

## **Making the Bylaws Work for the Pacific Salmon Commission and Public Participation**

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### **I. Introduction**

Wide-ranging public participation is a growing trend in administration of natural resource treaties, including fisheries management agreements. Principle 10 of the Rio Declaration on Environment and Development, which was adopted at the United Nations Conference on Environment and Development in 1992, embodies international recognition of the value of public participation and access to information, stating that “[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level.”<sup>1</sup> Principle 10 and the growing trend in public participation in international environmental decision-making reflects the idea that some level of public participation in management decisions legitimizes and enhances the public’s confidence in international decision-making.<sup>2</sup> Moreover, decision-makers may value the input of stakeholders with relevant, specialized expertise—these contributions ensure robust decision-making.<sup>3</sup> As a result, in recent decades, the international environmental legal community has seen a rise in the number of non-governmental organizations (NGOs) actively participating in international environmental decision-making,<sup>4</sup> including in the decision-making of many Regional Fisheries Management Organizations (RFMOs).

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<sup>1</sup> U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 10.

<sup>2</sup> Jonas Ebbesson, *Public Participation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 681, 683 (Daniel Bodansky et al. eds., 2007) (highlighting legitimizing effect of public participation); Alastair R. Lucas, *Legal Foundations for Public Participation in Environmental Decision-Making*, in NATURAL RESOURCES FOR A DEMOCRATIC SOCIETY 73, 74 (Albert E. Utton et al. eds., 1976) (stating public participation enhances confidence in decision-making processes because “citizens can clearly see in every case that all issues have been fully and carefully considered”); *Id.* at 74 (noting that public participation increases transparency and accountability of decision-making body).

<sup>3</sup> Ebbesson, *supra* note 2, at 687. Uncertainty as to the scientific causes and effects of international environmental problems, legal and political avenues for achieving policy objectives, and behavioral effects of policy decisions on sub-national interests is characteristic of international environmental policy-making. SEBASTION OBERTHÜR ET AL., PARTICIPATION OF NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL ENVIRONMENTAL CO-OPERATION: LEGAL BASIS AND PRACTICAL EXPERIENCE 40 (2002). NGOs can help address these uncertainties through collecting and distributing relevant information to policy-makers and the public at large, “thereby enhancing the knowledge base for international environmental governance.” *Id.* For instance, TRAFFIC International, an expert NGO, plays a critical role in providing information on illegal trade in endangered species to Parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), so much so that the framework of CITES specifically recognizes TRAFFIC as a source of information. *Id.* at 41. Similarly, public interest and business interest NGOs provide relevant information to international decision-making bodies. *Id.* For example, Environmental Investigation Agency, an environmental NGO, has furnished much of the data on illegal trade in ozone-depleting substances used in implementing the Montreal Protocol. *Id.* at 42. Parties to the Protocol also rely on information from the Alternative Fluorocarbon Environmental Acceptability Study, an industry association, regarding the production of ozone-depleting substances. *Id.* <sup>4</sup> Ebbesson, *supra* note 2, at 683. pleting substances. *Id.* <sup>4</sup> Ebbesson, *supra* note 2, at 683.

The Pacific Salmon Commission (PSC), a bilateral executive body charged with administration and implementation of the Pacific Salmon Treaty (PST),<sup>5</sup> like many other RFMOs, has adopted a set of bylaws governing public participation. However, the bylaws as currently written may not provide for the type of public participation and access to information that best benefit the work of the PSC or support the level of public engagement warranted in Pacific salmon management decisions.<sup>6</sup>

Thus, although the PSC's bylaws provide the basic framework for public participation, they lack the detail necessary for the participation contemplated to be truly meaningful. Several easy and efficient procedures exist that the PSC could enact to achieve the benefits of public participation. For instance, other RFMOs tend to provide more notice to the public as to meeting times and agendas, and many provide more sufficient access to documentation produced before, during, and after meetings. Additionally, other RFMOs' more detailed structure for public participation ensures that the burden of participation rests on the public—that is, if many of the rules adopted by other RFMOs are also adopted by the PSC, the public must register in advance of each meeting in order to attend and must pay a small fee to support PSC meetings.

