines one such case. It explores an emerging phenomenon in international relations—international summits²⁰⁷—that may serve as a bridging mechanism between the two positions, at least when certain process features are present. Unlike traditional diplomatic discourse, which is often sequestered and problem-specific, summits convene national leaders on a highly public stage in a transparent and frequently expansive policy dialogue. Summit agendas cover a broad range of technical and policy issues that are cooperatively

²⁰⁷ Heads of state and government are called by diverse names—prime minister, emir, king, and president, for example—as are meetings among them. This Article will use the terms “international summit” and “summit” to refer to a forum of heads of state from more than two countries who are meeting to discuss common interests in regional, economic, or security matters. This definition excludes ad hoc meetings that may take place from time to time to address this same range of issues and focuses instead on planned or institutionalized meetings that are typically periodic.

developed by specialized subsidiary state agencies that are capable of working across borders in collaboration with inter-state and non-state actors.

This Article argues that summits may be fertile ground for the sort of productive non-state input described by Charnovitz, Kamminga, Wirth, and others,²⁰⁸ while operating within the context of transboundary networks such as those described by Haas, Keck, and Sikkink, among others.²⁰⁹ Yet summits ultimately direct this cooperation and input through participating states' chief political authorities in a way that responds to the state-centered critique that is advanced by access critics such as Bolton and Anderson.²¹⁰ While non-state actors operate through transboundary networks to inform and shape outcomes, ministries and executive offices that are directly accountable to the state's principal political authority still review and approve final policy declarations and action plans. Heads of state and government must ultimately sign the commitments that must be ratified (in the case of formal obligations) or at least implemented (in the case of less formal promises) by domestic institutions of government.

Having helped to shape and advance specific outcomes, transboundary networks are positioned and motivated to support implementation, and this

²⁰⁸ See Charnovitz, *Nongovernmental Organizations*, *supra* note 195; Kamminga, *supra* note 199; Wirth, *supra* note 199; Dannenmaier, *supra* note 199.

²⁰⁹ See Haas, *supra* notes 187 and 189; Keck & Sikkink, *supra* note 191.

²¹⁰ See Bolton, *Global Governance*, and *Is There Really Law*, *supra* note 202; Anderson, *supra* note 203.

strengthens outcome legitimacy²¹¹ and increases the likelihood of compliance,²¹² both of which are important instrumental contributions to the process of international lawmaking. Participation by non-state actors also offers the normative value associated with deliberative democracy, such as promoting practices of mutual respect and encouraging public spiritedness.²¹³ Yet state

²¹¹ See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *LEGITIMACY AMONG NATIONS*] (arguing that nations are more likely to obey laws with a high degree of perceived legitimacy, and that legitimacy is reinforced by elements of “determinacy, symbolic validation, coherence, and adherence”); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 94 (2006) [hereinafter Franck, *Legitimacy of Power*] (arguing that “determinacy,” or “that which makes [the rule’s] message clear or transparent” is perhaps the most important of these legitimacy-reinforcing elements). Engaging non-state actors in international processes not only increases process transparency and the clarity of outcomes but also better positions non-state actors to support adherence in a domestic context; see also *infra* Part VII (arguing that engaging non-state actors in the summit process has increased the jurisgenerative potential of summits).

²¹² See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (advancing a “managerial” model of treaty compliance that relies on a continuing dialogue between the parties, international officials, and NGOs); see also *infra* notes 493 to 494 and accompanying text (describing the propensity of summits to “promote conforming behavior” among state institutions and to place societal actors in a position to monitor implementation).

²¹³ See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 10–12 (2004) (arguing that mutual respect and public spiritedness are important in dealing with moral disagreement that can otherwise undermine legitimacy in governance); see also *infra* notes 490 to 492 and accompanying text (summarizing how summits engage interested parties, including vocal dissidents, in dialogue and consensus building) and notes 509 to 513 and accompanying text (describing summits’ reliance on cooperative

commitment and state resources remain essential to fulfilling promises that are made through the summit process.

In recent years, international summits have advanced substantially in profile as well as productivity, though they remain largely unstudied outside the circle of diplomats and specialists who manage their processes. Although ad hoc high level meetings abound, this article is concerned with periodic and “institutionalized” summits where an iterative planning process drives outcomes, and where these outcomes rely on institutions or institutional features for implementation.²¹⁴ This Article studies the inter-American summit process as a case in point, focusing on efforts to strengthen democratic practices and institutions among Organization of American States (OAS) member states over the past decade. It finds that the inter-American process features a relatively flexible and inclusive mechanism through which epistemic communities—usually loose coalitions of state and non-state actors—have made modest but measurable progress in advancing this regional policy agenda.²¹⁵ In each case, inter-American summits provided a platform for states and inter-state networks to negotiate interests and shape regional approaches. And in each case, the outcomes were overseen by officials reporting to heads of state, and the outcomes

models and the potential of summits to change the context of interaction within regional policy institutions).

²¹⁴ For examples of nineteen global and regional summits that were organized around social, economic, or security interests, *see infra* notes 251 to 269 and accompanying text.

²¹⁵ *See infra* sections at page 121-147.

themselves were ultimately endorsed by heads of state.²¹⁶ In fact, it is often difficult to separate the agendas of state officials from those of non-state actors, at least as negotiated through and transformed by the deliberative process.²¹⁷

Although most inter-American summit “commitments” are not, in and of themselves, binding law in a positivist sense,²¹⁸ the process has a normative push that can drive more formal commitments.²¹⁹ Summit agreements frame the

²¹⁶ Formal summit outcomes, in the form of declarations and plans of action, are typically signed by the heads of state and government who participate in the summit meetings. The exception is the most recent summit in Trinidad in April 2009, where a consensus document was signed by the chair rather than participating state leaders. *See infra* note 315 and accompanying text.

²¹⁷ This outcome is seen as a positive feature of deliberative democracy, which seeks to combine preferences “in various ways that are efficient and fair” through a process that “tells citizens and their representatives to . . . reason together.” GUTMANN & THOMPSON, *supra* note 213, at 13, 20.

²¹⁸ Even calling summit statements “commitments” might be contested, although that is the term commonly used among negotiators and bureaucrats when describing the imperative language of summit documents. Inter-American summit documents are variously called “declarations” or “plans of action,” and the text is usually couched in terms that state the signatories “will” accomplish a set of aims, which can vary from statements of principle to concrete programs. *See, e.g.*, Third Summit of the Americas, Quebec City, Can., Apr. 22, 2001, *Plan of Action* [hereinafter Quebec Plan of Action], at 1, available at <http://www.state.gov/p/wha/rls/59664.htm> (“[will] recogniz[e] the relationship among democracy, sustainable development [and] the separation of powers”); *id.* at 6 (“[will] establish an inter-American program within the OAS for the promotion and protection of the human rights of migrants”). The word “commitment” will thus be used in this Article not to imply a binding legal obligation, but for ease of reference to provisions of summit documents that are more than merely precatory.

²¹⁹ Summit commitments can be seen as advancing the lawmaking process and, by some theorists, as a type of soft law. There are some summit outcomes that can be seen as positive law. *See* discussion *infra* pages 183-195.

agenda for key institutional actors and stimulate negotiations over details—such as trade agreements²²⁰—that encourage prescriptive adaptation. Moreover, summits can engage a broad spectrum of non-state actors and address wide-ranging social concerns—including the environment, human rights, gender discrimination, indigenous rights, and trade—in a dynamic and transparent way that may strengthen the legitimacy of summit outcomes and related regional projects.²²¹ As a consequence, inter-American summits have strong jurisgenerative potential, and the public process through which summit agendas are developed serves to strengthen that potential.²²² Moreover, because summits feature transparency, openness, and inclusive agenda setting that emphasizes collaboration among states and their domestic constituencies, outcomes are more

²²⁰ Negotiations for a Free Trade Area of the Americas, for example, were called for in the Miami Summit. *See infra* note 285 and accompanying text.

²²¹ Legitimacy in outcome and process may be viewed in different ways, but here I use the term legitimacy in the sense that Thomas Franck has described as “the capacity of a rule to pull those to whom it is addressed toward consensual compliance.” Franck, *Legitimacy of Power*, *supra* note 211, at 93. The case studies presented in this Article suggest that inter-American summit commitments are reached through a process that values transparency and public access in a way that satisfies common normative concerns of national constituencies that are concerned with the subject matter of summits. This does not suggest that the process is ideal or could not stand improvement, but it does help strengthen the legitimacy of summit outcomes as international legal norms; *see also* David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 173, 173–74 (James Bohman & William Rehg eds., 1997) (outcome legitimacy derives in part “from the epistemic value ... of the procedure that has produced it.”).

²²² *See infra* notes 486 to 513 and accompanying text.

likely to be drawn into domestic legal agendas through transboundary legal process mechanisms such as those described by transboundary process theorists.²²³ Evidence of this is found in domestic legislation that directly reflects summit commitments, in state behavioral adaptations, and in those instances when states commit funds and institutional resources to implement summit promises.²²⁴ Even the tension and discord in evidence at the most recent summit in Trinidad and Tobago²²⁵ suggest that there is a very real connection between summit outcomes and domestic concerns. The unwillingness of some leaders to embrace summit promises that are inconsistent with domestic priorities, and the strong rhetorical connection between regional and domestic discourses, are as indicative of the potential power of the summit process as they are of the fractious state of regional politics.

This chapter concludes that, by embracing transparent and participatory process features, inter-American summits have produced a mutually reinforcing phenomenon: the jurisgenerative potential of summits increases as public access to the insular world of international decision making expands.²²⁶ Where these features are present, summits can, in a sense, “democratize” without being antidemocratic. They might thus be seen as mechanisms that can bridge the

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See infra* notes 312 to 318 and accompanying text.

²²⁶ *See infra* pages 195-99.

distance between those who embrace transboundary networks and those who fear that they overreach, which is perhaps one step in the direction of reconciling an important theoretical divide.

Part two describes international summits as an emerging institutional phenomenon.²²⁷ It offers a partial catalogue of summits that have become regularized opportunities for heads of state to meet and affirm commitments to broad policy goals that can then be carried forward by state-bound institutions.

Part three explores the history of inter-American summits in particular, offering a brief background on how these regional meetings have emerged since the first contemporary Summit of the Americas in Miami in 1994 to create cooperative networks, shape institutional agendas, promote normative solutions, and facilitate monitoring and compliance.²²⁸

Part four reviews non-state actor access to inter-American summit preparations, including the formulation of summit commitments and mandates.²²⁹ It examines the unique process features that allow non-state actors to become engaged with foreign ministries and expert government agencies so that policy priorities are not discussed in a vacuum. Policy actors in the Inter-American System, both state and non-state, have taken advantage of these unique features to advance policy and normative goals through a process that is deliberative, and

²²⁷ See *infra* notes 242 to 246, 251 to 269 and accompanying text.

²²⁸ See *infra* notes 270 to 286 and accompanying text.

²²⁹ See *infra* notes 287 to 318 and accompanying text.

thus more democratic from an access proponent perspective, yet never outside the oversight or control of states, and thus no less democratic from an access critic perspective. The institutionalization of participatory norms within the inter-American summit has reinforced two types of summit outcomes. The first is a largely hortatory call for greater democracy within the region.²³⁰ The second is a series of commitments to reform regional institutions in order to make them more democratic, as well as to support and defend elected governments through those regional institutions.²³¹

Part five addresses the first and more general of these two outcomes.²³² It examines inter-American summit commitments to promoting principles of democratic governance and public participation at a regional and national level. This Part traces the language of inter-American summit agreements from 1994 to present that promote regional efforts to advance a “democracy” agenda among OAS member states.²³³ It also outlines commitments to greater participation in development decision making, both among and within OAS member states, along with prescriptive and institutional advances relating to these commitments.²³⁴

²³⁰ See *infra* notes 319 to 386 and accompanying text.

²³¹ See *infra* notes 387 to 485 and accompanying text.

²³² See *infra* notes 319 to 386 and accompanying text.

²³³ *Id.*

²³⁴ *Id.*

Part six addresses specific summit outcomes. It presents four case studies of democratic commitments that emerged from the inter-American summit process: (1) the formulation of the Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making (ISP), which addressed public participation at the regional and national level;²³⁵ (2) the development of an Inter-American Democratic Charter (IADC), which would in part discourage internal extra-constitutional challenges to elected governments;²³⁶ (3) the increase in openness and transparency of negotiations to create a Free Trade Area of the Americas (FTAA);²³⁷ and (4) the engagement of non-state actors in the OAS through a program of accreditation.²³⁸ Each example shows state leaders working alongside non-state actors to shape and advance a specific lawmaking goal.²³⁹

Part seven discusses the jurisgenerative potential of inter-American summits in light of the outcomes discussed in the prior two Parts.²⁴⁰ Inter-American summits have placed lawmaking and implementation in a more transparent institutional and procedural context, and they have opened the process

²³⁵ See *infra* notes 393 to 410 and accompanying text.

²³⁶ See *infra* notes 411 to 440 and accompanying text.

²³⁷ See *infra* notes 441 to 461 and accompanying text.

²³⁸ See *infra* notes 462 to 485 and accompanying text.

²³⁹ See *infra* notes 393 to 485 and accompanying text.

²⁴⁰ See *infra* notes 486 to 513 and accompanying text.

in a way that introduces important deliberative features. While this Article shows some cases in which the summit process has had a discernable impact on positive law that emerged from the inter-American system, it does not claim a linear or direct causal connection between summit outcomes and prescriptive commitments. Instead, it argues that the process through which inter-American summits are managed and executed has a role in substantiating normative claims and shaping positive legal frameworks. This Article does not directly enter the debate over the nature of international law and the importance of soft law and legal process versus positive law, but the phenomenon it describes is certainly relevant to that debate. Even if summit outcomes are not understood as law, they should be understood as part of lawmaking, and the inclusionary or exclusionary manner in which these outcomes are formulated matters.

Part eight concludes that a participatory and institutionalized inter-American summit process has served a mutually reinforcing function: increasing the legitimacy and prescriptive potential of summits even while providing a vehicle for bringing the concerns and agendas of non-state actors closer to the process and institutions of international law.²⁴¹ The format and impact of summits vary widely, and no claim is made that the inter-American summit process represents a universal model. Summits do, however, possess the common dimension that they periodically convene heads of state on a public stage to

²⁴¹ See *infra* pages 195-99.

address issues of public concern. The summits with which this Article is concerned also have an institutionalized multilateral framework within which those issues are discussed and outcomes are derived. To the extent that summits possess or may come to possess the key features explored in this Article, they offer a mechanism for engaging non-state actors that can satisfy divergent claims about how to advance democratic ideals through international process.

The Summit Phenomenon

International summits are an important, although under studied, post-World War II institutional trend that has grown in scope and impact in the post-Soviet era. As more commonly studied international institutions such as the United Nations and the World Bank have matured, at least twenty-one global and regional head of state forums have also evolved;²⁴² a few have been singular events, but most are planned and held on an annual or biennial basis. Summits address issues ranging from global concerns (such as climate change, human rights, and terrorism) to parochial concerns (such as trade and economic integration) to local concerns (such as Indonesian forest fires and the need to promote women to positions of authority in African states). While summits fulfill the public diplomacy role of providing a world stage to national leaders, their

²⁴² This count includes the following: seventeen continuing forums, each of which has included dozens of separate summit meetings; three stand-alone forums, namely the 2005 U.N. Summit, the 1992 and 2002 Sustainable Development Summits, and the 1955 and 2005 Asian-African Summits; and one new forum that was inaugurated in 2005, the East Asian States Summit. *See infra* notes 251 to 269 and accompanying text.

substantive impact should not be discounted. Summits provided a context and platform for the formation of the Organization for African Unity;²⁴³ helped to advance the formation of the Non-Aligned Movement (the 1955 Asian-African Conference);²⁴⁴ provided a platform for concluding the Convention on Biological Diversity and Framework Convention on Climate Change in 1992 (concluded at The United Nations Conference on Environment and Development or “Earth Summit”),²⁴⁵ and almost offered an opportunity for exile to Saddam Hussein a

²⁴³ Charter of the Organisation of African Unity, 479 U.N.T.S. 39 (signed May 25, 1963; entered into force Sept. 13, 1963) (signed by “the Heads of African States and Governments assembled in the City of Addis Ababa, Ethiopia”).

²⁴⁴ See GEORGE MCTURNAN KAHIN, *THE ASIAN-AFRICAN CONFERENCE: BANDUNG, INDONESIA, APRIL 1955*, (1956) (describing from a journalistic perspective the meeting of leaders from twenty-nine Asian and African countries and reproducing key speeches and final agreements). The Final Communiqué from Bandung included provisions for economic and cultural cooperation, the promotion of human rights and self determination, and the promotion of peace and security cooperation. *Id.* at 76-85. Participants created a basis for continuing cooperation through a commitment to appoint “Liaison Officers ... for the exchange of information on matters of mutual interest.” *Id.* at 78. Participants also signed a Declaration on the Promotion of World Peace and Cooperation which called for “respect for territorial integrity and sovereignty of all nations,” abstention from aggression, abstention from interference in domestic affairs, “equality of all races and nations,” peaceful dispute settlement, and “promotion of mutual interests and cooperation.” *Id.* at 83-85.

²⁴⁵ See Shanna L. Halpern, Academic Council for the UN Sys., *The United Nations Conference on Environment and Development: Process and Documentation*, at 12 (1992), available at <http://www.ciesin.org/docs/008-585/unced-home.html> (last visited July 30, 2009).

few weeks before the U.S. invasion of Iraq in 2003 (occurring at the Arab League Summit).²⁴⁶

As the power and legitimacy of international law are debated in a newly multi-polar international political context, the emergence of summits appears to have been underappreciated, or at least under studied. Efforts to construct a “new world order,”²⁴⁷ to deconstruct global administrative law,²⁴⁸ and to seek greater democratic access to international decision making²⁴⁹ might each benefit from a close study of the phenomenon of summits. Summits might not currently be viewed as formal international institutions, but as they become institutionalized

²⁴⁶ In the days before the U.S. invasion of Iraq in 2003, then-President George W. Bush announced, “Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict.” CNN reported that there were

=xt

some private maneuverings among some Arab leaders to try to forestall the U.S. invasion. . . . [R]oughly three weeks before the first U.S. strike, Saddam Hussein agreed in principle to accept an offer of exile. The offer came from the United Arab Emirates and was presented to other Arab leaders during a summit of the Arab League in Egypt. The proposal . . . was never acted upon.

=ft

The Situation Room (CNN television broadcast Nov. 2, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0511/02/sitroom.03.html> (last visited July 30, 2009).

²⁴⁷ Slaughter, *supra* note 194 at 15–17.

²⁴⁸ See Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 YALE L.J. 1490, 1495, 1561–62 (2006).

²⁴⁹ See Charnovitz, *Nongovernmental Organizations*, *supra* note 195, at 368–72.

and begin to shape institutional agendas, they might offer an opportunity to meet the concerns of those who wish to see international law become more democratic.

The following table of recent regional and global summits provides an idea of the extent of the summit phenomenon. While these meetings do not all share the same process features as the inter-American summits, they fit the basic definition of periodic meetings of heads of state and government.²⁵⁰ Although this article focuses only on the inter-American process, these other meetings might also warrant study as they become increasingly institutionalized international forums.

Table 1: Partial Catalogue of Recent Summits

1. Andean Community (ANCOM) (17th) Tarija, Bolivia 2007²⁵¹
2. Asia-Pacific Economic Cooperation (APEC) (16th) Singapore 2009²⁵²
3. Arab League (20th) Damascus, Syria 2008²⁵³
4. Association of South East Asian Nations (ASEAN) (14th) Cha-am Hua Hin, Thailand 2009²⁵⁴

²⁵⁰ See *supra* note 207, and accompanying text.

²⁵¹ Declaration of Tarija: Seventeenth Regular Meeting of the Andean Council of Presidents, Tarija, Bol., June 14, 2007, <http://www.comunidadandina.org/ingles/documentos/documents/tarija.htm> (last visited Oct. 14, 2009).

²⁵² Asia-Pacific Economic Cooperation, Peru and APEC, <http://www.apec2008.org.pe/apecperu/ndapec.aspx> (last visited Oct. 15, 2009).

²⁵³ The 2008 Arab League Summit, <http://www.middleeastprogress.org/2008/03/the-2008-arab-league-summit/> (last visited Oct. 15, 2009).

5. Asia-Europe Meeting (ASEM) (7th) Beijing, China 2008²⁵⁵
6. Asian-African Summit (2nd) Jakarta, Indonesia 2005 (50th anniversary of first)²⁵⁶
7. African Union (AU) (13th) Sirt, Libya 2009²⁵⁷
8. European Union (EU) Brussels, Belgium 2009²⁵⁸
9. Group of Eight (G-8) L'Aquila, Italy 2009²⁵⁹
10. Group of Twenty (G-20) United Kingdom 2009²⁶⁰

²⁵⁴ 14th ASEAN Summit, Cha-am Hua Hin, Thail., Feb. 28–Mar. 1, 2009, *Chairman's Statement of the 14th ASEAN Summit: "ASEAN Charter for ASEAN Peoples"*, <http://aseansec.org/22328.htm> (last visited Oct. 15, 2009).

²⁵⁵ Asia-Europe Meeting, ASEM Summits: Overview, <http://www.aseminfoboard.org/page.phtml?code=Summits#> (last visited July 30, 2009).

²⁵⁶ This second Asian-African Summit was held fifty years after the inaugural edition. Ministry of Foreign Affairs of Japan, Asian-African Summit 2005 and the Commemoration of the Golden Jubilee of the Asian-African Conference 1955, <http://www.mofa.go.jp/announce/announc/2005/4/0419.html> (last visited Oct. 15, 2009).

²⁵⁷ African Union, Summit 2009 Sirt—Libya, <http://foreign.gov.ly/online/ausummit2009/en/> (last visited June 27, 2009).

²⁵⁸ Brussels European Council, Brussels, Belg., June 18–19, 2009, *Presidency Conclusions* (June 19 2009), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf (last visited July 30, 2009).

²⁵⁹ G-8 Summit 2009, http://www.g8italia2009.it/G8/Home/G8-G8_Layout_locale-1199882116809_Home.htm (last visited July 30, 2009).

²⁶⁰ The London Summit, Apr. 2, 2009, *Global Plan for Recovery and Reform*, <http://www.londonsummit.gov.uk/resources/en/PDF/final-communique> (last visited July 30, 2009). Note that the G-20, formally known as the "Group of Twenty (G-20) Finance Ministers and Central Bank Governors," traces its history to 1999 and claims that its

11. Inter-American Summit (5th) Port of Spain, Trinidad and Tobago 2009²⁶¹
12. North Atlantic Treaty Organization (NATO) Strasbourg, France and Kehl, Germany 2009²⁶²
13. Non-Aligned Movement (15th) Sharm El Sheikh, Egypt²⁶³
14. Rio Group (20th) Santo Domingo, Dominican Republic 2008²⁶⁴
15. South Asian Association for Regional Cooperation (SAARC) (15th) Colombo, Sri Lanka 2008²⁶⁵

purpose is “to bring together systemically important industrialized and developing economies to discuss key issues in the global economy.” g-20.org, What Is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Sept. 12, 2009). The G-20 has only met twice at the head of state and government level.

²⁶¹ The Inter-American Summit is affiliated with the OAS. The Fifth Summit of the Americas was held in Port of Spain, Trinidad and Tobago, June 17–19, 2009. See <http://www.summit-americas.org/> (last visited Sept. 5, 2009).

²⁶² North Atlantic Treaty Organization, Summit Meetings of Heads of State and Government, <http://www.nato.int/docu/comm/2009/0904-summit/index.html> (last visited July 30, 2009).

²⁶³ Ministry of Foreign Affairs, Egypt, XV Summit of the non-Aligned Movement, <http://www.namegypt.org/en/pages/default.aspx> (last visited Sept. 21, 2009).

²⁶⁴ *Twentieth Summit of Heads of State and Government of the Rio Group*, Santo Domingo, Dom. Rep., Mar. 7, 2008, Santo Domingo Declaration, http://www.minfor.gov.gy/tSITE/images/minfor_docs/rio_group/2008/santo_domingo_declaration.pdf (last visited Jul 30, 2009).

²⁶⁵ Fifteenth South Asia Association for Regional Cooperation Summit, Colombo, Sri Lanka, Aug. 2–3, 2008, *Declaration: Partnership for Growth for Our People*, <http://www.saarc-sec.org/data/summit15/summit15declaration.htm> (last visited July 30, 2009). The Sixteenth Summit of the SAARC will be held in the Republic of Maldives. *Id.*

16. Southern African Development Community (SADC) (28th) Johannesburg, South Africa 2008²⁶⁶
17. Central American Integration System (SICA) (34th) Managua, Nicaragua 2009²⁶⁷
18. United Nations (UN) New York 2005²⁶⁸
19. World Summit on Sustainable Development (WSSD) Johannesburg, South Africa 2002²⁶⁹

A Brief History of Inter-American Summits

In 1994, presidents and heads of state from thirty-four of the thirty-five Western Hemisphere states met in Miami for the First Summit of the Americas.²⁷⁰

²⁶⁶ Dr. Tomaz Augusto Salomão, Southern African Development Community Executive Secretary, Address on the Occasion of the Pre-Summit Diplomats Briefing (Aug. 5, 2008), *available at* <http://www.sadc.int/index/browse/page/96> (last visited July 30, 2009).

²⁶⁷ Sistema de la Integración Centroamericana (SICA) (Central American Integration System), *Regional Summits*, <http://www.sica.int/busqueda/Reuniones%20Grupo%20de%20Autoridades.aspx?IDItem=37556&IDCat=9&IdEnt=401&Idm=1&IdmStyle=2> (last visited Nov. 5, 2009).

²⁶⁸ United Nations, The 2005 World Summit, <http://www.un.org/summit2005/> (last visited July 30, 2009).

²⁶⁹ The latest edition of this summit is a follow up to the 1992 UN Conference on Environment and Development, or “Earth Summit.” World Summit on Sustainable Development, Background and Resources, <http://www.bccaorg/ief/wssd.htm> (last visited July 30, 2009).

²⁷⁰ Cuba is the only state in the Western Hemisphere that does not participate in inter-American summits. Cuba remains a member of the Organization of American States (OAS), but was prevented from taking its seat in the OAS General Assembly pursuant to a 1962 resolution, which declared that “the present Government of Cuba has voluntarily

placed itself outside the inter-American system.” *Eighth Meeting of Consultation of Foreign Ministers*, Punta Del Este, Uru., *Final Act*, at 14, OAS Doc. OEA/Ser.F/II.8, doc. 68, (Jan. 22–31, 1962), available at <http://www.oas.org/consejo/meetings%20OF%20consultation/actas/acta%208.pdf> (last visited Aug. 2, 2009) (hereinafter 1962 Cuba Exclusion Resolution). The relevant part of that resolution reads,

1. That adherence by any member of the Organization of American States to Marxism-Leninism is incompatible with the inter-American system and the alignment of such a government with the communist block breaks the unity and solidarity of the hemisphere.
2. That the present Government of Cuba, which has officially identified itself as a Marxist-Leninist government, is incompatible with the principles and objectives of the inter-American system.
3. That this incompatibility excludes the present Government of Cuba from participation in the inter-American system.

Id. Until 2009, Cuba’s *non grata* status in the General Assembly and within OAS organs left it presumptively excluded from regional activities held under OAS auspices, and the OAS is a core institutional sponsor of inter-American summits. Cuba’s status changed in June 2009 when the OAS adopted a resolution at its 39th General Assembly in Honduras rescinding the 1962 Cuba Exclusion Resolution. AG/RES. 2438 (XXXIX-O/09) OEA/Ser.P AG/doc.5006/09 rev. 1 (29 September 2009) at ¶ 1 available at http://scm.oas.org/doc_public/ENGLISH/HIST_09/AG04689E10.DOC (last visited Nov. 6, 2009). The 2009 Resolution states that Cuba’s participation in the OAS going forward “will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS.” *Id.* at ¶ 2. This means that a key formal barrier to Cuba’s return to the regional political system, and thus the inter-American summit process, has been removed. But the actual return of Cuba would require a petition from its government along with commitments to reform political and economic policies to accord with the OAS charter and other basic documents. Cuba’s initial response to the resolution has been to reject the idea of rejoining what its official government newspaper, *Granma*, calls the “graveless cadaver” of the OAS. Frances Robles, *Cuba Says it Won't Join OAS*, Sun-Sentinel (Ft. Lauderdale) (June 9, 2009) at 9A.

