

# Transparency in 21<sup>st</sup> Century Fisheries Management: Options for Public Participation to Enhance Conservation and Management of International Fish Stocks

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## Abstract:

Effective implementation of international environmental and natural resource conservation agreements depends not only upon the cooperation of contracting parties, but also upon the ability of the agreement to win the continuing support and input of non-governmental stakeholders. This view, accepted and advocated by nations in the 1992 Rio Declaration, Agenda 21, and the recent Aarhus Convention on Public Participation, is now being incorporated into modern regional fisheries management organizations. These and earlier fisheries organizations can benefit from an awareness of how other multilateral agreements that adhere to the Rio Declaration and Agenda 21 tenets have enhanced sustainable development through their provisions for transparency and public participation. This article surveys how these regimes have implemented the principles of access to information, access to decision-making and access to justice, and makes corresponding recommendations to assist fisheries management organizations in achieving their goals.

## 1. Introduction

On September 4, 2000, representatives of twenty-four fishing nations adopted the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPOFC).<sup>2</sup> The WCPOFC creates one of the first regional fisheries management organizations (RFMO) since the conclusion in 1995 of the United Nations Fish Stocks Agreement.<sup>3</sup>

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<sup>2</sup> September 5, 2000, 40 I.L.M. 278 (2001) (not yet entered into force) [hereinafter WCPOFC]. As of April 2001, the Convention had been signed by sixteen states and ratified by three. Additionally, "Chinese Taipei" signed an "Arrangement for the Participation of Fishing Entities" on September 5, 2000. See Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, *Status of the Convention*, Draft Agenda Item 1, WCPFC/BP.1/Rev.2 (2001), available at <[http://www.ocean-affairs.com/pdf/WCPFCBP1\\_Rev2.pdf](http://www.ocean-affairs.com/pdf/WCPFCBP1_Rev2.pdf)> (visited Sept. 13, 2001).

<sup>3</sup> Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 34 I.L.M. 1542 (1995) (not yet entered into force) [hereinafter Fish Stocks Agreement].

One of the many difficult questions negotiators of the Convention had to grapple with was the extent to which the new RFMO would provide for transparency and public participation in its operations. On one hand, numerous governments and commentators have come to the conclusion that effective implementation of environmental and natural resource management agreements depends not only upon the cooperation of contracting parties, but also upon the ability of the agreement to win the continuing support and input of non-governmental stakeholders. On the other hand, some interests express the view that a closed decision-making process may be more efficient or easier to manage than an open one.

While the WCPOFC contains provisions that generally ensure the right of interested persons and groups to participate in its activities, the specifics of how that participation will occur will be defined under the rules of procedure and practices that the RFMO develops in the coming months and years. Those rules and practices will be influenced by the ways in which other multilateral regimes provide for transparency and public participation. In turn, they will help shape expectations for the manner in which existing RFMOs—and RFMOs yet to be created—should conduct their affairs.

This article is intended to inform the debate by surveying mechanisms for public participation drawn from the state of the art in international law and institutions. The article is guided significantly by developments in multilateral environmental law that have occurred subsequent to the adoption of the Rio Declaration on Environment and Development<sup>4</sup> and Agenda 21<sup>5</sup> at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992.

The Rio Declaration and Agenda 21 identified three principles, or “pillars,” of public participation essential for successfully achieving sustainable natural resource management: access to information, access to decision-making, and access to justice. These three principles have since been incorporated into the rules, procedures, and practices of the several multilateral environmental agreements that have entered into force in the post-Rio period. Like those agreements, the Fish Stocks Agreement and the WCPOFC have purposefully incorporated the tenets of the Rio Declaration and Agenda 21.

The article will begin, in Part II, by setting out the relationship between the Rio Declaration, Agenda 21, the Fish Stocks Agreement and the WCPOFC. Next, Part II will review the mandate for public participation contained in the Fish Stocks Agreement. The Part will note that the Fish Stocks Agreement mandate is reflected in the WCPOFC’s text, and will briefly contrast and compare the ways in which selected RFMOs that pre-dated the Fish Stocks Agreement have responded to that mandate.

In Part III, the article will identify and discuss some of the ways in which public participation can help states achieve the goals of a multilateral environmental or resource-management agreement. These include (1) enhancing legitimacy and facilitating public acceptance of a treaty regime, (2) improving the quality of decision-making by increasing the information and perspectives available to decision makers, (3) providing accountability of decision-making through public scrutiny, and (4) assisting small and less-developed states in building their capacity to participate effectively in the agreement.

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<sup>4</sup> Rio Declaration on Environment and Development, U.N. Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vol. I) (1992), 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

<sup>5</sup> Agenda 21, U.N. Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vols. I, II, III) (1992).

Part IV contains the “meat” of the article: a survey of public participation provisions and practices found in various multilateral agreements and institutions. The primary focus of the survey will be upon the three major multilateral environmental agreements that were adopted at or pursuant to the 1992 Rio Conference: the U.N. Framework Convention on Climate Change,<sup>6</sup> the Convention on Biological Diversity,<sup>7</sup> and the Convention to Combat Desertification.<sup>8</sup> Because these agreements—like the Fish Stocks Agreement and the WCPOFC—have been developed to conform to the Rio Declaration and Agenda 21, we believe a review of how they have integrated public participation into their respective activities could inform those who work in international fisheries management how they, too, might provide for effective public participation.

The survey will also include relevant aspects of other multilateral agreements and institutions, such as the Convention on International Trade in Endangered Species (CITES),<sup>9</sup> selected fisheries and marine resources agreements, the World Trade Organization (WTO),<sup>10</sup> the United Nations Economic and Social Council (ECOSOC),<sup>11</sup> and the North American Agreement on Environmental Cooperation (NAAEC).<sup>12</sup>

The survey will be introduced by a brief discussion of the three pillars of public participation articulated in the Rio Declaration, Agenda 21, and the recent “Aarhus” Convention.<sup>13</sup> These pillars provide the framework upon which the balance of Part IV is structured.

Under *Access to Information*, the article describes how the various treaty regimes disseminate documents, and what restrictions (if any) they place on the availability of information. Next, under *Access to Decision-Making*, the article covers the means by which the regimes accredit NGOs to participate in official sessions as observers; the rules and practices governing public attendance at the sessions; and the extent to which representatives of civil society are permitted to express their views by addressing meetings, distributing papers and other materials, and submitting proposals. In the final section, *Facilitating Compliance and Implementation*, the article focuses on how the final pillar of public participation, access to justice, can be used to allow civil society to facilitate and enhance compliance and implementation by performing monitoring or verification services, providing

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<sup>6</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (1992) [hereinafter Climate Convention or FCCC].

<sup>7</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter Convention on Biological Diversity or CBD].

<sup>8</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 33 I.L.M. 1328 (1994) [hereinafter Desertification Convention or CCD].

<sup>9</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085 (1973) [hereinafter Endangered Species Convention or CITES].

<sup>10</sup> Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

<sup>11</sup> The Economic and Social Council, U.N. CHARTER arts. 61-72 [hereinafter ECOSOC].

<sup>12</sup> North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

<sup>13</sup> Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, opened for signature June 25, 1998, 37 I.L.M. 1506 (1998) [hereinafter Aarhus Convention]. The Convention is scheduled to come into effect on October 30, 2001. See United Nations Economic Commission for Europe, *Aarhus Convention Starts Count-Down to Entry into Force*, UNECE press release ECE/ENV/01/06, Aug. 9, 2001, available at <http://www.unece.org/env/pp/pr.09.08.01.pdf> (visited Aug. 10, 2001).

compliance-related information, or supplying expert analyses and other services that supplement the capabilities of the treaty institution and state parties.

## **2. Participatory Provisions of the Rio Declaration and the Fish Stocks Agreement**

The provisions for public participation in the WCPOFC reflect those recommended in the 1992 Rio Declaration and its action plan, Agenda 21. This Part will begin by discussing the relationship between the Rio Declaration, Agenda 21, the Fish Stocks Agreement and the WCPOFC. The Part will then review the mandate for public participation contained in the Fish Stocks Agreement. The Part will conclude by briefly contrasting and comparing the ways in which selected RFMOs that pre-dated the Fish Stocks Agreement have responded to that mandate.

### **2.1 Origins of Modern Fisheries Management Law: The Rio Declaration and Agenda 21**

The WCPOFC's origins can be traced to the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992.<sup>14</sup> Among its many accomplishments, UNCED adopted the Rio Declaration on Environment and Development<sup>15</sup> and Agenda 21.<sup>16</sup> The Rio Declaration established twenty-seven principles to govern sustainable development and conservation of the world's natural resources. Agenda 21 is a detailed action plan for realizing the Rio Declaration's goals.

Agenda 21 included a recommendation that states convene an intergovernmental conference under United Nations auspices to deal with the problem of overexploitation of straddling and highly migratory fish stocks.<sup>17</sup> That recommendation led to the adoption in 1995 of the Fish Stocks Agreement.<sup>18</sup> The Fish Stocks Agreement, in turn, provides the legal authority under which RFMOs such as the WCPOFC are to be negotiated.<sup>19</sup>

Agenda 21 acknowledges that “one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.”<sup>20</sup> Building upon Principle 10 of the Rio Declaration, Agenda 21 established an action plan for enhancing mechanisms and procedures that promote public participation in all forums concerned with implementing Agenda 21. The transparency and participation principles of the Rio Declaration and action plan—access to information, access to decision-making, and access to justice—have since been incorporated into the rules, procedures, and practices of the several multilateral environmental agreements that have been adopted or entered into force in the post-Rio period.

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<sup>14</sup> See I.L.M. *Background/Content Summary to United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks*, 34 I.L.M. 1542 (1995).

<sup>15</sup> Rio Declaration, *supra* note 4.

<sup>16</sup> Agenda 21, *supra* note 5.

<sup>17</sup> See *id.* ch. 17.49.

<sup>18</sup> Fish Stocks Agreement, *supra* note 3.

<sup>19</sup> See WCPOFC, *supra* note 2, arts. 2, 4.

<sup>20</sup> Agenda 21, *supra* note 5, ch. 23.2.

## 2.2 The Fish Stocks Agreement Mandate

Similarly to other post-Rio agreements, the U.N. Fish Stocks Agreement contains provisions intended to facilitate broad public participation in its administration and implementation. Article 12 sets out a framework for transparency and public participation in the activities of sub-regional and regional fisheries management organizations and arrangements. Non-governmental organizations that are concerned with straddling and highly migratory fish stocks “shall have timely access to the records and reports” of RFMOs.<sup>21</sup> Member states are required to provide for transparency in the decision-making process and other activities of the RFMO.<sup>22</sup> Moreover, representatives from concerned NGOs are to be “afforded the opportunity to take part in [RFMO meetings] as observers or otherwise, as appropriate.” The rules governing this participation must not be unduly restrictive.<sup>23</sup>

By its own terms, the WCPOFC will operate subject to the Fish Stocks Agreement.<sup>24</sup> Accordingly, the WCPOFC contains language regarding public participation that is nearly identical to that of the Fish Stocks Agreement.<sup>25</sup> These provisions will form the starting point for the rules of procedure to be elaborated by the WCPOFC Commission and applied by the Commission and subsidiary bodies.

The provisions stand in marked contrast to instruments governing some of the RFMOs that were adopted prior to the 1992 Rio Conference. For example, until recently neither the International Convention for the Conservation of Atlantic Tunas (ICCAT),<sup>26</sup> the convention for the Northwest Atlantic Fisheries Organization (NAFO),<sup>27</sup> nor their respective rules of procedure contained any provisions acknowledging the value of public participation or permitting NGOs to participate as observers or in any other capacity.

These pre-Fish Stocks Agreement RFMOs developed under very different governing requirements than will the WCPOFC or other new RFMOs. However, because the Fish Stocks Agreement applies to all RFMOs regardless of when they were created, the hesitancy of ICCAT and NAFO to adhere fully to the Fish Stocks Agreement’s public participation rules may be more properly viewed as a reluctance of their parties to relinquish an outmoded model, rather than as an example of how the Fish Stocks Agreement’s provisions have been or should be implemented. Consequently, the past practices in these RFMOs with respect to

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<sup>21</sup> Fish Stocks Agreement, *supra* note 3, art. 12.2.

<sup>22</sup> *See id.* art. 12.1.

<sup>23</sup> *Id.* art. 12.2.

<sup>24</sup> *See* WCPOFC, *supra* note 2, art. 2 (stating Convention’s objective is to ensure conservation and sustainable use in accordance with U.N. Convention on Law of the Sea [UNCLOS] and Fish Stocks Agreement); art. 4 (stating Convention shall be interpreted and applied in the context of, and in a manner consistent with, UNCLOS and Fish Stocks Agreement).

<sup>25</sup> The only difference of note between the two texts is in the provisions governing NGO access to information. The Fish Stocks Agreement provides that NGOs “shall have timely access to the records and reports” of RFMOs, subject to the relevant rules of procedure. Fish Stocks Agreement art. 12.2. WCPOFC authorizes timely NGO access to “pertinent information,” subject to the rules and procedures the Commission adopts. WCPOFC art. 21.

<sup>26</sup> International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 U.S.T. 2887, *available at* <[www.iccat.es/documents/basictexts.pdf](http://www.iccat.es/documents/basictexts.pdf)> (visited Sept. 12, 2001) [hereinafter ICCAT].