This paper evaluates the existing public participation provisions of the PSC bylaws and recommends specific measures, modeled after the procedural rules of other RFMOs, that the PSC could adopt to enhance public engagement while at the same time achieving an appropriate level of diplomacy and confidentiality in the negotiating process. Part II explores the issue related to public attendance at PSC meetings, including a discussion of accreditation and registration processes. Part III discusses the need for adequate meeting notification and public access to meeting agendas. Part IV explains the need for public access to meeting documentation, and Part V discusses public participation during meetings. Part VI concludes that while the current rules provide a basic framework for public participation, the PSC's bylaws could be updated to incorporate many of the elements of some of the more comprehensive public participation frameworks found in other RFMOs in order to better facilitate a mutually beneficial scenario for the public and the PSC. These changes would bring the PSC's rules in line with accepted norms in international environmental law.

## **II. Attendance at meetings.**

The ability to attend meetings is the most basic principle of public participation—it is germane to any meaningful public participation regime. While this access need not be entirely unfettered and legitimate concerns may exist to restrict access to meetings, having a clearly defined process for public participation would be mutually beneficial for the public and the PSC. Currently, whether meetings are open or closed to the public is not governed by a straightforward, clear decision-making and notification process. Thus, although the PSC's bylaws suggest that a presumption of open meetings exists, the PSC holds the majority of its meetings as closed “executive sessions.” Many other RFMOs have been able to strike a healthy balance between public participation and the practical demands of high-level discussions, and

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<sup>5</sup> Pacific Salmon Treaty, *signed* Jan. 28, 1985, *entered into force* Mar. 18, 1985, 1469 U.N.T.S. 357.

<sup>6</sup> *See, e.g.*, Pacific Salmon Commission, *About Pacific Salmon*, [http://www.psc.org/about\\_salmon.htm](http://www.psc.org/about_salmon.htm) (last visited Oct. 15, 2007) (describing the myriad constituencies dependant upon successful salmon management).

these RFMOs' processes can serve as models for the PSC. This section suggests that more comprehensive rules regarding public attendance at meetings would facilitate transparency and clearly define both the public and the PSC's accountability.

### **A. Open Meetings and Mechanisms for Closing Meetings**

As a general rule, PSC meetings should be open to the public, and the current draft of the bylaws supports this interpretation. However, the provisions are vague enough that both the public and the PSC have potentially misinterpreted them. Rule 1 of Chapter II states, "Public observers may attend open meetings of the Commission."<sup>7</sup> According to Rule 1 of Chapter VII, the Chair and Vice-chair can convene an executive session only when a meeting concerns: "(a) [a]ny item that could jeopardize the success of the negotiation . . . [or] (b) personnel or administrative activities."<sup>8</sup> Read together, these rules suggest that the basic presumption is open meetings, as opposed to executive sessions. The rules create a presumption that the public may attend any meeting that is not designated an executive session, but executive sessions may only be called in limited—though discretionary—circumstances. This presumption is consistent with the presumption established in other RFMOs' rules of procedure.

At present, however, PSC seems to be operating under the reverse presumption, regarding executive sessions as the norm rather than the exception. This conflict in interpretations arises because the rules are quite vague as to what circumstances necessitate an executive session. Beyond the categories listed under Rule 1 of Chapter VII, the rules provide little guidance. While the exception concerning personnel or administrative activities is rather straightforward, the exception for "[a]ny item that could jeopardize the success of the negotiation" lends itself to potentially overly broad interpretation. The rule gives only two examples of types of items that could jeopardize negotiations, including the "development or evaluation of fishery regimes and proposals, or the conduct of negotiations on final fishery regimes."<sup>9</sup> However, without more guidance, these examples allow the exception to swallow the rule because these items are presumably germane to practically any discussion the PSC holds, thus eviscerating the presumption in favor of open meetings.