In fact, it was the third meeting of heads of state in the Americas following the Second World War. Although prior meetings had convened in 1956 and 1967,²⁷¹ the third meeting was considered the first meeting of the modern era, and it has launched a series of meetings that has been perpetuated to this date. Depending on how one counts, there have been either five or seven inter-American summits since 1994. Five formal, or numbered, summits²⁷² have taken place, the most recent in Port of Spain, Trinidad, in April 2009,²⁷³ along with two special, or

²⁷¹ See Richard E. Feinberg, *The Summit of the Americas: An Architecture for Inter-American Relations, Address Before the Inter-American Dialogue* (Sept. 20, 1994), in *ADVANCING THE MIAMI PROCESS: CIVIL SOCIETY AND THE SUMMIT OF THE AMERICAS* 41, 42 (Robin Rosenberg & Steve Stein eds., 1995). At the time of his address Feinberg was Special Assistant to the President of the United States and Senior Director for Inter-American Affairs on the National Security Council. *Id.* at 41; see also Org. of Am. States, *Declaration of the Presidents of the American Republics in Panama* (July 22, 1956), available at <http://www.summit-americas.org/declarat%20presidents-panama%201956-eng.htm> (last visited July 30, 2009) (discussing the history of Western Hemisphere Summits); Org. of Am. States, *Declaration of the Presidents of the Americas, Meeting of American Chiefs of State*, (April 14, 1967), available at <http://www.summit-americas.org/declaratpresidents-1967-eng.htm> (last visited July 30, 2009) (describing the outcome of the 1967 Summit); Summit of the Americas Information Network, *the Summit Process*, <http://www.summit-americas.org/eng/summitprocess.htm> (last visited Sept. 13, 2009) (providing history of Western Hemisphere summits provided by the OAS through its summit web site).

²⁷² The titles of these summits are preceded by ordinal numbers—for example, first, second, and so on—in official documents.

²⁷³ Records relating to the Port of Spain Summit can be found at <http://www.summit-americas.org> (last visited July 30, 2009).

thematic, summits: a Summit on Sustainable Development in Santa Cruz, Bolivia in 1996,²⁷⁴ and a Special Summit in Monterrey, Mexico in 2004.²⁷⁵

The confusion over numbering the meetings speaks in part to the relatively *ad hoc*—one might say flexible—and evolving structure for summit planning in the Western Hemisphere. In 1996, the Santa Cruz Summit, second in time (1996), dealt specifically with issues of sustainable development. For a range of reasons—some perhaps owing to the desire of governments not to elevate the theme too highly—Santa Cruz was not granted an ordinal number and remains known as the “sustainable development summit” rather than the “second summit.”²⁷⁶ Similarly, although the 2004 Monterrey Summit had not been planned as part of the summit sequence, some governments in the region sought to expedite a meeting after the time and place for the officially numbered “fourth” summit had already been announced for 2005 in Brazil.²⁷⁷ The government of

²⁷⁴ The summit web site maintained by the OAS provides a summary and history of each summit, including the “special” summits. See http://www.summit-americas.org/previous_summits.html (last visited Sept. 10, 2009).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ The United States, for example, was a chief proponent for holding an earlier meeting. Many observers speculated that the White House was seeking an opportunity for then-President George W. Bush to join his Latin American counterparts on an international stage early in a campaign year and to show some initiative in the region while he remained in office, rather than potentially ceding the process to a successor. The author was one of several moderators for civil society preparatory meetings hosted by the Organization of American States and the Government of Mexico as part of the Monterrey Summit preparatory process. These meetings included the Regional Forum entitled *Civil*

Brazil reportedly did not wish to advance the date of its summit, or to relinquish the privilege of holding the next official summit, so a compromise was reached: Mexico would host a non-numbered Special Summit, or *Cumbre Extraordinaria*, in Monterrey in January of 1994.²⁷⁸

The summits are institutionally tied to the OAS, and this connection has become stronger over time. The OAS serves as the summit secretariat and has seen its own agenda increasingly shaped by summit commitments. Yet summit agenda setting and implementation are still technically independent of the OAS. The process of negotiating and shaping summit agendas is managed by the Summit Implementation and Review Group (SIRG), which is chaired by the upcoming summit's designated host country and steered by past summit host

Society in the Processes of Hemispheric Integration, in the context of the Special Summit of the Americas held in Monterrey, Mexico, in November 2003, and the *Dialogue between Plenipotentiaries and Civil Society Representatives*, held in Monterrey on January 11, 2004, the day before the opening of the Summit. See *Civil Society in the Processes of Hemispheric Integration, in the context of the Special Summit of the Americas*, Mexico City, Mex., Nov. 24–25, 2008, <http://www.summit-americas.org/Quebec-CivilSociety/RegionalForum/bulletin-eng.pdf>; Summit of the Americas Information Network, <http://www.summit-americas.org/SpecialSummit/CivilSociety/Mainpage-eng.htm> (last visited Sept. 13, 2009). The information provided in this note was gathered during these meetings and during many informal discussions among the author and the participants in the Monterrey Summit and in other aspects of the preparatory process.

²⁷⁸ This information is based on conversations by the author with diplomats from Canada and the United States who were involved in summit planning, although it does not appear that the reasons for this arrangement have been acknowledged in print.

countries.²⁷⁹ An institutional tripartite committee, which includes the OAS, the Inter-American Development Bank (IDB) and the UN Economic Commission for Latin America and the Caribbean (ECLAC), helps to oversee summit implementation.²⁸⁰

The inter-American summits have typically featured one to three days of presidential plenary sessions and side meetings among heads of state and their delegations. Official documents have traditionally been signed by participating heads of state.²⁸¹ These include “declarations,” which are essentially a broad statement of principles, and “plans of action,” which are more detailed lists of commitments that state leaders will pursue in order to advance the principles on which they have agreed.²⁸² The action plans are often general and vague, but in

²⁷⁹ For those interested in more background on inter-American summits generally, the OAS maintains a web site at <http://www.summit-americas.org>; *see also* ADVANCING THE MIAMI PROCESS: CIVIL SOCIETY AND THE SUMMIT OF THE AMERICAS (Robin Rosenberg & Steve Stein eds., 1995) (highlighting the goals and outcomes of the early summit process and reprinting many of the original preparatory documents).

²⁸⁰ *See, e.g.*, Second Summit of the Americas, Santiago de Chile, Chile, Apr. 18–19, 1998, *Santiago Declaration and Plan of Action* [hereinafter “Santiago Plan of Action”], reproduced at 37 I.L.M. 947, 958 (1998).

²⁸¹ The 2009 Port of Spain Summit marked an exception to this tradition. *See infra* note 315 and accompanying text.

²⁸² These two documents were issued for the summits in Miami, Santa Cruz, Santiago, Quebec City, and Mar del Plata. *See discussion infra* notes 320 to 353, 361 to 365 and accompanying text (detailing outcomes from each of these summits). At the 2004 Special Summit (*Cumbre Extraordinaria*) in Monterrey, no plan of action was issued; instead, heads of state signed the Declaration of Nuevo León, which was largely a statement of principles but which included some concrete commitments such as those

some cases they include more concrete commitments to work toward social goals.²⁸³ The declarations and action plans are negotiated through the SIRG in a relatively transparent process that offers both formal and informal opportunities for non-state actors to offer advice, including advice about specific language, and to comment on elements of the documents. Non-state actors also work informally with the tripartite committee institutions, especially the technical units of the OAS, to conduct research and develop reports and recommendations that inform the preparation of summit documents.²⁸⁴

typically found in a plan of action. Special Summit of the Americas, Monterrey, Nuevo León, Mexico, Jan. 13, 2004, *Declaration of Nuevo León*, available at http://www.summit-americas.org/sp_summit/sp_summit_dec_en.pdf (last visited July 30, 2009). At the most recent summit in Port of Spain, heads of state signed no final document. Instead, Trinidad's Prime Minister, as summit host, signed a declaration of commitment on behalf of the heads of state. Declaration of Commitment of Port of Spain, OEA/Ser.E, CA-V/DEC.1/09 (April 19, 2009) available at CA-V/DEC.1/09 (last visited Nov. 6, 2009) (hereinafter Port of Spain Declaration). See *infra* notes 366 to 386 and accompanying text (discussing the context and outcomes of the Port of Spain summit).

²⁸³ These goals have included promoting universal primary education, establishing cooperative networks or institutions, and pursuing binding legal instruments. Frequently, plans of action also include instructions to regional institutions, often the OAS or one of its organs, directing them to pursue a project, prepare a report on an issue of concern, or both.

²⁸⁴ *Secretary General's Report on the Summit of the Americas Process (2004)* [copy on file with author]; see also Org. of Am. States, Inter-Am. Council for Integral Dev., Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, (2001) [hereinafter ISP Final Report], available at http://www.oas.org/dsd/PDF_files/ispenglish.pdf (last visited Aug. 2, 2009) (official report of the formulation of the OAS participation strategy, which includes accounts of public meetings and joint research that informed the strategy).

The subject matter of inter-American summits has varied widely to cover a range of security, economic, and social interests in the region. A commitment to negotiate a Free Trade Area of the Americas (FTAA) emerged at the First Summit in Miami,²⁸⁵ and greater economic integration remained a subject of many subsequent summit commitments until an impasse over the creation of a new regional free trade zone emerged in Quebec, which has hardened in subsequent summits.²⁸⁶ In addition to serving as a platform for the discussion of

²⁸⁵ See ORG. OF AM. STATES, 1 OFFICIAL DOCUMENTS OF THE SUMMIT PROCESS FROM MIAMI TO SANTIAGO 213–40 (1998); *Summit Report 2001–2003: Advancing in the Americas, Progress and Challenges*, Organization of American States Summits of the America Secretariat 62 (2004), available at http://www.summit-americas.org/pubs/summit_report_II_en.pdf (copy on file with author); First Summit of the Americas, Miami, Fl., Dec. 11, 1994, *First Summit of the Americas: Declaration of Principles and Plan of Action*, reprinted in 34 I.L.M. 808 (1995). The Miami Declaration and Plan of Action are available at <http://www.summit-americas.org/miamidec.htm> and <http://www.summit-americas.org/miamiplan.htm>, respectively.

²⁸⁶ Venezuela noted reservations regarding the proposed Free Trade Area of the Americas (FTAA) in the final Declaration of the Quebec Summit in 2001. See Third Summit of the Americas, Quebec City, Can., Apr. 20–22, 2001, *Declaration of Quebec City*, at 6, available at http://www.oas.org/dil/Declaration_of_Quebec_City.pdf [hereinafter Quebec Declaration]. Venezuela’s opposition to the FTAA at the Monterrey Summit in 2004, along with objections by Brazil, scuttled hopes for a commitment to complete the trade accord on a specific timetable. See Robert Collier, *Modest Gains for Bush at Summit of Americas; Sweeping Promises, Sharp Divisions as 34-Nation Meeting Ends*, S.F. CHRONICLE, Jan 14, 2004 at A1. At the Fourth Summit in Mar del Plata in 2005, the language in the Declaration regarding the proposed FTAA was equivocal, noting that “some member states” remain optimistic about the FTAA and that these states instruct their trade officials through the Declaration to resume negotiations in 2006. See Fourth Summit of the Americas, Mar Del Plata, Arg., Nov. 5, 2005, *Declaration of Mar del*

competing trade agendas, summits have addressed concerns over education, labor

Plata, ¶ 19A, available at <http://www.state.gov/p/wha/rls/56901.htm> (last visited July 28, 2009). The Mar Del Plata Declaration also states that

other member states maintain that the necessary conditions are not yet in place for achieving a balanced and equitable free trade agreement with effective access to markets free from subsidies and trade-distorting practices, and that takes into account the needs and sensitivities of all partners, as well as the differences in the levels of development and size of the economies.

Id. ¶ 19B. While the Declaration does not identify the dissenting states, press accounts reported that Venezuela, which continued to object to the FTAA as a neo-imperial project, was joined by states of the Mercado Común del Sur (MERCOSUR), which consists of Argentina, Brazil, Paraguay, and Uruguay as full members, and Bolivia, Chile, Colombia, Ecuador, and Peru as associate members. See American Society of International Law *Reports on International Organizations*, available at http://www.asil.org/rio/mercosur_sum09.html (last visited Nov. 2, 2009). These states objected to a trade agreement unless it addressed U.S. agricultural subsidies. See Patrick J. McDonnell & Edwin Chen, *Bush Exits Summit as Trade Talks End in Disagreement*, L.A. TIMES Nov. 6, 2005, at A1; Julie Mason & John Otis, *Summit of the Americas; Clash of Ideology in Street, at Forum*, HOUSTON CHRONICLE, Nov. 5, 2005, at A1. The unusual bifurcated text offered some measure of compromise that would allow trade ministers to return to the negotiating table. During the Hong Kong WTO meeting in December 2005, an agreement was finally reached on agricultural subsidies, calling for their elimination by 2013. See World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC (Dec. 22, 2005), available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf (last visited Aug. 2, 2009). While this might have offered an opportunity for the MERCOSUR countries to join continued FTAA negotiations, trade discussions have instead proceeded on a bilateral and subregional basis. J.F. HORNBECK, A FREE TRADE AREA OF THE AMERICAS: MAJOR POLICY ISSUES AND STATUS OF NEGOTIATIONS, CONGRESSIONAL RESEARCH SERVICE (2008), available at <http://wikileaks.org/wiki/CRS-RS20864> (last visited Sept. 14, 2009). The idea of the FTAA was not even mentioned in the final document to emerge from the Port of Spain summit. Port of Spain Declaration, *supra* note 282. See also *infra* notes 366 to 386 and accompanying text (discussing the context and outcomes of the Port of Spain summit).

rights, gender discrimination, human rights, the environment, democracy, transparency, health, and urban development, among others.

Non-State Access to Inter-American Summits

To understand how non-state actors have engaged in and influenced summit planning and outcomes, it is useful to begin with an analysis of the summit process itself because it offers a view of how rhetoric about participation accompanied a normative shift toward a more open and participatory process. The precedent was set when the preparations for the Miami Summit—including the preparation of background papers and the negotiation of documents to be signed by heads of state, integrated NGOs, academics, and other interested non-state actors—exposed OAS member states and the OAS itself to a level of participation that had not been seen in prior regional policy making processes.²⁸⁷ In the time leading up to the Miami Summit, the U.S. administration had made a decision to involve non-state actors in the summit process, and as the “host government,” it sponsored a series of roundtables and workshops among NGOs from throughout the region to discuss the summit agenda.²⁸⁸ These workshops were attended by OAS officials and summit negotiators from a number of OAS member states, mostly foreign ministry representatives, but in some cases

²⁸⁷ For a description of the level of participation, including copies of a number of NGO submissions and the results of NGO consultations, see generally *ADVANCING THE MIAMI PROCESS*, *supra* note 279.

²⁸⁸ *Id.*

representatives from ministries with responsibilities for the subject areas of the summit, such as education, environment, and health. The United States also tapped a congressionally funded think tank at the University of Miami, the North-South Center, to serve as an unofficial non-governmental host of the summit. The North-South Center held a number of meetings on summit issues that were attended by government delegates and non-state actors both prior to and during the summit.²⁸⁹

This participatory approach continued over the next two years in the process leading up to the Santa Cruz Summit. The Bolivian Government welcomed the participation of non-state actors in the formulation of the Santa Cruz Summit agenda;²⁹⁰ for example, as host of the upcoming summit, it participated in a regional dialogue hosted by the Government of Uruguay on “enabling responsible participation,” “strengthening representative organizations,” and “expanding avenues for participation” (collectively the

²⁸⁹ *Id.*

²⁹⁰ At the time, the government of Bolivia was experimenting with democratic reform at a national level, having just passed a new national law on democratic participation—the Ley de Participación Popular (Popular Participation Law) Ley No. 1551, 20 Apr. 1994, (Bol.), available at <http://www2.ids.ac.uk/logolink/resources/downloads/regionalreports/RegionalReportLatinAmericaAnnex%20final%20.pdf> (last visited Oct. 16, 2009). It was essentially a decentralization law, recognizing hundreds of new municipalities and local and indigenous communities as Organizaciones Territoriales de Base (Base Territorial Organizations), and giving them some input on national budget expenditures at a local level. For a description of how the Popular Participation Law operated, see MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 94–96 (2000).

Montevideo Dialogue) the outcomes of which were offered to Bolivia and other OAS members states as input for the Santa Cruz summit agenda.²⁹¹ This dialogue attracted over 150 participants including government representatives from twenty-three of the thirty-four OAS member states, along with non-state actors from throughout the region,²⁹² and it produced a recommendation to pursue a regional strategy for participation in development decision making that was adopted as part of the Santa Cruz Summit Plan of Action.²⁹³

²⁹¹ See INTER-AMERICAN SEMINAR ON PUBLIC PARTICIPATION IN SUSTAINABLE DEVELOPMENT: REPORT ON PROCEEDINGS, (1996) [hereinafter MONTEVIDEO REPORT] (on file with author). Uruguay was at the time serving as the “responsible government” for follow-up on summit agenda items relating to democracy and participation, and the seminar was co-sponsored by the OAS and USAID, among others. *Id.* at 1. See also *Advancing Sustainable Development In The Americas: U.S. Civil Society Recommendations for the 1996 Summit Conference on Sustainable Development, Santa Cruz, Bolivia* at 3, available at www.brazilink.org/tiki-download_file.php?fileId=7 (last visited Nov. 6, 2009) (discussing the Bolivian government’s “full support and participation” in the Montevideo conference); Eric Dannenmaier, *Democracy in Development: Toward a Legal Framework for the Americas*, 11 TUL. ENVTL. L.J. 1, 11–14 (1997) (describing the Montevideo meeting in detail); CITIZEN PARTICIPATION IN THE SUMMIT OF THE AMERICAS: Nine Years of Experience of the Network of Civil Society Organization of the Americas, Corporación Participa (March 2006), available at <http://www.civil-society.oas.org/Publicación%20Cumbre%209%20años%20ing.pdf> (last visited Nov. 5, 2009) (describing the decision to adopt Montevideo recommendations regarding the formulation of a regional strategy for public participation).

²⁹² Montevideo Report at 1.

²⁹³ The Montevideo meeting recommendation was reflected in the final Plan of Action from Santa Cruz, which called for the design of an “inter-American strategy for public participation in sustainable development decision-making” (ISP). See Summit of the Americas on Sustainable Development, Santa Cruz de la Sierra, Bol., Dec. 7–8, 1996, *Plan of Action for the Sustainable Development of the Americas*, at 14–15 [hereinafter

The Bolivian Government contracted with the World Resources Institute (WRI), a U.S.-based NGO, to provide advice on creating a plan of action for sustainable development,²⁹⁴ and the U.S. Government again financed a series of NGO consultations leading up to the Santa Cruz Summit, including the Montevideo Dialogue.²⁹⁵ The Declaration and Plan of Action adopted in Santa Cruz incorporated the principal recommendation from the Montevideo Dialogue:

Santa Cruz Plan of Action] available at <http://www.summit-americas.org/boliviaplan.htm>; see also *infra* notes 393 to 310 (describing the development of the ISP).

²⁹⁴ See Aaron Zazueta, Draft Plan of Action for Santa Cruz Summit, (1995) (on file with author); see also AARON ZAZUETA, CTR. FOR INT’L DEV. & ENV’T, ENVIRONMENTAL CHALLENGES IN LATIN AMERICA: BUILDING ORGANIZATIONAL CAPACITIES (XX PINCITE) (1993) (XX EXPLANATORY PARENTHETICAL). While Zazueta’s role as an outside NGO advisor to the Bolivian government was not well publicized at the time, it is documented in contemporary intergovernmental communications and in his professional biography. As of September 2009, Zazueta serves with the Monitoring and Evaluation Office of the Global Environment Facility (GEF). His biography sheet published by GEF includes the following entry:

[Zazueta] was appointed by Vice President Al Gore on to a Special Commission to assist the Bolivian President to incorporate sustainable development into the policies and programs carried out during his administration. He co-chaired the technical commission that drafted the Hemispheric Agenda for Sustainable Development, ultimately adopted by thirty two heads of state of the Americas in December 1996.”

GEF, Evaluation Office Staff Directory, <http://www.gefweb.org/gefevaluation.aspx?id=23144> (last visited Sept. 14, 2009). The “Hemispheric Agenda” referred to in Zazueta’s GEF biography is the 1996 Santa Cruz Summit Plan of Action. *Id.*

²⁹⁵ See MONTEVIDEO REPORT, *supra* note 291, at 1.

to formulate an “inter-American strategy for the promotion of public participation in sustainable development decision-making.”²⁹⁶

The practice of public consultation continued with the Santiago Summit in 1998 as the Government of Chile, with financial support from Canada and the United States, contracted a Santiago-based NGO, Corporación Participa, to host a series of NGO consultations for input into the Santiago Declaration and Plan of Action.²⁹⁷ Corporación Participa facilitated civil society consultations on three of the four principal topics of the summit—education, democratic governance, and poverty, but not hemispheric trade—with government officials who were negotiating the text sitting alongside civil society participants on panels and

²⁹⁶ Santa Cruz Plan of Action, *supra* note 293, at 14. The actions taken following the Santa Cruz Summit to implement this part of the Plan of Action are more fully described *infra* at pages 150-56.

²⁹⁷ See Project Results: Citizen Participation in the Context of the Summit of the Americas (1999) (on file with author), available at http://pdf.usaid.gov/pdf_docs/PDABR033.pdf (last visited Nov. 2, 2009); see also Yasmine Shamsi, *Mutual Misgivings: Civil Society Inclusion in the Americas*, North-South Institute 2003, at 26-31, available at http://www.un-ngls.org/orf/cso/mutual_misgivings.pdf (last visited Nov. 2, 2009); Ambassador Ellen Bogle of Jamaica, Statement to Workshop on the Role of Public Participation in Santiago, Chile, (Nov. 5–7, 1997), (on file with author). After describing consultations with civil society throughout the region during the three years following the Miami Summit and highlighting the role of civil society organizations in preparations for the Santiago Summit, the Ambassador concluded, “Indeed, it may well be that, following this meeting, Jamaica and Uruguay [coordinators for civil society in the summit process] can present to the Coordinator of the Santiago Summit, Chile’s Ambassador Juan Martabit, a new and more meaningful text which will reflect the efforts of the stakeholders.” Bogle, *supra* at 2.

roundtables.²⁹⁸ As with Santa Cruz, there is evidence that some of the NGO priorities were reflected in the final Santiago Summit Declaration and Plan of Action.²⁹⁹

NGO participation continued in the subsequent summits in Quebec City, Canada (2001), Monterrey, Mexico (2004), Mar del Plata, Argentina (2005), and Port of Spain, Trinidad and Tobago (2009),³⁰⁰ and has been supported by an OAS Civil Society Office, established following the 1996 Santiago Summit.³⁰¹ A

²⁹⁸ Agenda of Workshop on the Role of Public Participation, Santiago, Chile (Nov. 5–7, 1997) (copy on file with author).

²⁹⁹ The Santiago Plan of Action stated that “governments will [p]romote, with the participation of civil society, the development of principles and recommendations for institutional frameworks to stimulate the formation of responsible and transparent, non-profit and other civil society organizations” *Santiago Plan of Action, supra* note 280 at ¶III.A.III. The Santiago Plan of Action then refers to the Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making (ISP)—which had been pursued by the OAS with substantial civil society participation following the Santa Cruz Summit—and states, “[A]s soon as possible, Governments will adopt work plans to implement legal and institutional frameworks based on the principles and recommendations in their respective countries.” *Id.* This language was proposed by the OAS Unit for Sustainable Development and Environment and the NGOs working with the Unit to develop the ISP. *See infra* notes 408 to 410 and accompanying text.

³⁰⁰ A brief description of activities undertaken to engage civil society in connection with each of the summits is provided at the Summits of the Americas web site maintained jointly with the OAS at <http://www.summit-americas.org/cs.html#Hemisphere> (last visited Nov. 7, 2009). This site offers hyperlinks to official web pages maintained by host countries for each of the summits. In each case the country web site offers a summary of civil society activities sponsored or hosted by governments in connection with the summit.

³⁰¹ This office was created as part of a broader institutional reform aimed at engaging non-state actors more fully in the work of the OAS. *See infra* pages 175-83 (describing

coalition of NGOs, led by Corporación Participa from Chile, the Canadian Foundation for the Americas (FOCAL), and the U.S.-based Partners of the Americas and the Inter-American Democracy Network (IADN), has worked with the OAS Civil Society Office and summit host governments to facilitate workshops, seminars, and other forms of outreach as a means of incorporating input from non-state actors into the summit process.³⁰² Funding from the U.S. government has continued—although it was reduced and refocused under the Bush administration³⁰³—principally through the U.S. Agency for International Development (USAID). Funding from the Canadian Government has also

efforts to create NGO accreditation rules for the OAS). Following its creation, the office was moved into the OAS Department of International Affairs. *See* <http://www.civil-society.oas.org/> (*last visited* Nov. 7, 2009) (as of the time this Article went to press this web site serves as the principal formal point of entry for non-state actors to the OAS).

³⁰² *See, e.g.*, the discussion of summits and civil society input into the summit process on the websites of Corporación Participa, www.participa.cl (last visited July 28, 2009); Canadian Foundation for the Americas, www.focal.ca (last visited July 28, 2009); Partners of the Americas, www.partners.net (last visited July 28, 2009); Interamerican Democracy Network, <http://www.redinter.org> (last visited July 28, 2009); Civil Society Participation in OAS Activities, www.civil-society.oas.org (last visited July 28, 2009); Summits of the Americas, www.summit-americas.org (last visited July 28, 2009),

³⁰³ When George W. Bush took office in January 2001, his administration shifted emphasis from participatory democracy and the integration of NGOs into the summit process to the promotion of electoral democracy and an effort to ensure the continued exclusion of non-democracies—notably Cuba—from the summit process and inter-American institutions generally. *See infra* note 434 and accompanying text (discussing U.S. regional priorities and policy toward Cuba in the context of developing the Inter-American Democratic Charter).

continued, principally through Canada-based FOCAL and Chile-based Corporación Participa.³⁰⁴

Non-state participation has thus become *de rigueur*, even routine, in inter-American summitry. Governments have largely welcomed an increasing dialogue with non-state actors both in formal and informal settings. For their part, non-state actors have embraced the process even where they do not embrace the motivations or goals of the state leaders who gather for the summits, and this counter-current is tolerated—sometimes even sponsored by—governments against which it runs. For example, in addition to funding dialogue with civil society organizations about the formulation of the summit agenda at Quebec in 2001, the Canadian government also funded a parallel event, the self-titled People’s Summit, which was largely a protest meeting held outside the security zone of the official summit.³⁰⁵

At Mar del Plata in 2005, a parallel protest event at a soccer stadium featured President Hugo Chavez of Venezuela, who left the official proceedings to deliver an anti-trade, anti-neoliberal, anti-U.S. rant that lasted more than two

³⁰⁴ Interviews with staff of the Canadian Foundation for the Americas (FOCAL) and Corporación Participa. Notes on file with author.

³⁰⁵ The website for the People’s Summit in Quebec (a similar event had taken place in Santiago) describes its purpose as creating “a space and an opportunity for progressive civil society from north and south, to come together as equals. During the Summit we will debate, define new strategies for the Americas and create new alliances. The Summit will be another crucial step in the process of developing Alternatives.” Quebec City—Protest the Summit of the Americas, <http://www.web.net/comfront/quebec.htm> (last visited Oct. 16, 2009).

hours before an estimated crowd of 20,000.³⁰⁶ While Chavez has become notorious for his unorthodox and contrarian approach to diplomacy,³⁰⁷ the willingness of host government Argentina to permit such a public forum is noteworthy. In addition, one should not discount the importance of giving voice to a message of protest in the company of a large, seemingly receptive, audience³⁰⁸ in close proximity to a head of state meeting devoted to pursuing some of the very goals which were the subject of protest. Professor Richard Feinberg has criticized the Mar del Plata summit as a “shambles” in part because of “a duplicitous host government [and] an out-of-control Hugo Chávez.”³⁰⁹ Feinberg’s credentials and experience in Western Hemisphere affairs give his insights regarding Mar del Plata special weight,³¹⁰ yet his critique speaks more to

³⁰⁶ Larry Rohter and Elisabeth Bumiller, *Protesters Riot as Bush Attends 34-Nation Talks*, N.Y. Times (Nov. 5, 2005) at 1; Colin McMahon *Protesters Scorn Bush at Summit*, Chicago Tribune (Nov. 5, 2005) at 1.

³⁰⁷ See e.g., Warren Hoge, *Venezuelan's Diatribe Seen as Fatal to U.N. Council Bid*, N.Y. Times (Oct. 25, 2006) at A6 (recounting Chavez’s statement during a speech to the U.N. General Assembly in September 2006 that “he could still smell the telltale scent of sulfur on the General Assembly rostrum where Mr. Bush had spoken the day before”).

³⁰⁸ One opinion writer described television coverage of “applauding” crowds attending the Chavez speech. John Hughes, *Chavez's socialism won't help Latin America; free trade will*, Christian Science Monitor (Nov. 9, 2005) at 9.

³⁰⁹ Richard Feinberg, *Making the Fifth Summit the Finest So Far*. FOCAL Point, Canada’s Spotlight on the Americas, July-August 2008, Volume 7, Issue 6 at 1 available at <http://www.focal.ca/publications/focalpoint/fp0808/?article=article2&lang=e> (last visited Nov. 7, 2009).