<sup>27</sup> Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries, Oct. 24, 1978, *available at* <[www.nafo.ca/about/convention.htm](http://www.nafo.ca/about/convention.htm)> (visited Sept. 12, 2001) [hereinafter NAFO].

public participation may provide more contrast than guidance to the manner in which public participation should be exercised under post-Fish Stocks Agreement RFMOs.

Yet even ICCAT and NAFO have begun to move towards expanded participation by civil society. Each has recently adopted new rules governing transparency in their operations, though NAFO's practices still do not conform to the Fish Stocks Agreement requirements.<sup>28</sup>

Other RFMOs are considering responding more decisively to the trend towards broad public participation established at the Rio Convention and furthered under the Fish Stocks Agreement. For example, the Inter-American Tropical Tuna Commission (IATTC),<sup>29</sup> originally created in 1950, is currently renegotiating its governing convention. Negotiators have proposed reaffirming the contracting parties' commitment to the Rio Declaration and Agenda 21, adopting transparency provisions that are nearly identical to those of the WCPOFC, and including an Annex setting out detailed guidelines for the participation of intergovernmental and non-governmental organizations at Commission meetings.<sup>30</sup>

Similar participatory provisions have already been adopted in the Agreement on the International Dolphin Conservation Program, which has been administered largely by the IATTC.<sup>31</sup> In fact, the IATTC's liberalized approach may be seen as a direct result of its role in administering the Dolphin Conservation Program. After the adoption of the Dolphin Agreement's transparency provisions, the IATTC informally moved its own practices closer to those provisions. The IATTC's proposed transparency provisions—including adherence to the Rio Declaration and Agenda 21—could thus represent a codification of practices that began with the adoption of the Dolphin Conservation Agreement.<sup>32</sup>

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<sup>28</sup> NAFO's newly amended rules of procedure allow NGOs to apply for observer status by supplying exhaustive information about their organization "at least 100 days in advance of the meeting." So long as a majority of contracting parties do not object, the NGO can attend meetings, make statements upon the invitation of the chair, and distribute documents through the secretariat. However, the rules give NGOs the right only to attend plenary meetings of the General Council and Fisheries Commission. The rules do not authorize them to attend sessions of the subsidiary bodies, where most of the important decision-making traditionally takes place. See Northwest Atlantic Fisheries Organization, Rules of Procedure for the General Council, rule 9, and Rules of Procedure for the Fisheries Commission, rule 10 (amended Oct. 10, 2000), *available at* <<http://www.nafo.ca/about/convention2000/partIII.pdf>> (visited Sept. 6, 2001) [hereinafter collectively NAFO Rules of Procedure]. For a more detailed review of these rules, see discussion *infra* Part 4.3-4.4. ICCAT's transparency guidelines are more liberal than NAFO's. Interested NGOs may apply for observer status 50 days before a meeting. Once admitted, they may attend most meetings, including those of the subsidiary bodies. See International Convention for the Conservation of Atlantic Tunas, Guidelines and Criteria for Granting Observer Status at ICCAT Meetings (1998), *available at* <[http://www.iccat.es/Documents/Observer\\_Guidelines.pdf](http://www.iccat.es/Documents/Observer_Guidelines.pdf)> (visited Sept. 12, 2001).

<sup>29</sup> Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, *available at* <[www.oceanlaw.net/texts/iattc.htm](http://www.oceanlaw.net/texts/iattc.htm)> (visited Sept. 12, 2001) [hereinafter IATTC].

<sup>30</sup> See Inter-American Tropical Tuna Convention Renegotiation, Revised Chairman's Text, Mar. 31, 2000, preamble, art. XIX, and annex 2 [hereinafter IATTC Renegotiation]; see also Sixth Meeting of the Working Group on the IATTC Convention, WGC6 Doc 8, Apr. 4, 2001, art. XVI and annex 3 (both documents on file with author).

<sup>31</sup> See Agreement on the International Dolphin Conservation Program, May 15, 1998, preamble, art. XVII, annex X, *available at* <[www.oceanlaw.net/texts/aidcp.htm](http://www.oceanlaw.net/texts/aidcp.htm)> (visited Sept. 14, 2001) [hereinafter Dolphin Conservation Agreement].

<sup>32</sup> Though the IATTC's ad hoc practices have worked smoothly since being influenced by those of the Dolphin Conservation Agreement, some parties have had second thoughts. They have raised concerns that liberalized NGO participation might lead to the contracting parties being numerically overwhelmed by NGOs, and have suggested rules that could limit participation and increase the complexity of the application process for observer

### 3. Benefits of Public Participation in Multilateral Institutions

The Fish Stock Agreement provides an outline for the minimum public participation standards contracting parties to RFMOs should practice. Ultimately, the way in which parties implement those standards will reflect their own needs and their recognition of the benefits vigorous public participation might bring to the process of developing, implementing and administering an RFMO. This Part will briefly discuss some of those benefits, including the roles NGOs and the public can play in (1) enhancing legitimacy and facilitating public acceptance of a treaty regime, (2) improving the quality of decision-making by increasing the information and perspectives available to decision makers, (3) providing accountability of decision-making through public scrutiny, and (4) assisting small and less-developed states in building their capacity to participate effectively in the agreement.

#### 3.1 Enhancing Legitimacy and Facilitating Public Acceptance

Non-governmental organizations have long played a key role in identifying and promoting international responses to problems ranging from health, disaster relief, protection of minorities, transportation, commerce and workers' rights, to narcotics control, agriculture and protection of the environment and plant and animal species.<sup>33</sup> Once the international community agrees that action is needed, the same NGO attributes that were instrumental in identifying the problem—e.g., the ability to communicate with interested or affected groups of people both at home and abroad—can be important factors in enhancing the legitimacy of a treaty institution and facilitating public acceptance of its decisions.

The perceived integrity of environmental NGOs often stems from their ability to focus on specific issues and to take principled positions that need not be compromised by overtly political concerns.<sup>34</sup> Because these NGOs are viewed as being independent of government influence and guided by a desire to accomplish the environmental goal, a government's or treaty organization's position may gain legitimacy if it is supported by NGOs.<sup>35</sup>

Many NGOs have extensive membership bases, sometimes numbered in the millions.<sup>36</sup> Accordingly, they can provide important sources of political capital if their concerns and interests are appropriately considered. These factors allow some NGOs to perform the role of "information brokers" between broad cross sections of social or political groups and those whose job it is to implement international environmental law effectively.<sup>37</sup>

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status. Such proposals, if adopted, could place the IATTC in an extreme minority of multilateral agreements by moving it backwards towards *less* transparency and public participation than it already practices.

<sup>33</sup> See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 200 (1997).

<sup>34</sup> See Thomas Princen, *NGOs: Creating a Niche in Environmental Diplomacy*, in ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 29, 35 (Thomas Princen & Matthias Finger, eds. 1994).

<sup>35</sup> See *id.*

<sup>36</sup> For example, the World Wide Fund for Nature – WWF has operations in over 100 countries and nearly five million members. See WWF - *Taking Action for a Living Planet*, available at <<http://www.panda.org/aboutwwf/>> (visited Sept. 7, 2001).

<sup>37</sup> See HILARY FRENCH, *VANISHING BORDERS: PROTECTING THE PLANET IN THE AGE OF GLOBALIZATION* 255a (2000).

To the extent that the post-Rio conventions on climate, biological diversity, and desertification have strived to make information readily available and to foster inclusiveness in their decision-making processes, they have increased the likelihood that NGOs and, more broadly, civil society will support their decisions. That, in turn, enhances the possibility that the agreements will achieve their aims.

### **3.2 Improving Decision-Making**

Broad public participation, including participation by NGOs, can help improve the quality of decision-making by increasing the information and perspectives that are available to decision makers. Many NGOs have developed significant technical expertise on environmental and natural resource problems. Unlike national governments, which must balance the desires and priorities of multiple constituencies, these NGOs can concentrate on a single issue and can place that issue in a global perspective.<sup>38</sup> As such, they often can provide treaty institutions with ideas “from outside normal bureaucratic channels.”<sup>39</sup> Parties to the Climate Convention, for example, have frequently relied upon the writings and presentations of NGOs and qualified individuals to learn of new approaches or to supplement their knowledge on specific issues. Many of these ideas have eventually been implemented under the Convention or have found their way into the various implementing texts being negotiated under the Convention’s Kyoto Protocol.<sup>40</sup>

The role of independent expert often enables NGOs to help facilitate negotiations between different interests. NGO expertise allows them to provide rapid feedback to new proposals. Their independence permits them to serve as informal communications channels between official delegations and interested outside groups and constituencies, or to help find compromise solutions for parties with seemingly incompatible positions.<sup>41</sup>

### **3.3 Providing Accountability Through Public Scrutiny**

An increasingly important function of public participation is supplementing the capacity of state parties to monitor and enforce compliance with treaty commitments once a multilateral environmental or resource management agreement has entered into force. Non-governmental organizations and individuals can act as independent fact-finders and analysts, identifying incidences of non-compliance and ways to improve reporting and accountability mechanisms. This function has been key to the successful implementation of CITES, as discussed in Part IV of this article.

Speaking more broadly, increased public participation leads to greater transparency in treaty regimes, which enhances compliance.<sup>42</sup> By opening up the process and disseminating information to interested members of civil society, NGOs can give others the tools to

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<sup>38</sup> See Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61, 72 (1992).

<sup>39</sup> Charnovitz, *supra* note 33, at 274.

<sup>40</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (1998) [hereinafter Kyoto Protocol]. The Kyoto Protocol sets binding greenhouse gas emissions targets for developed countries and “economies in transition” of Eastern Europe.

<sup>41</sup> See Charnovitz, *supra* note 33, at 274-5.

<sup>42</sup> See Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT’L L. 1017, 1062 (1999).



mobilize around an issue and engage in the debate at the local, national, or international levels.<sup>43</sup> Transparency helps ensure that governments will deal with each other fairly and openly, because it makes them less likely to advocate positions that they would not care to defend publicly.<sup>44</sup>

Moreover, transparency enhances compliance because it increases the likelihood that treaty violations will be exposed.<sup>45</sup> Accordingly, it acts as a significant deterrent to non-compliance. This, in turn, helps assure states that their own implementation efforts will not be undercut by “free riders” who seek economic benefits at the expense of parties that comply with their commitments.

### 3.4 Assisting Small and Less-Developed Island States

Of particular relevance to RFMOs such as the WCPOFC is the potential role of NGOs in assisting small and less-developed island states to build their capacity for implementing and participating in the RFMO. The WCPOFC specifically recognizes the special needs of these states, and obligates parties to extend them special considerations.<sup>46</sup> Most pointedly, the WCPOFC instructs its Commission members to give particular attention—and to provide assistance where appropriate—to the vulnerability of small island developing states that depend on marine living resources as a food source; the need to avoid adverse impacts on subsistence, small-scale, and indigenous fishers; and the need to ensure that the RFMO’s measures do not transfer a disproportionate share of the responsibility for conservation onto these states and peoples.<sup>47</sup>

These provisions implicitly recognize that even though international institutions may be based upon the principle of sovereign equality, developing countries may require special considerations if they are to protect their interests against the will of the developed countries. By lending their resources and legitimacy to bolster the positions of many developing countries, NGOs can help “level the playing field.”<sup>48</sup> This could be especially true in the context of many RFMOs, in which small island developing states and environmental NGOs share the common interest of achieving a sustainable harvest of marine resources.

Small island developing states and environmental NGOs have collaborated—and continue to collaborate—in other treaty regimes, to their mutual benefit and to the benefit of the treaty regime as a whole. By the late 1980s, many small island states feared that rising seas caused by global warming could inundate them and wipe out their very existence. Yet the pace of international efforts to take meaningful action against the threat of climate change was proceeding at a slow and unsteady pace. The Centre for International Environmental Law (CIEL), based in London and now known as the Foundation for International Environmental Law and Development (FIELD),<sup>49</sup> initiated a dialogue with key small island

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<sup>43</sup> See Princen, *supra* note 34, at 35.

<sup>44</sup> See Hansen, *supra* note 42, at 1062.

<sup>45</sup> See *id.* at 1061.

<sup>46</sup> See WCPOFC, *supra* note 2, chapeau, arts. 10.3, 30.2, 30.4.

<sup>47</sup> See *id.* art. 30.2.

<sup>48</sup> See Charnovitz, *supra* note 33, at 277.

<sup>49</sup> The Center for International Environmental Law (CIEL) is now headquartered in Washington, D.C.; the Foundation for International Environmental Law and Development (FIELD) is headquartered in London. Although they share a common origin, CIEL and FIELD are entirely separate organizations having no formal affiliation with each other.

states. The dialogue ultimately led to the creation of the Alliance of Small Island States (AOSIS) and the appointment of CIEL/FIELD as AOSIS' legal advisors.<sup>50</sup>

CIEL took—and FIELD continues to take—an extremely active role in assisting AOSIS in climate negotiations. Their responsibilities have included preparing policy statements and draft negotiating texts, attending the official sessions, and briefing AOSIS members on the issues.<sup>51</sup> This activity has improved the ability of AOSIS delegates to take an active part in the negotiations, allowing AOSIS to function both as a conscience in the debates and a significant negotiating force under the Climate Convention and its Kyoto Protocol.