RFMOs operating under the presumption of open meetings offer more successful examples of effective public participation schemes. For example, the Inter-American Tropical Tuna Commission's (IATTC) rules of procedure provide that "[o]bservers may attend all regular and special meetings of the Commission."<sup>10</sup> Observers consist of non-member states, intergovernmental organizations, and "[a]ny organization . . . which has legitimate interest in the work of the Commission."<sup>11</sup> Similarly, the Commission for the Conservation of Antarctic Marine Living Resource's (CCAMLR) rules of procedure provide that "[o]bservers may be

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<sup>7</sup> Pacific Salmon Commission, *Bylaws*, at ch. II, § A, R. 1 (Feb. 11, 2000), *available at* [http://www.psc.org/about\\_bylaws.htm](http://www.psc.org/about_bylaws.htm) [hereinafter PSC Bylaws].

<sup>8</sup> *Id.* at ch. VII, R. 1.

<sup>9</sup> *Id.*

<sup>10</sup> IATTC, *Rules of Procedure*, at R. VIII (Aug. 13, 1952), *available at* <http://www.iattc.org/IATTCDocumentsENG.htm>.

<sup>11</sup> *Id.* at R. VIII(2).

present at public and private sessions of the Commission.”<sup>12</sup> Additionally, the North Atlantic Fisheries Organization (NAFO), the International Convention for the Conservation of Atlantic Tuna (ICCAT), and the International Whaling Commission (IWC) allow observers to attend the vast majority of Commission meetings.<sup>13</sup>

Moreover, these open RFMO meetings often include sensitive discussion items similar to those presumably discussed by the PSC, such as negotiations on final fishery regimes. Most, if not all, RFMOs allow public participation in just this type of fishery management development. Indeed, the United States and Canada regularly engage in the development of the fishery regimes under other treaties in full public view.<sup>14</sup> Once an “observer” becomes accredited by the International Whaling Commission (IWC),<sup>15</sup> she is “admitted to all meetings of the Commission and the Technical Committee, and to any meetings of subsidiary groups of the Commission and the Technical Committee, except the Commissioners-only meetings and the meetings of the Finance and Administration Committee.”<sup>16</sup> In practice, the IWC regularly develops and analyzes whaling regimes in full view of observers, despite the fact that whaling is a divisive, sensitive, and politically-charged issue. Notably, IWC rules allow for closed sessions as well, but unlike the PSC’s practice, the IWC does not exercise its discretion to hold closed meetings such that no meetings are open. Thus, other RFMOs have found it effective and appropriate to permit public scrutiny of the development of even highly sensitive management decisions.

However, like the PSC and IWC, nearly all RFMOs allow for closed meetings. To ensure that the bylaws support open meetings but also support the necessity of closed meetings in limited circumstances, the PSC’s bylaws could benefit from a list of delineated agenda items that would necessitate calling an executive session, which the PSC could continue to invoke at its discretion. Certain meetings are so sensitive that an executive session is necessary, but this is not true of all meetings. In a discussion of the accession of public participation in international environmental governance, Jonas Ebbesson, Professor of Environmental Law at Stockholm University, notes, “In terms of diplomacy and negotiation techniques, there are moments and circumstances in which privacy and secrecy may be necessary to achieve certain results, but this does not challenge the general presumptions in favour of transparent and participatory decision-

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<sup>12</sup> CCAMLR, *Rules of Procedure*, at pt. VI, R. 33(a), available at [http://www.ccamlr.org/pu/e/e\\_pubs/bd/toc.htm](http://www.ccamlr.org/pu/e/e_pubs/bd/toc.htm).

<sup>13</sup> NAFO’s rules of procedure provide, “All non-governmental organizations (NGOs) that support the general objectives of NAFO and with a demonstrated interest in the species under the purview of NAFO should be eligible to participate as an observer in all plenary meetings of the General Council, except meetings held in executive session or meetings of Heads of Delegations.” NAFO, *Rules of Procedure & Financial Regulations*, at R. 9.2, available at <http://www.nafo.int/publications/frames/general.html>. ICCAT’s rule states, “Meetings of the Commission shall be public unless the Commission otherwise decides.” ICCAT, *Rules of Procedure*, R. 10, available at <http://www.iccat.es/downloads.htm#comdocs> [hereinafter ICCAT Rules] (follow “Basic Texts” link). IWC’s rule states, “[a]ny international organization with offices in more than three countries may be represented at meetings of the Commission by an observer,” provided the observer has previously gone through the accreditation process.” IWC, *Rules of Procedure & Financial Regulations*, at § C(1)(b) (July 2004), available at <http://www.iwcoffice.org/commission/procedure.htm>.