³¹⁰ In addition to broad practical and academic experience in inter-American relations, Professor Feinberg was Senior Director of the National Security Council’s Office of

substantive challenges of inter-American relations than to any procedural debility of summits as a public forum. The counterproductive use of a public forum by a self-styled populist like Chavez (who would find a platform in any event) does not discount the need for, or importance of, public non-state forums held in connection with the summit. Chavez may have stolen headlines—a feat of which he has proven capable even in the more traditional diplomatic cloisters of the United Nations in New York³¹¹—but engaging the public more quietly in debating summit priorities and outcomes through public forums institutionalized through the summit process deprived Chavez of any claim to monopoly on public discourse. Put another way, Chavez cannot maintain that he is the only regional leader speaking to the people about their interests in regional political and institutional priorities.

By the time the 2009 Port of Spain summit convened, Inter-American politics had shifted in ways that would create even greater challenges to substantive outcomes for a common regional agenda. Bolivia, Ecuador, Honduras, and Nicaragua elected populist leaders with a socialist leaning³¹² which

Inter-American Affairs under President Clinton, and in that post served as a principal architect of the 1994 Miami summit. His biography and CV are reproduced at the University of California San Diego School of International Relations and International Studies web site, *available at* <http://irps.ucsd.edu/faculty/faculty-directory/richard-feinberg.htm> (*last visited* Nov. 7, 2009)

³¹¹ *See supra* note 307 (describing Chavez's 2006 U.N. performance).

³¹² Evo Morales became President of Bolivia in January 2006 [XX cite], Manuel Zelaya took office as President of Honduras in January 2006 [XX cite], and Rafael Correa

was anathema to some of the core regional integration goals that had defined the summit agenda since Miami,³¹³ and Chavez was thus joined at Port of Spain by heads of state who could match his substantive concerns if not his rhetoric. While Chavez had been reduced to noting exceptions to earlier summit agreements³¹⁴ these new ideological partners added enough weight to undermine support for outcomes which depend upon consensus. A single state dissent in a summit of thirty-four states will produce exceptions, but not necessarily scuttle a consensus document. But five dissenting states can change the dynamics of consensus.

became President of Ecuador in January 2007 [XX cite], and Daniel Ortega returned to the presidency of Nicaragua in January 2007, having previously served in that office from 1985 to 1990 [XX cite]. Each has joined an economic alliance with Venezuela called the “Bolivarian Alliance for the People of Our Americas,” which promotes an agenda that Venezuela’s President Chavez has branded as “21st Century Socialism.” Tyler Bridges, McClatchy Newspapers, *Tough Times For Leftist Leaders*;

Six Aligned Latin American Countries Find Populism Is Slowing, Sun-Sentinel (Fort Lauderdale, Florida) (July 5, 2009) at 13A.

³¹³ See *supra* notes 285 to 286 and accompanying text.

³¹⁴ The 2001 Quebec Declaration includes a reservation that states in part “The Venezuelan delegation wishes to reserve its position on paragraphs 1 [which relates to strengthening

representative democracy] and 6 [which instructs foreign ministers to prepare an Inter-American Democratic Charter], because, according to our government, democracy should be understood in its broadest sense and not only in its representative quality.” Quebec Declaration, *supra* note 286, at 6. The Quebec Declaration also includes a reservation by Venezuela regarding the proposed FTAA. The 2005 Mar del Plata Declaration includes a reservation by Venezuela to a paragraph under the “Strengthening Democratic Governance” heading which states “We are convinced that representative democracy is an indispensable condition for the stability, peace, and development of the region.” Mar del Plata Declaration, *supra* note 286, at ¶ 58,

The Port of Spain summit thus produced a declaration signed by the chair rather than participating heads of state,³¹⁵ and the substance of the declaration's text relating to democracy appears to reflect the parties' lack of substantive agreement on what exactly is meant by democracy.³¹⁶ But non-state actors remained a part of the Port of Spain summit, both in the preparatory meetings where the summit agenda was debated and at the summit itself.³¹⁷ Non-state

³¹⁵ At the conclusion of the Trinidad Summit, a dispute over some final aspects of the agreement and the continuing exclusion of Cuba from the inter-American political process led Venezuelan President Hugo Chavez, Bolivian President Evo Morales, Honduran President Jose Manuel Zelaya, and Nicaraguan President Daniel Ortega to withhold their signatures. See Shaliza Hassanali, *Morales to Colleagues: Don't Sign Declaration*, TRIN. & TOBAGO GUARDIAN, Apr. 18, 2009, available at <http://guardian.co.tt/news/general/2009/04/19/morales-colleagues-don-t-sign-declaration>; *Americas Rivals See Signs of Hope*, BBC NEWS, Apr. 19 2009, available at <http://news.bbc.co.uk/2/hi/americas/8007305.stm>; Tamara Pearson, *Venezuela and ALBA Promote "New Climate" in Summit of the Americas*, TRIN. & TOBAGO NEWS.COM, Apr. 21, 2009, available at <http://www.trinidadandtobagonews.com/5summit/210409.html> (last visited Sept. 5, 2009). The Trinidad summit chair, Trinidad and Tobago Prime Minister Patrick Manning, signed a statement indicating that the parties had agreed that he "would sign the declaration as having been adopted by all Heads of State and Government attending the Summit." Fifth Summit of the Americas, Apr. 17–19, 2009, Port of Spain, Trin. & Tobago, *Statement by the Chairman of the Fifth Summit of the Americas, the Honourable Patrick Manning, Prime Minister of the Republic of Trinidad and Tobago*, at 4, OAS Doc. OEA/Ser.E CA-V/DP-1/09 (Apr. 19, 2009), available at http://www.summit-americas.org/V_Summit/statement_chair_en.pdf (last visited Sept. 24, 2009).

³¹⁶ See *infra* notes 372 to 384 and accompanying text.

³¹⁷ The summit web site maintained by the OAS includes a compilation of documents describing consultations with various non-state actors, including indigenous peoples, youth, academia, labor, and private sector representatives. See <http://www.summit->

participants were afforded an opportunity to engage diplomats formally and informally in shaping a regional agenda even if the agenda had become captive to new regional politics.³¹⁸ Whether these new politics represent an anomaly or a trend that will overshadow the broader cooperative agenda of the summit process is uncertain. But even a rising disagreement about the nature of democracy at Port of Spain did not lead states to retreat from the tradition of non-state access that has become part of the summit process.

Commitments to Democratic Governance and Public Participation

Democratic governance and public participation have been consistent inter-American summit themes, and the rising dispute over how best to address these themes at a regional level³¹⁹ only serves to highlight their importance as summit objectives. The following outlines commitments made to advance both electoral and participatory democratic models in summits held to date.

Miami (1994)

The Miami Declaration affirmed that “[d]emocracy is based, among other fundamentals, on free and transparent elections and includes the right of all

americas.org/GA09_CD/psa_en.htm (*last visited* November 12, 2009) dialogue between ministers of foreign affairs and non-state actors was also held. *Id.*

³¹⁸ *Id.*

³¹⁹ *See supra* notes 312 to 316 and accompanying text (describing the emergence of Venezuela’s objection to summit language regarding democracy in the context of the 2001 Quebec summit, and increasing support for that objection among more recently elected leaders in the region).

citizens to participate in government.”³²⁰ The Declaration called for making “democratic institutions more transparent and accountable,” and it expressed an interest in ensuring “public engagement and commitment.”³²¹ The Miami Plan of Action asserted that “[t]he strengthening, effective exercise and consolidation of democracy constitute the central political priority of the Americas,”³²² and it called on the OAS “to promote and consolidate representative democracy.”³²³ Governments committed to “give expeditious consideration to ratifying the Cartagena de Indias,³²⁴ Washington,³²⁵ and Managua³²⁶ Protocols to the OAS Charter,” each of which added commitments to representative democracy to the OAS Charter.³²⁷ The Miami Plan of Action also called for regional institutional reform, including strengthening the ability of a technical office of the OAS, the

³²⁰ Miami Declaration, *supra* note 285, at 810.

³²¹ *Id.* at 810, 813.

³²² Miami Plan of Action, *supra* note 285, at 815.

³²³ *Id.*

³²⁴ Protocol of Amendment to the Charter of the Organization of American States, Dec. 5, 1985, 25 I.L.M. 527, 527–530 (1986) [hereinafter Protocol of Cartagena de Indias].

³²⁵ Protocol of Amendments to the Charter of the Organization of American States, Dec. 14, 1992, 33 I.L.M. 981, 1005 (1994) [hereinafter Protocol of Washington].

³²⁶ Protocol of Amendments to the Charter of the Organization of American States, June 10, 1993, 33 I.L.M. 981, 1009–10 (1994).

³²⁷ The Protocol of Washington amended the Article 33 of the OAS Charter to affirm that “[t]he Member States agree that . . . the full participation of their peoples in decisions relating to their own development are . . . basic objectives of integral development.” Protocol of Washington, *supra* note 325, at 1007.

Unit for Promotion of Democracy, so that it could provide assistance to “interested state[s]” in legislative and judicial processes and the administration of justice.³²⁸

The Miami Plan of Action also highlighted the importance of public participation, including civil society’s access to information and the decision-making process. The plan states that “a vigorous democracy requires broad participation in public issues. Such activities should be carried out with complete transparency and accountability, and to this end a proper legal and regulatory framework should be established to include the possibility of obtaining technical and financial support, including from private sources.”³²⁹ This language points, albeit obliquely, to the need to develop frameworks for the operation and financing of NGOs, which was a relatively new phenomenon in the Americas in the early 1990s. The Plan of Action also calls for increased access to information as a means to combat official corruption, which was a perennial inter-American summit theme. Heads of state pledged to “[e]nsure proper oversight of government functions by strengthening internal mechanisms, including investigative and enforcement capacity with respect to acts of corruption, and facilitating public access to information necessary for meaningful outside review.”³³⁰

³²⁸ Miami Plan of Action, *supra* note 285, at 815.

³²⁹ *Id.* at 817.

³³⁰ *Id.* at 818.

In a later part of the Miami Plan of Action dealing with environmental issues and sustainable development, heads of state again expressed support for participatory models. They pledged to “[s]upport democratic governmental mechanisms to engage public participation, particularly including members of indigenous communities and other affected groups, in the development of policy involving conservation and sustainable use of natural environments.”³³¹

Santa Cruz (1996)

Held two years after the Miami Summit, the Santa Cruz Summit on Sustainable Development echoed the themes of democratic governance and public participation. The Santa Cruz Declaration pledges that states “will support and encourage, as a basic requisite for sustainable development, broad participation by civil society in the decision-making process, including policies and programs and their design, implementation, and evaluation. To this end, we will promote the enhancement of institutional mechanisms for public participation.”³³² The Santa Cruz Declaration and Plan of Action called for public participation in a range of development areas, from watershed management to the use of forests and the conservation of biological diversity.³³³ The Plan of Action also called for the

³³¹ *Id.* at 833. The Plan of Action notes, however, that “[t]he forms of this participation should be defined by each individual country.” *Id.*

³³² Summit of the Americas on Sustainable Development, Santa Cruz de la Sierra, Bol., Dec. 7–8, 1996, *Declaration of Santa Cruz de la Sierra*, at ¶ 8, available at <http://www.summit-americas.org/boliviadec.htm>.

³³³ See Santa Cruz Plan of Action, *supra* note 293, at 5, 7, 8–10.

OAS to “assign[] priority to the formulation of an inter-American strategy for the promotion of public participation in decision-making for sustainable development.”³³⁴

Santiago (1998)

In 1998, at the inter-American summit in Santiago, Chile, heads of state again highlighted the importance of participatory democracy, both in principle and through commitments to institutional reform. The Santiago Declaration states that:

The strength and meaning of representative democracy lie in the active participation of individuals at all levels of civic life. The democratic culture must encompass our entire population. We will strengthen education for democracy and promote the necessary actions for government institutions to become more participatory structures. We undertake to strengthen the capabilities of regional and local governments, when appropriate, and to foster more active participation in civil society.³³⁵

Heads of state also pledged that “[t]he FTAA negotiating process will be transparent,” and they “encourage[d] all segments of civil society to participate in and contribute to the process in a constructive manner, through our respective mechanisms of dialogue and consultation and by presenting their views through the mechanism created in the FTAA negotiating process.”³³⁶

³³⁴ *Id.* at 14–15.

³³⁵ Second Summit of the Americas, Santiago de Chile, Apr. 18–19, 1998, *Declaration of Santiago*, available at <http://www.summit-americas.org/chiledec.htm>.

³³⁶ *Id.* at 3.

The Santiago Plan of Action included a pledge by states to “intensify our efforts to promote democratic reforms at the regional and local level.”³³⁷ The OAS had been working to develop the *Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making* (ISP) since the Santa Cruz Summit two years earlier,³³⁸ and the Santiago Plan of Action reads like an endorsement of the ISP’s terms of reference. Heads of state agreed to

[p]romote, with the participation of civil society, the development of principles and recommendations for institutional frameworks to stimulate the formation of responsible and transparent, non-profit and other civil society organizations, including, where appropriate, programs for volunteers, and encourage, in accordance with national priorities, public sector-civil society dialogue and partnerships in the areas that are considered pertinent in this Plan of Action. In this context the Organization of American States (OAS) may serve as a forum for the exchange of experiences and information.³³⁹

The Santiago Plan of Action goes on to state that the process of strengthening participatory mechanisms should “draw upon existing initiatives that promote increased participation of civil society in public issues, such as . . . the Inter-American Strategy for Public Participation, among others.”³⁴⁰ The Plan of Action also pledges that, “[a]s soon as possible, Governments will adopt work

³³⁷ Santiago Plan of Action, *supra* note 280, at 8.

³³⁸ *See infra* pages 150-56.

³³⁹ Santiago Plan of Action, *supra* note 280, at 7–8.

³⁴⁰ *Id.*

plans to implement legal and institutional frameworks based on the principles and recommendations in their respective countries.”³⁴¹

Quebec City (2001)

In 2001, the Quebec City Summit Declaration acknowledged “the contributions of civil society”³⁴² to the summit process and “affirm[ed] that openness and transparency are vital to building public awareness and legitimacy.”³⁴³ The Quebec Plan of Action noted that “good governance requires . . . transparent and accountable government institutions at all levels,” as well as “public participation.”³⁴⁴ Heads of state agreed to

[w]ork jointly to facilitate cooperation among national institutions with the responsibility to guarantee the protection, promotion and respect of human rights, and access to and freedom of information, with the aim of developing best practices to improve the administration of information held by governments on individuals and facilitating citizen access to that information.³⁴⁵

³⁴¹ *Id.* at 12.

³⁴² Quebec Declaration, *supra* note 286, at 6.

³⁴³ *Id.* at 2.

³⁴⁴ Quebec Plan of Action, *supra* note 218, at 1.

³⁴⁵ *Id.* at 2. This provision is aimed at ensuring greater transparency and information access rather than direct participation in decision-making processes. But information access is central to effective participation, and it is recognized, along with access to justice, as a critical component of public participation frameworks. *See* United Nations Conference on Environment and Development, Rio de Janeiro, Bra., June 3–14, 1992, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc. A/CONF. 151/26/Rev.1 (1992).

The Plan of Action also committed to “[c]reate and implement programs with the technical and financial support, where appropriate, of multilateral organizations and [multilateral development banks], to facilitate public participation and transparency . . . in decision-making processes.”³⁴⁶ The Quebec Plan of Action also noted that “men and women have the right to participate, with equality and equity, in the decision-making processes affecting their lives and well-being,”³⁴⁷ and heads of state pledged to “[p]romote participation of all minority groups in forging a stronger civil society.”³⁴⁸

Additionally, the Plan of Action addressed participation at a local level, pledging to “[p]romote mechanisms to facilitate citizen participation in politics, especially in local or municipal government.”³⁴⁹ It also addressed regional institutions, agreeing, for example, to “[e]nsure the transparency of the negotiating process, including through publication of the preliminary draft FTAA Agreement in the four official languages as soon as possible and the dissemination of additional information on the progress of negotiations.”³⁵⁰ The Quebec Plan of Action called for greater openness of the FTAA process. Specifically, states agreed to

³⁴⁶ Quebec Plan of Action, *supra* note 218, at 2.

³⁴⁷ *Id.* at 13.

³⁴⁸ *Id.* at 14.

³⁴⁹ *Id.* at 3.

³⁵⁰ *Id.* at 14.

[f]oster through their respective national dialogue mechanisms and through appropriate FTAA mechanisms, a process of increasing and sustained communication with civil society to ensure that it has a clear perception of the development of the FTAA negotiating process [and] invite civil society to continue to contribute to the FTAA process.³⁵¹

While this language hints at the marketing of the FTAA,³⁵² it suggests a degree of transparency and openness to public dialogue about the content of the proposed Agreement.

Finally, and significantly, the Quebec Declaration took note of “threats to democracy,” an indirect reference to the then-evolving constitutional challenges in Peru,³⁵³ and called for the preparation of an Inter-American Democratic Charter (IADC). Although more concrete commitments are usually reserved for action plans, the Quebec Declaration, in language that is unusually specific and action-oriented, reads:

Threats to democracy today take many forms. To enhance our ability to respond to these threats, we instruct our Foreign

³⁵¹ *Id.* at 14.

³⁵² By stressing the need to “ensure that” civil society has a “clear perception of the development of the FTAA negotiating process,” the text appears aimed at promotion rather than engagement. While this brings a degree of transparency to the process, the transparency is tied to a description of the venture rather than the right to influence the venture. A promise to “ensure that” civil society has an “opportunity to influence” or an “opportunity for input into” FTAA negotiations would advance participation interests far more directly. That said, transparency is an aid to informed input and thus advances the goal of participation even if it does not seem to make that goal a priority.

³⁵³ Quebec Declaration, *supra* note 286 at 2. *See infra* notes 427 to 436 and accompanying text (describing the political situation in Peru preceding the Quebec summit).

Ministers to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy.³⁵⁴

Monterrey (2004)

At Monterrey, Mexico, heads of state did not produce a Plan of Action, but only a statement of principles entitled the Declaration of Nuevo León.³⁵⁵ One of the summit's three central themes was democratic governance, and a number of provisions in the Declaration supported participatory processes. The Declaration of Nuevo León calls for the “full application of the Inter-American Democratic Charter, which constitutes an element of regional identity, and, projected internationally, is a hemispheric contribution to the community of nations.”³⁵⁶ Heads of state also pledged to “foster a culture of democracy and development

³⁵⁴ Quebec Declaration, *supra* note 286, at 2. An exception to this provision was noted by Venezuela, the first such exception ever noted to an inter-American summit declaration or plan of action. *Id.* at 4 n.1.

³⁵⁵ Special Summit of the Americas, Monterrey, Nuevo León, Mex., Jan. 13, 2004, *Declaration of Nuevo León*, available at <http://www.summit-americas.org/SpecialSummit/Declarations/Declaration%20of%20Nuevo%20Leon%20-%20final.pdf>.

³⁵⁶ *Id.* at 9. The Inter-American Democratic Charter was negotiated following the Quebec Summit and was signed in Lima, Peru on September 11, 2001. John W. Graham, *A Magna Carta for the Americas, The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections*, FOCAL Policy Paper (Sep. 2002) at 4-5 available at http://www.focal.ca/pdf/iad_charter.pdf (last visited Nov. 2, 2009). See also *Strengthening the Democratic Commitment*, OAS informal briefing paper for General Assembly 2001, available at http://www.oas.org/charter/docs/why_charter.htm (last visited Nov. 2, 2009).

based on pluralism and the acceptance of social and cultural diversity.”³⁵⁷ In addition, the Declaration of Nuevo León committed to increased transparency in international organizations,³⁵⁸ and heads of state undertook to “institutionalize meetings with civil society and with the academic and private sectors.”³⁵⁹ The Declaration also asserted that

[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights. We are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens.³⁶⁰

Mar del Plata (2005)

The Declaration from the most recent inter-American summit, held in Mar del Plata, Argentina, claims that heads of state “are convinced that representative democracy is an indispensable condition for the stability, peace, and development of the region.”³⁶¹ It also acknowledges that “[i]ncreased participation by citizens, communities, and civil society will contribute to ensuring that the benefits of democracy are shared by society as a whole.”³⁶² The Declaration goes further to

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 10.

³⁵⁹ *Id.* at 11.

³⁶⁰ *Id.*

³⁶¹ Declaration of Mar de Plata, *supra* note 286, ¶ 58. Venezuela noted a reservation to this provision.

³⁶² *Id.* ¶ 62.

link democratic governance to a range of benefits, including economic prosperity, “decent jobs and good employment,” and the security of the state.³⁶³ The Mar del Plata Plan of Action offers only limited new initiatives for democratic governance, instead calling for greater commitment to regional security, increased effort to combat corruption, and development of a regional extradition network, ironically all under the general heading of “Strengthening Democratic Governance.”³⁶⁴ The Plan of Action instructs the OAS Summit Implementation Review Group (SIRG) to continue to “coordinate the participation of civil society” in summit planning and implementation.³⁶⁵

Port of Spain (2009)

The 2009 summit in Port of Spain, Trinidad occurred against the backdrop of a global economic downturn that had a severe impact on the Americas.³⁶⁶ The summit also followed the ascendance of new left-leaning presidents in Bolivia, Ecuador, Honduras, and Nicaragua.³⁶⁷ These new heads of state joined Venezuela’s President Hugo Chavez in rejecting some of the fundamental ideas that had driven regional political relations, and the summit agenda, since Miami in

³⁶³ *Id.* ¶¶ 64, 67, 72.

³⁶⁴ *Id.* ¶¶ 57–76.

³⁶⁵ *Id.* ¶ 74.

³⁶⁶ [XX]

³⁶⁷ *See supra* note 312 (discussing the election of new leaders in each country).

1994.³⁶⁸ Port of Spain also marked the first inter-American summit of the administration of U.S. President Barack Obama, and much of the early preparatory work had been done under the guidance of political appointees of his predecessor, George W. Bush. While this context may have had a profound impact on summit negotiations and outcomes, analyzing this impact is beyond the scope of this Article. What can be reported that is relevant to this Article is that summit commitments to fundamental democratic concerns of electoral process and public participation—commitments to expand participatory rights at a regional and domestic level, including calls for the ISP³⁶⁹ and the IADC,³⁷⁰—stalled in Port of Spain.³⁷¹

A “Declaration of Commitment” signed “on behalf of heads of state and government” by summit host, Trinidad and Tobago Prime Minister Patrick

³⁶⁸ Presidents Morales, Correa, Zelaya, and Ortega have each embraced socialist rhetoric and policy objectives. *Id.* At the summits preceding Port of Spain, Chavez insisted on exceptions to the consensus documents reflecting his distrust of a trade-driven (what he terms a neo-liberal) agenda. *See supra* note 286 (discussing Venezuela’s reservations to the summit agreement in Quebec regarding the proposed FTAA), and note 306 and accompanying text (describing Chavez’s speech at the Mar de Plata summit denouncing a “neo liberal” regional trade agenda). As the agenda for Port of Spain was negotiated, Chavez was no longer the lone voice in this regard.

³⁶⁹ *See infra* notes 398 and accompanying text.

³⁷⁰ *See infra* notes 435 to 436 and accompanying text.

³⁷¹ Statement by the Chairman of the Fifth Summit of the Americas, the Honourable Patrick Manning, Prime Minister of the Republic of Trinidad and Tobago, OEA/Ser.E, CA-V/DP-1/09 (April 19, 2009) *available at* http://www.summit-americas.org/V_Summit/statement_chair_en.pdf (*last visited* Nov. 6, 2009) (hereinafter Port of Spain Chairman’s Statement)

Manning.³⁷² The Port of Spain Declaration included a section on “Strengthening Democratic Governance,”³⁷³ which addresses poverty,³⁷⁴ decentralization,³⁷⁵ corruption,³⁷⁶ access to government budgets,³⁷⁷ human rights,³⁷⁸ social inclusion,³⁷⁹ “all forms of discrimination,”³⁸⁰ indigenous rights,³⁸¹ the protection of children,³⁸² and the role of the OAS in promoting peace,³⁸³—ostensibly as these concerns relate to strengthening democracy. These are important social concerns that should not be discounted, but they notably do not address core issues of electoral or participatory democracy at the domestic or regional level.

It is difficult to say whether the abandonment of these core issues at Port of Spain reflects a new regional emphasis or simply a passing artifact of regional

³⁷² Port of Spain Declaration, *supra* note 282.

³⁷³ *Id.* at ¶¶ 78-88.

³⁷⁴ *Id.* at ¶ 78.

³⁷⁵ *Id.* at ¶ 79.

³⁷⁶ *Id.* at ¶ 80.

³⁷⁷ *Id.* at ¶ 81.

³⁷⁸ *Id.* at ¶¶ 82-83.

³⁷⁹ *Id.* at ¶ 84.

³⁸⁰ *Id.* at ¶ 85.

³⁸¹ *Id.* at ¶ 86.

³⁸² *Id.* at ¶ 87.

³⁸³ *Id.* at ¶ 88.

political interests or tensions.³⁸⁴ But participatory democracy issues are not dead to inter-American summits. Although Port of Spain did not produce new initiatives specifically dealing with these issues, broader commitments made under the heading of “democratic governance”—especially language concerning corruption and access to information concerning government finances³⁸⁵—respond to core democratic concerns, and commitments to access mechanisms made at prior summits continued to be pursued in the broader regional institutional context.³⁸⁶

Commitments to Democracy: Four Case Studies

The preceding Part catalogues the extent to which inter-American summits have embraced the rhetoric of democracy, including ideas of participatory democracy and governance through open, transparent, and inclusive processes. Yet much of the language is merely precatory, expressing statements of principle or wishes and desires that do not call for specific action. A cynical view would hold that summit declarations and plans of action are not even aspirational: they

³⁸⁴ This neglect of earlier summit priorities is difficult to explain in terms of the public summit record. Venezuela had pushed for some integration of participatory democracy principles into the IADC, *see supra* note 314, and while the distinct diplomatic goals of individual states engaged in the summit process cannot be definitively discerned, it is possible disagreement over how to frame direct democracy (participatory and electoral) concerns in the context of the Port of Spain summit could not be overcome in framing a final text, even where the text was only framed as a Chair’s statement.

³⁸⁵ *See supra* notes 376 to 377 and accompanying text.

³⁸⁶ *See infra* pages 147-83 (discussing commitments to regional democratic mechanisms made at prior summits and ongoing efforts to implement these commitments).

are just smokescreens for inaction. Political leaders, from this perspective, are simply making statements that allow them to claim some moral high ground, even as they ignore deeper challenges and avoid taking the difficult policy steps that might advance the causes that they purport to champion.

To be sure, summit documents include a good deal of language about promoting democracy that is beyond the capacity or will of signatories to act. Yet the summit commitments also call for the development of specific programs and institutional responses that can begin to support the higher democratic ideals of summit rhetoric. The call for an Inter-American Democratic Charter in Quebec City, which would have binding elements,³⁸⁷ was quite concrete, as was the agreement reached in Santa Cruz to create a program to design the ISP.³⁸⁸ Statements in Miami, Santa Cruz, and Santiago summit agreements about the importance of civil society and the role of the OAS as a public forum served as tangible reference points for a later OAS General Assembly resolution that advanced a program of NGO accreditation in the OAS.³⁸⁹ Even the call in Miami for securing participatory rights through “proper legal and regulatory framework[s],”³⁹⁰ while more rhetorical than programmatic, may have significance beyond its symbolic value. Even rhetoric, when stated publicly and

³⁸⁷ See *infra* notes 435 to 436 and accompanying text.

³⁸⁸ See *infra* notes 398 to 401 and accompanying text.

³⁸⁹ See *infra* notes 469 to 473 and accompanying text.

³⁹⁰ Miami Plan of Action, *supra* note 285, at 5.

plainly, has an enduring value with the potential to transform attitudes and alter institutional behavior, at least in a context where interested parties can refer to and build upon that rhetoric in pursuit of more concrete programs. As James Madison once noted about the Bill of Rights, which he privately claimed did not need to be set forth affirmatively,³⁹¹ “political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”³⁹²

What, then, has been the utility of the inter-American summit claims and commitments about democratic governance and public participation? By placing the language in context, an answer begins to emerge. In a number of cases, summit commitments have grown out of regional or domestic initiatives that were championed by specific governments or by non-state actors working with governments, and the summit has helped to advance those initiatives through official acknowledgement and institutional action. The following four cases are illustrative.

³⁹¹ Letter from James Madison to Thomas Jefferson (October 17, 1788), in 11 THE PAPERS OF JAMES MADISON, 298–99 (Robert A. Rutland et al. eds., 1977). Madison confided to Jefferson, “I have never thought the omission [of a Bill of Rights] a material defect.” *Id.* at 297. Among other reasons for this position, Madison explained, “I have not viewed it in an important light . . . because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted.” *Id.*

³⁹² *Id.* at 298–99.

Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making (ISP)

In the months prior to the 1996 Santa Cruz Summit in Bolivia, an informal working group of governmental officials and non-state actors met to discuss how public participation issues should be addressed in the context of the upcoming summit. Participants included representatives of the government of Uruguay,³⁹³ the OAS, and the U.S. Agency for International Development (USAID), as well as a representative of World Resources Institute (WRI) who had been tapped by the Bolivian government to offer advice on the formulation of a summit agenda.³⁹⁴ This informal working group facilitated the design of a regional

³⁹³ Uruguay had been designated as the “responsible coordinator” for follow-up on summit commitments regarding democratic governance. The system of “responsible coordinators” was developed following the 1992 Miami Summit as a means of identifying “countries or international organizations [to] volunteer to coordinate implementation of individual action items, taking the lead in developing an implementation strategy, convening meetings, and communicating relevant information about the implementation process.” Summit Implementation: An Evolving Process (unpublished paper presented to the IV SIRG by the United States), <http://www.summit-americas.org/SIRG/1995/IV/Summit-paper-USA-IVSIRG.htm> (last visited Sept. 27, 2006).

³⁹⁴ See *supra* note 294 and accompanying text. The author served as part of this informal working group in his capacity as an advisor to U.S. Agency for International Development (USAID) and participated in much of the subsequent planning and development of the ISP. Information regarding participation in the meetings is based on the author’s recollection and on documents—including agendas, correspondence, and working papers—that are on file with the author. The work of the informal group, like the later work of the ISP, was always meant to be open and transparent, and not classified or privileged in any way.

consultation held in Montevideo, Uruguay and co-hosted by the governments of Bolivia and Uruguay in August 1996. The consultation resulted in a series of recommendations for consideration in planning the 1996 Santa Cruz Summit.³⁹⁵

The Montevideo meeting convened over 150 participants, including representatives of more than twenty governments from the region and a range of NGOs and academics.³⁹⁶ Participants used an informal workshop approach to develop recommendations for the heads of state who would meet in Santa Cruz later in the year. The principal recommendation was that heads of state should commit to the formulation of an inter-American strategy for public participation.³⁹⁷ This recommendation was adopted verbatim at the subsequent summit, and the outcomes of the Montevideo meeting were cited in the Santa Cruz Plan of Action as a point of guidance in the development of the strategy. In a section entitled “Public Participation,” the Santa Cruz Plan of Action stated,

15. In order to support the specific initiatives on public participation contained in the Plan of Action, entrust the OAS with assigning priority to the formulation of an inter-American strategy for the promotion of public participation in decision-making for sustainable development, taking into account the recommendations of the Inter-American Seminar on Public Participation held in Montevideo in 1996.

³⁹⁵ See *supra* notes 291 to 293 and accompanying text. For a more complete description of the Montevideo meeting, see Dannenmaier, *Democracy in Development*, *supra* note 291 at 12-13.

³⁹⁶ See MONTEVIDEO REPORT, *supra* note 291, at 1.

³⁹⁷ *Id.* at 1-2, 5-7.

16. The strategy should promote the exchange of experiences and information among government representatives and civil society groups with regard to the formulation, implementation, and improvement of sustainable development policies and programs, legal and institutional mechanisms, including access to and flow of information among the relevant actors, training programs, and consultation processes used at the national level to ensure civil society involvement. Establish consultation processes at the regional level, such as regular fora for government-civil society dialogue at relevant high-level meetings convened by the OAS, and when necessary support the integration and strengthening of national sustainable development councils, drawing on the experience of Central America and other existing councils in the Hemisphere.³⁹⁸

Because the OAS had been involved in the formulation of this proposal from the beginning through an arm of its Permanent Secretariat, the Unit for Sustainable Development and Environment (UDSE),³⁹⁹ it was positioned to respond to this summit commitment quickly. Within a year of the Santa Cruz Summit, the USDE had formed a technical advisory group to begin developing a regional participation strategy.⁴⁰⁰ With the support of the ISP Technical Advisory Group, the OAS USDE also formed a separate Project Advisory Committee that included seven representatives from OAS member states—two each from North, South, and Central America, and one from the Caribbean—and seven non-

³⁹⁸ Santa Cruz Plan of Action, *supra* note 293, at 14–15.

³⁹⁹ The OAS Unit for Sustainable Development and Environment (USDE) is now known as the OAS Department of Sustainable Development. See <http://www.oas.org/dsd/> (last visited Sept. 12, 2009).

⁴⁰⁰ The author was a member of the ISP Technical Advisory Group and participated in its deliberations throughout the time that the OAS worked to develop the ISP.

governmental representatives who were nominated and selected by NGOs of the region from seven areas of work.⁴⁰¹

During 1997 and 1998, the Technical Advisory Group, with guidance from the Public Advisory Committee, hosted a series of public workshops, funded pilot studies, and sponsored research regarding frameworks and mechanisms, including legal and regulatory frameworks, in order to help frame the ISP and promote public participation in the region more generally.⁴⁰² More than \$1 million in funding support was provided collectively by USAID, the Global Environment Facility (GEF), and the United Nations Economic and Social Council (UNESCO).⁴⁰³ The work resulted in a fifty-one page strategy document that was given the same name as the project, the *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development*.⁴⁰⁴ This strategy document was adopted by the OAS Inter-

⁴⁰¹ The seven NGO areas of work were Business, Trade and Economic Growth; Environmentally Sustainable Development; Socially Sustainable Development; Women's Issues; Minority or Marginalized Peoples (non-Indigenous); Indigenous Peoples; and Labor Interests. A contact list for the OAS/ISP is maintained on file with the author.

⁴⁰² Workshop agendas, participant lists, and reports of outcome are on file with the author.

⁴⁰³ Copies of the ISP budget and grant instruments, along with reports by OAS USDE personnel on funding sources and budgeting, are on file with the author.

⁴⁰⁴ See Org. of Am. States, *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development*, OEA/Ser.D/XXIII.1 (2001) [hereinafter *ISP Strategy Document*], available at http://www.oas.org/dsd/PDF_files/ispenglish.pdf (last visited Aug. 1, 2009).

American Council on Integral Development (CIDI) on April 20, 2000.⁴⁰⁵ While the document does not purport to bind OAS member states to specific actions, it does include a series of recommendations for implementation by member states at a national level. In a section entitled “Legal Frameworks,” the ISP recommends that OAS member states “[c]reate, expand, and implement legal and regulatory frameworks that ensure the participation of civil society in sustainable development decisions.”⁴⁰⁶ It also includes a section entitled “Institutional Procedures and Structures,” recommending that OAS member states “[d]evelop and support institutional structures, policies, and procedures that promote and facilitate, within all levels of government and civil society, interaction in sustainable development decisions, and encourage change within existing institutions to pursue a basis for long-term direct dialogue and innovative solutions.”⁴⁰⁷

These recommendations were developed over a two-year period through a process that included the participation of government officials—usually a combination of foreign ministry officials and those from technical ministries, such as ministries of the environment, at whom the recommendations were aimed—

⁴⁰⁵ CIDI Res. 98 (V/O/00), 5th Reg. Meeting, OEA/Ser.W/II.5. CIDI/Doc. 25/00 (Apr. 20, 2000).

⁴⁰⁶ ISP Strategy Document, *supra* note 404, at 7 (Policy Recommendation No. 2).

⁴⁰⁷ *Id.* at 9 (Policy Recommendation No. 3).

alongside NGO participants, scholars, and OAS staff.⁴⁰⁸ They were adopted in draft form at a regional meeting that included representatives from most OAS member states, and they were vetted at a national level by technical ministries following the regional meeting and prior to CIDI approval of the ISP.⁴⁰⁹ Thus, the recommendations were vetted at a national level by relevant officials through a process that offered ample opportunity for non-state actors to influence the thinking of these officials and give shape to the final ISP. Moreover, throughout the process, draft language of the ISP was presented at public meetings and the details were discussed and debated among participants from civil society and

⁴⁰⁸ Non-state actor input was facilitated by the Technical Advisory Group, which oversaw the two-year process and helped draft much of the final language of the ISP, as well as the Project Advisory Committee, which participated in public meetings and periodically met to advise the OAS USDE on project design. The author served as a member of this group. Notes from the Technical Advisory Group and the Project Advisory Committee meetings are on file with the author. *See also* ISP Strategy Document, *supra* note 404, at 13–15 (describing the process through which the ISP was developed and emphasizing the role of public consultations and advisors drawn from civil society).

⁴⁰⁹ As a member of the Technical Advisory Group, the author made a presentation on the process of regional consultations to an inter-governmental meeting on the ISP held in Mexico City in September 1999. This presentation described outreach efforts undertaken by the Technical Advisory Group, including a mailing of hundreds of surveys regarding the proposed ISP to NGOs identified by Project Advisory Committee members and other OAS contacts, thirteen national consultations hosted in and by OAS member states, and a two-week virtual discussion hosted over the internet by the OAS, among other efforts.. A copy of this presentation is on file with the author. *See also* Richard A. Meganck, Head, OAS USDE, Speech at Mexico City Meeting, 1–2 (Sept. 8, 1999) (copy on file with author) (describing the importance of input from civil society actors in formulating the ISP).

government agencies. The suggestions of participants in these meetings, both state officials and non-state actors, regularly found their way into the ISP draft.⁴¹⁰

Inter-American Democratic Charter (IADC)

Although the twentieth century history of Latin America and the Caribbean has been characterized by authoritarian regimes and violent transfers of power, the region saw a pronounced shift toward electoral democracy in the 1980s and this move became consolidated, or at least stable, after the collapse of the Soviet Union.⁴¹¹ Despite a number of “irregular disruptions”⁴¹² and moves by

⁴¹⁰ Agendas, participant lists, and reports of outcome from these meetings, along with personal notes about the process, including Technical Advisory Group and Project Advisory Committee meetings, are on file with the author. The ISP Strategy Document also describes this iterative and open process. See ISP Strategy Document, *supra* note 404, at iii (foreword by Richard A. Meganck); *id.* 13–14 (describing the “unique advisory structure [which] ensured that the ISP itself was open to continual input and that it supported the ongoing work of the regular OAS staff, consultants, and dedicated volunteers”).

⁴¹¹ See Scott Mainwaring, *The Surprising Resilience of Elected Governments*, 10 J. DEM. (1999) 101-114, 101 (despite shortcomings, “[b]y 1990, virtually every government in the region was either democratic or semidemocratic”); Larry Diamond, *Is the Third Wave Over?*, 7 J. DEM. (1996) 20-37, 29-30 (describes the “growing gap between electoral and liberal democracy” in the region, but notes that the “persistence of constitutional procedures gives grounds for hope about the future of democracy in Latin America”);

⁴¹² The term “irregular disruptions” was used by Arturo Valenzuela, who is now a professor of government at Georgetown University, but who was formerly Special Assistant to the President and Senior Director for Inter-American Affairs at the U.S. National Security Council from 1999 to 2000. In a recent article, Valenzuela reports that “[f]rom 1930 until 1980, 40 percent of all governmental changes in Latin America were by military coups,” and that this “number dropped by half in the 1980s.” Arturo Valenzuela, *Putting Latin America Back on the Map*, 42 FIN. & DEV., Dec. 2005, at 16, 16, (2005).

some leaders to amend constitutional term limits in order to extend their opportunities for re-election,⁴¹³ all but one state in the region is now a nominal democracy.⁴¹⁴ While the recent history of electoral democracy in the region is difficult to describe as stable, a tradition of political change by military coup has largely given way to change through the electoral process. Honduran President Ernesto Zelaya was ousted by elements of the Honduran army in late June 2009,⁴¹⁵ ending almost two decades of respite since the last successful military coup in the region, which occurred in Haiti in 1991.⁴¹⁶ But the Honduran coup had the explicit support of the country's Supreme Court and legislature,⁴¹⁷ and occurred after the President had taken what many in the country claimed were extra-constitutional steps when no constitutional process for impeachment

⁴¹³ In 1995, President Carlos Menem of Argentina succeeded in an effort to change the constitution so that he could run for a second consecutive term. However, in 1999 he failed to gather sufficient support to reinterpret the constitution so that he could serve a third term. *Profile: Carlos Menem*, BBC NEWS, Apr. 28, 2003, available at <http://news.bbc.co.uk/2/hi/americas/202482.stm> (last visited Sept. 25, 2009). In 2009, Hugo Chavez succeeded in having constitutional term limits lifted so that he could run for an additional term. See Tyler Bridges, *Term Limit Win for Chavez*, CHI. TRIB., Feb. 16, 2009, at 10. Bolivia's Evo Morales and Ecuador's Rafael Correa have won similar challenges to constitutional term limits. *Id.*

⁴¹⁴ Cuba is the lone exception, although some have questioned the democratic quality of several other governments in the region. See generally Mainwaring and Diamond, *supra* note 411 (discussing the shortcomings of Latin American democracies).

⁴¹⁵ See Elisabeth Malkin, *Honduran Army Ousts President Allied to Chavez*, N.Y. TIMES, June 29, 2009, at A1.

⁴¹⁶ See *Haitian Army Seizes Power in Bloody Coup*, CHI. TRIB., Oct. 1, 1991, at 3C.

⁴¹⁷ See Malkin, *supra* note 195.

existed.⁴¹⁸ Despite universal regional condemnation of Mr. Zelaya's ouster,⁴¹⁹ the move by his country's military was itself alleged, perhaps ironically, to have been taken in defense of Honduras' constitutional order.⁴²⁰ During the eighteen years between the 1991 coup in Haiti and the 2009 coup in Honduras, and perhaps even despite recent events in Honduras, it can be argued that civilian-led constitutional systems have taken root in most countries despite instances of unrest.⁴²¹

⁴¹⁸ See *Ghost of Coups Past*, CAN. GLOBE & MAIL, June 30, 2009, at A16.

⁴¹⁹ See Mary Beth Sheridan, *U.S. Condemns Honduran Coup*, WASH. POST, June 30, 2009, at A5; Press Release, Org. of Am. States, OAS Permanent Council Condemns Coup D'etat in Honduras, Calls Meeting of Ministers and Entrusts Secretary General with Carrying Out Consultations, June 28, 2009, available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-214/09 (last visited July 10, 2009).

⁴²⁰ See Ramon Antonio Vargas, *Local Hondurans Back Zelaya's Ouster; But Don't Call It a Coup, They Say*, NEW ORLEANS TIMES-PICAYUNE, June 30, 2009, at 8.

⁴²¹ For a discussion of the relative stability in the years preceding the Honduras coup, see Valenzuela, *supra* note 412 at 16. See also Mainwaring and Diamond, *supra* note 411. The term "relative" stability is used because constitutional challenges did occur between 1991 and 2009. These include Alberto Fujimori's "auto-golpe," or "self-coup," in Peru in 1992, which saw an elected president suspend the constitution, dissolve congress, and retain plenary power until November 2000; in Venezuela in 2002, when opposition parties supported by the military temporarily ousted an elected president, Hugo Chavez, for roughly two weeks in May; and in Haiti in February 2004, when elected president Jean Bertrand Aristide left the country in the face of mounting opposition—beginning with his contested 2001 election and escalating to a full-scale national rebellion—but was replaced by his constitutional successor, Boniface Alexandre, the President of the Haitian Supreme Court. In addition, democratically elected presidents were forced to resign early in the face of popular pressure in Ecuador (Abdallah Bucaram in February 1997, followed by Jamil Mahuad in January 2001), Argentina (Fernando de la Rúa in December 2001, followed by four others within a matter of weeks, with Nestor Kirchner later elected in May 2003), and Bolivia (Gonzalo Sanchez de Losada in October 2003,

In an effort to secure democratic practices and electoral transitions in the region, the OAS General Assembly approved the Santiago Commitment to Democracy and the Strengthening of the Inter-American System at its 1991 meeting in Santiago, Chile, and it embraced the idea of collective response to any illegal or sudden interruption of democratic rule.⁴²² The Santiago Commitment was supplemented at the same General Assembly by a Resolution on Representative Democracy, known as Resolution 1080, the purpose of which was

followed by his vice president, Carlos Mesa, who resigned in June 2005 and was succeeded by the President of the Bolivian Supreme Court until elections were held in December 2005). An April 2005 article about the resignation of Ecuador's president after a "constitutional coup" provides a further "brief catalogue of irregular changes of government" in the region that includes the examples above as well as the 1999 presidential resignation in Paraguay and the 2001–2002 presidential successions brought on by economic woes in Argentina. See "*Constitutional Coup*" by Congress Ousts Gutierrez on Wave of Popular Protests, *LATIN AM. WKLY. REP.*, Apr. 26, 2005, at 1–3. In each of these cases, succession occurred under established constitutional procedures, and the military was a minor player or notably absent, usually remaining quartered while civilian authorities worked through succession procedures and later held elections. Some have argued that even the recent Honduras coup is hard to categorize as an overthrow of civilian power, despite its obvious constitutional challenge, because the military acted after key national civilian institutions, the country's supreme court and congress, raised serious concerns about a third branch's extra-constitutional behavior. See Vargas, *supra* note 420; see also *infra* note 499 (discussing more recent developments in Honduras).

⁴²² See Santiago Commitment to Democracy and the Renewal of the Inter-American System OAS GA, Santiago Chile, 3d plenary sess., June 4, 1991, OAS Proceedings, Volume I, OEA/Ser.P/XXI.O.2 (20 Aug 1991) at 1-3, available at <http://scm.oas.org/pdfs/agres/ag03805E01.pdf> (last visited Nov. 6, 2009); see also Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393, 399 (1994) (arguing that the Santiago Commitment moved the Latin American nations "closer to a more activist position posture toward military coups").

to “promote and consolidate representative democracy” in the region by creating a response mechanism “in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any OAS Member State.”⁴²³ A year later, a special session of the OAS General Assembly approved an amendment to the OAS Charter, known as the Washington Protocol, which calls for the suspension of any OAS member state whose government is overthrown by force.⁴²⁴

While these instruments supported the ideal of elected government, they failed to provide a concrete mechanism that responded to internal assaults on elected governments. The Santiago Commitment offers only precatory language, and although Resolution 1080 provides a basis for consultation, at least where a threat is external or clearly extra-constitutional, it offers no real basis for response. Instead, it merely calls for the “immediate convocation” of the OAS Permanent Council to “examine the situation” and to convene foreign ministers

⁴²³ OAS G.A. Res. 1080, ¶ 1, 5th Plen. Sess., OAS Doc. AG/RES.1080 (XXI-O/91) (June 5, 1991), *available at* <http://www.oas.org/juridico/english/agres1080.htm> (last visited Sept. 18, 2009) [hereinafter Resolution 1080].

⁴²⁴ Protocol of Amendments to the Charter of the Organization of American States art. 1, Dec. 14, 1992, 33 I.L.M. 981, 1005. The amendment was approved in 1992 and entered into force in 1997. OAS Department of International Law Treaties and Agreements Database, *available at* http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington_sign.htm (last visited Nov. 6, 2009).

for further discussion.⁴²⁵ While it provides for a meeting of the General Assembly to “look into the events collectively and adopt any decisions deemed appropriate, in accordance with the OAS Charter and international law,”⁴²⁶ there is no real guidance on what course of action the General Assembly might appropriately take. Thus, Resolution 1080 allows for the kind of joint deliberation that would likely occur in any event, but does not create a meaningful procedural response. Even the Washington Protocol, which would punish a successful coup with membership suspension, does little more than state the obvious course of action because a suspension would likely be sought even absent the Charter amendment, and it gives no hope of immediate relief to a legitimate government under pressure or to a state whose government has stepped outside of constitutional bounds. Resolution 1080 only addresses external challenges to power, but it does not deal with cases in which an elected government seeks to remain beyond its constitutional tenure or in which an election is stolen.

These debilities became apparent during Peru’s 2000 election cycle when its president, Alberto Fujimori, decided to run for a constitutionally questionable third term and then won in what was widely regarded as a corrupt electoral process.⁴²⁷ Although the country and the region had tolerated Fujimori’s 1992

⁴²⁵ Resolution 1080, *supra* note 423, ¶ 1.

⁴²⁶ *Id.* at ¶¶ 2–3.

⁴²⁷ See Peter Hakim, *Follow Up After Peru’s Election*, CHRISTIAN SCI. MONITOR, May 31, 2000, at 20. Hakim is the President of the Inter-American Dialogue; see also Andres

“self-coup,” in which he suspended the Peru’s constitution and dissolved the country’s congress and the supreme court in order to give himself latitude to fight the Shining Path guerilla insurgency, local and international constituencies loudly protested his 2000 election. In 2000, a series of scandals involving his intelligence chief, Vladimir Montesinos, eroded Fujimori’s remaining support at home and abroad, and, in the face of unrelenting pressure, Fujimori left office later in November of year.⁴²⁸ He fled Peru, sought asylum in Japan, and submitted his resignation. The resignation was rejected by Peru’s congress, which instead approved a resolution finding Fujimori “permanently morally unfit” to continue his term and appointing its speaker, Valentin Paniagua, as interim president.⁴²⁹

Paniagua learned a great deal about the inter-American framework’s inability to protect democratic governments from this experience. The terms of

Tapia, *En Elecciones Peruanas*, MENSAJERO, Apr. 19, 2000, at 8 (describing election irregularities); *A Second Chance for Toledo, and Peru*, ECONOMIST, Apr. 15, 2000, at 31–32 (describing the context of the election).

⁴²⁸ See Rick Vecchio, *Fujimori Renuncia*, MENSAJERO, Nov. 22, 2000, at 1.

⁴²⁹ *Id.*; see also Clifford Krauss, *Peru Congress Says Fujimori Is “Unfit” and Picks Successor*, N.Y. TIMES, Nov. 22, 2000, at A12 (describing the steps taken by Peru’s congress to transfer power to Mr. Paniagua following Fujimori’s resignation and departure from the country). The appointment of Paniagua was an appropriate constitutional step because both of the country’s vice presidents had also resigned. See *The Future Without Fujimori*, ECONOMIST, Nov. 25, 2000, at 38–39. For additional background, see Samantha Newbold, *The Fujishock: How and Why Did it Occur? An Analysis of Alberto Fujimori’s Policy Reversal of 1990*, GEORGETOWN CTR. FOR LATIN AM. STUDIES, in *ENTRECAMINOS 2003* (2003).

Resolution 1080 had not fit the circumstances of the stolen election in Peru, and the OAS had been unable to agree to invoke the resolution during a meeting of the General Assembly in June 2000 in Windsor, Canada. Instead, the OAS sent a high level mission comprised of “the Chair of the General Assembly and the Secretary General of the OAS” to Peru in order to explore “options” to strengthen democracy and to make recommendations for democratic reform.⁴³⁰ Some credit this high level mission with smoothing the transition as Fujimori fled the country the following November,⁴³¹

Informed by its experience, Paniagua’s transitional government called for the creation of an Inter-American Democratic Charter in part to ensure that the Inter-American System would respond when a democratic state is “perverted from within” and in part to strengthen the mechanisms for response.⁴³² For Paniagua

⁴³⁰ OAS G.A. Res. 1753, ¶ 1, OAS Doc. OEA/Ser.P AG/RES. 1753 (XXX-O/00) (June 5, 2000).

⁴³¹ See MAXWELL A. CAMERON, LIU INST. FOR GLOBAL ISSUES, *THE INTER-AMERICAN DEMOCRATIC CHARTER: TOWARD A PLAN OF ACTION*, (2003) available at http://www.ligi.ubc.ca/sites/liu/files/Publications/19May2004_InteramericanCharter.pdf (last visited Aug. 2, 2009).

⁴³² *Members of Organization of American States Sign Declaration Supporting Democracy*, NOTISUR—S. AM. POL. & ECON. AFF., Sept. 14, 2001 (quoting Peruvian Foreign Minister Diego Garcia Sayan on the need for a democratic charter: “Although Peru is not the only example, it most clearly demonstrates that democracies can be perverted from within”); see also Nfer Muoz, *Politics-Americas: OAS Applauds Peru's Smooth Elections*, INTER PRESS SERVICE, June 4, 2001 (reporting on diplomatic discussions at the OAS General Assembly then taking place in San Jose, Costa Rica regarding Peru’s political transition and the proposed Inter-American Democratic Charter).

and Peru, the timing of the upcoming Quebec City Summit was auspicious. The agenda for the April summit was taking shape as Paniagua took office in November 2000, and it was finalized during the early months of 2001. Peru found support from its neighbors in South and Central America; from Canada, which had been directly involved diplomatically in the crisis engendered by Fujimori's election and the Montesinos scandal,⁴³³ and from the incoming Bush administration, which may have seen a democratic charter as a means to further secure the lock-out of Cuba from the inter-American system as a means of pressing for political change in Cuba.⁴³⁴ There was something of a groundswell

⁴³³ As host of the June 2000 OAS General Assembly, Canada was Chair of the General Assembly and its representative joined the Secretary General in the mission to Peru called for in the June 5, 2000 resolution. Stephanie Boyd, *Canadians Lauded For Work On Peru*, *The Toronto Star*, Oct. 28, 2000, at 1 (describing work by Canadian diplomats in convincing the OAS to send a mission to Peru and in brokering an agreement with Fujimori to hold elections).

⁴³⁴ President George W. Bush took office in January 2001, two months before the Quebec Summit, and his new administration's Western Hemisphere policy—led by Under Secretary of State for Western Hemisphere Affairs Robert Noriega—was characterized in part by a policy of increasing the isolation of Cuba as a means to compel internal political change. See Michele Zebich-Knos, *US Policy toward Cuba: Trends and Transformation during the George W. Bush Administration*, in MICHELE ZEBICH-KNOS AND HEATHER NORA NICOL, *FOREIGN POLICY TOWARD CUBA: ISOLATION OR ENGAGEMENT?* at 31, 32-36 (discussing the Bush administration's turn away from engagement and toward further isolation of Cuba). More recently there has been a move led by Cuba's allies within the inter-American system to re-integrate Cuba into regional political institutions. See discussion *infra* at 270 (describing 2009 OAS vote to readmit Cuba upon its meeting certain commitments).

of support for Peru's initiative, and the final Declaration from the 2001 Quebec Summit agreement included a "democracy clause" that stated,

We acknowledge that the values and practices of democracy are fundamental to the advancement of all our objectives. The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process. Having due regard for existing hemispheric, regional and sub-regional mechanisms, we agree to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process.⁴³⁵

The Quebec Declaration went further, calling for the development of a binding regional Inter-American Democratic Charter to restate regional democratic values, to help OAS member states "respond to" democratic challenges, and "to reinforce OAS instruments for the active defense of representative democracy."⁴³⁶

The Inter-American Democratic Charter (IADC) was negotiated in the months following the Quebec Summit, and a draft was presented by Peru to the OAS General Assembly in June 2001, although a final agreement could not be reached.⁴³⁷ Negotiations continued through the summer of 2001, and a final text

⁴³⁵ Quebec Declaration, *supra* note 286, at 1.

⁴³⁶ *Id.* at 1–2. Venezuela noted an exception to this language. *Id.* at 4.

⁴³⁷ See Jim Lobe, New Chief Takes Over at OAS—and Gives Mixed Signals, INTER-PRESS SERVICE, May 26, 2005.

was accepted by all OAS member states except Venezuela.⁴³⁸ Venezuela ultimately reserved its objections, and the IADC was signed in Lima, Peru on September 11, 2001.⁴³⁹

While it cannot be claimed that the IADC owes its existence to the summit process alone, the timing and the process of the Quebec Summit helped advance the agreement. The fact that earlier summits had dealt with the theme of

⁴³⁸ Venezuela's stated reasons for objecting were that the Charter should refer to "participatory" rather than "representative" democracy and, echoing the Cold War socialist bloc theme in the human rights field, that a charter on "social rights" should be made an integral part of any effort to define regional political rights. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, 237-38 (2d ed. 2000) (describing how the debate over two sets of human rights—civil and political versus economic, social, and cultural—had become a "casualty of the Cold War"). At a subsequent OAS General Assembly meeting in 2004 in Quito, Ecuador, Venezuela's Foreign Minister Jesus Arnaldo Pérez again pushed for the adoption of an inter-American social charter. According to Radio Nacional de Venezuela, he "stressed the need to give democracy a 'social content,' because the continent has had 'enough of elitist democracies.'" *Venezuela: Highlights of Radio Nacional de Venezuela* (BBC Monitoring International Reports June 7, 2004) (Global News Wire June 8, 2004). Venezuela's persistence paid off: the OAS called for the formulation of a social charter at its 2004 General Assembly. See OAS G.A. Res. 2056, 4th Plen. Sess., OAS Doc. AG/RES. 2056 (XXXIV-O/04) (June 8, 2004). The new Secretary General of the OAS—Jose Miguel Insulza, a former Interior Minister from Chile—took up the call for a social charter shortly after his election in May 2005. See Lobe, *supra* note 437. The 2005 General Assembly renewed the call to draft a social charter. See OAS G.A. Res. 2139, OAS Doc. AG/RES. 2139 (XXXV-O/05) (June 7, 2005). The OAS began the process of developing the Inter-American Social Charter with a ministerial meeting in Caracas in August 2005. *Venezuelan Foreign Minister Calls for "Understanding" with USA*, (BBC Monitoring International Reports, Aug. 29, 2005) (Global News Wire Aug. 31, 2005).