#### **4. Public Participation Under Multilateral Agreements**

This Part of the article reviews the policies and practices that govern how the public participates in selected treaty regimes. In the regimes we surveyed, “public participation” generally means participation by non-governmental organizations. The Part consequently focuses substantially on the opportunities for participation by NGOs in each regime.

The Part begins with a brief discussion of the three “pillars” of public participation articulated in the groundbreaking “Aarhus” Convention.<sup>52</sup> These pillars—access to information, access to decision-making, and access to justice—provide the framework upon which the balance of the Part is structured. As explained earlier, the primary focus of the survey will be upon the three agreements that were implemented in the aftermath of the 1992 Rio Convention: the Framework Convention on Climate Change, the Convention on Biological Diversity, and the Convention to Combat Desertification. However, the Part also surveys relevant aspects of other multilateral agreements and institutions, including CITES, the Ramsar Convention on Wetlands, selected fisheries and marine resources agreements, the World Trade Organization (WTO), the United Nations Economic and Social Council (ECOSOC), and the North American Agreement on Environmental Cooperation (NAAEC).

##### **4.1 The Three Pillars of Public Participation**

Agenda 21 and Principle 10 of the Rio Declaration have provided the framework for public participation in the various multilateral environmental agreements adopted at, or developed after, the 1992 Rio Conference.<sup>53</sup> In Rio Principle 10, nations agreed to facilitate and encourage public awareness and participation in environmental issues, and to provide effective access to judicial and administrative remedies.

The Aarhus Convention provides one of the most comprehensive articulations of Principle 10 to be found in a binding multilateral agreement. Adopted by the European Union and 35 countries of the United Nations Economic Commission for Europe (UNECE), the Convention will provide the public and NGOs in those countries with common tools and

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<sup>50</sup> See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY REGIMES* 260-62 (1995).

<sup>51</sup> See *id.*

<sup>52</sup> Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention), *supra* note 13.

<sup>53</sup> See discussion *supra* Part I.

standards for monitoring performance and engaging in environmental decision-making.<sup>54</sup> The Convention specifically applies to the rules by which state parties allow public participation in their national governance processes. However, it also requires parties to apply its principles in any international agreements to which they accede.<sup>55</sup>

Serving as an extension of the Rio Declaration and other agreements, the Aarhus Convention identifies three pillars of public participation in environmental matters, which all of its state parties are obliged to uphold: (1) access to information, (2) access to decision-making, and (3) access to justice.

*Access to information* means the public should be able to obtain environmental information with only limited, explicitly defined exceptions.<sup>56</sup> Effective access includes assuring that public authorities make environmental information available to the public in a transparent manner. Transparency and access can be enhanced by freely providing information through electronic databases over the internet.<sup>57</sup>

*Access to decision-making* means the public should be able to participate in the environmental decision-making process and have its input taken into account. Meaningful access to decision-making requires that the concerned public receive notice of environmental decision-making processes at an early stage and in an adequate, timely and effective manner.<sup>58</sup> The opportunities for participation should also begin at an early time, when all options are still open.<sup>59</sup> Clear and transparent provisions should exist for interested persons and groups to submit information, comments or analysis relevant to the issue.<sup>60</sup> Moreover, decision-makers should genuinely take into account the outcomes of this public input, and should promptly inform the public of their decisions.<sup>61</sup>

*Access to justice* means individuals and groups should have opportunities for redress when authorities fail to comply with their duties to provide access to information or decision-making.<sup>62</sup> This ideal is essential for preserving the rights of the public in respect of their national governments. Hence, Aarhus Convention parties have empowered their citizens with the means to help enforce the other two Convention pillars. Parties have thus agreed to recognize the important role the public may have in ensuring the compliance of states with their environment-related legal obligations.

In the context of a regional fisheries management agreement, in which the obligations of sovereign states are directed towards each other rather than towards their respective

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<sup>54</sup> See ELENA PETKOVA WITH PETER VEIT, ENVIRONMENTAL ACCOUNTABILITY BEYOND THE NATION-STATE: THE IMPLICATION OF THE AARHUS CONVENTION 1 (World Resources Institute Env'tl. Governance Notes, April 2000); see also CLAUDIA SALADIN & BRENNAN VAN DYKE, IMPLEMENTING THE PRINCIPLES OF THE PUBLIC PARTICIPATION CONVENTION IN INTERNATIONAL ORGANIZATIONS 2-7 (European Eco Forum, June 1998).

<sup>55</sup> See Aarhus Convention, *supra* note 13, art. 3.7.

<sup>56</sup> See *id.* art. 4.

<sup>57</sup> See *id.* art. 5.10-11.

<sup>58</sup> See *id.* art. 6.2.

<sup>59</sup> See *id.* art. 6.6.

<sup>60</sup> See *id.* art. 6.7.

<sup>61</sup> See *id.* art. 6.8, 6.10. In practice, access to information and access to decision-making may not be discrete rights, nor do they operate in isolation from one another. For example, the most useful information about an institution's proceedings may best be obtained by participating in the official sessions. Effective public participation in decision-making may be impeded unless the non-governmental individual or group has access to negotiating drafts and other documents before the session begins. For the organizational purpose of this article, we will discuss the principles separately, while recognizing that they are closely intertwined.

<sup>62</sup> See *id.* art. 9.

citizens, the focus of this public participation pillar may most appropriately be on the role the public and NGOs can play in facilitating compliance and implementation of the RFMO's provisions. Agreements like CITES demonstrate that non-governmental organizations and qualified individuals can be well-suited to assist parties by performing monitoring or verification services, providing compliance-related information, or supplying expert analyses and other services that supplement the capabilities of the treaty institution and state parties. Accordingly, this article will review the cooperative role of the public in implementing international environmental agreements, while acknowledging that—in the context of developing most RFMOs—the most important opportunities for public participation may be in the more policy-oriented areas related to access to information and decision-making.

## **4.2 Access to Information**

The Fish Stocks Agreement stipulates that non-governmental organizations concerned with straddling and highly migratory fish stocks “shall have timely access to the records and reports” of RFMOs.<sup>63</sup> That requirement echoes Agenda 21's instruction that the various components of the United Nations system should provide access for NGOs to “accurate and timely data and information to promote the effectiveness of their programs and activities and their roles in support of sustainable development.”<sup>64</sup> The WCPOFC provides that NGOs concerned with matters relevant to the implementation of the Convention will be given “timely access to pertinent information,” subject to the rules and procedures that the Commission may adopt.<sup>65</sup>

This section will discuss how selected agreements disseminate information to the public, and what types of information they generally make available.

### **4.2.1 Document Dissemination**

All three of the Rio-era agreements we reviewed—the Climate, Biological Diversity and Desertification Conventions—authorize full public access to their official documents. In the Framework Convention on Climate Change (FCCC), Article 6 broadly governs document access, providing that parties shall promote public awareness on climate change at national, regional, and international levels. The FCCC's draft rules of procedure contain no additional provisions regarding information availability, other than instructions to the secretariat to reproduce and distribute documents at the sessions and to publish and distribute official documents.<sup>66</sup> Accordingly, the practices for document dissemination have developed over time, in response to suggestions from NGOs and decisions by the parties.

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<sup>63</sup> Fish Stocks Agreement, *supra* note 3, art. 12.2.

<sup>64</sup> Agenda 21, *supra* note 5, ch. 27.9(g).

<sup>65</sup> WCPOFC, *supra* note 2, art. 21.

<sup>66</sup> See *Draft Rules of Procedure of the Conference of the Parties and Its Subsidiary Bodies*, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 11th Sess., Agenda Item 6, rule 29, U.N. Doc. A/AC.237/L.22/Rev.2 (1995) [hereinafter FCCC Draft Rules of Procedure]. These draft rules of procedure have never been officially adopted by the Conference of the Parties, due to a lack of agreement over the provisions for voting. The parties have agreed to use the draft rules for all matters other than voting. See FCCC Secretariat, *Guide to the Climate Change Negotiation Process: The Procedures*, available at <<http://www.unfccc.de/resource/process/components/procedures/proced.html>> (visited Sept. 12, 2001).

Paper (“hard”) copies of Climate Convention documents are available at official meetings, from the secretariat’s library in Bonn, Germany, or at the various United Nations libraries.<sup>67</sup> All of these documents have also long been available electronically from the FCCC website, which has become the most important public access point for them. Posted documents include not only the final texts, but also any interim or working drafts distributed by the secretariat.

Though documents are generally posted on the website in a timely manner, this has not always been the case. Many business and environmental NGOs complained that their access was hampered, especially when they tried to obtain draft negotiating documents that were necessary for meaningfully participating in the discussions.<sup>68</sup> A workshop on NGO participation was held, and several state parties submitted recommendations supporting enhanced NGO access to information.<sup>69</sup> The Subsidiary Body on Implementation (SBI) encouraged the secretariat to improve the availability of documentation and information, noting that NGOs must be well informed about the FCCC process if they are to be effectively involved in its implementation.<sup>70</sup> The secretariat subsequently redesigned the website to improve document access, and explored forwarding documents to designated contact persons for each “constituency” (business, environmental, and local government) so that those contact persons could in turn distribute them to interested persons in an expedited manner.<sup>71</sup>

The websites for the Convention on Biological Diversity (CBD) and Convention to Combat Desertification similarly are the most important sources for the official documents of those agreements. The CBD secretariat describes its website as being very up to date.<sup>72</sup> The Desertification Convention website has a specific section dedicated to public information, including fact sheets on various issues, press releases, and a regularly issued newsletter.<sup>73</sup>

The Climate, Biodiversity, and Desertification Convention secretariats typically do not charge non-government observers at meetings for the expenses of supplying official documents. By contrast, non-government participants at meetings of the Endangered Species Convention (CITES) currently pay a flat registration fee of US \$600, half of which is attributed to the cost of document distribution.<sup>74</sup> The International Dolphin Conservation Agreement and the Inter-American Tropical Tuna Commission’s current renegotiated text

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<sup>67</sup> Telephone Interview with Barbara Black, NGO Liaison Officer, FCCC secretariat (Apr. 13, 2000).

<sup>68</sup> See *Report by the Global Environment Information Centre: NGO Consultative Mechanisms with the United Nations Framework Convention on Climate Change*, Subsidiary Body for Implementation, 6th Sess., Provisional Agenda Item 10, at 9, 12, U.N. Doc. SBI/1997/MISC.6 (1997).

<sup>69</sup> See *Mechanisms for Consultations with Non-Governmental Organizations: Note by the Secretariat*, Subsidiary Body for Implementation, 6th Sess., Provisional Agenda Item 10, at ¶ 2, U.N. Doc. FCCC/SBI/1997/14 (1997); see generally *Mechanisms for Consultations with Non-Governmental Organizations (NGOs): Compilation of Submissions*, Subsidiary Body for Implementation, 7th Sess., Provisional Agenda Item 10, U.N. Doc. FCCC/SBI/1997/MISC.7 (1997).

<sup>70</sup> See *Report of the Subsidiary Body for Implementation on Its Eighth Session: Involvement of Non-Governmental Organizations*, Agenda Item 11, at 23, U.N. Doc. FCCC/SBI/1998/6 (1998).

<sup>71</sup> During the twelfth session of the subsidiary bodies (SB-12) held in Bonn, Germany in June 2000, the secretariat posted most documents on the website within a day or two.

<sup>72</sup> Telephone Interview with Dan B. Ogalla, Legal Adviser, Secretariat of the Convention on Biological Diversity (Apr. 14, 2000).

<sup>73</sup> See Convention to Combat Desertification website, <<http://www.unccd.de>>.

<sup>74</sup> See *Eleventh Meeting of the Conference of the Parties: Additional Information*, ¶ 6, CITES Doc. 1999/90 (1999), available at <<http://www.CITES.org/eng/notifs/1999/090.shtml>> (visited Sept. 12, 2001).

also give their respective Directors discretion to charge non-government observers reasonable fees to cover copying expenses attributable to their attendance.<sup>75</sup>

#### 4.2.2 Types of Information Available

None of the three UNCED Conventions restricts the availability of official documents to the public. For the Climate Convention, official documents comprise all those that are distributed by the secretariat, including interim or “working” drafts. Only those materials from closed sessions at which no official report was made are not distributed by the secretariat and, hence, not publicly available.<sup>76</sup>

Though the “default” rule in these Conventions is that all official documents are publicly available, there are some exceptions. Informal meetings are viewed by parties to the Biological Diversity Convention as being outside of the official CBD process. For example, in the Biosafety Protocol<sup>77</sup> negotiations, parties believed it was necessary to conduct informal meetings behind closed doors to solve critical and contentious issues. Accordingly, documents from those meetings were not publicly distributed by the secretariat.<sup>78</sup>

Some agreements developed prior to the 1992 Rio Conference restrict the availability of information because of its confidential or sensitive nature. While all observers, including NGOs, admitted to a Meeting of the Parties to the Dolphin Conservation Agreement are provided the same documentation generally available to parties, documentation containing business-confidential data can be restricted.<sup>79</sup>

Similarly, CITES restricts the distribution of sensitive information. One of the most important functions of CITES is to coordinate efforts of the parties’ respective law enforcement agencies so they can more effectively enforce restrictions on international trafficking of endangered species of wildlife. Information in the CITES law enforcement databases is confidential and off-limits to the public, due to its sensitive nature in investigations and the risk that it could be used to tip off potential violators who are targeted for investigation.<sup>80</sup>

The Rio-era agreements and most other MEAs have embraced the spirit and mandate of Agenda 21 by making environmental information publicly available subject only to limited exceptions. Conversely, the World Trade Organization, which inherited the “closed culture” of its predecessor, the General Agreement on Tariffs and Trade (GATT), has failed to incorporate that mandate fully. A primary impetus for the well-publicized civil protests against the WTO at its ministerial meeting in Seattle, Washington in late 1999 was the belief that the WTO operates secretly and without public accountability. WTO documents are

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<sup>75</sup> IATTC Renegotiation, *supra* note 30, annex 2 ¶ 7; Dolphin Conservation Agreement, *supra* note 31, annex X ¶ 7.

