

**Yearbook**  
**of**  
**International Environmental Law**

Volume 18  
2007

OXFORD UNIVERSITY PRESS

# A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums

Eric Dannenmaier

## I. 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 (UNECE) in the context of the region's early 1990s economic and political transition.<sup>1</sup> The idea gave rise to a regional dialogue on how best to advance environmental citizenship in UNECE states,<sup>2</sup> and this dialogue produced the Convention on Access to Information, Access to Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention), which opened for signature in Aarhus, Denmark, in June 1998.<sup>3</sup>

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

The author wishes to acknowledge his debt to the Aarhus Secretariat for gathering data upon which part of this article relies, and to its director, Jeremy Wates, for insights on the early history of the Aarhus Convention. Thanks also to Emily Slaten and Danielle Tucker for research assistance, to David Hunter and his fellow editors for comments on the article in draft, and to Stacy Belden for editorial support. Mistakes and omissions remain entirely those of the author.

<sup>1</sup> The United Nations Economic Commission for Europe (UNECE) 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>>.

<sup>2</sup> 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.

<sup>3</sup> 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].

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,<sup>4</sup> holding the accord out as a model and holding the door open for accession by non-ECE states.

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.'<sup>5</sup> 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 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

<sup>4</sup> 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 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.

<sup>5</sup> Aarhus Convention, *supra* note 3, Article 3.7.

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).<sup>6</sup> It is followed by a discussion of 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.

## II. INTERNATIONAL GOVERNANCE AND THE DEBATE OVER NON-STATE ACTORS

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.

### 1. 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.<sup>7</sup> What order could be found in the chaos of international politics was pinned to the idea of territorially sovereign states as the principal legal actors across geographic borders. Positive international law came to depend on state commitments, state custom, and state practice.<sup>8</sup> Yet a

<sup>6</sup> UNECE, 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]. The author was a member of the Expert Group on Public Participation in International Forums that developed an initial draft of the Almaty Guidelines in consultation with the Aarhus Secretariat in 2004–5. See UN Doc. ECE/MP/PP/WG.1/2005/8 (22 November 2004).

<sup>7</sup> 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.

<sup>8</sup> 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*

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 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

These scholars, and many others, have described the impact of non-state actors on international law and have helped discredit the idea of detached international lawmaking among insular states.<sup>12</sup> The point is not that international decision making is invariably an open and participatory process<sup>13</sup>

Law, American Society of International Law Studies in Transnational Legal Policy, no. 36, at 5 (2005).

<sup>9</sup> 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).

<sup>10</sup> Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, at 1–2 and 121–63 (1998), (describing environmental advocacy networks).

<sup>11</sup> Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control* 43 Int' 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).

<sup>12</sup> 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).

<sup>13</sup> In fact, many note continuing barriers to access and call for greater openness. See, for example, Charnovitz, *supra* note 12 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

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.

## 2. Normative Claims about Public Participation

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 origin—and in the more explicit claim that this participatory model tells us what law *should be*.<sup>14</sup> We are told that doctrines emerging from a participatory process are more like law<sup>15</sup> (more likely to be embraced both internationally and domestically by states and others intended to be bound)<sup>16</sup> 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.

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

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).

<sup>14</sup> 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](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’).

<sup>15</sup> 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 8, 47 at 51. Participation by non-state actors is one way of identifying and implementing those interests.

<sup>16</sup> 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).

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.'<sup>17</sup> 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.<sup>18</sup> Still others raise questions about the accountability of non-state actors, concerned about the potential ties of non-state actors to government and the danger of capture.<sup>19</sup>

### 3. 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.<sup>20</sup> Others have described the same phenomenon.<sup>21</sup> While those who seek more open international decision making are not yet satisfied with the present scope of access,<sup>22</sup> and questions about efficacy and impact remain largely unanswered,<sup>23</sup> examples of public access to international forums increasingly abound.

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

<sup>17</sup> John R. Bolton, *Should We Take Global Governance Seriously?* 1 Chi. J Int'l L. 205 at 217 (2000).

<sup>18</sup> 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).

<sup>19</sup> See, for example, *Sins of the Secular Missionaries*, *The Economist*, 29 January 2006.

<sup>20</sup> See Charnovitz, *supra* note 12. 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).

<sup>21</sup> 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 10.

<sup>22</sup> 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).