⁴³⁹ Inter-American Democratic Charter, OAS G.A. Res. 1, 28th Spec. Sees., OAS Doc. OEA/Ser.P, AG/RES. 1 (XXVIII-E/01) (Sept. 10, 2001).

democracy and that a constituency of state and non-state actors looked to the summit process to advance democratic themes cannot have hurt.

Some observers have made the connection more directly. A policy brief written by the Liu Institute for Global Studies at the University of British Columbia, an Institute headed by former Canadian Foreign Minister Lloyd Axworthy, asserted that

[t]he idea of a Charter might have been ignored and forgotten had it not been taken up by the organizers of the Summit of the Americas in Quebec City, which instigated the negotiations leading to the signing of the Charter in September 11, 2001. The negotiation process that culminated in the Charter was led by a coalition of countries including Peru, Canada, Costa Rica, Argentina, and Mexico.⁴⁴⁰

FTAA Negotiations

As international trade agreements have been constructed in recent years, calls for greater transparency and public access to the trade process have increased, including access to negotiations on the texts of agreements and to dispute resolution processes. This has been exemplified at the global level by a growing discourse on NGO participation in the processes of the World Trade Organization (WTO) and growing claims for access.⁴⁴¹ These claims have, in

⁴⁴⁰ *The Inter-American Democratic Charter: Toward a Plan of Action*, *supra* note 431, at 4 (emphasis omitted).

⁴⁴¹ See e.g., Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321, 1338-41 (2000) (describing efforts by NGOs to gain access to the WTO); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 331, 357 (1996) (tracing efforts by NGOs to gain access to the WTO and arguing for the

some respects, begun to yield results in opening the WTO to non-state actors, although the results have been quite modest and generally limited to the right to “attend” Ministerial Conferences,⁴⁴² to participate in certain technical or informational forums, and to submit amicus briefs to dispute resolution panels.⁴⁴³ No real institutional effort has been made to open the WTO negotiating process to actors, although some delegations have occasionally posted negotiating positions

creation of formal opportunities for participation); Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT’L ECON. L. 709, 719 (1998) (arguing that an “expanded role for NGOs, particularly environmental groups, in the workings of the international trading system, would not only address public choice problems that might otherwise diminish the legitimacy of WTO decision-making, but would offer the prospect of broader political support for trade and investment liberalization”); John H. Jackson, *The Linkage Problem—Comments on Five Texts*, 96 AM. J. INT’L L. 118, 120 (2002) (noting the apparent agreement among five scholars contributing to a symposium edition on the WTO “that the WTO as an institution is seriously flawed, in some cases because of important institutional defects such as lack of democratic input, transparency, public participation, and relationship with nongovernmental organizations (NGOs).”); Gabrielle Marceau & Peter Pedersen, *Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society’s Claims for More Transparency and Public Participation*, 33 J. WORLD TRADE 5, 37 (1999) (discussing the “state of affairs” of claims for greater access to WTO work and noting some limited opportunities for access to trade dispute settlement processes); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 504–06 (2001) (discussing criticism of “the way the GATT/WTO had used its power and the democratic deficit and lack of transparency and legitimacy”).

⁴⁴² Marceau & Pedersen, *supra* note 441, at 5, 12.

⁴⁴³ See James Cameron & Stephen Orava, *WTO Opens Disputes to Private Voices*, NAT’L L.J., Dec. 7, 1998, at B5–B6; Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT’L L. J. 173, 183–197 (2000).

or specific proposals on their web sites.⁴⁴⁴ This measure of transparency at least informs public positions and allows non-state actors to think strategically about where allies and obstacles may lie.

Similar claims for access greeted negotiations for the proposed Free Trade Area of the Americas (FTAA). Unlike the WTO, which has grown as an autonomous economic integration body, the FTAA proposal had its origins in the inter-American summit process, having been conceived at the Miami Summit,⁴⁴⁵ and advanced and promoted in subsequent summits. FTAA negotiations stalled following the Eighth Annual Ministerial Conference in Miami in 2003, and for a number of reasons, the FTAA proposal has not been revived.⁴⁴⁶

⁴⁴⁴ See Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 115 (2002). This reflects the general attitude that access to the process of making trade policy should be at the national level. See General Counsel Decisions, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 ¶ 6, (July 23, 1996), available at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last visited Sept. 27, 2009).

⁴⁴⁵ See Miami Plan of Action, *supra* note 285, at 11.

⁴⁴⁶ Negotiations were suspended after the Miami Ministerial Meeting for a number of reasons. A principal impasse involved agricultural subsidies, and negotiations were halted in part so that this difficult issue could be worked out first in the WTO. The issue was addressed at the 2005 WTO meeting in Hong Kong, thus clearing an obstacle to continuing the FTAA discussions. A second obstacle was the policy position taken by Venezuela. President Hugo Chavez has stridently opposed the FTAA on more or less philosophical grounds as a neocolonial or neoliberal project. Perla Noguera, *Chavez, en vez del ALCA el ALBA*, (Feb. 21 2003), available at <http://ecuador.indymedia.org/es/2003/02/1772.shtml> (last visited Nov. 8, 2009) (quoting Chavez as saying “el camino del neoliberalismo no es el correcto, ese modelo neoliberal fracasó porque moralmente no tiene sustentación y nuestra Constitución es

While regional trade negotiations may or may not be revived, the degree of transparency and public access to the negotiation process was clearly on the rise prior to suspension. As described below, this access was informed by summit commitments and efforts to implement those commitments.

At the Santiago Summit in 1998, heads of state explicitly called for greater transparency and participation in FTAA negotiations:

The FTAA negotiating process will be transparent . . . in order to create the opportunities for the full participation by all countries. We encourage all segments of civil society to participate in and contribute to the process in a constructive manner, through our respective mechanisms of dialogue and

antineoliberal,” author’s translation: “The path of neoliberalism is not correct, this neoliberal model failed because, morally, it has no substance and our Constitution is antineoliberal.”); Perla Noguera, *El ALCA es un mecanismo para la desintegración de nuestros pueblos*, Nov. 26, 2003 (available at <http://www.nuestraamerica.info/leer.hlvs/2634> (last visited Nov. 8, 2009) (quoting Chavez as stating: “el ALCA constituye un mecanismo para la desintegración de nuestros pueblos y Repúblicas,” author’s translation: The FTAA constitutes a mechanism for the disintegration of our people and republics”). The Venezuelan delegation was apparently isolated in this position at the Miami Ministerial Meeting, but subsequent events demonstrate that some other Latin American leaders are rethinking the advisability of any potential free trade agreement. At the Mar del Plata Summit in 2005, the four full member states of MERCOSUR—Argentina, Brazil, Paraguay, and Uruguay—joined Venezuela in opposing continued negotiations for an FTAA. The other participating states agreed to a U.S. proposal to resume negotiations, and this resulted in a statement that “some member states” remain optimistic about the FTAA. See Declaration of Mar del Plata, *supra* note 286, ¶ 9A. At the 2009 summit in Port of Spain the question of an FTAA is not even mentioned in the final document. Port of Spain Declaration, *supra* note 282.

consultation and by presenting their views through the mechanism created in the FTAA negotiating process.⁴⁴⁷

While this commitment is aimed in part at the participation of smaller states whose capacity to engage in complex and protracted trade negotiations is limited, it also contemplates a degree of openness to non-state actors. The mechanism referred to is the Committee of Government Representatives on the Participation of Civil Society (SOC), which was created as part of a broader scheme to receive input from civil society on a range of issues, and which convened for the first time several months after the Santiago Summit.⁴⁴⁸

Heads of state renewed their commitment to a transparent process at the Quebec Summit in 2001 by pledging to

[e]nsure the transparency of the negotiating process, including through publication of the preliminary draft FTAA Agreement in the four official languages as soon as possible and the dissemination of additional information on the progress of negotiations.⁴⁴⁹

The negotiating text of the FTAA was released three months later, and two subsequent revisions were released in the days preceding the annual meetings of

⁴⁴⁷ Second Summit of the Americas, *Santiago Summit Declaration and Plan of Action*, 37 I.L.M. 947, 951 (1998).

⁴⁴⁸ Information about the Committee of Government Representatives on the Participation of Civil Society (SOC) and its proceedings can be found on the official FTAA web site at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP (last visited Oct. 16, 2009).

⁴⁴⁹ Quebec Plan of Action, *supra* note 218, at 14.

trade ministers, which punctuate the negotiating process.⁴⁵⁰ The Quebec Summit Plan of Action also includes a pledge by states to

[f]oster through their respective national dialogue mechanisms and through appropriate FTAA mechanisms, a process of increasing and sustained communication with civil society to ensure that it has a clear perception of the development of the FTAA negotiating process [and to] invite civil society to continue to contribute to the FTAA process.⁴⁵¹

While this language appears partly aimed at marketing the FTAA to civil society—communications are intended to “ensure” clear perceptions rather than to invite meaningful input—it also includes a call for non-state actors to contribute to the process. These contributions have largely been managed by the SOC, although the negotiating process at trade ministerial meetings has also been opened to some extent.

The SOC created a public input mechanism that invited NGOs to make “submissions” on any area of concern that was raised by the proposed FTAA.⁴⁵² This mechanism has been criticized for being a somewhat one-way “post office

⁴⁵⁰ The current draft text can be found on the official FTAA website at http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (last visited June 27, 2009).

⁴⁵¹ Quebec Plan of Action, *supra* note 218, at 14.

⁴⁵² For the most recent iteration of this invitation, see Free Trade Area of the Am., Comm. of Gov’t Representatives on the Participation of Civil Soc’y, *Open and Ongoing Invitation to Civil Society in FTAA Participating Countries*, FTAA.soc/15/Rev.5 (Mar. 31, 2004), available at http://www.ftaa-alca.org/spcomm/SOC/INVITATION/SOC15r5_e.asp. (last visited June 27, 2009).

box” approach to public input that creates no real basis for dialogue.⁴⁵³ Nevertheless, since its inception, it has evolved to some extent, and the SOC now collates and summarizes submissions for trade delegations, so that at least this one-way flow of information is a bit more accessible. Between 2003 and 2004, the SOC also hosted a series of three “issue meetings” on agriculture, services, and intellectual property rights.⁴⁵⁴ While these themes reflected the concerns of governments more than those of the NGO community—NGO concerns relate more to environmental, labor, and other social issues—the meetings at least provided an opportunity for direct interaction between non-state actors and responsible government officials, including negotiators and representatives of technical ministries. The SOC was also charged with designing a proposal for a “civil society consultative committee within the institutional framework of the FTAA,” as called for in the eighth ministerial meeting in Miami in 2003,⁴⁵⁵ but efforts to develop the proposal have not proceeded since the FTAA negotiation process was suspended.

⁴⁵³ See Centro Ecuatoriano de Derecho Ambiental 2003, *Towards Civil Society Participation in the Americas: Memoirs of the Trade and Environment Workshops in the Quito Ministerial 75–76* [hereinafter CEDA/FFLA Proceedings] (copy on file with author).

⁴⁵⁴ Summaries of the meeting agendas and results can be found at http://www.ftaa-alca.org/SpComm/SOC/Thema_e.asp (last visited June 27, 2009).

⁴⁵⁵ Free Trade Area of the Americas: Eighth Trade Ministerial Meeting, Miami, Fla., Nov. 20, 2003, *Ministerial Declaration*, ¶ 28, available at http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp (last visited June 27, 2009).

The last two FTAA Ministerial Meetings, in Quito in 2002 and in Miami in 2003, also provided opportunities for direct interaction between trade negotiators and interested civil society participants. In both cases, the issues that NGOs brought to the table were related to the broader social concerns raised by the FTAA proposal. In Quito, trade ministers held a brief direct meeting with non-state actors who had participated in three separate non-governmental forums. The first, on indigenous and labor concerns, was hosted by a loose coalition called the Hemispheric Social Alliance.⁴⁵⁶ The second, on environmental sustainability, was hosted by two Ecuadorian NGOs and their counterparts from the region.⁴⁵⁷ The third, on trade policy more generally, was hosted by a Latin American coalition of parliamentarians.⁴⁵⁸ In Miami, a coalition of NGOs from the region organized a forum called the Americas Trade and Sustainable Development Forum (ATSDF) and, at the invitation of the Office of the United States Trade Representative, hosted a three-day workshop inside the “security perimeter” that was established to contain street protests.⁴⁵⁹ The ATSDF included parallel

⁴⁵⁶ Dannenmaier, *supra* note 199, at 1101-03. For a more complete description of NGO participation in both the Quito and Miami ministerial meetings, *see id.* at 1089-1113.

⁴⁵⁷ *Id.* at 1089-90.

⁴⁵⁸ *Id.* at 1101-02.

⁴⁵⁹ *Id.* at 1105; *see also* John Audley & Scott Vaughan, Civil Society and the November 2003 Miami Free Trade Area of the Americas (FTAA) Ministerial, (Carnegie Endowment for International Peace Briefing Paper) (May 21, 2003), *available at* <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=619> (last visited Sept. 27, 2009)

workshops on nine areas: trade and agriculture; trade, democracy, and human rights; trade and environment; trade and smaller economies; trade, participation, and access; trade and sustainable livelihoods; trade, corruption, and transparency; trade, knowledge, and intellectual property rights; and trade and investment.⁴⁶⁰ More than three hundred NGO participants from over twenty countries attended, and representatives from trade ministries of at least eight countries were present for at least part of the proceedings.⁴⁶¹

While each of these mechanisms is imperfect, and although considerable obstacles still prevent the opening any future regional trade negotiations to meaningful participation by non-state actors, a framework is evolving that offers a greater degree of access than can be found in comparable negotiations related to other trade accords.

NGO Accreditation Rules for the OAS

Non-state actors have for many years worked in an informal manner with the OAS and its technical units, but until the 1990s, no formal status was afforded to NGOs before the political bodies of the organization.⁴⁶² The Canadian

⁴⁶⁰ Dannenmaier, *supra* note 199, at 1108.

⁴⁶¹ *Id.*

⁴⁶² In 1971, the OAS issued a set of standards that approved relations with NGOs willing to provide advisory services or carry out programs for the OAS. But the standards included no reference to the status of NGOs as interest groups that might seek to influence the programs or policies of the OAS or its member states. OAS G.A. Res. 57, 10th Plen. Sess., ¶¶ 13–22, OAS Doc. OEA/Ser.P AG/doc.109 rev. 1 (Apr. 22, 1971),

government became interested in creating an NGO accreditation mechanism, and in 1994 made a formal request to the OAS Permanent Council that the question of NGO status be studied.⁴⁶³ The request was approved, and in the ensuing years, Canada worked through the summit process and through the organs of the OAS to create an accreditation mechanism.⁴⁶⁴

In 1994, the OAS began slowly creating a Working Group to Study the Possibility of Granting Status to Non-governmental Organizations (NGO's) in the OAS through the Committee on Juridical and Political Affairs of the Permanent Council.⁴⁶⁵ The Working Group catalogued NGOs with which the OAS had cooperative agreements, interviewed OAS Secretariat staff about their work with NGOs, and looked to comparative examples of NGO participation in some UN

available at <http://www.oas.org/legal/english/CoopRelations/CoopRelations1.htm> (last visited Sept. 27, 2009).

⁴⁶³ Org. of Am. States, Permanent Council, Note from the Permanent Mission of Canada on the “Study of the Possible Granting of Status to Non-Governmental Organization (NGOs) at the OAS,” OAS Doc. OEA/Ser. G CP/doc.2486/94, (May 2, 1994), available at <http://www.civil-society.oas.org/Permanent%20Council/CP-DOC-2486-94-eng.htm> (last visited Sept. 27, 2009).

⁴⁶⁴ The author discussed these efforts with Canadian representatives to the OAS, and with other OAS officials in the course of discussions regarding Canada’s accreditation proposal in 1999. Some of the efforts are described *infra* notes 474 to 478 and accompanying text.

⁴⁶⁵ See Org. of Am. States, Comm. on Juridical and Political Affairs, *Working Group to Study the Possibility of Granting Status to Non-governmental Organizations (NGO's) in the OAS*, OAS Doc. OEA/Ser.G CP/CAJP-1005/95 (Mar. 23, 1995), available at <http://www.civil-society.oas.org/Permanent%20Council/CP-CAJP-1005.htm> (last visited Aug. 2, 2009).

conferences.⁴⁶⁶ Yet the Working Group took over two years to conclude its efforts, offering a final report to the Committee on Juridical and Political Affairs in July 1997.⁴⁶⁷ Rather than offering a plan for NGO accreditation, the report recommended new measures that could have limited the potential for NGO consultations on substantive issues, at least where those consultations were sought with technical bodies of the OAS.⁴⁶⁸

⁴⁶⁶ *Id.*

⁴⁶⁷ See Org. of Am. States, Comm. on Juridical and Political Affairs, Report by the Committee on Juridical and Political Affairs on the Status of Non-Governmental Organizations (NGOs) in the OAS, OEA/Ser.G CP/doc.2946/97 (July 11, 1997) [hereinafter Report on Juridical and Political Affairs], available at <http://www.civil-society.oas.org/Permanent%20Council/CP-doc-2946-97-Dixon.htm> (last visited Sept. 27, 2009).

⁴⁶⁸ *Id.* It is not clear that the Committee intended to propose limitations on NGO access, and in fact its report lauded the relations that NGOs generally had with the OAS. But the Committee's draft resolution failed to create any accreditation program and did not speak to how NGOs might become more actively engaged with the political bodies of the OAS. It focused instead on the OAS Technical Secretariat. In addition, the draft resolution proposed that the General Secretariat "draft practical guidelines to ensure consistency and enhancement of relations between the OAS General Secretariat and NGOs, which include: (i) the definition of selection criteria with regard to NGO participation in programs, projects and activities; (ii) financing; and (iii) document dissemination." *Id.* app. 2 ¶ 2. Defining "selection criteria" to "ensure consistency and enhancement or relations" reads more like an effort to turn NGOs into an efficient contractor force for the technical branches of the OAS than an effort to assure robust participation by non-state actors in the workings of the OAS. See OAS Permanent Council CP Res. 704, OEA/Ser.G CP/RES. 704 (1129/97) (July 24, 1997), available at <http://www.civil-society.oas.org/Permanent%20Council/CP-RES-704.htm> (last visited Aug. 2, 2009). This language was endorsed verbatim by the Committee on Juridical and Political Affairs. See Org. of Am. States, Comm. On Juridical & Political Affairs, *Report by the*

With progress on NGO accreditation stalled in the OAS technical and political organs, Canada was able to turn to the summit process. Summits had produced written commitments to increase civil society participation at the regional level,⁴⁶⁹ as well as a growing epistemic community of NGOs that were engaged in OAS processes and interested in greater participation. In June 1998, at the OAS General Assembly meeting following the Working Group report, a Canadian proposal was approved that went well beyond the modest and potentially limiting proposals of the Committee on Juridical and Political Affairs.⁴⁷⁰ The proposal, Resolution 1539, made specific reference to the Miami, Santa Cruz, and Santiago Summit language about the “importance of civil society,” and to Santiago Summit Language about the role of the OAS as a “forum for the exchange of experiences and information.”⁴⁷¹ In essence,

Comm. On Juridical & Political Affairs on the Status of Non-Governmental Organizations in the OAS, OAS Doc. OEA/Ser.G, CP/doc.2946/97 (July 11, 1997).

⁴⁶⁹ See discussion *supra* pages 121-32.

⁴⁷⁰ OAS G.A. Res. 1539, OAS Doc. AG/RES. 1539 (XXVIII-O/98) (June 2, 1998) [hereinafter Resolution 1539]; see also Santiago Plan of Action *supra* note 299. The language cited in Resolution 1539 was drawn from a section of the Santiago Plan of Action that dealt with civil society. The same section called upon states to “draw upon existing initiatives that promote increased participation of civil society in public issues, such as relevant successful experiences from the National Councils for Sustainable Development and the Inter-American Strategy for Public Participation,” which called for greater openness to civil society participation at the national level. *Id.* at 8. See ISP Strategy Document, *supra* note 404, at 10 ¶¶ b–c, 17.

⁴⁷¹ Resolution 1539, *supra* note 470.

Resolution 1539 re-tasked the Permanent Council to address the issue of civil society access to the OAS. The General Assembly resolved

[t]o instruct the Permanent Council to examine ways to increase the degree to which appropriate nongovernmental organizations and civil society organizations may become more closely involved in, and contribute to, the activities of the Organization, and ways to implement the tasks entrusted to the OAS in the Santiago Plan of Action with respect to civil society. In this process, representatives of civil society organizations may be asked for their views on the matter.⁴⁷²

The Permanent Council was also instructed to report on progress at the following General Assembly meeting in June 1999.⁴⁷³

Acting pursuant to Resolution 1539, Canada convened an informal working group of NGOs and government representatives in Washington to make recommendations for an NGO accreditation framework.⁴⁷⁴ The group examined accreditation practices at the UN and discussed how to design an accreditation program for the OAS that would provide maximum openness for NGOs while creating some limits that would allow governments to constrain participation by groups operating contrary to the principles of the OAS Charter, such as the Shining Path rebels in Peru.⁴⁷⁵ The group also discussed how to ensure access to working documents for accredited organizations, how to finance costs associated

⁴⁷² *Id.* ¶ 1.

⁴⁷³ *Id.* ¶ 2.

⁴⁷⁴ The author participated in this informal working group and has his notes of the meetings, along with copies of draft accreditation proposals, on file.

⁴⁷⁵ *Id.*

with the program, and how to ensure that an accreditation system did not discourage or limit existing avenues of access by NGOs, particularly to the technical units of the OAS.⁴⁷⁶

The results of this work, including draft guidelines for accreditation, were presented to a Special Joint Working Group of the Permanent Council and CIDI on the Strengthening and Modernization of the OAS, chaired by Canada.⁴⁷⁷ This Special Joint Working Group, which was formed to address a broader range of institutional reform issues within the OAS, reported favorably on the accreditation of NGOs to the OAS in a presentation to the General Assembly through the Permanent Council.⁴⁷⁸

In response to the report, the General Assembly approved a resolution in 1999 (Resolution 1661) that created a Committee on Civil Society Participation in OAS Activities within the Permanent Council and that instructed the Permanent Council “to prepare, by way of that committee, and bearing in mind the

⁴⁷⁶ *Id.*

⁴⁷⁷ The author discussed these results with representatives of the Permanent Mission of Canada to the OAS.

⁴⁷⁸ See Org. of Am. States, Special Joint Working Group of the Permanent Council and the Inter-American Council for Integral Development on the Strengthening and Modernization of the OAS, *Discussion Paper: The OAS and Civil Society*, OAS Doc. OEA/Ser.T/VII, GETC/FORMOEA-101/99 rev. 4 (May 21, 1999), available at <http://www.summit-americas.org/Reform%20Group/getc101-99.htm> (last visited Aug. 2, 2009); OAS G.A. Res. 1661, OAS Doc. AG/RES. 1661 (XXIX-O/99) (June 7, 1999), available at <http://www.oas.org/juridico/English/ga-res99/eres1661.htm> (last visited Aug. 2, 2009).

attachment to the report presented by the Permanent Council, guidelines for civil society participation in OAS activities, for adoption before December 31, 1999.⁴⁷⁹ In support of Resolution 1661, the General Assembly quoted at length from language of the Miami and Santiago Summits.⁴⁸⁰

The Permanent Council created a Civil Society Committee in the following weeks and issued accreditation guidelines on December 15, 1999.⁴⁸¹ The Civil Society Committee's functions were later merged with the OAS Office of Summit Follow-up and are now managed by the OAS Department of International Affairs within the Secretariat of External Relations.⁴⁸² The OAS accreditation program and summit-related issues are now managed by the Permanent Council Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities (CISC).⁴⁸³ The CISC's functions are defined as follows:

- a. With respect to the Summit process:

⁴⁷⁹ OAS G.A. Res. 1661, OAS Doc. AG/RES. 1661 (XXIX-O/99) (June 7, 1999).

⁴⁸⁰ *Id.*

⁴⁸¹ OAS G.A. Res. 759, OAS Doc. OEA/SER.G, CP/RES.759 (1217/99) (Dec. 15, 1999), available at <http://www.civil-society.oas.org/Permanent%20Council/CP-RES-759.htm> (last visited Aug. 2, 2009).

⁴⁸² The work of the Civil Society Committee and its relationship to the summit process is described on its web page at <http://www.civil-society.oas.org/>.

⁴⁸³ The Permanent Council Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities (CISC) maintains a web site at <http://www.oas.org/consejo/CUMBRES/> (last visited July 30, 2009).

- i. To coordinate OAS activities in support of the Summits of the Americas process;
 - ii. To coordinate follow-up and implementation activities relating to mandates assigned to the Organization by the Summits;
 - iii. To request and receive contributions from civil society, relating to its participation in the Summit process, for consideration by the Summit Implementation Review Group (SIRG);
 - iv. To study topics relating to the Summit process that are assigned to it by the Council or the General Assembly and to make recommendations thereon to the Permanent Council;
 - v. To consider the reports prepared by the Executive Secretariat for the Summit Process and the technical dependency responsible for ministerial meetings and other sectoral meetings linked to the Summits process.
- b. With respect to civil society participation in OAS activities:
- i. To implement the Guidelines for the Participation of Civil Society Organizations in OAS Activities and to present to the Permanent Council such amendments as the Committee deems pertinent;
 - ii. To design, implement, and evaluate the necessary strategies to increase and facilitate civil society participation in OAS activities;
 - iii. To promote the strengthening of relations established between civil society organizations and the bodies and dependencies of the OAS within the scope of the functions conferred upon the Permanent Council by the OAS Charter;
 - iv. To study matters relating to civil society participation in OAS activities that are presented to it by civil society organizations or entrusted to it by the Permanent Council or the General Assembly and to

make recommendations thereon to the Permanent Council;

- v. To analyze and transmit to the Permanent Council applications presented by civil society organizations to the Secretary General to participate in OAS activities.⁴⁸⁴

The merging of summit and civil society liaison functions reflects the fact that the OAS agenda, at the broadest political level, is increasingly driven by the summit process, and that the facilitation and management of input from non-state actors at the OAS and in the summit process are administratively and institutionally parallel.⁴⁸⁵

Jurisgenerative Potential of Summits

These four case studies show that summits advanced the international lawmaking process in the Inter-American System, and in some cases they produced international legal commitments that even a strict formalist could recognize as positive law. Inter-American summits nurtured institutional reforms

⁴⁸⁴ Org. of Am. States, Permanent Council, *Rules of Procedure of the Permanent Council of the OAS*, at 6, OAS Doc. OEA/Ser.G, CP/doc.1112/80 rev. 4 corr. 1 (Aug. 27, 2003), available at scm.oas.org/doc_public/ENGLISH/HIST_03/CP11732E07.DOC (last visited Aug. 2, 2009); see also Org. of Am. States, Permanent Council, *Work Plan of the Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities (2005–2006)*, OAS Doc. OEA/Ser. G, CP/CISC-183/05 rev. 1 (Sept. 26, 2005) (outlining the commitment to engage civil society actors as part of summit follow up and implementation activities in furtherance of OAS support role in summit process).

⁴⁸⁵ An examination of the OAS Civil Society web site demonstrates how these functions overlap. It also shows how important partnerships with NGOs and NGO networks have become to the Summit process and to the OAS. See <http://www.civil-society.oas.org/> (last visited Sept. 21, 2009).

both in the process for negotiating a regional trade accord and the process for engaging non-state actors in the OAS. Summits also gave rise to the IADC, which has positive legal features. While these instruments and institutional reforms have yet to be fully deployed, they owe their genesis to summits and the unique framework for access and interaction that summits offer.

Evidence of a shift in state practice tied to a summit commitment can be seen in the fact that both Argentina and Mexico enacted laws on access to information in the years that followed the approval of the Inter-American Strategy for Public Participation which was approved in 2000.⁴⁸⁶ The call for a domestic commitment to greater access to information was one of the principal recommendations of the ISP that emerged from the summit process.⁴⁸⁷ It cannot be claimed that the ISP alone motivated these changes, but some influence can certainly be posited.⁴⁸⁸

⁴⁸⁶ See Decreto No. 1172/03, Dec. 3, 2003, B.O. (Arg.); Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, [Federal Law of Transparency and Access to Public Governmental Information], Diario Oficial de la Federación [D.O], 11 de Junio de 2002 (Mex.).

⁴⁸⁷ See ISP Strategy Document, *supra* note 404, at 5–6.

⁴⁸⁸ As discussed *supra* notes 408 to 409, the author served as a member of the Technical Advisory Group that helped shape the ISP process and draft its language over the course of two years, and in that capacity worked closely with foreign and environment ministry officials from Argentina and Mexico, who regularly monitored the process of developing the ISP. As discussed *supra* note 409, the Mexican government hosted the final meeting in which the language of the ISP was debated. Argentine and Mexican NGOs also played a prominent role in formulating the ISP, and the participation of non-state actors from Mexico was facilitated by the location of the final drafting meeting: Mexico City.