<sup>76</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>77</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 9, 2000, 39 I.L.M. 1027 (2000) (not yet entered into force) [hereinafter Biosafety Protocol].

<sup>78</sup> Telephone Interview with Dan Ogalla, *supra* note 72.

<sup>79</sup> Dolphin Conservation Agreement, *supra* note 31, annex X ¶ 8.

<sup>80</sup> Telephone Interview with Marceil Yeater, Chief of the Enforcement Assistance Unit, CITES secretariat (Apr. 26, 2000).

publicly accessible only after they have been “de-restricted.”<sup>81</sup> Most documents are only de-restricted six months after publication, and any state may block the de-restriction simply by indicating its opposition.<sup>82</sup>

Unlike the WTO, many international financial institutions that were long characterized by secrecy now claim that they operate under presumptions of transparency and broad availability of information to the public. For example, the World Bank Group’s Policy on Disclosure states that “The Bank recognizes and endorses the fundamental importance of accountability and transparency in the development process. Accordingly, it is the Bank’s policy to be open about its activities and to welcome and seek out opportunities to explain its work to the widest possible audience. . . . There is a presumption in favor of disclosure. . . . [The] Bank has recently further broadened the scope of information about its activities that it makes publicly available.”<sup>83</sup> Similarly, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the European Development Bank all have published policies that require them to operate under a presumption in favor of broad disclosure of information.<sup>84</sup>

### 4.3 Access to Decision-Making

Access to decision-making means that the public should be able to participate in the environmental decision-making process and have its input taken into account. The WCPOFC incorporates this principle by requiring its Commission to “promote transparency in its decision-making process and other activities” and to afford concerned NGOs the opportunity to participate in Commission and subsidiary body meetings “as observers or otherwise as appropriate.”<sup>85</sup> These provisions are nearly identical to those contained in the Fish Stocks Agreement.<sup>86</sup> The texts of both the Fish Stocks Agreement and the WCPOFC complement Agenda 21’s suggestions that NGOs “should be recognized as partners in the implementation of Agenda 21” and that the U.N. system should take measures to enhance or establish mechanisms and procedures within each U.N. organization “to draw on the expertise and views of non-governmental organizations in policy and programme design, implementation and evaluation.”<sup>87</sup>

This section will examine how the reviewed agreements promote public access to the decision-making process. The section will first discuss the procedures by which non-government organizations and individuals receive accreditation to attend official meetings.

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<sup>81</sup> See INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN INTERNATIONAL FORA 5 (Pub. Participation in the Int’l Trading Sys. Series No. 5, 1999).

<sup>82</sup> See *id.*

<sup>83</sup> The World Bank Group, *The Disclosure of Information: Policy*, available at <<http://www.worldbank.org/html/pic/dp02.htm>> (visited Sept. 12, 2001).

<sup>84</sup> See International Finance Corporation, *IFC’s Policy on Disclosure of Information*, Sept. 1998, available at <[http://www.ifc.org/enviro/enviro/Disclosure\\_Policy/disclosure.htm](http://www.ifc.org/enviro/enviro/Disclosure_Policy/disclosure.htm)> (visited Sept. 12, 2001); Multilateral Investment Guarantee Agency, *Environment and Disclosure Policies*, available at <<http://www.miga.org/screens/projects/disclose/disclose.htm>> (visited Sept. 12, 2001); European Bank for Reconstruction and Development, *Public Information Policy*, available at <<http://www.ebrd.org/english/policies/index.htm>> (visited Sept. 12, 2001).

<sup>85</sup> WCPOFC, *supra* note 2, art. 21.

<sup>86</sup> Cf. Fish Stocks Agreement, *supra* note 3, art. 12.1, 12.2.

<sup>87</sup> Agenda 21, *supra* note 5, ch. 27.1, 27.9(b).

Next, it will look at how the agreements give notice of meetings, and any restrictions they may have governing whether non-governmental observers may or may not attend the different types of meetings. Finally, the section will review the rules and practices concerning how non-governmental observers are actually allowed to participate: whether they are allowed to address the meetings, take part in the discussions, or submit or distribute written statements to the parties or secretariat.

### 4.3.1 Accreditation

#### 4.3.1.1 Applying for accreditation; approval

The legal texts for the Climate, Biological Diversity, and Desertification Conventions all establish similar rules for how non-governmental observers may be accredited to attend official meetings. Any NGO that is qualified in matters covered by the respective convention may inform the secretariat of its wish to be represented as an observer, and it will be admitted unless at least one third of the convention parties present object.<sup>88</sup> The recent IATTC renegotiation and the Dolphin Conservation Agreement contain more liberal provisions, giving NGOs automatic observer status “unless a majority of the Parties formally objects for cause in writing at least 30 days prior to the beginning of the meeting.”<sup>89</sup>

In all these agreements, only accredited NGOs may attend official sessions. Detailed accreditation procedures for the Desertification Convention can be found at the CCD website in an NGO Accreditation Memorandum, which also includes an application form.<sup>90</sup> NGOs wishing to participate as observers in the work of the conference of the parties (COP) are requested to send the secretariat documentation containing the following information: (a) the purposes of the organization; (b) programs and activities of the organization that demonstrate its competence and relevance to the work of the COP; (c) proof that the organization is legally registered as a non-governmental, non-profit organization in the country in which it is based; (d) copies of annual financial reports and statutes of establishment; (e) a listing of governing body members and their country of nationality; and (f) for membership organizations, a description of the membership, including total numbers and geographical distribution.<sup>91</sup>

Requirements for NGO accreditation to the Climate and Biological Diversity Conventions are less demanding. For the Climate Convention, any NGO that is legally constituted, non-profit and competent in climate change may be accredited. After the NGO sends in documentation establishing its eligibility, the secretariat checks the documentation and forwards it to the various Convention bodies. The secretariat’s in-house review takes

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<sup>88</sup> See FCCC, *supra* note 6, art. 7.6; FCCC Draft Rules of Procedure, *supra* note 66, rule 7.1; Convention on Biological Diversity, *supra* note 7, art. 23.5; Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity, rule 7.1, U.N. Doc. UNEP/CBD/COP/1/17 (1995); Desertification Convention, *supra* note 8, art. 22.7; Desertification Convention, Rules of Procedure of the Conference of the Parties, rule 7.1, U.N. Doc. ICCD/COP(1)/121/Add.1 (1997) [hereinafter Desertification Convention Rules of Procedure].

<sup>89</sup> Dolphin Conservation Agreement, *supra* note 31, annex X ¶¶ 2-5. At the time of this writing, however, some IATTC negotiators are expressing discomfort with that provision.

<sup>90</sup> See Interim Secretariat of the Convention to Combat Desertification, *NGO Accreditation Memorandum* (January 1999) available at <<http://www.unccd.int/ngo/memo-eng.pdf>> (visited Sept. 12, 2001).

<sup>91</sup> See *id.*



about one month. The secretariat then prepares a document listing each nominated group's name; these groups receive provisional accreditation for all of the meetings scheduled for that year.<sup>92</sup>

Only the FCCC conference of the parties (COP) can give formal, open-ended accreditation to an NGO. The COP grants formal accreditation each year as part of the organizational matters at its annual meetings.<sup>93</sup> No NGO has ever lost its Climate Convention accreditation after it was granted. However, if an accredited NGO changes its address or undergoes any substantive change (e.g., changing its constitution), then it must submit new documentation to the secretariat.<sup>94</sup>

In contrast to those agreements that openly adhere to the public participation tenets of the Rio Declaration and Agenda 21, NAFO's recently amended rules of procedure require significantly more detailed information when an NGO applies to participate as an observer. In addition to the types of information required by other agreements (contact information, addresses of regional offices, aims and purposes, membership information, etc.), NGO applications for NAFO meetings must include:

1. Information on the organization's decision-making process and funding;
2. A brief history of the organization's history and description of its activities;
3. Representative papers produced by or for the organization related to NAFO's subject matter;
4. A history of NAFO observer status granted or revoked; and
5. The information or input that the organization plans to present at the meeting, including any materials that it would wish for the secretariat to circulate, supplied in sufficient quantity.<sup>95</sup>

The potential burden these rules present is two-fold: First, they could require a significant time commitment from the secretariat staff, who will be charged with reviewing, evaluating, and then distributing to the contracting parties the potentially voluminous amount of materials NGOs would be obliged to submit with their applications. The secretariat staff could well have to be expanded to cover the added workload.

Second, the rules could dramatically curtail the effectiveness of NGO participation. NGOs must apply before each meeting (the rules do not provide for NGOs to be granted permanent observer status) and they must provide all of the information and material with

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<sup>92</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>93</sup> See, e.g., Note by the Secretariat, *Admission of Organizations as Observers*, Provisional Agenda Item 2(e), U.N. DOC. FCCC/CP/1998/14 (1998); *Report of the Conference of the Parties on Its Fourth Session*, Addendum, pt. 2, U.N. DOC. FCCC/CP/1998/16/Add.1, Decision 18/CP.4 (1998). In practice, the Climate and Biological Diversity secretariats accept all NGO accreditation requests and then present their recommendations to the respective chairs of the conference of the parties, who in turn "rubber stamp" the recommendations. Similarly, in the Desertification Convention, no applications have ever been denied. However, there have been cases in which a party or group of parties to that convention has expressed a "reservation" to the NGO's application. These reservations are usually politically, not substantively, based; e.g., they are based upon differences that the objecting party has with the national government of the NGO applicant. Telephone Interview with Sylvia Jampies, Associate Relations Officer, Interim Secretariat of the Convention to Combat Desertification (Apr. 20, 2000).

<sup>94</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>95</sup> See NAFO, *Rules of Procedure*, *supra* note 28.

their application *at least 100 days before the meeting*.<sup>96</sup> If enforced to the letter, the rules' effect could be to require NGOs to prepare written materials or proposed statements in finished form months before the meeting. As a practical matter, this may be difficult or impossible to do. Moreover, it could render the materials out of date by the time the meeting actually takes place.

None of the Rio-era agreements we reviewed contained analogous restrictions on the ability of NGOs to distribute documents or other materials at meetings. Those agreements adopted prior to Rio that had specific application deadlines for attendance were generally far more flexible than NAFO. For example, in both the IATTC re-negotiation and the Dolphin Conservation Agreement, any NGO desiring to participate as an observer in a meeting of the parties may notify the director of its wishes at least 50 days in advance of the meeting.<sup>97</sup> If the meeting is held with less than 50 days notice, however, the director can treat this rule more flexibly.<sup>98</sup> For CITES, the deadline by which an NGO must submit its name to the secretariat is one month before the meeting.<sup>99</sup>

#### **4.3.1.2 Observer status and classes**

As soon as an NGO is given observer status to the Convention on Biological Diversity, it acquires the same participation rights as all other accredited NGOs.<sup>100</sup> The Climate Convention shares a similar practice, although the conference of the parties and secretariat treat business and environmental NGOs as separate constituencies.<sup>101</sup>

Some agreements treat different classes of non-governmental observers differently. While "international" NGOs may apply directly to the CITES secretariat when they wish to attend a meeting, "national" NGOs must first obtain the approval of their home government.<sup>102</sup>

The United Nations Economic and Social Council (ECOSOC) has detailed rules that allow for three different statuses of NGO "consultative relationships," each of which gives NGOs different participatory rights. ECOSOC, which was created under the U.N. Charter, provides the main forum for NGO involvement in the United Nations system.<sup>103</sup> ECOSOC policies on establishing consultative relationships are intended to balance (1) the need to enable the Council or its subsidiary bodies to secure expert information or advice from

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<sup>96</sup> See *id.*

<sup>97</sup> See Dolphin Conservation Agreement, *supra* note 31, annex X, ¶ 3.

<sup>98</sup> See *id.* ¶ 4.

<sup>99</sup> See *Strategic and Administrative Matters: Rules of Procedure (Provisional)*, rule 3.4, CITES Doc. 11.1 (rev. 1), annex (April 2000) [hereinafter CITES Rules of Procedure] (on file with author).

<sup>100</sup> Telephone Interview with Dan Ogalla, *supra* note 72.

<sup>101</sup> This distinction is observed primarily as an accommodation to these respective groups, who often have very different or incompatible motivations and aims for participating in the treaty process. The COP also recognizes local governments and municipal authorities as a third interested constituency. See *Mechanisms for Consultation with Non-Governmental Organizations: Note by the Secretariat, Subsidiary Body for Implementation*, 6th Sess., Provisional Agenda Item 10, at 2, U.N. Doc. FCCC/SBI/1997/14/Add.1 (1997).