<sup>23</sup> See, for example, Hunter, *supra* note 13 at 474.

early twentieth centuries that 'states have an obligation to listen to non-governmental opinion and to take it into account when making decisions affecting other nations...has become a clearer reality in our time.'<sup>24</sup> 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 claim for public participation even as theoretical challenges remain.

#### 4. The Importance of Public Participation in International Environmental Law

The theoretical debate and practical progress described above have particular relevance for international environmental law because much of the pressure for progress on the environment has originated with non-state actors and many of the examples of participatory international models emanate from environmental law. Many theorists who argue that international law-making 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> International environmental law is also concerned with transgressions that cross boundaries in a physical

<sup>24</sup> Charnovitz, *supra* note 12 at 372.

<sup>25</sup> See, for example, Keck and Sikkink, *supra* note 10 at 121; and Haas, *supra* note 11.

<sup>26</sup> 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').

<sup>27</sup> See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd edn, at 987-1021 (2000).



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 other fields of 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.

### III. BACKGROUND OF 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.

#### 1. '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.<sup>28</sup> 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,<sup>29</sup> the 'Environment for Europe' process combined a new democratic energy from eastern Europe with a broader regional environmental agenda. From the outset, non-state

<sup>28</sup> The 'Environment for Europe' process is facilitated by the UNECE, 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 inter-governmental organizations, regional environment centres, non-governmental organizations and other major groups.' UNECE briefing note on the 'Environment for Europe' process, <<http://www.unece.org/env/efe/welcome.html>> [copy on file with author].

<sup>29</sup> 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).

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 a key objective. The conclusions of the Ministerial Conference 'Environment for Europe' in Prague, which were ratified by participating environment ministers,<sup>30</sup> 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.'<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

<sup>30</sup> 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.

<sup>31</sup> Conclusions of the Ministerial 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](http://www.unece.org/env/efe/wgso/pre-kiev.declar/Dobris_E.pdf)> [copy on file with author].

<sup>32</sup> 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].

<sup>33</sup> 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].

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.<sup>34</sup> The Sofia Guidelines also call upon participating states to consider 'the development of a regional Convention on Public Participation'<sup>35</sup> with 'the appropriate involvement of [non-governmental organizations] NGOs.'<sup>36</sup>

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.<sup>37</sup> 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.

## 2. Aarhus Convention

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 Geneva during June 1996. Twenty of fifty-five UNECE countries sent representatives who were joined by about a dozen non-state participants, including six who represented a 'delegation' of Environmental Citizens Organizations (ECO).<sup>38</sup> The ECO participated actively throughout

<sup>34</sup> 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].

<sup>35</sup> Sofia Ministerial Declaration, *supra* note 33 at para. 47.

<sup>36</sup> *Ibid.*

<sup>37</sup> 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).

<sup>38</sup> 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*,

the negotiation process and produced written reports of discussions and outcomes that provide far greater detail than the 'official' reports prepared by the UNECE Secretariat.<sup>39</sup> Two governments, Poland and the Netherlands, invited ECO members to join their official delegations, and the UNECE funded participation by an ECO member from Russia.<sup>40</sup>

The working group met on ten occasions to negotiate the details of a proposed convention, and the negotiations remained largely an open and collaborative process. While an ECO rapporteur characterized as 'disturbing' a European Union<sup>41</sup> decision to coordinate a regional negotiating position in secret,<sup>42</sup> 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.<sup>43</sup>

<[http://www.participate.org/archive/convention/eco\\_report\\_1\\_text.htm](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.

<sup>39</sup> 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.

<sup>40</sup> 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](http://www.participate.org/archive/convention/eco_report_4_text.htm)> [copy on file with author].

<sup>41</sup> 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.

<sup>42</sup> 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](http://www.participate.org/archive/convention/eco_report_8th_session.htm)> [copy on file with author].

<sup>43</sup> 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 desert) 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 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 42. 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.*).

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.<sup>44</sup> As of July 2008, there were forty-one parties to the convention.<sup>45</sup>

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.'<sup>46</sup> The convention provides that 'each Party shall guarantee the rights' of access to information, decision-making, and justice,<sup>47</sup> and parties agree to 'take the necessary legislative, regulatory and other measures' to implement this commitment.<sup>48</sup> The convention links procedural access rights and the public accountability of governments to the substantive objective of environmental protection.<sup>49</sup> 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.'<sup>50</sup> And it has been found to have 'had significant influence on the jurisprudence of the European Court of Human Rights.'<sup>51</sup> The convention is also credited with an increased role for non-state actors in environmental enforcement matters.<sup>52</sup>

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),<sup>53</sup> which creates a binding commitment among parties to establish publicly accessible national inventories of hazardous pollutants released at industrial facilities and other sources.<sup>54</sup> 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

<sup>44</sup> A current accession table is available from the UNECE at <[http://www.unece.org/env/pp/ctreatyfiles/ctreaty\\_2007\\_03\\_27.htm](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 Env'tl. 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/>>.