From a legal process perspective, summits play a role in determining “international society’s values” and thus legitimize and substantiate normative claims.⁴⁸⁹ Summits are highly public events where government leaders seek both to affirm and to define societal values through dialogue and consensus. Non-state actors reflecting a broad cross-section of civil society collaborate in summit preparatory meetings and agenda setting. At times, governments invite non-state

Participant lists of ISP meetings and notes of meetings, including the Mexico City meeting, are on file with author. While causal claims cannot be proved, the participation of government officials and non-state actors from both countries as an integral part of the ISP development process over the course of two years leaves open at least the possibility that they were influenced, inspired, or at least informed by the process. The ISP certainly facilitated the formation and strengthening of an epistemic community of governmental and non-governmental actors concerned with greater public access to development decision-making in both of these countries, and connected them with others from throughout the region with similar interests. While offering proof of the mechanisms through which such a community worked is beyond the scope of this Article, the NGO community’s potential to affect policy outcomes should not be discounted.

⁴⁸⁹ For a discussion of new international legal process theory, see Mary Ellen O’Connell, *New International Legal Process*, in RATNER & SLAUGHTER, *supra* note 186, at 84–86; see also Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183-86 (1996) (discussing transnational legal process as the “theory and practice of how public and private actors ... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”). While the case studies discussed above focus on regional policy and international norms, the impact of summits on domestic policy is also worth exploring. An argument might be made that summit attention to participatory democratic mechanisms has led to increased interest in these mechanisms at the national level, a claim that transnational process theorists such as Harold Koh might find interesting. See *id.* at 205 (“Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.”).

actors to participate directly as ex officio members of negotiating teams.⁴⁹⁰ Even some arenas of public protest against summits or their agendas have been funded and sanctioned by government.⁴⁹¹ This speaks less of co-option than of an effort to engage interested parties, including vocal dissidents, in the dialogue on regional values and policies. The most radical dissenters—those who outright reject summit initiatives and turn to street rallies or violence to convey their message—also use summit venues to stage their theatre, thus implicitly acknowledging that even outsiders find some utility in the broader summit process.⁴⁹²

⁴⁹⁰ The author has spoken with several individuals who have served in this capacity, including individuals invited by the governments of Canada, Germany, and the United States. *See also* UNAIDS Programme Coordinating Board Communique (January 2009) at 2, *available at* [http://www.unaidspcbngo.org/pcb/blog/UNAIDS_PCB_NGO_Delegation_Communique_on_the_23rd_PCB_mtg_final%20\(1\).doc](http://www.unaidspcbngo.org/pcb/blog/UNAIDS_PCB_NGO_Delegation_Communique_on_the_23rd_PCB_mtg_final%20(1).doc) (*last visited* October 31, 2009) (noting that some states included civil society in their own national delegations at a UN conference on HIV in 2008); *Taking Issue: The Sustainable Development Issues Network* Volume 5, Issue 10 (April 15 2005) at 1, *available at* http://www.bpwnl.nl/archief/th4_sust/050415-TI.doc (*last visited* October 31, 2009) (noting that, since the Johannesburg World Summit on Sustainable Development, “the Dutch have included a Youth, a Women and a NGO representative in their national delegation”).

⁴⁹¹ Canada partially funded the People’s Summit as an alternative to the official summits both in Santiago in 1998 and Quebec City in 2001. Interviews by author with representatives of Canada’s Permanent Mission to the OAS. President Hugo Chavez of Venezuela was a keynote speaker at the People’s Summit in Mar del Plata in 2005. *See Terminó la Cumbre de los Pueblos*, NACIÓN (Arg.), Nov. 4, 2005, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=753463 (*last visited* October 31, 2009).

⁴⁹² For example, regional firebrand Hugo Chavez, President of Venezuela, used the occasion of the 2005 summit in Mar del Plata, Argentina, to stage a massive public rally

The cases also suggest that summits promote conforming behavior among state agencies and regional organizations through interaction and the internalization of norms.⁴⁹³ Linking these institutions to civil society actors lays a foundation for cooperative follow-up, and it produces expectations among societal *demandeurs* who are in a position to monitor implementation and promote further progress.⁴⁹⁴ This may strengthen the propensity of states to comply with

outside of the formal diplomatic proceedings. The rally was aimed at generating public sentiment in favor of his own government's policy positions and against those of his favorite target, the United States. See Elisabeth Bumiller, *In Latin America, Messy Foray for Bush*, INT'L HERALD TRIB., Nov. 6, 2005, available at <http://www.nytimes.com/2005/11/06/world/americas/06iht-letter.html> (last visited October 31, 2009); Jordana Timerman, *Chávez and Maradona Lead Massive Rebuke of Bush*, NATION, Nov. 5, 2005, available at <http://www.thenation.com>.

⁴⁹³ For a discussion of the importance of these factors in shaping normative responses, see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2400 (1991).

⁴⁹⁴ Even more aspirational statements of principle embodied in summit commitments can promote expectations which, over time, can be converted to hard commitments through the efforts of interested state and non-state actors. These statements formed part of the basis for claims for greater access to the FTAA negotiation process by organizers of the Americas Trade and Sustainable Development Forum (ATSDF), who were able to cite summit commitments dating back to 1994 in their effort to open up the trade ministerial meetings in Quito in 2002 and Miami in 2003. See *supra* notes 447 to 451 and accompanying text. Non-state actors involved in the summit process have also been involved in summit follow-up projects, which monitor compliance with summit mandates. See, e.g., *The Summits Must Not End Up As Empty Promises: Hemispheric Report 2006-2008*, Active Democracy Citizen Network For Governmental Compliance with the Summits (April 2009) available at [http://www.civil-society.oas.org/documents/123_ENG_informe%20hemisf%C3%A9rico%20\(ingl%C3%A9s\).pdf](http://www.civil-society.oas.org/documents/123_ENG_informe%20hemisf%C3%A9rico%20(ingl%C3%A9s).pdf) (last visited October 31, 2009) (report of a summit commitment monitoring project implemented by Corporación Participa, among others, and funded by the U.S.

obligations by putting NGOs in a better position to perform “parallel and supplementary” monitoring functions.⁴⁹⁵

Summits also provide a mechanism that can reinforce state efforts to advance policy goals when these goals are both consistent with the value-laden currents of the summit process and supported by the summits’ epistemic communities. Peru, for example, sought regional affirmation to secure the position of its elected leaders at a critical moment in its history, and its interim President, Valentín Paniagua, used the summit process to advance the IADC and bolster fragile domestic institutions after eight years of autocratic rule.⁴⁹⁶ After its former President, Alberto Fujimori, had threatened to return and rule his country, Paniagua used a moment of democratic respite to secure some assurances from Peru’s neighbors, through the IADC, against the possibility that Fujimori might make good on his threat. Peru was substantially aided by the historical summit rhetoric of democracy and an array of pro-democracy groups and like-minded countries that had coalesced around the summit process to form a supportive epistemic community.⁴⁹⁷ While the IADC remains a relatively young instrument, and it has yet to be tested by a returning exile like Fujimori, it did appear to

Government through the National Endowment for Democracy, and by the Canadian International Development Agency and the OAS).

⁴⁹⁵ See CHAYES & CHAYES, *supra* note 212, at 250–53.

⁴⁹⁶ See *supra* notes 427 to 439 and accompanying text.

⁴⁹⁷ See Haas, *supra* note 187, at 569-70 (describing idea of “epistemic communities”).

operate as designed in the first two cases that arose after its adoption.⁴⁹⁸ More recently, following the military ouster of Honduran President Ernesto Zelaya in June 2009, IADC procedures were invoked and OAS member states presented a largely unified front by suspending Honduras membership and by cutting off aid and other financial flows to the country.⁴⁹⁹

⁴⁹⁸ The IADC was invoked in response to the coup attempt in Venezuela in April 2002. See Denis Paradis, Secretary of State For Latin America and Africa, Statement to the 29th Special Session of the General Assembly of the Organization of American States (April 18, 2002), available at <http://www.oas.org/speeches/speech.asp?sCodigo=02-0347> (last visited Aug. 2, 2009). It was not invoked in Haiti in February 2004, despite the arguments by some, including Jean Bertrand Aristide, that what took place was effectively a coup. See Mark Weisbrot, Co-Director for the Center of Economic and Policy Research, Statement to OAS Meeting Between Civil Society Organizations, the Secretary General, and Heads of Delegations (June 6, 2005), available at <http://www.commondreams.org/cgi-bin/print.cgi?file=/news2005/0606-20.htm> (last visited July 30, 2009).

⁴⁹⁹ At the time this Article went to press there was still no consensus resolution of the controversy surrounding Zelaya's ouster, although it appeared that OAS member states, including the United States, were taking a wait-and-see approach and were poised to recognize the results of a planned November 29, 2009 election. Mary Beth Sheridan, *Honduras Accord is on Verge of Collapse; Ousted President Says U.S. Lacks Commitment to Reinstatement*, The Washington Post, (Nov 12, 2009) at A3. A full analysis of how the IADC worked in the wake of the Honduran coup (or not) will need to be conducted with the benefit of time, more complete information, and hindsight, but it appears even from contemporaneous and incomplete reports that the instrument worked at least in some of the ways it was planned to work by providing a framework for regional response and coordination—and for normative pressure. The Charter did not prevent a coup, but that was not its purpose. Instead it provided a basis for regional democracies to speak and act with a degree of purpose and unity, and it appears that, despite some delay and consternation, they did so. [XX update after results of Nov 29 election]

Examples such as the IADC also show the utility of summits as proactive mechanisms that allow states to move from a problem-oriented, reactive mode to one of setting goals and aspirations. While the IADC grew partly out of Peru's experience with Fujimori, and in that sense interest in such a mechanism can be seen as a reaction, broader regional support for the IADC can be seen as a proactive move to create a framework for response and to create disincentives to future democratic disruptions. Canada's effort to create a mechanism for NGO accreditation within the OAS is another example of a proactive approach. It was not a response to any crisis or any new demand on the part of NGOs. Until Canada began pushing to formalize access, NGOs that had historically chosen to work with the OAS or to seek to influence its policies had found informal avenues and mechanisms to do so.⁵⁰⁰ Canada sought broader participation in OAS political bodies and regularized access to documentation, among other things, as a means of improving the system at a time when it had the luxury to do so, and it found an advantage in working through the summit process and its network of

⁵⁰⁰ See Report on Juridical and Political Affairs, *supra* note 467, at 4–6; see also Org. of Am. States, Permanent Council, *Nongovernmental Organizations With Which the Organization of American States Has Established Cooperative Relations*, OAS Doc. CA/CAJP-962/94 (Sept. 1, 2004), available at <http://www.civil-society.oas.org/Permanent%20Council/CP-CAJP-962-94-septiembre%20de%201994-eng.htm> (last visited Aug. 2, 2009) (describing the range of cooperation between NGOs and various OAS organs prior to the creation of a formal accreditation mechanism).

democracy groups, instead of working solely through the OAS itself, which had been historically resistant to an accreditation scheme.⁵⁰¹

Inter-American summits have also helped place the negotiation of prescriptive agreements in the broader context of regional values. In the case of the FTAA, summit commitments called for attention to regional social concerns that would otherwise be anathema to a traditional trade negotiation.⁵⁰² While many have argued against the FTAA, and indeed trade agreements in general, as a neo-colonial instrument that will benefit the wealthy at the expense of the poor,⁵⁰³ summit instruments have at least called for some effort to balance economic goals with social concerns, and they have lent support to those who would bring social concerns to the negotiating table. Nascent efforts to open the FTAA negotiating process to non-state actors can also be traced to explicit commitments made through the summit process.⁵⁰⁴ While the current breakdown in FTAA negotiations reflects a deeper global policy dispute about the terms under which

⁵⁰¹ Recall that efforts at reform through internal processes had proceeded at a snail's pace and produced a proposal that was more of a step backward than forward. *See supra* notes 465 to 468 and accompanying text.

⁵⁰² *See supra* notes 452 to 460 and accompanying text; *see also* Miami Plan of Action, *supra* note 285, ¶ 9(2) (calling for trade expansion to be pursued in a manner consistent with environmental policies and concerns for workers' rights).

⁵⁰³ *See* Dannenmaier, *supra* note 199, at 1087-89.

⁵⁰⁴ *See* Miami Plan of Action, *supra* note 285, ¶ 9(2).

multilateral trade accords will proceed,⁵⁰⁵ the summit process has offered a stage upon which the issues at the heart of the quarrel can be publicly contested, and it may eventually provide a vehicle to resolve contests that otherwise would have no forum.

The inter-American summit process has also promoted international policy transparency more broadly, both through the access it provides to non-state actors seeking to monitor and influence the agenda and through the stage it sets for leaders to carry their policy messages to a broader audience. The former is facilitated in part because the process has been open from the outset, and because non-state actors have found ways to engage delegations and promote their agendas.⁵⁰⁶ The latter is facilitated in part because summit commitments are negotiated with a view toward a broader audience and because language is less technical and more accessible.⁵⁰⁷ The effort to explain policy priorities through public international forums has the potential to be transformative. At the least, it opens up opportunities to engage the public in new and potentially meaningful ways. Government officials and civil society leaders recognize that audiences for

⁵⁰⁵ FTAA negotiations became stalled—along with global WTO negotiations—over disputes about agricultural subsidies and industrial market access that appeared to defy compromise in the Doha round. *See So, What Next?*, 12 BRIDGES, DEC. 2008–JAN. 2009, at 1, 1 (“WTO Director General Pascal Lamy told the [WTO] membership on 12 December that his consultations with capitals had not revealed ‘a readiness to spend the political capital’ needed to reach an agreement.”).

⁵⁰⁶ *See supra* notes 287 to 318 and accompanying text

⁵⁰⁷ *See supra* notes 319 to 386 and accompanying text

summits are members of their diverse societies, and they thus seek to make policy goals and principles transparent. The downside, of course, is additional precatory language that is vague, aspirational, and unenforceable. But this language, though broad and aspirational, can serve to clarify and reinforce “international society’s values”⁵⁰⁸ in a way that more technical treaties often cannot and these values are an important touchstone for norms that guide state behavior.

Institutional theorists should recognize inter-American summits as a valuable tool of international law because summits rely heavily on cooperative models and institution building.⁵⁰⁹ In each of the cases described above, there is evidence that commitments of the inter-American summit process have resulted in administrative changes and institutional adaptations at the regional level. Summits may be viewed either as supporting existing institutions—they certainly

⁵⁰⁸ See Mary Ellen O’Connell, *New International Legal Process*, in Steven R. Ratner and Anne-Marie Slaughter, eds., *Symposium on Method in International Law*, 93 AM. J. INT’L L. 334, 336, (1999). O’Connell describes the relationship between legal process theory to international legal process theory and explaining that, for legal process theorists, “acceptable answers” about law’s purposes “should be guided by society’s values.” *Id.* She concludes that new international legal process theory “would advocate knowledge of the legal system and valuing institutional settlement in line with international society’s values.” *Id.* at 339.

⁵⁰⁹ For a discussion of institutionalist theory, see Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, in RATNER & SLAUGHTER, *supra* note 186, at 134–35; see also Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 489 (1997) (“The ‘instrumentalist optic’ focuses on interests and argues that rules and norms will matter only if they affect the calculations of interests by agents. International institutions ... can make a difference, but only when their rules create specific opportunities and impose constraints which affect state interests.”).

breathed new life into the OAS in the past decade—or as being institutions in their own right. In either case, summits potentially have independent effects on behavior by changing the context of interaction, facilitating negotiation and implementation, reducing transaction costs,⁵¹⁰ providing constituent-derived information, inserting expert actors, and facilitating the pooling of information.

Inter-American summits have also constructed frameworks for institutional cooperation. Some of these frameworks have been formalized through the OAS system, such as the Summit Implementation Review Group⁵¹¹ and the Inter-American Working Group on Sustainable Development.⁵¹² Some cooperative frameworks remain informal and fluid.⁵¹³ Summits serve to motivate

⁵¹⁰ Of course it is possible, perhaps likely, that additional process features will result in some increased transaction costs, particularly in the short term, as mechanisms and institutional infrastructure are created to manage the process. But these costs should be offset by the increased animation of a public that can help shape and implement policy.

⁵¹¹ See *supra* notes 279 to 280 and accompanying text.

⁵¹² This is a group of inter-governmental organizations including OAS technical units concerned with sustainable development issues that was convened by the Head of the Unit for Sustainable Development and Environment (now the OAS Department of Sustainable Development). See Org. of Am. States, Working Group on Sustainable Development, *Work Schedule of the CEPCIDI Working Group on Sustainable Development, October/December 2006*, OAS Doc. Ser.W/IV CEPCIDI/GT/DS/doc.62/06 (describing Working Group plans for a ten-year follow up on the Santa Cruz Summit).

⁵¹³ Examples include the Civil Society Task Force of the Esquel Group Foundation, which convened monthly meetings of state and non-state actors to discuss regional issues, the inter-American summit process in Washington, D.C., and the Partners of the Americas Civil Society Forum, which has hosted regional workshops and internet forums relating to the regional summit process. See, e.g., Esquel Group, Task Force,

and facilitate this cooperation and to clarify the cooperative agenda. They also offer a mechanism for ratifying institutional advancements and arrangements that emerge through the cooperative process.

Finally, inter-American summits provide a potentially important negotiating space for heads of state, and for their advisors and agencies in the process of negotiating summit agendas, which might create strong inter-personal relationships and networks. These interactions may promote greater trust and affinity among participants because they are not crisis driven, and in most cases they do not involve high stakes. In this respect, the broader, more aspirational nature of summit commitments gives diplomats an opportunity to interact and work toward consensus on statements of principle and programs of cooperation. This forward-looking, relatively positive negotiation space might help build relationships among and even informal networks of officials who might serve to foster deeper collaborative efforts and to diffuse tensions and facilitate progress when crises arise.

Conclusion

The cases reviewed in this Article offer examples of state and non-state actors working in the inter-American system, and they demonstrate unique participatory aspects of the summit process that advance policy and normative

<http://www.esquel.org/taskforce> (last visited July 30, 2009); *Advances and Challenges Facing Civil Society Within the Framework of the Summits of the Americas*, http://www.partners.net/images/partners/EN/Documents/PDF/monterrey_report.pdf (last visited July 30, 2009).

goals. The cases suggest that inter-American summits have a discernable normative push, at least in part because they exhibit process features such as transparency, openness, and inclusive agenda setting that emphasize value formation and collaboration among state and non-state constituencies. Inter-American summits can be seen to serve a legitimizing and value-internalization function that is meaningful in international lawmaking, even when direct outcomes are not hard law.

By pursuing democratic objectives within a process that itself has democratic features, inter-American summits have produced a mutually reinforcing phenomenon, increasing their own jurisgenerative potential even as they expand public access to the traditionally insular world of international decision making. Given that the discourse of democracy has become increasingly important in the Western Hemisphere, if not globally, the importance of this phenomenon should not be discounted.

The case studies from the inter-American region demonstrate that head of state summits can satisfy the democracy concerns that animate both access critics and access proponents. Where summits include the type of process features that have become integral to the summit of the Americas system—open consultations, information sharing, cooperative dialogue, and government financial support—they engage and build epistemic communities that are concerned with summit agenda items, such as the environment, health care, women's rights, and the preservation and expansion of democratic domestic institutions. Summits of this

type do not represent a move toward a formal, electoral “new order,” but they do offer an open, transparent, and network-driven model of deliberative democracy. Yet the outcomes are not forced upon state leaders nor formulated behind their backs. In every case, state officials are at the center of negotiations and heads of state and government sign final commitments. Where necessary, state legislators still ratify or adopt outcomes that require changes in domestic law.

Thus, despite greater openness and participation, states do not compromise fundamental claims about decision-making authority. In fact, as the Peru and Canada case studies show, state leaders often initiate proposals that are developed and strengthened through the summit process in a way that might not otherwise be possible. The process itself—which takes place within a supportive and reinforcing epistemic community—demonstrably advances state goals and outcomes, and the active participation of domestic constituencies helps to deepen commitment to the outcomes within those constituencies.

The cases presented in this Article each deal with state objectives that call upon values that are widely shared by active communities of interest. The specific policy objectives were thus amenable to progress with the full participation of non-state actors. It is probable that other state goals that are less broadly shared would have less purchase in the kind of deliberative international process that summits can offer. Yet even where a state goal is controversial, there is reason to believe that public access can support positive outcomes. The FTAA case study, for example, shows that deliberative processes can yield positive

outcomes even where deep controversy exists. This Article assesses only an initial sample and additional work is needed to determine the extent to which issue variables would advance or impede successful outcomes in a deliberative international setting.

The Article also samples a set of case studies within a regional system that itself has unique features. All state participants in the inter-American summit process are nominal democracies, and while some key actors have demonstrated less-than-democratic tendencies, this formal feature might also lead to more positive outcomes for deliberative processes. Certainly, the willingness of regional summit participants to pursue a democracy agenda, and to do so in a participatory manner, can be tied to their shared political traditions. But it should be recalled that the position of access critics is that increased participation in an international setting threatens the democratic values of democratic states, so it is valid to test this claim within a community of democracies. Certainly, as summits are studied for their broader potential as deliberative mechanisms, the variables of state political systems and regional political heterogeneity will need to be separately assessed.

No claim is made that the inter-American summits are representative of all summits, or that their process features are universal; indeed, summits follow many forms and produce varied results. But summits held in the Western Hemisphere do share many features in common with other summits, making them a useful model to examine. In addition to issue and system variables discussed

above, further research is needed to determine how far claims about normative push and legitimization may extend beyond the inter-American experience. Even where summit processes are less open and transparent, as many regional models seem to be, the jurisgenerative potential of summits is a feature worth examining. While these issues are beyond the scope of this Article, the work presented herein may help frame issues for future research.

CHAPTER 4 THE ROLE OF NON-STATE ACTORS IN CLIMATE COMPLIANCE⁵¹⁴

Introduction

Non-state actors have helped to advance the international climate regime since its inception.⁵¹⁵ They breathed life into initial commitments in 1992, playing a “prominent role in galvanizing support” for the UN Framework Convention on Climate Change (UNFCCC) that emerged from the Rio Conference.⁵¹⁶ By one account of Rio, “the ratio of NGO participants to UN and

⁵¹⁴ This chapter was published as Eric Dannenmaier, *The Role of Non-State Actors in Climate Compliance*, in Jutta Brunnée, et al., eds., *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME*, 149-77 (Cambridge University Press) (2012). Citations to the material in this chapter should be to that piece. It is available for download from ssrn.com

⁵¹⁵ This chapter deals with the broadest category of non-state actors, including all nine major groups identified as stakeholders in Agenda 21 (business and industry non-governmental organizations (BINGO); environmental non-governmental organizations (ENGO); indigenous peoples organizations (IPO); farmers non-governmental organizations (Farmers); local government and municipal authorities (LGMA); research and independent non-governmental organizations (RINGO); trade unions non-governmental organizations (TUNGO); women and gender non-governmental organizations (Women and Gender); and youth non-governmental organizations (YOUNGO)) as well as parliamentarians, individual citizens, and any other non-state stakeholder or constituent in climate change issues. The author makes no distinction among these groups or individuals for purposes of access rights. Although these distinctions may be relevant within a given institution, forum, or process, they are beyond the scope of this chapter.

⁵¹⁶ “Combating Global Warming: The Climate Change Convention,” Background Paper for Earth Summit +5, Special Session of the UN General Assembly to Review and Appraise the Implementation of Agenda 21, (1997) available at <http://www.un.org/ecosocdev/geninfo/sustdev/climate.htm>; see also John W. Ashe1,

government officials was one to one.”⁵¹⁷ Jessica Mathews has noted that “NGOs set the original goal of negotiating an agreement to control greenhouse gases long before governments were ready to do so, proposed most of its structure and content, and lobbied and mobilized public pressure to force through a pact that virtually no one else thought possible before the talks began.” Mathews argues that NGOs “penetrated deeply into official decision-making” at the 1992 Conference.⁵¹⁸ Non-state actors have been active *demandeurs* of negotiators ever since – supporting (and in some cases opposing) a robust climate regime. They have even participated directly in negotiations, to a point.⁵¹⁹ While this level of non-state participation is not universally acclaimed (indeed it is contested by

Robert Van Lierop, and Anilla Cherian, “The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFCCC),” 23 *Natural Resources Forum* 209-220 (1999); Steve Lerner, “Beyond the Earth Summit: Conversations With Advocates Of Sustainable Development” 89, 144 (1992).

⁵¹⁷ Chiara Giorgetti, “The Role of Non-governmental Organizations in the Climate Change Negotiations,” 9 *Colo. J. Int'l Envtl. L. & Pol'y* 115 (1998); *see also* Dan Tarlock, “The Role of Non-Government Organizations in the Development of International Environmental Law,” 68 *Chi.-Kent L. Rev.* 61, 61(1992);

⁵¹⁸ Jessica T. Mathews, “Power Shift,” *Foreign Affairs* (Jan/Feb 1997) at 55.

⁵¹⁹ For example, a public interest environmental NGO, the Centre for International Environmental Law (now the Foundation for International Environmental Law and Development (FIELD)) in London and the Center for International Environmental Law (CIEL) in Washington, DC), represented small island states early in the process.

some states and scholars)⁵²⁰ many states have welcomed and facilitated non-state access.

Non-state actors have also been welcomed as observers of the compliance process as commitments to cooperative action and Greenhouse Gas (GHG) reductions emerged in 1998 at Kyoto and have continued to evolve in negotiations for a climate change framework beyond 2012. Transparency has become a key feature of climate compliance. As Jennifer Morgan notes in her contribution to this volume, “on a high level, all parties have agreed to a greater level of reporting, review and verification than ever before.”⁵²¹ This commitment to openness is vital. In addition to facilitating cooperative or enforcement interventions to resolve noncompliance, information access promotes broader public awareness of the climate change problem and informs debate about the effectiveness of measures designed to address that problem. It also, not coincidentally, links constituents to the work of their state representatives and facilitates more articulate public demands for action (as noted above, these

⁵²⁰ See discussion *infra* at pages 204-13.

⁵²¹ Jennifer L. Morgan, “The Emerging Post-Cancun Climate Regime,” in this volume at XX *citing* Fransen, Enhancing Today's MRV Framework to Meet Tomorrow's Needs: The Role of National Communications and Inventories (Working Paper) (Washington: World Resources Institute, June 2009); H. Winkler and J. Beaumont, ‘Fair and Effective Multilateralism in the Post-Copenhagen Climate Negotiations’, *Climate Policy*, 10.6 (2010), 638-654.

demands have been a critical feature of constructing the climate regime since its inception).⁵²²

Unfortunately, despite this level of non-state participation and transparency, compliance mechanisms emerging from climate change negotiations create very limited formal space for non-state actors in assuring international climate law compliance through direct action. Non-state actors have created a space for themselves (with state acquiescence) in negotiations, and states have assured a degree of transparency with respect to both negotiating and implementing climate regimes constructed so far. But failing to integrate non-state actors into the principal mechanisms for climate law compliance misses an important opportunity. This is not to say that greater non-state participation in compliance is an unalloyed good, nor to deny the importance of state-to-state procedures. But it can be reasoned, consistent with the increasing weight of international authority, that non-state access to compliance actions has important intrinsic and instrumental value that is of particular relevance in the climate change context.

This chapter highlights that value and documents progress to date in providing that access. The chapter offers examples of non-state access to existing multilateral environmental agreements that have features which may be relevant

⁵²² An informed public can better assess the effectiveness of regimes their governments have constructed and thus reward success or press for reform. This can include pressing for additional policy changes at home in a domestic context or promoting regime strengthening in international negotiations.

for the evolving climate change regime. In order to emphasize the utility – and creativity – of non-state actors in advancing climate concerns through the compliance provisions of international regimes, the author also details a number of recent cases where NGOs have advanced climate change concerns before “non-climate” institutions. These cases not only illustrate the ability of non-state actors to promoting climate compliance (even where legal tools are not originally so designed or particularly well suited) but also provide models of how they might be engaged in post-2012 climate compliance institutions. The author concludes that the positive impact of non-state participation in advancing climate change concerns is an important feature of the evolving climate regime, and recommends that negotiators embrace a even more substantive role for non-state actors in post-2012 climate compliance mechanisms and institutions.