<sup>102</sup> See CITES Rules of Procedure, *supra* note 99, rule 2.2.

<sup>103</sup> See U.N. CHARTER ch. X. The ECOSOC subsidiary bodies include the Human Rights Commission and the Commission on Sustainable Development, which is charged with overseeing the implementation of Agenda 21. See *Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development*, G.A. Res. 47/191, U.N. Doc A/47/719 (1992).

organizations that have special competence, with (2) the need to enable organizations that “represent important elements of public opinion to express their views.”<sup>104</sup>

*Roster status* is available for NGOs that the Council believes can make occasional, useful contributions to the Council’s work.<sup>105</sup> It includes the rights to receive the ECOSOC agenda and attend public meetings of the Council and subsidiary bodies. *Special status* is awarded to organizations with special competence and specific concerns in only a few fields of activity covered by the Council and subsidiary bodies. Such NGOs may circulate brief written statements at meetings and may speak at subsidiary bodies meetings.<sup>106</sup> *General consultative status* is reserved for those organizations concerned with most of the activities of the Council and subsidiary bodies. These NGOs have large, international memberships and are “closely involved with the economic and social life of the peoples of the areas they represent.”<sup>107</sup> They may propose items for the agenda of meetings, circulate longer statements and address meetings of both the Council and subsidiary bodies.<sup>108</sup>

#### **4.3.1.3 Declarations of support for agreement’s aims**

ECOSOC requires NGO participants to support the work of the United Nations and have aims and purposes that conform to the spirit, purposes and principles of the U.N. Charter.<sup>109</sup> Most multilateral environmental agreements, however, do not require a “loyalty oath.” NAFO is one exception. NAFO requires all NGOs wishing to participate in meetings to prepare a statement that they generally support NAFO objectives.<sup>110</sup> Neither the IATTC re-negotiation nor the Dolphin Conservation Agreement contain similar requirements.

The subject has arisen periodically under the Climate Convention. Environmental NGOs have argued that accreditation should only be granted to organizations that support the objectives and implementation of the Convention, while business NGOs have responded that the emphasis should instead be on engaging the fullest range of NGOs, regardless of why they may be motivated to participate.<sup>111</sup> The Convention’s conference of the parties has never decided to require a statement of support from NGOs.

#### **4.3.2 Attending Meetings**

##### **4.3.2.1 Providing notice of upcoming meetings**

All three of the Rio-era agreements we surveyed have established procedures for notifying the public of upcoming meetings. The Climate Convention’s rules of procedure instruct the FCCC secretariat to notify observers of the date and venue of any official

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<sup>104</sup> U.N. ECOSOC Res. 1996/31, 49th. plen. mtg. at ¶ 20 (1996).

<sup>105</sup> See *id.* ¶ 24.

<sup>106</sup> See *id.* ¶ 23.

<sup>107</sup> *Id.* ¶ 22.

<sup>108</sup> See *id.* ¶¶ 28-32.

<sup>109</sup> See *id.* ¶¶ 2-3.

<sup>110</sup> See NAFO Rules of Procedure, *supra* note 28, Rules for the General Council, rule 9.3 and Rules for the Fisheries Commission, rule 10.3.

<sup>111</sup> See *Mechanisms for Consultation with Non-Governmental Organizations (NGOs)*, Subsidiary Body for Implementation, 7th Sess., Provisional Agenda Item 10, at 6, 13, U.N. DOC. FCCC/SBI/1997/MISC.7 (1997).

session.<sup>112</sup> Consequently, the secretariat notifies NGOs in the same way that it notifies parties, intergovernmental organizations and other observers, by sending all accredited NGOs an announcement by fax two months before the meeting date.<sup>113</sup>

Notice of meetings is also posted on the FCCC website, along with registration forms and related information.<sup>114</sup> Similarly, the secretariat's website is the primary means of providing interested organizations and individuals with meeting and scheduling information for the Biological Diversity Convention.<sup>115</sup>

The Desertification Convention secretariat is required by the Convention's rules of procedure to notify observers of the date and venue of all sessions of the conference of the parties and subsidiary bodies.<sup>116</sup> Accordingly, the secretariat mails official invitations to all accredited NGOs.<sup>117</sup>

In contrast to these three conventions, NAFO historically did not provide notice of meetings to the public. This reflected the fact that the NAFO practice was to allow neither non-governmental organizations nor individuals to attend meetings as independent observers. Instead, they were allowed to attend only if they were part of their national delegations.<sup>118</sup> Despite NAFO's recent decision to offer observer status to qualified NGOs, the new rules of procedure do not contain any provisions for giving them formal notice.<sup>119</sup> However, NAFO now maintains a list on its website containing the dates and locations of upcoming events.<sup>120</sup>

#### *4.3.2.2 Types of meetings open to NGO attendance*

For the main Rio-era conventions, the trend has been to allow accredited NGOs to attend nearly all types of official meetings. This trend is also apparent in natural resources regimes such as CITES, the IATTC renegotiation and the Dolphin Conservation Agreement; it is similarly reflected in the WCPOFC. Conversely, pre-Fish Stocks Agreement RFMOs such as NAFO subscribe to a more conservative model.

*Climate Convention (FCCC): Formal provisions for attendance at all levels.* Non-governmental organizations and their representatives have long been allowed to attend plenary meetings of the Climate Convention's conference of the parties as well as subsidiary body meetings. Originally, NGO attendance at meetings of the more specialized contact groups was restricted. However, in 1998, as the contact groups began to take on an increasingly important role in developing the rules for implementing the Kyoto Protocol, the conference of the parties decided that NGOs should be able to attend contact group meetings.<sup>121</sup>

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<sup>112</sup> See FCCC Draft Rules of Procedure, *supra* note 66, rule 8.

<sup>113</sup> Telephone Interview with Barbara Black, *supra* note 67. There are currently about 500 accredited NGOs. E-mail communication with Barbara Black, Aug. 30, 2001.

<sup>114</sup> See FCCC website at <<http://www.unfccc.int/wnew/index.html>> (visited Sept 14, 2001).

<sup>115</sup> Telephone Interview with Dan Ogalla, *supra* note 72.

<sup>116</sup> See *Report of the Conference of the Parties on Its First Session*, Addendum, pt. 2, at 5, U.N. Doc.

ICCD/COP(1)/11/Add.1 (1997); Desertification Convention Rules of Procedure, *supra* note 88, rules 8, 27.

<sup>117</sup> Telephone Interview with Sylvia Jampies, *supra* note 93.

<sup>118</sup> Telephone Interview with Michael H. Testa, Esq., NGO representative on U.S. delegation to NAFO (May 4, 2000).

<sup>119</sup> See NAFO Rules of Procedure, *supra* note 28.

<sup>120</sup> See NAFO, *Upcoming Events* at <<http://www.nafo.ca/events/upcoming.htm>> (visited Sept. 12, 2001).

<sup>121</sup> See *Report of the Conference of the Parties*, Decision 18/CP.4, *supra* note 93.

The presiding officers of these meetings retain the power to close the proceedings to NGOs at any time if they believe it is necessary to do so.<sup>122</sup> For the least formal meetings, such as technical workshops, NGO admission depends on the nature of the topic or issue to be discussed. Nevertheless, because of their relatively informal nature, these workshops have afforded NGOs some of the greatest opportunities to participate actively in the Kyoto Protocol rulemaking process.<sup>123</sup>

*Biological Diversity Convention (CBD): Access to most formal meetings.* According to the CBD secretariat, the only restrictions regarding non-governmental observers are that they are not allowed to vote or set the agenda.<sup>124</sup> Such observers thus have general access to all official meetings, including those of the conference of the parties, subsidiary bodies and workshops.<sup>125</sup> Similarly to meetings of the Climate Convention, CBD meetings may be closed to non-governmental observers if one-third of the parties object to their presence.<sup>126</sup> In practice, observers have had access to the meetings of all CBD groups except for the budget group.<sup>127</sup> However, if the meeting is considered to be an “informal” one outside of the regular CBD process (e.g., the Biosafety Protocol sessions), then non-governmental observers may be excluded.<sup>128</sup>

*Endangered Species Convention (CITES): Trend toward full access to working groups.* CITES, which predates the Rio Declaration and Agenda 21, has long been noted for its public access. All plenary sessions of the conference of the parties, sessions of “Committee I” and “Committee II,” and budget committee meetings are open to the public.<sup>129</sup> Any single session can be closed by decision of a simple majority of party representatives present and voting.<sup>130</sup> As a general rule, public attendance at the other committees and working groups is limited to observers invited by the chair.<sup>131</sup> However, the practice at the conference of the parties in April 2000 was to welcome NGOs to all the working groups and drafting committees.<sup>132</sup>

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<sup>122</sup> See *id.* In practice, the chairs generally do not close contact group meetings. However, in the latter part of the Sixth Conference of the Parties (COP6) at the Hague in November 2000, COP6 President Jan Pronk ordered many of the contact group meetings and ministerial sessions closed, because he hoped to minimize distractions to negotiators as they attempted to finalize agreement on Kyoto Protocol rules. The closure remained in effect through most of the resumed “COP6bis” session at Bonn in July 2001, when NGO representatives were allowed to attend some meetings after receiving specific permission from the contact group chairs. Personal experience of author.

<sup>123</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>124</sup> Telephone Interview with Dan Ogalla, *supra* note 72.

<sup>125</sup> See *id.*

<sup>126</sup> See *Report of the First Meeting of the Conference of the Parties to the Convention on Biological Diversity*, at 70, annex III; Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity, rule 7, U.N. Doc. UNEP/CBD/COP/1/17 (1995).

<sup>127</sup> See ICTSD, *Accreditation Schemes*, *supra* note 81, at 10.

<sup>128</sup> Telephone Interview with Dan Ogalla, *supra* note 72.

<sup>129</sup> See CITES Rules of Procedure, *supra* note 99, rule 12.1. Committee I is “responsible for making recommendations to the Conference [of the Parties] on all proposals to amend the appendices of the Convention and on any matter of a primarily biological nature,” while Committee II “shall act similarly in relation to other matters to be decided upon by the Conference.” *Id.* rule 5.

<sup>130</sup> See *id.* rule 12.1.

<sup>131</sup> See *id.* rule 12.2.

<sup>132</sup> See International Institute for Sustainable Development, *Summary of the Eleventh Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: A Question of Good Governance*, EARTH NEGOTIATIONS BULLETIN, Apr. 24, 2000, available at <<http://www.iisd.ca/vol21/enb2111e.html>> (visited Sept. 12, 2001).

*Selected RFMOs: IATTC adheres to Fish Stocks Agreement precepts, while NAFO lags behind.* The IATTC re-negotiation and the Dolphin Conservation Agreement state that eligible NGOs may attend all meetings of, respectively, the IATTC Commission and IDCP Meeting of the Parties, with the exception of meetings held in executive session or meetings of Heads of Delegations.<sup>133</sup> This rule applies to ordinary and extraordinary (i.e., inter-sessional) meetings. In practice, NGOs have been allowed to attend meetings of IATTC subsidiary bodies as well.<sup>134</sup>

Under the new public participation rules for NAFO, those NGOs that meet the eligibility criteria may attend meetings of the General Council or the Fisheries Commission, but they may not attend meetings of the subsidiary bodies or working groups.<sup>135</sup> Because these latter meetings are where the key debates and decisions are often made, NAFO's new rule may not conform to the Fish Stocks Agreement's requirement that "states shall provide for transparency in the decision-making process and other activities of [RFMOs]."<sup>136</sup> The WCPOFC, by contrast, specifically provides an opportunity for NGOs to participate in subsidiary body meetings "as observers or otherwise as appropriate."<sup>137</sup>

## 4.4 Expressing Views

### 4.4.1 Addressing Meetings

Most of the agreements we reviewed permit representatives of accredited NGOs to make written or oral statements at some or all meetings they attend. The specific manner in which this participation occurs, however, is often governed more by practice that has developed over time than by written rule.

*Climate Convention (FCCC): Opportunities at all levels.* The Climate Convention requires its state parties to promote public participation at the international level, and it instructs the conference of the parties to seek and utilize where appropriate the services, cooperation and information of competent NGOs.<sup>138</sup> At the ministerial, or high level, segment of meetings, NGOs are given an opportunity to make a general statement to the plenary before the ministers speak. This process accommodates statements by a limited number of NGOs on the major issues.<sup>139</sup> The number of speakers is traditionally balanced between environmental and business NGOs.

For FCCC subsidiary body sessions and informal sessions on specific agenda items, NGOs may speak at the chair's discretion.<sup>140</sup> At the plenary meetings, the NGO

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<sup>133</sup> See IATTC Renegotiation, *supra* note 30, annex 2 ¶ 2; Dolphin Conservation Agreement, *supra* note 31, annex X ¶ 2.

<sup>134</sup> Telephone Interview with Brian Hallman, Marine Resource Advisor to Inter-American Tropical Tuna Convention (May 10, 2000).

<sup>135</sup> See NAFO Rules of Procedure, *supra* note 28.