<sup>45</sup> Accession table, *supra* note 44.

<sup>46</sup> Aarhus Convention, *supra* note 3.

<sup>47</sup> *Ibid.* at Article I. <sup>48</sup> *Ibid.* at Article 3.1.

<sup>49</sup> *Ibid.* at Preamble. <sup>50</sup> *Ibid.* at Preamble.

<sup>51</sup> Alan Boyle, *Human Rights or Environmental Rights? A Reassessment* 18 *Fordham Env'tl. Law Rev.* 471 at 478 (2007).

<sup>52</sup> 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).

<sup>53</sup> See Ratification table at <[http://www.unece.org/env/pp/ctreaty\\_files/cproto\\_col\\_2008\\_07\\_01.htm](http://www.unece.org/env/pp/ctreaty_files/cproto_col_2008_07_01.htm)>.

<sup>54</sup> The text of the protocol is available at <<http://www.unece.org/env/pp/prtr/docs/prtrtext.htm>>.

into the environment and placing on the market of genetically modified organisms.<sup>55</sup> As of July 2008, there were only sixteen parties to the amendment,<sup>56</sup> and it has not yet entered into force,<sup>57</sup> but it is already a notable contribution to the Biosafety debate.

### 3. 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.<sup>58</sup> Yet despite its European origin, proponents of the Aarhus Convention 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.<sup>59</sup> While Western Hemisphere states have been unresponsive to the invitation to join the Aarhus Convention,<sup>60</sup> there has been some receptivity among Central Asian states.<sup>61</sup>

The UNECE has also reinforced what might be seen as global ambitions for the convention. An UNECE *Aarhus Implementation Guide*, which was

<sup>55</sup> *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.

<sup>56</sup> See Ratification table at <[http://www.unece.org/env/pp/ctreaty\\_files/camendment\\_2008\\_06\\_03.htm](http://www.unece.org/env/pp/ctreaty_files/camendment_2008_06_03.htm)>.

<sup>57</sup> The convention requires amendments to be approved by three-quarters of signatories prior to entering into force. Aarhus Convention, *supra* note 3, Article 14.4. See also the Secretariat website relating to the Genetically Modified Organisms amendment, <<http://www.unece.org/env/pp/gmo.htm>>.

<sup>58</sup> 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 NIS countries* 3(1) *Intl J. Not-for-Profit L.* (2000), <[http://www.icnl.org/journal/v013iss1/ar\\_walek1.htm](http://www.icnl.org/journal/v013iss1/ar_walek1.htm)> [copy on file with author].

<sup>59</sup> 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].

<sup>60</sup> No Western Hemisphere state has acceded to the convention, and even Canada and the United States, which are members of the UNECE, are not signatories to the Aarhus Convention. See UNECE accession table, *supra* note 44.

<sup>61</sup> Turkmenistan ratified the convention in 1999, Azerbaijan in 2000, and Kazakhstan, Kyrgyzstan, and Tajikistan in 2001. See accession table, *supra* note 44. 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.

published in 2000, states '[a]lthough regional in scope, the significance of the Aarhus Convention is global.'<sup>62</sup> 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'<sup>63</sup> 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 strengthening the application of principle 10 [of the Rio Declaration]<sup>64</sup> in other regions of the world.'<sup>65</sup>

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.<sup>66</sup>

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.<sup>67</sup>

<sup>62</sup> *Aarhus Convention: An Implementation Guide*, UN Doc ECE/CEP/72 (2000), <<http://www.unep.org/env/pp/acig.pdf>> [Copy on file with author] [*Aarhus Implementation Guide*].

<sup>63</sup> *Ibid.* at v (foreword by Kofi A. Annan, secretary-general of the United Nations).

<sup>64</sup> 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) [Rio Declaration]. 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.

<sup>65</sup> *Aarhus Implementation Guide*, *supra* note 62 at v (foreword by Kofi A. Annan, secretary-general of the United Nations).