Access as an Emerging International Norm

Non-state access to the institutions and processes of international law serves both intrinsic and instrumental values.⁵²³ Public participation advances

⁵²³ For a discussion of these democratic process concerns in greater detail *see, e.g.*, Eric Dannenmaier, “Lawmaking on the Road to International Summits,” 59 DePaul L. Rev 1 (2009) [hereinafter International Summits] at 2-6; Mary Ellen O’Connell, “New International Legal Process,” in THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2005), at 84–86; see also Harold Hongju Koh, “The 1994 Roscoe Pound Lecture: Transnational Legal Process,” 75 NEB. L. REV. 181, 183-86 (1996) (discussing transnational legal process as the “theory and practice of how public and private actors ... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”)

concerns about democratic process and the legitimacy of international rules⁵²⁴ even as it promotes the integration and acceptance of legal norms on a transboundary basis.⁵²⁵ It supports the construction of international legal frameworks that more closely fit social norms and promotes greater compliance with those frameworks once constructed. Broader access also helps to assure that information responds to priority public concerns and that communication occurs bi-directionally.⁵²⁶ Participatory and democratic models rely not only on citizens knowing what the state is up to. State leaders must know what their constituents value. Non-state access to decision-making and compliance has particular salience within a framework such as climate where the policies and measures that will assure success must be embraced and implemented locally.

As the Framework Convention on Climate Change was approved at the 1992 Rio Summit, delegates also produced an action programme for the United

⁵²⁴ See generally Thomas Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

⁵²⁵ See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (advancing a “managerial” model of treaty compliance that relies on a continuing dialogue between the parties, international officials, and NGOs); Jutta Brunnée, “The Kyoto Protocol: Testing Ground for Compliance Theories?” in this volume at XX.

⁵²⁶ Communication in fact occurs multi-directionally through many formal and informal means. But if one thinks in terms of a vertical governance model with a top (state leadership) and bottom (constituents), then it is not enough for communication to be top down; it must also be bottom up. In reality such a simple model fails to describe the many complex interactions and dialogues that inform state policy. But, unfortunately, there is still a tendency to fall back on this simple bilateral hierarchy when constructing formal legal systems at international law.

Nations, known as Agenda 21, and a Declaration on Environment and Development (Rio Declaration). Each document highlighted the commitment of states to critical principles for assuring long term sustainable development. Agenda 21 recognizes the importance of “national strategies, plans, policies and processes” and “international cooperation” in facing “the challenges of the next century” even as it encourages the “broadest public participation and the active involvement of non-governmental organizations and other groups.”⁵²⁷ Principle 10 of the Rio Declaration goes further, acknowledging that “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”⁵²⁸ Using relatively prescriptive, Principle 10 of the Rio Declaration states:

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

⁵²⁷ Report of the United Nations Conference on Environment and Development, Annex 2, Agenda Item 21, U.N. Doc. A/Conf. 151/26/Rev.1 (1992) at ¶1.3 [hereinafter Agenda 21].

⁵²⁸ Report of the United Nations Conference on Environment and Development, Principle 10, U.N. Doc. A/CONF. 151/26/Rev.1 (1992) (emphasis added) [hereinafter Rio Declaration].

information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁵²⁹

The “Rio Access Principles” embodied in Principle 10 can be described in shorthand as:⁵³⁰

1. Access to information;
2. Access to the process of (or “participation in”) decision-making;
and
3. Access to justice.

These principles are increasingly recognized in practice – particularly within multilateral environmental agreements.

In 2002, the environmental research group Eco-Logic conducted a study of NGO participation in international environmental co-operation on behalf of the German Federal Environment Agency (*Umweltbundesamt*).⁵³¹ The study included an examination of MEA practices as well as economic institutions and

⁵²⁹ *Id.*, Principle 10.

⁵³⁰ *See, e.g.*, Eric Dannenmaier, “Democracy in Development: Toward a Legal Framework for the Americas,” 11 *Tulane Env'tl. Law J.* 1, 8 (1997). The alternative formulation of the second principle (participation in decision-making) has been adopted by, for example, World Resources Institute’s Access Initiative. *See, e.g.*, Joseph Foti, et al., “Voice and Choice: Opening the Door to Environmental Democracy,” World Resources Institute (2008) at 2, *available at* http://www.accessinitiative.org/sites/default/files/voice_and_choice.pdf.

⁵³¹ Sebastian Oberthur, et al., *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*, Final Report.

other international institutions and relied on interviews as well as an examination of institutional agreements. It concluded that “all international institutions relevant to the environment – be it formal organisations or treaty systems – appear to have at their disposal some kind of NGO consultation.”⁵³² In 2006, the UN Economic Commission for Europe’s (UNECE) Aarhus Secretariat circulated a questionnaire among more than one hundred ‘international forums’ (defined broadly to include institutions, secretariats, commissions, etc.) in an effort to catalogue current approaches to public participation.⁵³³ Respondents included most of the major global institutions with environmental policy relevance as well as secretariats of global environmental conventions and a number of regional forums. The questionnaire responses reveal widespread practices that emphasize access to information and procedures granting observer status to non-state actors. The questionnaire responses also show that several forums have committees or groups that place non-state actors in an advisory role to the forum – either directly or through a sort of joint committee which includes key state actors alongside non-state actors – variously called “global steering committee,”⁵³⁴ “organizing

⁵³² Id. At 206-07.

⁵³³ United Nations Economic and Social Council, and Economic Commission for Europe (UNECE), *Synthesis of Responses Received from International Forums to the Written Questionnaire in the Consultation Process on the Almaty Guidelines: UN/ECE/MP.PP/WG, 2007* (hereinafter *UNECE Synthesis of Responses*).

⁵³⁴ Response of United Nations Environment Programme (UNEP) to the Aarhus Secretariat Questionnaire (copy on file with author).

partners,⁵³⁵ and “advisory networks.”⁵³⁶ Responses also revealed “formalized compliance mechanisms that allow NGOs to present issues of compliance” to several bodies.⁵³⁷ In addition, the secretariat of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) reported “draft operating rules then being drawn up” to assure that the Committee could consider compliance information from the public.⁵³⁸

The Aarhus Convention Secretariat itself has created a “Compliance Committee for the review of compliance by the Parties with their obligations under the Convention,”⁵³⁹ and established procedures whereby “communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the convention.”⁵⁴⁰ The compliance committee is required to consider these communications, unless they are

⁵³⁵ Response of the United Nations Commission on Sustainable Development (UNCSD) to the Aarhus Secretariat Questionnaire (copy on file with author).

⁵³⁶ Response of the United Nations ECE Committee on Housing and Land Management (CHLM) to the Aarhus Secretariat Questionnaire (copy on file with author).

⁵³⁷ The Secretariats for the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), the Convention on the Protection of the Alps (Alpine Convention), and the Bureau of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).

⁵³⁸ UNECE Aarhus Secretariat Questionnaire Response Synthesis, *supra* note 169 at 7, ¶21.

⁵³⁹ “Review of Compliance,” annex to decision I/7 of the first session of the Meeting of the Parties to the Aarhus Convention, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004) at ¶1.

⁵⁴⁰ *Id.* at ¶8.

anonymous or found to be abusive, unreasonable, or “inconsistent with the provisions” of the convention.⁵⁴¹ The committee may hold hearings⁵⁴² and gather information relating to the communication,⁵⁴³ and is directed to bring the communication “to the attention of the Party alleged to be in non-compliance,”⁵⁴⁴ which must “submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made.”⁵⁴⁵

Another regional MEA, the environmental side agreement to the North American Free Trade Agreement (NAFTA),⁵⁴⁶ established a relatively robust system that gives NGOs direct access to policymaking processes. The side agreement also gives citizen groups and individuals within a state party that are concerned about their government’s enforcement of its environmental laws access to a petition procedure.⁵⁴⁷ One of the concerns driving the side agreement was the possibility that a party might weaken its domestic environmental enforcement as a means of encouraging the relocation of businesses to a legal system less likely to

⁵⁴¹ Id. at ¶22.

⁵⁴² Id. at ¶24.

⁵⁴³ Id. at ¶25.

⁵⁴⁴ Id. at ¶22.

⁵⁴⁵ Id. at ¶23.

⁵⁴⁶ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993).

⁵⁴⁷ North American Agreement for Environmental Cooperation, U.S.-Can.-Mex., 32 I.L.M. 1480, Arts. 14-16 (1993).

enforce environmental laws seen as costly.⁵⁴⁸ In response to this concern, the side agreement invites submissions to the North American Commission on Environmental Cooperation⁵⁴⁹ “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law ...”⁵⁵⁰ The Commission Secretariat is tasked with reviewing submissions – a process which can include expert review, hearings, and requests for response from the parties – and issuing a report (a “factual record”) where it “considers that the submission, in the light of any response provided by the Party, warrants developing a factual record.” Since the creation of the article 14/15 submission process in 1995, dozens of submissions have been filed and dozens of factual records have been prepared.⁵⁵¹ Although the process has been criticized as having no real enforcement teeth,⁵⁵² its published factual records, and even the

⁵⁴⁸ The concern was aimed particularly at Mexico which was perceived as having weaker environmental laws and environmental enforcement.

⁵⁴⁹ The NAFTA Commission for Environmental Cooperation, also created under the side agreement, supports both collaborative inter-party measures to address trade-environment issues and manages the citizen petition process through a Secretariat based in Montreal.

⁵⁵⁰ Id. Art. 14.

⁵⁵¹ The Commission maintains a registry of submissions at http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250&BL_ExpandID=99 (last visited Feb. 15, 2011)

⁵⁵² See, e.g., Laura Carlsen and Hilda Salazar, “Limits to Cooperation: A Mexican Perspective on the NAFTA’s Environmental Side Agreement and Institutions,” in GREENING THE AMERICAS: NAFTA’S LESSONS FOR HEMISPHERIC TRADE 224-26

investigatory and response process, have had some positive effect on parties' behaviour.⁵⁵³ The NAFTA environmental side agreement also created a "Joint Public Advisory Committee" (JPAC) comprised of five head of government appointees from each party which oversees the cooperative work plan of the commission and monitors compliance issues and the citizen submissions process.

554

These examples all show an emerging state practice, particularly within environmental agreements, to provide non-state actors with robust access to information, and to the process of decision-making (even if only as observers). There is also an emerging practice of granting justice – or redress – that allows non-state actors to be part of the compliance process. The final model, emerging from the North American context, might be especially relevant to a future climate

(Carolyn L. Deere & Daniel C. Esty eds., 2002) (arguing that a lack of political will left NAFTA environmental institutions with a restricted scope of authority on enforcement issues and insufficient independence to carry out investigations).

⁵⁵³ See, e.g., Paul Stanton Kibel, "The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case," 39 Colum. J. Transnat'l L. 395, 470 (2001) citing Prepared Testimony of Ambassador Richard Fisher Deputy United States Trade Representative Before the Senate Committee on Foreign Relations, Subject - Economic Effects of NAFTA, Fed. News Serv. (Apr. 13, 1999) (noting Mexico's pledge to undertake environmental management study and strengthen laws protecting endangered coral reefs following the resolution of a NAFTA environmental citizen submission); Gustavo Alanis-Ortega, "What Can We Learn from NAFTA," in *ASIAN DRAGONS AND GREEN TRADE XX* (Simon S.C. Tay & Daniel C. Esty eds., 1996).

⁵⁵⁴ See Eric Dannenmaier, "The JPAC at Ten: A Ten-Year Review of the Joint Public Advisory Commission of the North American Free Trade Agreement," NAFTA Commission on Environmental Cooperation (2005)

regime because the emerging ‘bottom-up’ approach seems to contemplate reliance on a state’s own environmental laws to meet targets and assure cooperation. Allowing citizens to have access to a multilateral mechanism within which they might challenge their government’s compliance with or commitment to domestic climate policies and measures would complement this emerging bottom-up model.

Climate Access Commitments to Date

Information exchange and information access features are present in the 1992 Framework Convention commitment to “[t]he full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change,”⁵⁵⁵ to “[e]ducation, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations,”⁵⁵⁶ and to “[c]ommunicate to the Conference of the Parties information related to Implementation.”⁵⁵⁷ Access is also implicit in the promise to establish a financial mechanism “within a transparent system of governance.”⁵⁵⁸

⁵⁵⁵ United Nations Framework Convention on Climate Change, U.N. Doc. A/AC.237/18 (Part II)/Add.1 and Corr. 1 (1992) [hereinafter the Framework Convention] at Art. 4 ¶ 1(h).

⁵⁵⁶ Id. at Art. 4 ¶1(i).

⁵⁵⁷ Id. at Art. 4 ¶1(j).

⁵⁵⁸ Id. at Art. 11 ¶2.

Information sharing and access are features of the 1998 Kyoto Protocol, which encourages domestic policies and measures to achieve emission reduction targets in part by committing parties to “take steps to share their experience and exchange information on such policies and measures, including developing ways of improving their comparability, transparency and effectiveness.”⁵⁵⁹ Kyoto parties also agree that “greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed” through “modalities and procedures” that ensure “transparency, efficiency and accountability through independent auditing and verification.”⁵⁶⁰ Kyoto parties commit to “[c]ooperate in and promote ... education and training programmes ... and facilitate at the national level public awareness of, and public access to information on, climate change.”⁵⁶¹

These commitments to transparency are laudable. Yet they remain one-dimensional. There is no promise in the Framework Convention or the Kyoto Protocol to engage civil society in constructing the system of climate governance and only limited efforts to integrate the public into compliance measures.⁵⁶² The

⁵⁵⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNFCCC, COP-3, UN Doc. FCCC/CP/1997/L.7/Add.1 (1998) [hereinafter the Kyoto Protocol] at Art. 2 ¶1(b).

⁵⁶⁰ Id. at Art. 3 ¶3, Art. 12 ¶7.

⁵⁶¹ Id. at Art. 3 ¶3, Art. 10(e).

⁵⁶² Non-state actors have access to information regarding compliance proceedings through Secretariat report, (*see* Secretariat web page at

present regime has two branches intended to promote compliance: an Enforcement Branch and a Facilitative Branch.⁵⁶³ As their titles suggest, the Facilitative Branch is “responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments,”⁵⁶⁴ while the Enforcement Branch confirms whether emission limitation or reduction commitments are met and whether GHG inventory

http://unfccc.int/kyoto_protocol/compliance/items/5470.php (last visited March 10, 2011)). “Competent” NGOs may also provide factual information to the Committee. Rule 20.1, “Consolidated Rules of Procedure of the Compliance Committee of the Kyoto Protocol,” adopted at UNFCCC Dec. 27/CMP.1, “Procedures and mechanisms relating to compliance under the Kyoto Protocol,” Conference of the Parties 8th Sess., FCCC/KP/CMP/2005/8/Add.3, pg. 93 (2006) [Hereinafter Kyoto Compliance Procedures]. But these mechanisms offer no guarantee that non-state concerns will be heard and give non-state actors no standing to pursue compliance failures that states choose not to raise. The very real likelihood that states may – for reasons unrelated to the merits – choose to refrain from pursuing compliance matters should not be discounted. As Meinhard Doelle notes in his contribution to this volume, the only Facilitate Branch case brought to date was brought by South Africa as chair of the Group of 77 and China but the case faltered on the question of whether the case could be brought in such a representative capacity versus directly by a party. Doelle explains that “[t]he broader concern is the difficulty of bringing matters before the FB. The fact that no party was willing to follow up the South Africa submission on its own is telling in this regard. It suggests a fear of reprisal by individual parties.” Doelle at XX, note 5. Such a fear of reprisal is one of many reasons a state may refrain from complaining about the performance of another party, and one can well imagine broader strategic interests could lead a state to avoid confrontation. Non-state actors, on the other hand, are often more at liberty to be single-minded in their pursuit of compliance.

⁵⁶³ Kyoto Compliance Procedures, *supra* note 562; *see also* David M. Driesen, *Free Lunch or Cheap Fix?: The Emissions Trading Idea and The Climate Change Convention*, 26 B.C. ENVTL. AFF. L. REV. 1 (1998).

⁵⁶⁴ Kyoto Compliance Procedures Art. IV.4

adjustments or accounting corrections need to be made.⁵⁶⁵ The Enforcement Branch is also responsible for “applying the consequences” of non-compliance⁵⁶⁶ which can include remedial measures and a suspension from participation in the Protocol.⁵⁶⁷ In essence, while the compliance branches are called “enforcement” and “facilitative,” (implying both a “stick” and a “carrot” approach) the protocol’s primary enforcement sanction is to withhold facilitation (that is, the principal “stick” is no “carrot”).⁵⁶⁸

These compliance mechanisms integrate non-state actors to only a limited extent. NGOs cannot file complaints, initiate investigations, challenge compliance data they believe to be incomplete or inaccurate, or request compliance documentation beyond *pro forma* submissions.⁵⁶⁹ Instead, the Kyoto Protocol provides that “competent nongovernmental organizations” may submit “relevant factual and technical information” relating to “questions of

⁵⁶⁵ Id. at Art. V.4 & V.5.

⁵⁶⁶ Id. at Art V.6.

⁵⁶⁷ Id. at Art XV.

⁵⁶⁸ For a more complete discussion of *see* Meinhard Doelle, “Experience with the Facilitative and Enforcement Branches of the Kyoto Compliance System,” and René Lefeber and Sebastian Oberthür, “Key Features of the Kyoto Protocol’s Compliance System,” both of which appear in this volume. As Doelle, Lefeber, and Oberthür discuss, the degree of force behind other compliance ‘sticks’ remains to be seen.

⁵⁶⁹ Kyoto Compliance Procedures, *supra* note 562. As noted above, and detailed below at pages 222-41, *infra*, a number of other international accords and institutions, including multilateral environmental agreements, provide such opportunities.

implementation” where a matter has already been commenced by a state party.⁵⁷⁰

Non-state actors may also support monitoring and implementation of Emission Trading, Joint Implementation (JI) and the Clean Development Mechanisms (CDM)⁵⁷¹ because the nature of these mechanisms relies on their partnership and participation.

The ability to make submissions on pending questions of implementation is important; it is something akin to an *amicus* brief process that many international dispute procedures do not afford for non-state actors. And the ability to participate in trading, JI, and CDM implementation is practical. After all, non-state actors will often have a direct stake in funding or implementing these mechanisms. But it is notable that non-state actors have no right to initiate procedures where states fail or refuse to implement Kyoto obligations⁵⁷² – even

⁵⁷⁰ Rule 20.1, Kyoto Compliance Procedures, *supra* note 562.

⁵⁷¹ Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 *ECOLOGY L.Q.* 53 (2000).

⁵⁷² Expert Review Teams, selected by the Secretariat from experts nominated by Parties, support the annual review of individual inventories of each Annex I Party. Decision 19/CP.8, UNFCCC guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention, U.N. Doc. FCCC/CP/2002/7/Add.2, at 15, 28; UNFCCC Guidelines on Reporting and Review, Review of the Implementation of Commitments and of Other Provisions of the Convention National Communications: Greenhouse Gas Inventories from Parties Included in Annex I to the Convention, Conference of the Parties, Eighth session, New Delhi, 23 October – 1 November 2002, U.N. Doc FCCC/CP/2002/8 (28 Mar. 2003). But expert participation in these teams – even if the expert is drawn from an advocacy NGO – is explicitly designed to be divorced from any policy perspective that the expert and his or her organization may have. Expert reviewers are required to sign an agreement that specifies “terms and conditions”

where those procedures are designed to be cooperative in nature.⁵⁷³ This means that NGOs and other private actors cannot raise questions about a state's failure to adopt appropriate policies and measures for Greenhouse Gas (GHG) reduction or a state's failure to achieve reduction targets. These are the dominant means and ends of the climate regime, yet the ability of citizens to actively police them is foreclosed.

As negotiations to extend and expand the Kyoto commitments within the framework of the UNFCCC continue, states have highlighted information exchange among parties, but they have been less careful to reiterate a commitment to non-state information access. The Copenhagen Accord, while failing to renew or strengthen emission reduction targets, does promise that the "delivery of reductions and financing by developed countries" that may be agreed to in the future "will be measured, reported and verified" under guidelines that, at the least, "will ensure that accounting of such targets and finance is rigorous,

including, among other things, the requirement that "In conducting review activities, the expert shall perform duties in an objective, neutral and professional manner and serve in the best interest of the Convention. The expert shall notify the secretariat of any known potential conflict of interest relating to a specific review activity in which the expert has been invited to participate." "Agreement for Review Services" at ¶2, *available at* http://unfccc.int/files/national_reports/annex_i_ghg_inventories/application/pdf/agr_expr_ev.pdf (last visited March 10, 2011).

⁵⁷³ Kyoto compliance mechanisms emphasize both facilitation and enforcement.

robust and transparent.”⁵⁷⁴ The Accord also calls for a “context” of “transparency” with respect to funding mechanisms for mitigation and adaptation.⁵⁷⁵ But Copenhagen says nothing specific about the participation of non-state actors in cooperative action and there is no opening for access to compliance and enforcement processes.

Emerging Access Post-Kyoto

To negotiate commitments beyond the Kyoto Protocol’s target year of 2012, states established ad hoc working groups to further greenhouse gas targets of the Kyoto Protocol (the “Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol,” or AWG-KP) and to advance cooperative action (the “Ad Hoc Working Group on long-term Cooperative Action under the Convention,” or AWG-LCA).⁵⁷⁶ The proposals emerging from these two working groups at the 16th Conference of the Parties (the 6th Meeting of the Parties to Kyoto) in Cancun in 2010 show divergent approaches to non-state actor access.

⁵⁷⁴ Copenhagen Accord, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (Dec. 18, 2009) at ¶4.

⁵⁷⁵ *Id.* at ¶9.

⁵⁷⁶ The AWG-KP was established in Montreal in 2005. Decision 1/CMP.1. “Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol,” UN Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006). The AWG-LCA was created in Bali in 2007. “Bali Action Plan,” Decision 1/CP.13 (Dec. 14-15, 2007), in COP Report No. 13, Addendum, at 3, UN Doc. FCCC/CP/2007/6/Add.1 (reissued Mar. 14, 2008).

The Non-State Role in Cooperative Action

The AWG-LCA explicitly “[r]ecognize[d] the need to engage a broad range of stakeholders at global, regional, national and local levels, be they government, including subnational and local government, private business or civil society, including youth and persons with disability, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.”⁵⁷⁷ The LCA group also affirmed the importance of a “participatory and fully transparent approach,”⁵⁷⁸ and invited views on engaging “[s]takeholders with relevant specialized expertise” in the development of the committee’s work programme.⁵⁷⁹ In the context of reducing emissions from deforestation and forest degradation (REDD), the LCA working group also asked that developing country parties ensure “the full and effective participation of relevant stakeholders, inter alia, indigenous peoples and local communities,” in “developing and implementing their national

⁵⁷⁷ United Nations Climate Change Conference in Cancun, COP 16 / CMP 6, 29 November - 10 December 2010, Draft decision [-/CP.16], “Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,” Advance unedited version *available at* http://unfccc.int/meetings/cop_16/items/5571.php (last visited Feb. 12, 2011) at ¶7.

⁵⁷⁸ *Id.* at ¶12.

⁵⁷⁹ *Id.* at ¶28(d)

strategies or action plans.”⁵⁸⁰ The LCA working group invited accredited observers to submit views on the development of market-based mechanisms to promote mitigation,⁵⁸¹ and decided that meetings of the Transitional Committee created to design a new “Green Climate Fund” would be open to observers.⁵⁸² The working group also acknowledged the importance of coordinating technology development and transfer initiatives with non-state stakeholders and organizations,⁵⁸³ called upon a newly-created Technology Executive Committee to “seek input from civil society,”⁵⁸⁴ and “reaffirmed” that capacity-building should be “participatory.”⁵⁸⁵

The Non-State Role in Compliance with Further Commitments

In contrast to the acknowledgement of the role of non-state actors in cooperative measures by the LCA working group, the AWG-KP made not a single mention of non-state actors, stakeholders, non-governmental organizations,

⁵⁸⁰ Id. at ¶72. See also Id. at Annex I ¶2(c), (d) (guidelines for policy approaches to REDD emphasize respect for knowledge and rights of indigenous peoples and the “full and effective participation of relevant stakeholders”).

⁵⁸¹ Id. at ¶¶82, 86, 87.

⁵⁸² Id. at ¶110. See also Id. at Annex III ¶1(j) (“Terms of Reference for the design of the Green Climate Fund” call upon Transitional Committee to develop “mechanisms to ensure stakeholder input and participation”) & 2(b) (the Transitional Committee is called upon to “[e]ncourage input ... from relevant international organizations and observers.”)

⁵⁸³ Id. at ¶¶121(f) & (g) and 123(c)(ii).

⁵⁸⁴ Id. at Annex IV ¶10. In addition, meetings of the committee are to be open to accredited observers. Id. at ¶11.

⁵⁸⁵ Id. at part IV(C) (preamble to ¶¶130-37).

civil society, relevant experts, or even accredited observers, in the formal document approved in Cancun.⁵⁸⁶ Notably, even the draft negotiating text of the AWG-KP – the revised proposal by the Chair that was presented in Cancun – makes no mention of non-state actors, stakeholders, non-governmental organizations, civil society, or observers (accredited or otherwise). Bracketed provisions of the draft text’s chapter on land use, land-use change and forestry (LULUCF) “[e]ncourages Parties to invite their land use, land-use change and forestry experts to apply for the UNFCCC roster of experts, with a view to increasing the number of land use, land-use change and forestry reviewers.”⁵⁸⁷ This suggests that experts outside of formal governmental institutions may be invited to join the LULUCF roster, and they would certainly bring an outside perspective to the role. But, as with the Expert Review Teams established to

⁵⁸⁶ United Nations Climate Change Conference in Cancun, COP 16 / CMP 6, 29 November - 10 December 2010, Draft decision [-/CMP.6] “Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session,” Advance unedited version *available at* http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_kp.pdf (last visited Feb 18, 2011).

⁵⁸⁷ Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, Fifteenth session

Cancun, 29 November, Agenda item 3 Consideration of further commitments for Annex I Parties under the

Kyoto Protocol, Revised proposal by the Chair, U.N. Doc. FCCC/KP/AWG/2010/CRP.4/Rev.4 at Ch. 2 ¶17.

review of the national greenhouse gas inventory reports submitted by Parties.]

review Annex I Party GHG inventories, the function of experts acting in their expert capacity is not to directly advance civil society or stakeholder concerns.⁵⁸⁸

Climate Compliance through Non-Climate Mechanisms

As negotiators continue to construct a post-2012 approach, they may wish to take note of climate-related compliance actions that have been pursued through other, “non-climate” channels – the use of compliance mechanisms within international forums and tribunals outside of the formal climate regime. The examples below reveal both openness to non-state access and a remarkable degree of innovation by non-state actors in creating channels to address climate concerns. Examples include the World Bank’s Inspection Panel, UNESCO’s framework for

⁵⁸⁸ Arguments have been made that the identity or affiliation of experts necessarily influences the advice that they give to a governmental body. *See, e.g.*, Yiorgos Vassalos, Corporate Europe Observatory, “Expert Groups – Letting Corporate Interests set the Agenda” *available at* <http://www.alter-eu.org/sites/default/files/bbb-chap-06.pdf> (last visited March 5, 2011) (arguing that “the composition of expert groups involving nongovernmental actors demonstrates the European Commission’s clear preference to consult with corporate interests”); Torbjörn Larsson, Stockholm University “Precooking - The Function and Role of Expert Groups in the European Union” *available at* http://aei.pitt.edu/6516/1/001507_1.pdf (last visited March 5, 2011) (noting difference between expert groups comprised of “highly specialised people often academics and scientists” and groups composed of “interest group” and “stakeholders”). It is certainly true that identity and affiliation create perspective, even bias. But non-state actors who have been called upon for their expertise are not acting as civil society ‘representatives’ of ‘voices’ in any meaningful sense; they are instead seeking to act as ‘neutrals’ (even if imperfectly neutral) with relevant expertise. Procedural rules and explicit conditions of service (such as the ERT rules discussed *supra* at note 572) coupled with the scientific and technical nature of the task and the balance of experts called upon in the climate change context likely go a long way to minimize individual biases. At the very least, they are in most cases a constraint on open position advocacy.

protecting World Heritage Sites, and the compliance mechanisms of human rights bodies. These forums, though limited and still evolving, are being deployed to address at least some concerns relating to climate change and may serve as models for a mechanism for engaging non-state actors in climate compliance mechanisms.

International Financial Institutions (energy financing)

International financial institutions have substantial potential to affect GHG emissions and the creation and preservation of carbon sinks because they finance development projects throughout the world. Financial institutions can encourage investments that reduce carbon footprints, and discourage, condition, or withhold financing for inefficient projects with a large carbon footprint such as timber and fossil fuel extraction. They can leverage their investments even if they are only providing partial financing or seed money for a project and, unlike private financiers, their investments decisions are subject to direct oversight by public officials. Unfortunately, the record of international financial institutions as a positive force for climate policy has been mixed.⁵⁸⁹ At the World Bank, for example, climate change is now seen as a development concern, climate impact

⁵⁸⁹ Kirk Herbertson & David Hunter, Sustainable Energy: Emerging Standards for Sustainable Finance of the Energy Sector, 7 SUSTAINABLE DEV. L. & POL'Y 4 (2007).; see also Benjamin J. Richardson, Reforming Climate Finance through Investment Codes of Conduct, 27 WIS. INT'L L.J. 483 (2009).

must be considered as part of the Environmental Assessment process,⁵⁹⁰ and the bank has increased its renewable energy portfolio.⁵⁹¹ But this has not resulted in a fundamental change in the bank's lending portfolio, and it has done little to blunt criticism of the bank's continuing support for fossil fuel projects, timber projects, and other carbon-regressive development.⁵⁹²

As NGOs press for improvements in lending policies to address environmental concerns such as climate, the ability of non-state actors to review, challenge, and dispute lending practices and priorities has become increasingly important. And a dispute mechanism has been formed in response to this need. In 1993, the bank established an Inspection Panel to consider NGO challenges to bank lending decisions.⁵⁹³ The Inspection Panel can review

⁵⁹⁰ World Bank, Operational Policy 4.01, Environmental Assessment, (Jan. 1999) at ¶3 note 5.