<sup>136</sup> See Fish Stocks Agreement, *supra* note 3, art. 12. The United States has expressed the opinion that the NAFO public participation rule does *not* provide a precedent for RFMO participation rules adopted pursuant to the Fish Stocks Agreement. Telephone Interview with Michael Testa, *supra* note 118.

<sup>137</sup> WCPOFC, *supra* note 2, art. 21.

<sup>138</sup> See FCCC, *supra* note 6, arts. 6, 7.2(l).

<sup>139</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>140</sup> At the Twelfth Meeting of the FCCC Subsidiary Bodies (SB-12) held in Bonn, Germany during June 2000, the chair of the Contact Group on Mechanisms devoted a full session to NGO interventions. NGO

representative presents her or his request to the secretariat, which in turn notifies the chair. The chair, at his discretion, then places the NGO on the speaker's list. The chair gives the floor to the NGO representative at a suitable point in the session. But if the chair does not give the representative the floor, he is expected to give a reason for not doing so.<sup>141</sup>

For informal FCCC meetings such as workshops conducted by the contact groups, NGO representatives may be allowed to participate actively in the discussions, depending on the nature of the workshop and the discretion of the chair.<sup>142</sup> The workshops have afforded NGOs numerous opportunities to give formal presentations to the delegates as experts and advocates.

*Biological Diversity Convention (CBD): Intergovernmental meeting co-chaired by NGO representative.* The trend in the CBD is toward expanded public participation rights. An important precedent was set at an inter-sessional working group meeting held in March 2000 to discuss implementation of CBD rules regarding the traditional knowledge of indigenous peoples.<sup>143</sup> For the first time in an intergovernmental meeting under the CBD, the meeting was co-chaired by an NGO representative. NGO observers participated significantly in the development of the agenda for the meeting, and they spoke nearly as much as the party representatives.<sup>144</sup>

*Desertification Convention (CCD): NGO-Official Dialogue.* Recognizing that "participation of the NGO community is vital to [its] successful implementation," the Desertification Convention "welcomes the full participation of the NGO community in accordance with the rules of the COP."<sup>145</sup> In addition to fostering broad NGO participation in many of their sessions, CCD parties schedule a half-day plenary session at each annual meeting devoted to an "NGO-Official Dialogue." This dialogue is part of the conference of the parties' official agenda; however, NGOs decide what the agenda of the dialogue will be. It is usually co-chaired by an NGO representative and the normal chair of the plenary. Many delegates typically attend these dialogues, depending on the topic and how effectively NGOs lobby them to attend.<sup>146</sup>

*NAFO: Formal opportunities for oral statements, but potential "roadblocks."* Under the new NAFO rules, NGOs admitted to a General Council meeting may make oral statements during the meeting upon the invitation of the chairman.<sup>147</sup> However, it remains

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representatives from the business and environmental constituencies were invited to address party delegates in two separate, half-hour presentations from the podium, followed by a question and answer session.

<sup>141</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>142</sup> *Id.*; personal experience of author.

<sup>143</sup> See Stas Burgiel et al., *Summary of the Open-Ended Ad Hoc Inter-Sessional Working Group on Article 8(j) and Related Provisions: 27-31 March 2000*, EARTH NEGOTIATIONS BULLETIN, April 3, 2000, available at <<http://www.iisd.ca/linkages/vol09/enb09149e.html>> (visited Sept. 12, 2001).

<sup>144</sup> Telephone Interview with Dan Ogalla, *supra* note 72. Mr. Ogalla notes that this trend of expanded participation relates to the specific issue in question and will likely continue to develop in the coming years. "Hard-line" states that have opposed public participation in the CBD appear to be losing ground in this respect.

<sup>145</sup> See Accreditation Memo, *supra* note 90, at 2; see also Desertification Convention, *supra* note 8, arts. 3.c (stating important principle of Convention is cooperation with NGOs), 9.3 (stating parties shall encourage NGOs to support elaboration, implementation and follow-up of action programmes), 14.1 (same), 16.d (stating parties shall make full use of expertise of competent NGOs regarding information collection, analysis and exchange), 22.2.h (stating conference of the parties shall seek cooperation and utilize services and information from competent NGOs).

<sup>146</sup> Telephone Interview with Sylvia Jampies, *supra* note 93.

<sup>147</sup> See NAFO Rules of Procedure, *supra* note 28, Rules for the General Council, rule 9.5 and Rules for the Fisheries Commission, rule 10.5.

unclear what the utility of that provision will be, because the rules also require NGOs wishing to participate in Council meetings to furnish the secretariat, at least 100 days in advance, with any “input” that the NGO plans to present at the meeting.<sup>148</sup> If this provision is interpreted so that NGOs may only present statements that have been prepared over three months before the meeting, such statements might prove to be irrelevant due to their lack of timeliness.

The history of NGO participation in NAFO makes this concern a genuine one. The practice has been that NGOs were not admitted to NAFO meetings as independent observers. Rather, if they could attend at all, it was as members of their national delegations. Accordingly, contrary to the mandate of Agenda 21, NGOs never had the opportunity to voice opinions in NAFO sessions that strayed from their home country’s official position.<sup>149</sup>

#### 4.4.2 Distributing Documents

The various agreements we reviewed have a range of approaches for permitting NGOs to distribute documents at meetings. Some of these approaches are governed by written rules, while others have developed informally over time.

*Climate Convention (FCCC): Informal accommodation.* The general practice in the Climate Convention has been for non-governmental observers freely to place any materials they wish to distribute on tables located outside of the conference rooms. The secretariat supplies these tables free of charge. No prior approval is required to distribute documents in this fashion.<sup>150</sup>

The chair of an FCCC meeting may, at his or her discretion, permit written statements or other documents by NGOs to be distributed directly to the party delegates. This is most commonly done when a representative of the NGO has received permission to address the meeting, in which case the secretariat distributes the documents to those delegates who are present.

*CITES: Codified, flexible rules.* NGO observers to CITES enjoy similarly flexible privileges, which were recently codified in the CITES Rules of Procedure.<sup>151</sup> The new rule permits any NGO observer to submit “for the attention of the participants to the meeting” informative documents on conservation and utilization of natural resources. The documents must clearly identify the observer who is presenting them. Documents that are distributed by the secretariat require prior approval. Those that are not distributed by the secretariat require no prior approval, though any representative of a party may complain to the CITES Bureau if she or he finds the materials offensive.<sup>152</sup> At the Eleventh Conference of the Parties, NGOs were allowed to distribute their materials in delegates’ mailboxes, provided they received permission in advance from the secretariat.<sup>153</sup>

*NAFO: Potentially restrictive rules.* As noted in the previous section, the new NAFO rules of procedure could minimize the ability of NGOs to make oral statements at meetings. These rules could similarly make it very difficult for NGOs to distribute written

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<sup>148</sup> Rules for the General Council, rule 9.3.

<sup>149</sup> Telephone Interview with Michael Testa, *supra* note 118.

<sup>150</sup> Personal experience of author.

<sup>151</sup> See CITES Rules of Procedure, *supra* note 99, rule 28.

<sup>152</sup> See *id.* rule 28.4. See also discussion of complaints procedure, *infra* p. 26.

<sup>153</sup> See IISD, *A Question of Good Governance*, *supra* note 132.



materials effectively. NGOs admitted to meetings of the General Council may distribute documents only through the secretariat.<sup>154</sup> But if the NGO wishes for the secretariat to circulate these documents, it must include them as part of its application, which it must submit at least 100 days prior to the meeting.<sup>155</sup>

#### 4.4.3 Submitting Proposals

Many multilateral environmental agreements develop new policies by soliciting submissions on the matter from the various state parties, compiling and synthesizing the submissions into a single working document, and then debating and re-drafting until the parties decide they have produced a final, satisfactory version. The Desertification and Climate Conventions have adopted, or are considering, ways in which the public may participate in the submission process.

*Desertification Convention (CCD): Informal integration of NGO submissions into synthesis documents.* In addition to soliciting submissions from parties, the conference of the parties to the Desertification Convention will often request submissions from NGOs regarding issues in which they may have expertise or may be able to provide relevant input. These submissions are usually coordinated through the NGO network. They are then submitted either directly to the secretariat or through the focal points of the NGOs' national governments. The secretariat then integrates the submissions into the synthesis document it prepares, along with submissions received from the parties.<sup>156</sup>

*Climate Convention (FCCC): Exploring ways to accept and post NGO submissions.* Only recommendations from parties are included in the synthesis documents that the Climate Convention secretariat and contact group chairs prepare. However, the secretariat is presently trying to develop a framework or structure under which NGOs may make parallel submissions that would be accepted by the secretariat and then electronically posted in some way. The secretariat states that it has a "positive will" to accept and post such submissions; however, there are still several technical questions that need to be resolved. These include: whether the information will be posted on the official website or at some other location; which submissions will be accepted; will there be limits on how many are accepted; and who will review the submissions and decide whether they will be accepted. The secretariat is exploring the possibility of having the submissions managed by an outside entity, rather than by the secretariat itself.<sup>157</sup>

#### 4.4.4 Other Practices of Note

*Climate Convention (FCCC): Special events; logistical support from secretariat.* A tradition of "special events" has developed on the margins of the official Climate Convention meetings. These events and exhibits are organized mainly by the NGO community. They include workshops and seminars that provide a forum for the exchange of information

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<sup>154</sup> See NAFO Rules of Procedure, *supra* note 28, Rules for the General Council, rule 9.5 and Rules for the Fisheries Commission, rule 10.5.

<sup>155</sup> See Rules for the General Council, rule 9.3.

<sup>156</sup> Telephone Interview with Sylvia Jampies, *supra* note 93. In these synthesis documents, specific points or ideas are not attributed to the party or NGO that originally suggested them.

<sup>157</sup> Telephone Interview with Barbara Black, *supra* note 67. The author notes however that, at the time of this writing, there has been no apparent progress in resolving this issue.

between observers, the party delegates, the United Nations and other agencies and intergovernmental organizations.<sup>158</sup> The secretariat arranges for and provides facilities, including rooms and equipment, to NGOs free of charge for their use at these events.

Additionally, the secretariat provides office space, computers, etc.—again, at no charge—for the use of each of the three recognized FCCC “constituencies” during the course of the official sessions.<sup>159</sup> These facilities allow each constituency (environmental NGOs, business NGOs, and local and municipal governments) to have a “home base” where they can prepare position papers, hold briefings and strategy meetings, and conduct other coordinating activities in tandem with the official sessions.

*Participation Fees.* While the Rio-era agreements generally do not charge NGO observers fees for participating in meetings, some other agreements do. As noted earlier, NGO participants in CITES conference of the parties sessions currently pay a flat registration fee of US \$600, half of which is attributed to the cost of document distribution.<sup>160</sup> The International Dolphin Conservation Program and the Inter-American Tropical Tuna Commission’s current renegotiated text give their respective Directors discretion to charge NGO observers reasonable fees to cover expenses attributable to their attendance.<sup>161</sup> Similarly, NAFO’s new observer participation rule requires NGOs to pay a fee that covers the “additional expenses generated by their participation, as determined annually by the Executive Secretary.”<sup>162</sup>

*CITES: Complaints procedure.* Included in the formalized NGO participation rules recently adopted by CITES parties is a procedure for resolving complaints received when a participant has been subject to abuse by another or when a party representative considers an NGO-distributed document to be offensive.<sup>163</sup> In the case of a complaint about a document, the Bureau of the Conference will consider whether the document “abuses or vilifies a Party, or brings the Convention into disrepute.”<sup>164</sup> Depending on its findings, the Bureau may, as a last resort, make a formal complaint to a party or request the withdrawal of an NGO’s right of admission to the meeting.<sup>165</sup>

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<sup>158</sup> See FCCC Secretariat, *Guide to the Climate Change Negotiation Process: Observers*, available at <<http://www.unfccc.de/resource/process/components/participants/observ.html>> (visited Sept. 14, 2001).

<sup>159</sup> Telephone Interview with Barbara Black, *supra* note 67.

<sup>160</sup> See CITES, *Resolution of the Conference of the Parties: Financing and Budgeting of the Secretariat and of Meetings of the Conference of the Parties*, 10th mtg., CITES Doc. Conf. 10.1 (1997), available at <<http://www.cites.org/eng/resols/resol101.shtml>> (visited Sept. 12, 2001); *Eleventh Meeting of the Conference of the Parties: Additional Information*, CITES Doc. 1999/90, at ¶ 7 (1999), available at <<http://www.CITES.org/eng/notifs/1999/090.shtml>> (visited Sept. 12, 2001). Similarly, NGOs must pay a US \$100 registration fee to attend meetings of the CITES Committee of Plants and Animals. Some CITES parties have expressed concerns that the requirement could discourage some groups from attending, especially those from less developed regions such as Africa. Consequently, the Committee chair has the discretion to waive the fee for some NGOs. See CITES Secretariat, *Proceedings, Ninth Meeting of the Plants Committee* 15 (1999), available at <<http://www.CITES.org/eng/cttee/plants/9/proceed.pdf>> (visited Sept. 12, 2001).

<sup>161</sup> IATTC Renegotiation, *supra* note 30, annex 2 ¶ 7; Dolphin Conservation Agreement, *supra* note 31, annex X ¶ 7.