<sup>66</sup> Aarhus Convention, *supra* note 3 at Article 3.7.

<sup>67</sup> UNECE Committee on Environmental Policy, Working Group for the Preparation of a Draft Convention on Access to Environmental Information and Public Participation

The final text has two principal modifications. First, the commitment to 'support the provisions'<sup>68</sup> became in the final version a commitment to 'promote the principles.'<sup>69</sup> 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 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.<sup>70</sup>

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>>.

<sup>68</sup> *Ibid.*

<sup>69</sup> Aarhus Convention, *supra* note 3 at Article 3.7.

<sup>70</sup> *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](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 UNECE, Committee on Environmental Policy, Working Group for the Preparation of a Draft Convention on



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, the form in which such an obligation might be transferred or inherited would remain uncertain.<sup>71</sup> 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 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.'<sup>72</sup> Russia also reportedly opposed participation in 'international processes (including national policies which will be presented in international fora).'<sup>73</sup> Denmark

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

<sup>71</sup> 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.

<sup>72</sup> *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](http://www.participate.org/archive/convention/eco_report_3_text.htm)> [copy on file with author].

<sup>73</sup> *Ibid.* at 25.

was said to be 'dragging its heels on the notion of public participation in preparing legislation or in international decisionmaking.'<sup>74</sup> On the other hand, the Netherlands was seen as '[v]aguely supportive of ECOs on international processes,'<sup>75</sup> and other states, including Portugal and Slovenia, continued to broadly support the concept.<sup>76</sup> ECO participants continued to push for the provision.<sup>77</sup>

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.<sup>78</sup>

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.<sup>79</sup> 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

<sup>74</sup> *Ibid.* at 24.                      <sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* at 25.                      <sup>77</sup> *Ibid.* at 21–2.

<sup>78</sup> *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](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 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.

<sup>79</sup> See note 71 in this article and accompanying text.

'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 an obligation to 'promote'—an obligation that might be characterized as a *duty of evangelism*.<sup>80</sup>

*A. 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),<sup>81</sup> 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,<sup>82</sup> can be seen to 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.

<sup>80</sup> The term 'evangelism' is used in the sense of 'zealous advocacy of a cause or doctrine.' Oxford Encyclopedic English Dictionary, at 485 (3rd edn, 1996). The term has a religious connotation that 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.

<sup>81</sup> See, for example, Rio Declaration, *supra* note 64, 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.'

<sup>82</sup> See accession table, *supra* note 44.

*B. 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<sup>83</sup> not by separate obligations for these separate types of processes but, rather, by a more general commitment to ‘promote the application of the principles’ of the Aarhus Convention,<sup>84</sup> 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.<sup>85</sup>

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

<sup>83</sup> See *ECO Report on the First Meeting of the Ad Hoc Working Group*, *supra* note 70 and accompanying text.

<sup>84</sup> Aarhus Convention, *supra* note 3 at Article 3.7.

<sup>85</sup> 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](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm)>; 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.

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.<sup>86</sup> At the same time, they are consistent with, and in many ways a logical extension of, Principle 10.

#### IV. IMPLEMENTING ARTICLE 3.7: THE ALMATY GUIDELINES

##### 1. The 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, Italy, in October 2002.<sup>87</sup> The Lucca Declaration suggested the need for guidelines on implementing Article 3.7,<sup>88</sup> 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 Parties<sup>89</sup> establish an ad hoc expert group to 'consider the scope, format and content of possible guidelines and the appropriate process for their development.'<sup>90</sup> The Secretariat invited experts designated by governments, NGOs, relevant international organizations, other UNECE environmental conventions, and multilateral environmental agreements<sup>91</sup> to form the ad hoc group, which met during the latter half of 2004 and early 2005 to produce draft guidelines. This draft was revised by the Working Group of the Parties and submitted to the second Meeting of the Parties in Almaty, Kazakhstan, in May 2005.<sup>92</sup>

<sup>86</sup> See discussion in note 64 in this article.

<sup>87</sup> UNECE, 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).

<sup>88</sup> *Ibid.* at para. 31.

<sup>89</sup> 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.

<sup>90</sup> UNECE, 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.

<sup>91</sup> 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.