⁵⁹¹ Xiaodong Wang, Legal and Policy Frameworks for Renewable Energy To Mitigate Climate Change, 7 SUSTAINABLE DEV. L. & POL'Y 17 (2007).

⁵⁹² Steven Ferrey, The Failure of International Global Warming Regulation to Promote Needed Renewable Energy, 37 B.C. ENVTL. AFF. L. REV. 67 (2010).; see also David Takacs, Carbon Into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law, 15 HASTINGS J. ENV. L. & POL'Y 39 (2009).; see also Press Release, Bretton Woods Project, Briefing "Clean Energy Targets for the World Bank: Time for a Recount" (May 2010), available at <http://www.brettonwoodsproject.org/doc/env/energytargets.pdf>.; see also Matthew Berger, "Civil Society Calls on World Bank to Reform its Energy Lending Source: Inter Press Service (April 26, 2010).

⁵⁹³ World Bank (International Bank for Reconstruction and Development) Resolution No. IBRD 93-10; International Development Association Resolution No. IDA 93-6 "The World Bank Inspection Panel," (Sep. 22, 1993).; *see also* Daniel D. Bradlow,

decisions of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) upon receipt of a Request for Inspection from parties “in the territory of the borrower” claiming that “rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank.”⁵⁹⁴ Procedures can lead to an investigation, if approved by the Bank’s Board of Directors, and a report to Bank management. Management responds to reports with recommendations to bring a project into compliance with Bank policies and procedures, and these recommendations must be approved by the Board.⁵⁹⁵

The Panel process has been used to address climate concerns. In April of 2010, a request for inspection was filed by local NGOs regarding a proposed \$3.75 billion loan for construction of the 4800 Mega Watt coal-fired power plant by the utility company Eskom in the Midupi, South Africa (World Bank

International Organizations and Private Complaints: The Case of the World Bank Inspection Panel, 34 VA. J. INT’L L. 553 (1994).

⁵⁹⁴ World Bank (International Bank for Reconstruction and Development) Resolution No. IBRD 93-10; International Development Association Resolution No. IDA 93-6 “The World Bank Inspection Panel,” (Sep. 22, 1993).

⁵⁹⁵ *Id.*

Inspection Panel Request, 2010).⁵⁹⁶ The affected parties cited concerns including health impacts, water demand and scarcity, cultural impacts, and involuntary resettlement as well as concern over the project's impact on climate:

The proposed loan will compromise the World Bank's commitments on climate change, and make it more difficult for South Africa to meet its own greenhouse gas reduction commitments. Despite claims that the Medupi plant will use 'cleaner coal technology' and will be 'carbon capture and storage-ready,' there is no certainty whether these measures will be sufficient to control the enormous amounts of pollutants.⁵⁹⁷

The Inspection Panel recently concluded that the request meets eligibility requirements and has recommended an investigation.⁵⁹⁸ The Panel's Chair explained that bank policy:

[c]alls for the Bank to consider if the borrower's system is designed to achieve, among other elements, the operational principle to "assess potential impacts of the proposed project on physical, biological, socio-economic and physical cultural resources, including transboundary and global concerns" ... The Panel will be guided by this policy provision in assessing, for instance, issues relating to greenhouse gas emissions of the Project, and the potential mitigation actions contained in the Project to address these concerns.⁵⁹⁹

⁵⁹⁶ World Bank Inspection Panel Request for Inspection of Eskom Investment Support Project (Project ID: P116410) (Apr. 6, 2010).

⁵⁹⁷ Id.

⁵⁹⁸ World Bank Inspection Panel Report and Recommendation South Africa: Eskom Investment Support Project (IBRD Loan No. 78620) (INSP/R2010-0003) (June 28, 2010).

⁵⁹⁹ World Bank Inspection Panel Statement of Mr Roberto Lenton, Chairperson of the Inspection Panel Read at Board Meeting on South Africa - Eskom Investment Support Project (July 29, 2010). The Panel went on to caution that it would not "investigate other

The panel's eligibility finding is encouraging even though the scope of review will be limited to assessing compliance with formal bank policies. Although the panel has no enforcement or sanctioning authority, its reporting function has at times led to decisions by the bank's board to withdraw or withhold funding where bank policies are clearly not being followed. The panel's public reporting function also serves to raise awareness of compliance problems and one cannot discount the deterrent effect that a report can have on bank officials who might consider evading bank policies or borrower countries that might seek to ignore environmental policy constraints on their borrowing.

In addition to World Bank's inspection panel procedures, a number of regional development banks also have related processes. The African Development Bank (AfDB), Inter-American Development Bank (IADB), and the European Bank for Reconstruction and Development (EBRD) each offer some opportunity for non-state actors to raise concern about compliance with policies.⁶⁰⁰ It is not difficult to imagine the potential that such mechanisms might

climate change related claims mentioned in the Request that do not raise issues of compliance under Bank policy, such as for example whether the Project meets the requirements of the Bank strategy document on "Development and Climate Change: A Strategic Framework for the World Bank Group." *Id.*

⁶⁰⁰ U.N. Economic and Social Council, Economic Commission for Europe, "Synthesis of Responses Received From International Forums to the Written Questionnaire in the Consultation Process on the Almaty Guidelines," Meeting Of The Parties To The Convention On Access To Information, Public Participation In Decision-Making and Access to Justice in Environmental Matters, Working Group of the Parties Seventh Meeting Geneva, 2-4 May 2007 Item 5 of the Provisional Agenda, Public Participation in

hold in the context of climate compliance, or to understand the importance of these mechanisms as a model for public oversight of future climate commitments.

International Economic Cooperation Institutions

International Economic Cooperation Organizations⁶⁰¹ are increasingly embracing the language of sustainability and some have even made modest commitments to environmental goals or created guidelines that call for greater attention to environmental – and climate – issues.

The OECD, for example, has issued “Guidelines for Multinational Enterprises” that offer voluntary recommendations for governments and

International Forums, U.N. Doc ECE/MP.PP/WG.1/2007/L.2 (Feb. 16 2007) at p. 7 ¶21. (hereinafter “UNECE Aarhus Secretariat Questionnaire Response Synthesis”).

⁶⁰¹ Examples include the Economic Cooperation Organization (ECO) a forum for seven members from Central Asia Treaty of Izmir, Mar. 12, 1977, *available at* <http://www.ecosecretariat.org/>; Asia-Pacific Economic Cooperation (APEC) a forum for 21 Pacific Rim countries Canberra Ministerial Statement, “First APEC Ministerial Meeting. Canberra, Australia, Joint Statement” (November 1989) at 6-7.; Latin American Economic System, (SELA), a forum for 27 Latin American and Caribbean States Panama Convention (*Convenio de Panamá Constitutivo del Sistema Económico Latinoamericano*) (SELA) (Oct. 17, 1975) *available at* [http://216.122.62.22/attach/258/default/T023600000397-0-Convenio de Panama \(enero 2006\).pdf](http://216.122.62.22/attach/258/default/T023600000397-0-Convenio de Panama (enero 2006).pdf); and the Organization for Economic Cooperation and Development (OECD), a forum for 32 members from various regions Convention on the Organisation for Economic Co-operation and Development (Dec. 14, 1960) *available at* http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html.

multinational enterprises “operating in or from adhering countries.”⁶⁰² The Guidelines call for enterprises to focus on issues of environmental management and performance, and to operate with some degree of transparency. Enterprises are called upon to “assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle,”⁶⁰³ and more generally to “minimize aspects of their activity that may have negative impacts on the environment.”⁶⁰⁴

The OECD has also established a complaint process that non-state actors can use where they believe that the guidelines have been ignored, and the process has been used at least once in the climate context. In 2007, Germanwatch filed a complaint against Germany-based Volkswagen alleging that Volkswagen was representative of a transport sector “responsible for 20 to 28 per cent of worldwide CO₂ emissions”⁶⁰⁵ and that the company had pursued technology and a

⁶⁰² Press Release, OECD, “Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points” (Oct. 7, 2009), *available at* <http://www.oecd.org/dataoecd/15/43/33914891.pdf>.

⁶⁰³ *Id.*

⁶⁰⁴ Press Release, OECD, “Environment and the OECD Guidelines for Multinational Enterprises Corporate Tools and Approaches,” (2004), *available at* <http://www.oecd.org/dataoecd/12/1/34992954.pdf>.

⁶⁰⁵ Germanwatch Complaint Against Volkswagen AG Under the OECD Guidelines for Multinational Enterprises (2000) – Request to the German National Contact Point (Federal Ministry of Economics and Technology) to Initiate the Procedures for the

market strategy destined to increase emissions from its products. The NGO alleged fifteen violations of OECD Guidelines,⁶⁰⁶ including provisions regarding adequate environmental management,⁶⁰⁷ transparency,⁶⁰⁸ deceptive marketing,⁶⁰⁹ and the responsibility of industry to “contribute to the development of environmentally meaningful and economically efficient public policy.”⁶¹⁰ Germanwatch asked that the National Contact Point for Germany⁶¹¹ undertake public mediation proceedings aimed at bringing Volkswagen into compliance with OECD Guidelines.

An initial assessment by the National Contact Point for Germany “found that the company had not violated the Guidelines”⁶¹² and thus Germanwatch did

Solution of Conflicts and Problems in the Implementation of the Guidelines (May 7, 2007), *available at* www.germanwatch.org/corp/vw-besch-e.pdf.

⁶⁰⁶ Press Release, OECD, “Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points” (Oct. 7, 2009), *available at* <http://www.oecd.org/dataoecd/15/43/33914891.pdf>.

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ “The National Contact Point (NCP) is a government office responsible for encouraging observance of the Guidelines in a national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties.” (OECD 2010)

⁶¹² OECD “Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points” (Oct. 7 2009) at 11, *available at* <http://www.oecd.org/dataoecd/15/43/33914891.pdf>

not get the public mediation they had sought. But the complaint did call attention to business practices of one of the chief actors in the automobile industry and advanced the case that corporate decisions have climate impacts. As with the World Bank inspection panel, the OECD compliant process offers a window into how non-state actors might find a point of entry for compliance with future climate agreements.

Human Rights Bodies

Human rights institutions offer several mechanisms for non-state actors to initiate and participate in compliance proceedings that may also serve as useful models in the climate context. NGOs can initiate petitions to human rights bodies to consider individual cases or broader human rights policy concerns, they can offer evidence where tribunals and special experts are considering compliance matters, and they can file “shadow reports” to supplement or challenge state self-reporting that is filed periodically with human rights bodies.

One prominent recent example of a climate-based human rights claim is the petition by the Inuit Circumpolar Conference (now the Circumpolar Council)⁶¹³ to the Inter-American Commission on Human Rights⁶¹⁴ in 2005

⁶¹³ The Circumpolar Council describes itself as an “international non-government organization representing approximately 150,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia).” See http://inuitcircumpolar.com/index.php?auto_slide=&ID=16&Lang=En&Parent_ID=¤t_slide_num= It was represented by the Center for International Environmental Law (CIEL), see http://www.ciel.org/Climate/Climate_Inuit.html, and Earthjustice, see <http://www.earthjustice.org/features/inuit-human-rights-and-climate-change>

alleging that the United States has made a “major and disproportionate contribution to [the] transboundary environmental impacts of climate change⁶¹⁵ and that the US government “has violated its international responsibility for preventing activities within its jurisdiction from damaging the environment outside its borders [and failed] to take effective action to minimize these impacts”⁶¹⁶ The Commission declined to take the case and issued no formal opinion on the merits. Instead, the Commission sent a letter to counsel for the Circumpolar Conference, in November of 2006, informing them that “it will not be possible to process your petition at present because the information it contains does not satisfy” the Commission’s rules “or other applicable instruments.” The letter continued, “Specifically, the information provided [in the petition] does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration [of the Rights and

⁶¹⁴ The Commission serves a sort of a gatekeeper for the Inter-American Court for Human Rights, and conducts and initial investigation of petitions filed within the regional system. If the Commission believes the petition has sufficient merit to move forward, it essentially represents to petitioner’s position before the Court.

⁶¹⁵ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Dec. 7, 2005 [hereinafter Inuit Circumpolar

Petition], *available at* <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>, at pg. 100.

⁶¹⁶ *Id.*

Duties of Man].”⁶¹⁷ The Inuit petition thus appears to have been rejected without prejudice. The Circumpolar Conference representatives did not directly appeal this decision or seek to re-file. Instead, they requested a hearing “on the relationship between global warming and human rights,”⁶¹⁸ and the Commission responded by inviting them to attend its “127th ordinary period of sessions” to “address matters relating to Global Warming and Human Rights.”⁶¹⁹ The Inuit petitioners and counsel offered statements.⁶²⁰ To date, no findings or report has been published by the Commission on the basis of that hearing.⁶²¹

⁶¹⁷ Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights to Paul Crowley, Legal Representative, Inuit Petition, Nov. 16, 2006, *available at* <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (last visited December 5, 2010) *citing* American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948) *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992);

⁶¹⁸ January 15, 2007 Letter from Sheila Watt-Cloutier to Santiago Cantón “Re: Request for a Hearing on the Relationship Between Global Warming and Human Rights,” *available at* http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf

⁶¹⁹ Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights to Sheila Watt-Cloutier, “Ref: Global Warming and Human Rights, Hearing – 127th Ordinary Period of Sessions, Feb. 1, 2007,” *available at* http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf.

⁶²⁰ Press Release, Earthjustice, “Nobel Prize Nominee Testifies About Global Warming,” (2007), *available at* <http://www.earthjustice.org/news/press/2007/nobel-prize-nominee-testifies-about-global-warming>.

⁶²¹ This is based on a review of the Commission’s public records as of the date this chapter was written.

Not long after the Inter-American Commission declined to proceed with the Inuit petition, in November 2007, the Republic of the Maldives hosted a meeting of representatives of small island developing states to explore the linkage between human rights and climate. The Maldives has been an active proponent of international action on climate, and was a chief protagonist, along with other members of the Association of Small Island States (AOSIS), in raising concerns over climate change in international forums, and in promoting the adoption of the UNFCCC at the Rio Summit. Participants in the November meeting adopted the “Male’ Declaration on the Human Dimension of Global Climate Change,” which called for progress on a post-Kyoto agreement at the next Conference of the Parties scheduled for Bali, and also called for “The Office of the United Nations High Commissioner for Human Rights [OHCHR] to conduct a detailed study into the effects of climate change on the full enjoyment of human rights ... prior to the tenth session of the Human Rights Council.”⁶²² At the next Council session, in March 2008, the Council adopted a resolution offered by the Maldives requesting that the OHCHR conduct “a detailed analytical study on the relationship between climate change and human rights,”⁶²³ and the OHCHR completed the study and

⁶²² Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, *available at* [http://www.ciel.org/Publications/Male Declaration Nov07.pdf](http://www.ciel.org/Publications/Male%20Declaration%20Nov07.pdf).

⁶²³ U.N. Human Rights Council Res. 7/23, *in* U.N. Human Rights Council, Report of the Human Rights Council on its Seventh Session, U.N. Doc. A/HRC/7/78 (July 14, 2008) at 65. The resolution had 78 co-sponsors.

issued a report in January 2009.⁶²⁴ The OHCHR Report details the potential impact of climate change on specific human rights and describes the unique risks of climate change to vulnerable groups including women,⁶²⁵ children,⁶²⁶ and indigenous peoples,⁶²⁷ as well as the potential impact of displacement caused by climate effects.⁶²⁸ Although the OHCHR Report declines to determine whether climate effects “[c]an be qualified as human rights violations in a strict legal sense, and stops short of finding that states have any particular responsibility to formulate development, energy, or transportation policies in any way that would be redressable under existing human rights instruments,⁶²⁹ the fact that the OHCHR would respond to a broad based public petition (NGOs joined by small island states – which were represented in part by NGOs) with a detailed and substantive study and report is telling.

World Heritage Sites

Under the Convention Concerning the Protection of The World Cultural and Natural Heritage non-state actors are able to petition the United Nations

⁶²⁴ OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report].

⁶²⁵ Id. at ¶¶ 45-47.

⁶²⁶ Id. at ¶¶ 48-50.

⁶²⁷ Id. at ¶¶ 51-54.

⁶²⁸ Id. at ¶¶ 55-60.

⁶²⁹ Id. at ¶ 70.

Educational, Scientific and Cultural Organization (UNESCO), to consider the state of World Heritage Sites that are threatened.⁶³⁰ In 2005, a series of NGO petitions to UNESCO sought to have World Heritage Sites included on the List of World Heritage in Danger because of the effects of climate change.⁶³¹ The petitions addressed the need to adapt to climate impacts anticipated at these important cultural and natural sites and the need to mitigate GHG emissions as a continuing threat to the sites.

When UNESCO's World Heritage Committee (WHC) met in the summer of 2005, it took note of these petitions and the potential impact of climate change

⁶³⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), "Convention Concerning the Protection of the World Cultural and Natural Heritage" 27 U.S.T. 37; TIAS No. 8226 (1972), adopted at the Seventeenth Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Paris (Oct. 17-Nov. 21, 1972).

⁶³¹ Petitions were filed concerning Sagarmatha National Park (Nepal), Huascarán National Park (Peru), the Great Barrier Reef (Australia) and the Belize Barrier Reef Reserve System (Belize). UNESCO World Heritage Committee Twenty-ninth Session, Durban, South Africa, "Decisions of the 29th Session of the World Heritage Committee (Durban, 2005)" (UN Doc. WHC-05/29.COM/22) at 36-37, Decision 29 COM 7B.a "Examination of the State of Conservation of World Heritage Properties: State of Conservation Reports of Properties Inscribed on the World Heritage List" (July 10-17, 2005) [hereinafter UNESCO WHC 2005]. A later petition was filed concerning the Waterton-Glacier International Peace Park (Canada and the United States). UNESCO World Heritage Committee Thirtieth Session, Vilnius, Lithuania, "Decisions Adopted at the 30th Session of the World Heritage Committee (Vilnius, 2006)" (UN Doc WHC-06/30.COM/19) at 7-8, Decision 30 COM 7.1 "Issues Related to the State of Conservation of World Heritage Properties: The Impacts of Climate Change on World Heritage Properties" (July 8-16, 2006) [hereinafter UNESCO WHC 2006].

on World Heritage Sites.⁶³² The Committee also asked the World Heritage Centre to work with interested states parties and petitioners to establish an expert working group to “a) review the nature and scale of the risks posed to World Heritage properties arising specifically from climate change; and b) jointly develop a strategy to assist States Parties to implement appropriate management responses.”⁶³³ The working group was charged with preparing a joint report on “Predicting and managing the effects of climate change on World Heritage” for review by the Committee.⁶³⁴ The Committee also “encouraged” states parties to “highlight the threats posed by climate change to natural and cultural heritage,” and “start identifying the properties under most serious threats,” so that management actions could be taken, and it “encourage[ed] UNESCO to do its utmost to ensure that the results about climate change affecting World Heritage properties reach the public at large, in order to mobilize political support for activities against climate change.”⁶³⁵

These steps may seem limited, but they served, at least, to call climate change to the attention of those concerned with culturally and ecologically important sites. The move also got the attention of the United States administration, which had been active at the time in shutting down, or at least

⁶³² UNESCO WHC 2005, *supra* note 631, at 36-37.

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

avoiding, climate mitigation and adaptation commitments internationally and domestically. The US joined the World Heritage Committee in late 2005 and began working to oppose a strong response to the petitions.⁶³⁶ The US issued a position paper questioning climate science, opposing the listing of a site as being “in danger” without the consent of the state in which it is located, and arguing that “There is no compelling argument for the Committee to address the issue of global climate change-- especially at the risk of losing the unified spirit and camaraderie that has become synonymous with World Heritage.”⁶³⁷

At its next meeting in the summer of 2006, the World Heritage Committee stepped back from strong commitments to work on climate mitigation and did not link state energy and climate policies to effects on World Heritage Sites. Instead, it requested that the World Heritage Centre “prepare a policy document on the impacts of climate change on World Heritage properties” to be discussed at the next meeting of States Parties in 2007.⁶³⁸ The Committee asked specifically that the document address “legal questions on the role of the World Heritage Convention with regard to suitable responses to Climate Change” and “alternative

⁶³⁶ Climate Justice Programme, “US Government to oppose World Heritage action on climate change” (Mar. 15, 2006) available at <http://www.climatelaw.org/cases/country/intl/unescoglacier/2006Mar15/>.

⁶³⁷ US Position Paper, Position of the United States of America on Climate Change with Respect to the World Heritage Convention and World Heritage Sites, (2006) available at www.elaw.org/system/files/u.s.climate.US+position+paper.doc.

⁶³⁸ UNESCO WHC 2006, *supra* note 632, at 7-8

mechanisms, other than the List of World Heritage in Danger, to address concerns of international implication, such as climatic change.”⁶³⁹

The policy statement on “legal questions” prepared at the Committee’s behest contains no elaboration of states parties’ obligations to pursue energy and climate policies and measures in order to protect World Heritage Sites.⁶⁴⁰ In a sense, this missed an opportunity to make the link implicit in NGO petitions to the Committee and to clarify to the Convention’s original call for parties “to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory.”⁶⁴¹ The policy statement asserts only that:

In the context of climate change, this provision will be the basis for States to ensure that they are doing all that they can “to the utmost of their resources, which they may be able to obtain” to address the causes and impacts of climate change, in relation to the potential and identified effects of climate change (and other

⁶³⁹ Id.

⁶⁴⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (May 23, 2007), UN Doc WHC.07/31.COM/7.1, at 6-10 (2007).

⁶⁴¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), “Convention Concerning the Protection of the World Cultural and Natural Heritage” 27 U.S.T. 37; TIAS No. 8226 (1972), Art. 4, adopted at the Seventeenth Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Paris (Oct. 17-Nov. 21, 1972).

threats) on World Heritage properties situated on their territories.⁶⁴²

The policy statement does clarify that climate effects should be considered “serious and specific dangers” to World Heritage sites under Article 11 (4) of the Convention even though the article “does not specifically refer to climate change.”⁶⁴³

The World Heritage Committee endorsed the policy statement and authorized work on changes to its Operational Guidelines to reflect the link between climate and threats to World Heritage Sites.⁶⁴⁴ Those changes were later adopted by the Committee.⁶⁴⁵ The Committee also asked the “World Heritage Centre and the Advisory Bodies to develop in consultation with States Parties criteria for the inclusion of those properties which are most threatened by climate change on the List of World Heritage in Danger.”⁶⁴⁶ Again, this example of a non-

⁶⁴² United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (May 23, 2007), UN Doc WHC.07/31.COM/7.1, at 6-10 (2007a).

⁶⁴³ Id.

⁶⁴⁴ United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (Jun. 23-Jul. 2, 2007), UN Doc WHC-07/31.COM/24, at 4-5 (2007).

⁶⁴⁵ United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee, 31st Sess., (Mar. 31, 2009), WHC-08/32.COM/24Rev at 40-41, Decision 32 COM 7A.32, (Jul. 2-10, 2008).

⁶⁴⁶ In 2008, climate was added as a factor affecting the preservation of four properties already inscribed and four properties newly inscribed (UNESCO 2008). In 2009, climate

state actor petition process leading to investigation and reform by intergovernmental bodies can serve as a model for institutions designed specifically to deal with climate.

Convention on Biological Diversity

In 2009, a Canada-based NGO, the Action Group on Erosion Technology and Concentration (ETC Group), submitted a letter to the Convention on Biological Diversity (CBD) Bureau alleging that Germany had breached CBD decisions on ocean fertilization.⁶⁴⁷ The fertilization experiment had apparently been conducted by Germany's Ministry of Science over the objection of the German Minister of Environment and following a "detailed discussion in the German Government as well as in the German Parliament."⁶⁴⁸ The experiment was conducted outside of coastal areas in contravention of a CBD Conference of the Parties decision.⁶⁴⁹ The Bureau Executive Director reported that it had no procedural jurisdiction to address an "issue of implementation of COP decisions" and the Bureau concluded that "the responsibility to implement COP decision lay

was added as a factor affecting the preservation of twelve properties already inscribed and one property newly inscribed (UNESCO 2008).

⁶⁴⁷ Minutes of the Meeting of the Bureau of the Conference of the Parties to the Convention on Biological Diversity Held in Nairobi on 13 February 2009, U.N. Doc. UNEP/CBD/COP/Bur/2009/1/3 (Feb. 19, 2009) at ¶34.

⁶⁴⁸ Id. at ¶35.

⁶⁴⁹ Id. at ¶¶35-36.

with the Parties at the national level.”⁶⁵⁰ While the Bureau directed the chair to send a letter to Germany expressing its “concerns,” it also decided that any direct response to the NGO that had complained of the ocean seeding experiment must come from Germany.⁶⁵¹

This case offers an example of an international environmental secretariat responding to an NGO’s compliance concern despite the lack of a formal process for non-state access to the compliance process. It resulted in little more than a letter of concern to the party alleged to be out of compliance, but this was because the Bureau determined it was without jurisdiction – not because the complaining NGO was found to be without standing. While this level of response is entirely within the discretion of the international body – discretion unlikely to be exercised where a lack of interest, an over-crowded docket the objection of a state party serve to impede⁶⁵² – the case illustrates a relatively benign procedure that can have a positive impact on compliance matters. Absent the NGO letter, the matter may not have reached the CBD Bureau in the first place.

Domestic Institutions

Non-state actors have also had success in litigating climate issues in domestic forums under domestic law. These cases, or their corollaries, might

⁶⁵⁰ Id. at ¶37.

⁶⁵¹ Id at ¶38.

⁶⁵² It is noteworthy that the German delegate did not object to the Bureau’s consideration of this matter, and even left the room while other Bureau members discussed the NGO letter and their response. Id. at ¶36.

have a strong influence on encouraging a state to comply with international norms even where the basis for the claim is grounded in domestic law. In 2006, for example, a US environmental group sued to compel the US Overseas Private Investment Corporation (OPIC) and the US Export-Import Bank (Ex-Im Bank) to conduct environmental impact assessments under the US National Environmental Policy Act (NEPA) where lending and financing decisions supported fossil fuel exploration and extraction projects. The court in Friends of the Earth v Mosbacher,⁶⁵³ held that that the procedures sought by FOE should not be seen as an “extraterritorial application of NEPA” because the decisions by the agencies “purportedly significantly affect the domestic environment.”⁶⁵⁴ The case was later settled by an incoming Obama administration, which agreed that the agencies would conduct NEPA analysis, before it could proceed further,⁶⁵⁵ but the case serves as an example of the utility of domestic institutions in addressing international environmental norms that have been embraced at the national level. Climate commitments that are effected by means of national legislation could be similarly enforced by non-state actors through domestic tribunals.

⁶⁵³ Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889 (2007).

⁶⁵⁴ Id., 488 F. Supp. at 908.

⁶⁵⁵ See Environmental Law Institute, Endangered Environmental Laws Program, “RECENT CASES: Friends of the Earth v. Mosbacher,” available at http://www.endangeredlaws.org/case_mosbacher.htm

Given the potential importance of domestic enforcement, a post-Kyoto climate regime might look to mechanisms to encourage access to local tribunals through redress provisions or through cooperative support for citizen suits.

Conclusion

Much has been made of the promise of transparency in recent climate commitments, and for good reason. The breakthrough on monitoring, reporting, and verification negotiated in Copenhagen and cemented in Cancun is a critical means to help assure the integrity of any continuing climate commitments and has appropriately been celebrated as strengthening the regime that remains under construction. But transparency is only one step in service of meaningful compliance. Where monitoring and reporting identify performance failures, the ability of interested parties to pursue compliance responses or regime adjustment strengthens regime effectiveness.

Developments in the climate change regime from Rio in 1992 through Cancun in 2010 show that international climate law is being constructed in a manner that engages non-state actors and recognizes the importance of openness to critical constituencies. But it also constrains the non-state role in important respects. Building a legal regime that offers information access but limits or denies access to compliance and enforcement mechanisms relegates important constituencies to the role of relatively passive recipients of data rather than participants in assuring the success of a climate change framework.

Non-state actors are proven enforcers – sometimes more effective than states. The climate cases brought by non-state actors to non-climate institutions demonstrate this point. Leaving the public without standing to push for compliance within any formal mechanisms misses a critical opportunity to promote compliance. And the mechanisms for non-state access to compliance are already modelled within multilateral environmental agreements ranging from Aarhus to NAFTA.