<sup>162</sup> NAFO Rules of Procedure, *supra* note 28, Rules for the General Council, rule 9.6 and Rules for the Fisheries Commission, rule 10.6.

<sup>163</sup> See CITES Rules of Procedure, *supra* note 99, rule 29.1.

<sup>164</sup> *Id.* rule 29.3.

<sup>165</sup> See *id.* rule 29.4.

## 4.5 Facilitating Compliance and Implementation

Access to information and access to decision-making provide the core for effective, productive public participation in multilateral environmental agreements. Additionally, non-governmental organizations and individuals can be well-suited to facilitating compliance and implementation of an environmental agreement by performing monitoring or verification services, providing compliance-related information, or supplying expert analyses and other services that supplement the capabilities of the treaty institution and state parties. Agenda 21 recognizes that “NGOs . . . possess well-established and diverse experience, expertise and capacity in fields which will be of particular importance to the implementation and review of environmentally sound and socially responsible sustainable development.”<sup>166</sup> States consequently agreed that the United Nations system should take measures to enhance or establish “mechanisms and procedures within each [U.N.] agency to draw on the expertise and views of NGOs in policy and programme design, implementation and evaluation.”<sup>167</sup>

Modern fisheries management could well benefit by heeding that recommendation. For example, while the WCPOFC does not contain provisions that specifically call for NGO assistance in its compliance-related activities, it creates mandates and functions that may profit from such assistance. Both the Scientific Committee and the Technical and Compliance Committee are charged with conducting research and providing the Commission with information relating to implementation of the Convention.<sup>168</sup> The Regional Observer Programme is required to operate in a “cost-effective” manner, while providing a sufficient level of coverage to provide the Commission with data and information on catch levels and related matters.<sup>169</sup> Article 11.5 instructs the Committees to consult “where appropriate” with any fisheries management, technical or scientific organization for assistance in exercising their functions.

This section highlights examples of arrangements in which NGOs contribute to the effectiveness of treaty implementation and compliance by providing monitoring, data management and outreach services; alerting parties to potential cases of non-compliance; and submitting legal briefs for compliance-related proceedings.

### 4.5.1 Assisting Implementation

#### 4.5.1.1 *Monitoring and data management: CITES*

CITES is perhaps the most prominent MEA in which NGOs provide substantial levels of technical expertise to the parties. CITES regulates international trade in endangered wildlife, plants, and products made from them by requiring parties to maintain and enforce a detailed permitting system for imports and exports.<sup>170</sup> The Convention relies heavily upon the monitoring and verification functions of two independent organizations, the Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC) and the Wildlife Trade Monitoring Unit (WTMU).

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<sup>166</sup> Agenda 21, *supra* note 5, ch. 27.3.

<sup>167</sup> *Id.* ch. 27.9(b).

<sup>168</sup> See WCPOFC, *supra* note 2, arts. 12-14.

<sup>169</sup> *Id.* art. 28.4(a).

<sup>170</sup> See generally CITES, *supra* note 9.

TRAFFIC is the joint wildlife trade monitoring program of the World Wide Fund for Nature (WWF) and the World Conservation Union (IUCN).<sup>171</sup> Working through a decentralized network of regional and national offices and in close cooperation with the CITES secretariat, TRAFFIC monitors and investigates illegal wildlife trade and smuggling activities.<sup>172</sup> TRAFFIC analyzes local and international trade statistics, assesses trade mechanisms and routes, and assists in local investigations and enforcement actions.<sup>173</sup>

The WTMU is operated by the World Conservation Monitoring Centre, which was established by WWF, IUCN, and the United Nations Environment Programme (UNEP).<sup>174</sup> The WTMU serves as the data manager for the CITES secretariat. It handles trade records of those wildlife species listed in the Appendices to the Convention and maintains a database extending back to 1975, which contains over two and a half million records.<sup>175</sup> These trade records allow the import and export records of CITES parties to be cross-matched. When records do not match, the WTMU reports the anomaly to the CITES secretariat.<sup>176</sup>

The text of CITES provides that “suitable” NGOs may assist the secretariat “to the extent and in the manner [the secretariat] deems appropriate.”<sup>177</sup> Through TRAFFIC and the WTMU, local and regional NGOs provide a considerable amount of compliance information by reporting directly to the secretariat or supplying information to state parties.<sup>178</sup> They also play an important “watchdog” role by alerting governments to infractions, investigating illegal operations, and pressuring state authorities to improve their domestic laws and enforcement.<sup>179</sup> Noting the importance of TRAFFIC, the WTMU and other NGOs to the success of CITES compliance efforts, CITES parties have concluded that the Convention should increase its cooperation and strategic alliances with international stakeholders.<sup>180</sup>

#### **4.5.1.2 Engaging stakeholders through outreach: The Ramsar Convention on Wetlands**

The Ramsar Convention on Wetlands is dedicated to “the conservation and wise use of wetlands by national action and international cooperation as a means to achieving

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<sup>171</sup> See TRAFFIC, *What is Traffic?*, available at <[http://www.traffic.org/about/what\\_is.html](http://www.traffic.org/about/what_is.html)> (visited Sept. 12, 2001).

<sup>172</sup> See TRAFFIC, *How Does Traffic Operate?*, available at <[http://www.traffic.org/about/about\\_operate.html](http://www.traffic.org/about/about_operate.html)> (visited Sept. 12, 2001).

<sup>173</sup> See *id.*

<sup>174</sup> See World Conservation Monitoring Centre, *Data Management Services*, available at <<http://www.wcmc.org.uk/about/WCMC/dataman.html>> (visited Sept. 12, 2001).

<sup>175</sup> See *id.*

<sup>176</sup> See John Lanchbery, *Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 57, 71 (David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff eds., 1998).

<sup>177</sup> CITES, *supra* note 170, art. 12.1. The World Heritage Convention, 1037 U.N.T.S. 151 (1972), contains a similar provision.

<sup>178</sup> See Lanchbery, *supra* note 176, at 71.

<sup>179</sup> See WORLD WILDLIFE FUND, *INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK* 6-7 (Ginette Hemley, ed., 1994).

<sup>180</sup> See CITES, *Strategic Plan for the Convention*, Goal 5 (2000), CITES Doc. 11.12.2, available at <<http://www.cites.org/eng/news/English%20strategies.pdf>> (visited Sept. 12, 2001); CITES, *Co-operation and Synergy with the Convention on Biological Diversity and Other Biodiversity-Related Conventions*, at ¶ 22 (2000), CITES Doc. 11.12.3 (on file with author).

sustainable development throughout the world.”<sup>181</sup> The Convention’s contracting parties have agreed that, to be effective, they must engage stakeholders in defining the issues and possible solutions needed for preserving wetlands. They recognize that key to that task is using communication and education as tools that should be linked to international and domestic legal and economic instruments.<sup>182</sup> Accordingly, a central part of the Convention’s implementation focuses on communication, and relies upon support from the Convention’s International Organization Partners.<sup>183</sup>

International Organization Partners are officially designated NGOs such as BirdLife International, the World Conservation Union (IUCN), Wetlands International, and the World Wide Fund for Nature (WWF). These organizations played a significant role in the inception of the Convention and have subsequently been instrumental in its development and application.<sup>184</sup> Because they can offer significant resources and expertise, the contracting parties rely upon them to assist in developing strategic approaches to communication, education and public awareness about wetlands issues.<sup>185</sup>

The Convention’s relationship with these groups developed informally over time. However, the contracting parties decided in 1999 to formalize the relationship by adopting a set of rules, in the hope that doing so would encourage other NGOs to contribute to the Convention’s mission as well.<sup>186</sup> The rules are broadly drawn and focus on NGO expertise and willingness to help the Convention realize its aims. Accordingly, international NGOs may acquire International Organization Partner status by signing a Memorandum of Cooperation with the Convention Bureau and establishing that they have expertise and a track record in wetlands conservation; experience in implementing partnership ventures in capacity building, policy development, and/or evaluation and assessment; and the will to contribute actively and on a regular basis to the Convention’s work, especially in helping contracting parties meet their Convention obligations.<sup>187</sup>

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<sup>181</sup> Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245, composite text including amendments, *available at* <[http://www.RAMSAR.org/key\\_conv\\_e.htm](http://www.RAMSAR.org/key_conv_e.htm)> (visited Sept. 12, 2001) [hereinafter Ramsar Convention]; *Mission Statement, Strategic Plan 1997-2002*, Conference of the Contracting Parties, 6th Sess. (1996), *available at* <[http://www.RAMSAR.org/key\\_strat\\_plan\\_e.htm](http://www.RAMSAR.org/key_strat_plan_e.htm)> (visited Sept. 12, 2001).

<sup>182</sup> See *The Convention’s Outreach Programme 1999-2002: Actions to Promote Communication, Education and Public Awareness to Support Implementation of the Convention on Wetlands*, Conference of the Contracting Parties, 7th Sess., ¶ 3 (1999), *available at* <[http://www.RAMSAR.org/key\\_outreach\\_prog\\_e.htm](http://www.RAMSAR.org/key_outreach_prog_e.htm)> (visited Sept. 12, 2001).

<sup>183</sup> See *id.* ¶ 16.

<sup>184</sup> See *Resolution VII.3 on Partnerships with International Organizations*, Conference of the Contracting Parties, 7th Sess., ¶¶ 1-2 (1999), *available at* <[http://www.RAMSAR.org/key\\_res\\_vii.03e.htm](http://www.RAMSAR.org/key_res_vii.03e.htm)> (visited Sept. 12, 2001).

<sup>185</sup> See *The Convention’s Outreach Programme*, *supra* note 182, ¶ 16.

<sup>186</sup> See *Resolution VII.3*, *supra* note 184, ¶ 4.

<sup>187</sup> See *id.* annex ¶ 4.

## 4.6 Alerting Parties to Potential Cases of Non-Compliance

### 4.6.1 Citizen “Submissions on Enforcement Matters”: The North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation (NAAEC) employs a different approach for tapping non-governmental resources to enhance compliance.<sup>188</sup> NAAEC was adopted as a side agreement to the North American Free Trade Agreement (NAFTA), which established a free-trade bloc comprised of Canada, Mexico, and the United States.<sup>189</sup> NAAEC requires each contracting party to ensure that it will effectively enforce its environmental laws, insofar as they might affect international trade between parties.<sup>190</sup>

NAAEC empowers NGOs or private persons to petition the secretariat if they believe a party is failing to enforce its environmental laws effectively.<sup>191</sup> These “submissions on enforcement matters” are part of the NAAEC’s facilitative approach to compliance, whereby problems are identified with an eye towards finding cooperative solutions rather than coercing non-compliers with punitive enforcement responses.<sup>192</sup>

If a citizen submission contains all the required information (including documentary evidence), satisfies various procedural requirements, and “appears to be aimed at promoting enforcement rather than at harassing industry,” then the secretariat makes a determination whether the submission merits requesting a response from the party against whom it is directed.<sup>193</sup> The complained-against party can halt the process if it notifies the secretariat that the matter in question is subject to a pending judicial or administrative proceeding, was already resolved by such a proceeding, or if domestic legal remedies are available that the person or organization has not pursued.<sup>194</sup>

A citizen submission that passes these hurdles cannot directly trigger any NAAEC enforcement procedures. However, it may lead to an exchange of views between the parties, and to the Council of the Commission on Environmental Cooperation (CEC) releasing a report on the matter to the public.<sup>195</sup>

In practice, the CEC has been reluctant to take the initiative in the citizen submission process, preferring instead to pass its decision-making prerogatives to the NAFTA parties’ environmental ministers. For example, responding to a petition filed by environmental groups trying to draw attention to the stalled cleanup of a lead smelter in Mexico, the CEC agreed that the smelter warranted an investigation.<sup>196</sup> However, the CEC did not agree that Mexico had failed to enforce its criminal code by not extraditing the owners of the smelter, and left it to the environmental ministers to determine whether a factual record of the case

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<sup>188</sup> See NAAEC, *supra* note 12.

<sup>189</sup> North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>190</sup> See NAAEC art. 5.1-2.

<sup>191</sup> See *id.* art. 14.

<sup>192</sup> Conversation with Darlene Pearson, Head, Law and Policy Program, Commission on Environmental Cooperation (July 14, 1999).

<sup>193</sup> NAAEC, *supra* note 12, art. 14.1.

<sup>194</sup> See *id.* art. 14.3.

<sup>195</sup> See *id.* art. 15.

<sup>196</sup> See Leslie Moore, *CEC Could Press for Cleanup of Tijuana Lead Smelter at June Meeting*, 23 INT’L ENV’T REP. 384 (2000).

should be prepared.<sup>197</sup> Still, despite the CEC's hesitancy to exercise its powers, the environmental groups' submission raised the possibility that NAFTA parties would acknowledge the smelter problem and take steps to remedy it.