<sup>92</sup> UNECE, 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

## 2. 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.<sup>93</sup> The draft that emerged from a drafting committee formed following the first expert group meeting took a rather ambiguous stance on the former question:

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.<sup>94</sup>

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.<sup>95</sup> 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.<sup>96</sup>

The broader expert group accepted this 'inspiration' language with only modest changes<sup>97</sup> but took steps to strengthen the language regarding the

Meeting of the Parties held in Almaty Kazakhstan, on 25–7 May 2005 [Decision II/4]; and Almaty Guidelines, *supra* note 6 at para. 31.

<sup>93</sup> 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.

<sup>94</sup> 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.31Oct.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.'

<sup>95</sup> *Ibid.* <sup>96</sup> *Ibid.* at para. 2.

<sup>97</sup> UNECE, 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 Promoting the Application of the Principles of the Aarhus Convention in International Forums, prepared by

role of 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)<sup>98</sup> 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]<sup>99</sup> fully reflected, and to shape the way in which international access is secured.<sup>100</sup>

Final proposed guidelines were adopted at the fifth meeting of the Working Group of the Parties in May 2005<sup>101</sup> and presented for adoption to the second Meeting of the Parties to the Aarhus Convention during the following month in Almaty.<sup>102</sup> The proposed guidelines that emerged from the working group followed the UNECE'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.<sup>103</sup>

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.'<sup>104</sup>

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].

<sup>98</sup> 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.

<sup>99</sup> 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.

<sup>100</sup> *Ibid.* at para. 2.

<sup>101</sup> 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-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].

<sup>102</sup> *Ibid.*

<sup>103</sup> Almaty Guidelines, *supra* note 6 at para. 6.

<sup>104</sup> *Ibid.* at para.3.

### 3. 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 are fundamental elements of good governance at all levels and essential for sustainability’<sup>105</sup> and that ‘[p]roviding international access... generally improves the quality of decision-making and the implementation of decisions.’<sup>106</sup> They also recognize the need to ‘adapt and structure international processes and mechanisms in order to ensure meaningful and equitable international access’<sup>107</sup> but caution that ‘care should be taken to make or keep the processes open, in principle, to the public at large.’<sup>108</sup> 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.’<sup>109</sup> 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.<sup>110</sup>

These provisions speak directly to the unique challenges of structuring a ‘democratic’ process in the unique circumstances of international decision making and address the charges of critics who fear the anti-democratic potential of participatory international processes.<sup>111</sup>

The guidelines define ‘international forums’ broadly—without limitation to those controlled by the parties to the Aarhus Convention<sup>112</sup>—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.’<sup>113</sup> 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.’<sup>114</sup> 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

<sup>105</sup> *Ibid.* at para. 11.

<sup>106</sup> *Ibid.* at para. 12.

<sup>107</sup> *Ibid.* at para. 13.

<sup>108</sup> *Ibid.* at para. 14.

<sup>109</sup> *Ibid.* at para. 15.

<sup>110</sup> *Ibid.*

<sup>111</sup> See discussion of Bolton, *supra* note 17; and Anderson, *supra* note 18.

<sup>112</sup> Almaty Guidelines, *supra* note 6 at para. 9.

<sup>113</sup> *Ibid.* at para. 19.

<sup>114</sup> *Ibid.* at para. 28.



facilitate public access to review procedures relating to any application of the rules and standards of each forum.<sup>115</sup>

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 manner<sup>116</sup> and encourage the designation of information officers.<sup>117</sup> 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.’<sup>118</sup> This emphasis on clearly stated standards for decisions to close a process is a feature of domestic systems,<sup>119</sup> yet it is not a common element of international processes that often have a more informal and ad hoc approach to participatory rights.<sup>120</sup> 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:

- (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.<sup>121</sup>

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.’<sup>122</sup> 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.<sup>123</sup>

<sup>115</sup> *Ibid.* at para. 40.

<sup>116</sup> *Ibid.* at para. 21.

<sup>117</sup> *Ibid.* at para. 22.

<sup>118</sup> *Ibid.* at para. 29.

<sup>119</sup> 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 favour of requiring an open meeting under Washington State, United States, open meeting law).

<sup>120</sup> See the discussion later in this article.

<sup>121</sup> Almaty Guidelines, *supra* note 6 at para. 30.

<sup>122</sup> *Ibid.* at para. 31.

<sup>123</sup> *Ibid.*

The guidelines also encourage early and open access to documentation relating to meetings of international forums in order to assure that participation is meaningful<sup>124</sup> and encourage the use of technology such as websites to help overcome the burden of document distribution in an international setting.<sup>125</sup> 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.’<sup>126</sup>

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,’<sup>127</sup> 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.<sup>128</sup>

The expert group also states that

[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.<sup>129</sup>

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.<sup>130</sup>

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

<sup>124</sup> *Ibid.* at para. 34.      <sup>125</sup> *Ibid.* at para. 36.

<sup>126</sup> *Ibid.* at para. 39.

<sup>127</sup> Expert Group Final Draft Guidelines, *supra* note 97 at para. 54.

<sup>128</sup> *Ibid.*      <sup>129</sup> *Ibid.* at para. 55.

<sup>130</sup> Almaty Guidelines, *supra* note 6 at para. 40.

environmental matters, though it does retain the outward-looking promotional aspect of the broader text.

#### V. 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.<sup>131</sup> The 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.'<sup>132</sup> 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.<sup>133</sup> The task force chose these ninety-seven forums from a much larger potential pool on the basis of five criteria:

- the number of members in a forum ('a forum containing a larger number of participating States being considered higher priority');
- 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');
- the proportion of the forum's decisions or actions that affect the environment ('greater emphasis . . . on consulting with forums for which a sizeable proportion of decisions have environmental impacts');
- 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
- 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.')

<sup>131</sup> Decision II/4, *supra* note 92 at paras. 5–6.

<sup>132</sup> *Ibid.* at para. 7.

<sup>133</sup> UNECE, 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).

<sup>134</sup> *Ibid.* at para. 6(i)–(v).

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 willingness to engage in the consultation process.'<sup>135</sup> 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.'<sup>136</sup>

#### VI. QUESTIONNAIRE RESPONSES

The Secretariat received responses from sixty-five of the ninety-seven international forums identified as a 'priority for consultation.'<sup>137</sup> Of these, fifty-two agreed to take part in the consultation process,<sup>138</sup> and forty-eight provided completed responses.<sup>139</sup> The questionnaire asks relatively general

<sup>135</sup> *Ibid.* at para. 7.

<sup>136</sup> *Ibid.*

<sup>137</sup> UNECE, 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).

<sup>138</sup> Questionnaire Response Synthesis, *supra* note 137 at para. 9.

<sup>139</sup> *Ibid.* at para. 12.

questions,<sup>140</sup> and the responses were frequently lacking in detail.<sup>141</sup> The Secretariat prepared synthesis reports highlighting the range of formalized rules and non-formalized practices used by the responding forums.<sup>142</sup> The Secretariat also prepared a synthesis of 'current and future work plans,' 'challenges' to engaging the public as identified by respondents, and comments on the Almaty Guidelines.<sup>143</sup> 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.<sup>144</sup> Less than 20 percent of forums report that they offer a procedure for written

<sup>140</sup> 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.

<sup>141</sup> 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].

<sup>142</sup> These reports are available at <<http://www.unece.org/env/pp/ppif.htm#Synthesispaper>> [on file with the author].

<sup>143</sup> *Ibid.*

<sup>144</sup> 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 UNECE Timber Committee (*ibid.*). Many UN bodies indicated that they follow

comments.<sup>145</sup> 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,<sup>146</sup> and only one indicated that it had a practice of allowing non-state submissions or petitions relating to its operations.<sup>147</sup>

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 UNECE mandate, to implement the parties' commitments to 'promote the principles' of the convention, and it is noteworthy 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.<sup>148</sup> The meeting offered a further opportunity to promote Article 3.7 and the Almaty Guidelines and to

general United Nations Economic and Social Council (UNESCO) guidelines on NGO statements and interventions (*ibid.*).

<sup>145</sup> 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.*).

<sup>146</sup> The International Fund for Agricultural Development and the European Bank for Reconstruction and Development (*ibid.*).

<sup>147</sup> The International Fund for Agricultural Development (*ibid.*).

<sup>148</sup> A provisional agenda for the meeting is available at <<http://www.unece.org/env/pp/ppif/Provisional%20annotated%20agenda%20for%20website%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>>.

discuss challenges that international forums face when seeking to engage non-state actors.<sup>149</sup>

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

## VII. 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

<sup>149</sup> UNECE, 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 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](http://www.unece.org/env/pp/ppif/ece_mp_pp_wg_1_2007_1_8_e.pdf)> [on file with the author].

representation, or even capture, by a small or 'unrepresentative' group of civil society actors) 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.<sup>150</sup>

<sup>150</sup> UNECE, 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.



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.<sup>151</sup> 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 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 UNECE) 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.

<sup>151</sup> 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.

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.