#### **4.6.2 Identifying Non-Compliance Through the Documents Submission Process: The Convention on the Conservation of Antarctic Marine Living Resources**

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),<sup>198</sup> part of the Antarctic Treaty System, is dedicated to conserving marine life in the Southern Ocean by ensuring that "harvesting is carried out in a rational manner."<sup>199</sup> CCAMLR is administered by a Commission and a Scientific Committee, each of which is instructed to seek to develop cooperative working relations with NGOs that could contribute to its work.<sup>200</sup> NGO observers may submit relevant documents to the secretariat for distribution to members as informational documents, which may in turn be considered as official documents if the Commission or Committee decides.<sup>201</sup>

Most NGOs that participate in CCAMLR do so under the auspices of the Antarctic and Southern Ocean Coalition (ASOC).<sup>202</sup> ASOC comprises 240 member groups located in 50 countries. Due to the extensive scientific and research experience many ASOC groups have in the Antarctic, contracting parties often turn to ASOC for advice. Many of the papers tabled by ASOC have been used and cited by the Commission and Scientific Committee.<sup>203</sup>

ASOC is not involved in the "hands-on" work of compliance and enforcement.<sup>204</sup> In fact, the Standing Committee on Observation and Inspection, which oversees CCAMLR compliance, does not allow NGOs to attend its meetings. However, ASOC has used the documents submission process to name countries or citizens of countries who are violating CCAMLR's terms. For example, ASOC presented a paper in the early 1990s reporting violations by the Russian fisheries industry. Though it took several years, Russia ultimately admitted to the charges.<sup>205</sup>

#### **4.6.3 Submitting Legal Briefs**

In the ongoing negotiations to develop implementing rules for the Climate Convention's Kyoto Protocol,<sup>206</sup> FCCC parties have committed to creating a compliance

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<sup>197</sup> See *id.*

<sup>198</sup> Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, T.I.A.S. 10240 [hereinafter CCAMLR].

<sup>199</sup> Commission for the Conservation of Antarctic Marine Living Resources, *General Introduction*, available at <[www.ccamlr.org/english/e\\_general\\_intro.htm](http://www.ccamlr.org/english/e_general_intro.htm)> (visited Sept. 12, 2001).

<sup>200</sup> CCAMLR, *supra* note 198, art. 23.3.

<sup>201</sup> See Commission for the Conservation of Antarctic Marine Living Resources, Rules of Procedure of the Commission, rule 34, available at <[http://www.ccamlr.org/English/e\\_basic\\_docs/e\\_pt3\\_p3.htm](http://www.ccamlr.org/English/e_basic_docs/e_pt3_p3.htm)> (visited Sept. 12, 2001); Commission for the Conservation of Antarctic Marine Living Resources, Rules of Procedure of the Scientific Committee, rule 19, available at <[http://www.ccamlr.org/English/e\\_basic\\_docs/e\\_pt4\\_p2.htm](http://www.ccamlr.org/English/e_basic_docs/e_pt4_p2.htm)> (visited Sept. 12, 2001).

<sup>202</sup> Telephone Interview with Beth Clark, Director, Antarctica Project, ASOC secretariat (May 18, 2000).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Kyoto Protocol, *supra* note 40.

body that would be charged with addressing and resolving cases of non-compliance in a quasi-judicial way.<sup>207</sup> No party has yet proposed that NGOs should have a formal role in initiating complaints against governments suspected of non-compliance. However, the present negotiating text for the Protocol's procedures and mechanisms on compliance would give NGOs and civil society the opportunity to submit compliance-related information directly to the compliance body or secretariat, without first having to filter the information through a state party.<sup>208</sup> The compliance body would be obliged to accept the information only; it would be under no obligation to act upon it. Moreover, realizing that broad sources of information could enhance transparency and effectiveness of the compliance system, the United States has recommended that NGOs and civil society be permitted to submit legal briefs to the compliance body during a non-compliance proceeding.<sup>209</sup>

This proposal is a stronger version of the position adopted by the Appellate Body under the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO).<sup>210</sup> The WTO resolves trade disputes among its members by submitting the disputes to quasi-judicial panels, which are empowered to make binding decisions. Members may appeal unfavorable decisions to the Appellate Body, whose decisions are final.

Many of these trade disputes raise issues of direct concern to environmental and business NGOs. Consequently, NGOs have sought the right to submit *amicus curiae* (friend of the court) briefs to the panels, with a view to supplementing or highlighting information that is relevant to the case. The WTO Dispute Settlement Understanding (DSU) permits every panel to "seek information and technical advice from any individual or body which it deems appropriate."<sup>211</sup> This provision does not indicate whether panels may accept unsolicited briefs. The Appellate Body has since confirmed that, although panels have no legal duty to accept or consider unsolicited *amicus* briefs from individuals and organizations, neither are they prohibited from doing so.<sup>212</sup> Accordingly, the Appellate Body will accept such briefs so long as it finds them pertinent and useful.<sup>213</sup>

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<sup>207</sup> See *Review of the Implementation of Commitments and of Other Provisions of the Convention: Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol*, Conference of the Parties, 6th Sess. part 2, Agenda Items 4 and 7, at 13-14, U.N. DOC. FCCC/CP/2001/L.7 (2001).

<sup>208</sup> See *Preparation for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol: Procedures and Mechanisms on Compliance Under the Kyoto Protocol, Draft Decision Proposed by the Co-Chairmen of the Negotiating Group*, Conference of the Parties, 6th Sess. part 2, Agenda Item 7 (d), at 8, U.N. DOC. FCCC/CP/2001/CRP.12/Rev.1 (2001).

<sup>209</sup> Intervention of Evan Bloom, U.S. State Dept., Workshop on Compliance Under the Kyoto Protocol, Bonn, March 2, 2000. After the Bush Administration's rejection of the Kyoto Protocol in March 2001, U.S. negotiators began to refrain from taking part publicly in Protocol-related negotiations that did not, in the administration's view, directly affect "legal precedent" or U.S. "national interests." Consequently, the U.S. no longer is proactively advocating its earlier position.

<sup>210</sup> WTO Agreement, *supra* note 10, annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 2.1 [hereinafter DSU].

<sup>211</sup> *Id.* art. 13.1. However, before a panel seeks information from an individual or body that is under the jurisdiction of a WTO member, the panel must inform the member of its intentions. See *id.* ¶ 2.

<sup>212</sup> See *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Appellate Body, WT/DS138/AB/R, at ¶¶ 41-42 (U.S.-Euro. Comm. 2000).

<sup>213</sup> See *id.*



## 5. Conclusion and Recommendations

Effective implementation of RFMOs and other international environmental and natural resources-management regimes depends not only upon the cooperation of contracting parties, but also upon the ability of the regime to win the continuing support of non-governmental stakeholders. Hence, a critical dimension of the work for negotiators and contracting parties is to define the degree and means by which representatives of civil society will participate in the regimes. This may be especially important for ensuring that an RFMO's recognition of the unique needs of small and less-developed island states is included not only in its mandate, but also in its practices.

This article has sought to provide perspectives on the roles the public can play in helping multilateral agreements realize their objectives. The article has demonstrated that a rich array of procedures and practices exist to facilitate public participation in many levels of the rulemaking, implementation, and monitoring phases of environmental and natural resource management treaties. Multilateral environmental agreements implemented in the aftermath of the 1992 Rio Conference—including the U.N. Conventions on Climate Change, Biological Diversity, and Desertification—have made a particularly conscious effort to “operationalize” the Rio Declaration and Agenda 21 recommendations that civil society should have broad access to information, a genuine role in the decision-making process, and an opportunity to take part in ensuring that all state parties faithfully implement their treaty commitments.

The trend in MEAs has been toward progressively broader public participation. Still, some interests express the view that a closed decision-making process may be more efficient or easier to manage than an open one. They may fear that an inclusive approach could attract too many NGOs to meetings; that some organizations may have irrelevant, offensive, extreme or even illegitimate agendas; or that NGO participation may place an undue financial burden upon the parties to the agreement. These concerns have sometimes been used to justify the practices of those pre-Fish Stocks Agreement RFMOs in which the focus was not upon sustainable development, but rather upon maximizing commercial exploitation of the fishery, and where it was easier to accomplish that end if the decision-making process was not exposed to public scrutiny.

By contrast, the experience in the Rio-era MEAs—in which sustainable development is an overriding objective—has established that active participation from a broad and diverse range of NGOs enhances the quality of decision-making and increases the legitimacy of decisions made. These regimes have effectively managed NGO participation through their accreditation practices and rules of procedures. By requiring applicant NGOs to establish that they are legally constituted in their home country, the MEAs recognize that the power to qualify and verify a group as an NGO is a responsibility that falls primarily within the discretion of individual national governments. Moreover, because these MEAs value public participation as an asset, they have elected not to charge registration fees for NGOs, and instead have often provided them with meeting facilities and equipment free of charge.

Like the other Rio-era agreements, the U.N. Fish Stocks Agreement and the WCPOFC have purposefully incorporated into their texts the principles of transparency and public participation reflected in the Rio Declaration and Agenda 21 (and now codified under the Aarhus Convention). As contracting states to the WCPOFC and other RFMOs continue

to develop the rules and procedures necessary for effective implementation, the practices of the Rio-era agreements and others that have come to rely upon the benefits of vigorous public participation should provide an influential guide.

We suggest international fisheries managers consider following the example of the International Dolphin Conservation Program, which includes a public participation annex in its foundational text.<sup>214</sup> The annex sets out a framework for NGO accreditation, specifies the participatory privileges and obligations of accredited NGOs, and provides that NGOs will generally have access to the same documentation as state parties. The annex does not contain a high level of detail. However, it clearly establishes the basic rights of public access to information and decision-making, while leaving room for more specific elaboration and development in its rules of procedure and practices.

After negotiators agree on an adequate public participation framework, we recommend they work out the details in a stepped approach that accords with the priorities of contracting parties and interested NGOs. We believe the experiences of the three main Rio-era agreements we reviewed can provide valuable instruction, especially in the following ways:

*Dissemination of official documents:* Aside from distributing paper copies of documents to participants at meetings, the most effective way to make information available to the public is via a dedicated internet website. We strongly recommend that priority be given to creating an easy-to-navigate site at which all official documents, including working drafts, may be obtained promptly after their publication.

*Availability of information:* Any exceptions to the rule favoring full availability of documents and information should be clearly and narrowly defined. This should particularly apply to any business-confidentiality exception. Negotiating states that are signatories to the Aarhus Convention should bear in mind that they are obliged to promote the application of that Convention's access to environmental information provisions in all international environmental decision-making processes in which they take part.<sup>215</sup> Those provisions include the requirement that environmental information may be withheld only on the specific grounds listed in the Convention, and that those grounds must be interpreted "in a restrictive way."<sup>216</sup>

*Accreditation for observer status:* While accreditation may be useful to assure orderly participation at meetings by representatives of civil society, it should not serve as an exclusionary device. The accreditation process should thus strive to confirm the "bona fides" of interested NGOs without being unduly burdensome. The accreditation practices of the Climate Convention provide a model that has achieved an appropriate balance; by contrast, those of NAFO have not.

*Notice of meetings:* Because adequate notice is essential for effective public participation, RFMOs should institute reliable mechanisms for advising all interested observers of pending meetings well in advance of their scheduled dates. Such information should appear in a timely manner on a dedicated, publicly accessible internet web site. Additionally, all accredited observers should receive direct notice by post or fax transmission.

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<sup>214</sup> See Dolphin Conservation Agreement, *supra* note 31, annex X.

<sup>215</sup> See Aarhus Convention, *supra* note 52, art. 3.7.

<sup>216</sup> *Id.* art. 4.4.

*Access to meetings:* As in other agreements that adhere to the tenets of Rio and Agenda 21, there should be a presumption favoring public access to all official meetings, including those of the subsidiary bodies and working groups. The Climate, Biological Diversity, and Desertification Conventions have all benefited from enhanced transparency due to their open-access policies. RFMOs should follow those agreements' examples.

*Addressing meetings:* The perspectives of NGO experts can enhance the quality of decision-making in an RFMO, in part because NGO perspectives need not be limited by national or political considerations and may thus most closely support the RFMO's resource-conservation objectives. Accordingly, RFMOs should support direct NGO participation to the highest practicable degree. We recommend that RFMOs approach the question of NGO interventions informally, with a presumption that such interventions will be allowed whenever feasible. Contracting states should avoid adopting rules that appear to allow NGO interventions, but include burdensome requirements (such as pre-approval far in advance of the meeting) that make the opportunity a limited one.

*Distributing documents:* Distributing technical studies, policy analyses, advocacy pieces, etc. remains one of the most important ways in which NGOs can help increase the knowledge and perspectives of decision-makers. Following the practices of the Rio-era agreements we reviewed, RFMOs should support NGOs in their efforts to provide information to participants at meetings. Again, an informal approach may perhaps be the most effective way of accomplishing this, whereby NGOs may distribute without prior approval any documents they wish, simply by placing them on tables or other appropriate places in the halls of the meeting site. Participants may then pick up the documents at their own discretion. We recommend that RFMOs not consider any arrangement under which documents would have to be approved by the secretariat or some other entity before they could be distributed in this fashion.

Having established a strong foundation for public participation through access to information and decision-making, RFMOs, in consultation with interested NGOs and individuals, should also consider ways in which they might utilize non-governmental expertise to facilitate compliance and implementation. An NGO role may be especially useful in assisting small and less-developed island states participate effectively and protect their interests in sustaining the fishery for subsistence, small-scale, and indigenous uses. While this latter type of NGO role could be established at the international level, individual contracting states may also wish to explore on their own initiative developing cooperative relations with those NGOs whose expertise and interests may help them assure the long-term success of the RFMO.