<sup>14</sup> Both the United States and Canada are Parties to ICCAT and IWC, conventions that discuss fishery and whaling regimes under public scrutiny.

<sup>15</sup> See *infra* pp. 5–6.

<sup>16</sup> IWC, *supra* note 14, at § C(2).

making structures.”<sup>17</sup> RFMOs are at their most transparent when they limit the number of closed sessions, basing the determination to close a meeting on clearly defined, articulable criteria.<sup>18</sup> To enhance transparency and thus the vigor of the decision-making process, the reasons for closing a meeting should be made public in advance of any such meeting and such a decision should be based on clearly stated criteria.

In addition, the PSC could benefit from establishing procedures for closure of otherwise open meetings. Other international environmental governing bodies’ rules of procedure lay out a process by which Parties may choose to close an open meeting in the interest of the continued success in negotiations. For example, the rules of procedure for the Conference of the Parties under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) state that “[a]ll plenary sessions of the meeting and sessions of Committees . . . shall be open to the public. However, any single session may be closed to the public by a decision of a simple majority of the Representatives present and voting.”<sup>19</sup> In this way, CITES honors the presumption of open meetings, while protecting the Parties’ interest in confidentiality when necessary.<sup>20</sup> PSC has no formal procedure for closing open meetings when the need for confidentiality arises,<sup>21</sup> but the PSC could protect privacy interests by adopting such a procedure. To do so would be in accordance with how other international environmental decision-making bodies currently handle public participation.

## **B. Accreditation and Registration**

Other RFMOs offer additional procedures the PSC could adopt in order to protect its interests and allow for a smooth, efficient, and diplomatic public participation process. These procedures concentrate on the accreditation and registration of NGOs prior to participation in meetings. Perhaps one reason that RFMOs allow such open access to sensitive meetings is because NGOs go through this accreditation and registration process. Therefore, the Parties know that the participants have demonstrated a heightened level of interest and even expertise in the topics at hand.

Nearly all RFMOs require members of the public and NGOs to apply for accreditation to become “observers.”<sup>22</sup> The RFMO rules contain varying degrees of specificity as to what an

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<sup>17</sup> Ebbesson, *supra* note 2, at 688.

<sup>18</sup> OBERTHÜR, *supra* note 3, at 234, 248.

<sup>19</sup> CITES, *Rules of Procedure for the Conference of the Parties*, at pt. II, R. 12(1) (2004), available at <http://www.cites.org/eng/com/sc/index.shtml> (follow “Rules of Procedure” link under “Quick Links” section in left column).

<sup>20</sup> Most of the RFMOs examined for this paper have not adopted such a mechanism yet. CCAMLR has come the closest, stating “[i]f a Member of the Commission so requests, sessions of the Commission at which a particular agenda item is under consideration shall be restricted to its Members [and certain designated Observers].” CCAMLR, *supra* note 13, at pt. VI, R. 33(b).

<sup>21</sup> Presently, PSC’s bylaws provide only that the Commission can convene an executive session during an otherwise open meeting, and that the Chair must announce when he expects the meeting to re-open. PSC Bylaws, *supra* note 7, at ch. VII, § A, R. 2. However, there is no procedure for the PSC to make the decision to close the meeting.

<sup>22</sup> A representative, fairly comprehensive accreditation rule is from IATTC’s rules of procedure. “Any organization . . . which has legitimate interest in the work of the Commission may send observers to the meetings, subject to prior approval of the member countries. Requests for invitations shall be sent to the Director of

NGO must include in its application for accreditation. Some RFMOs' rules require only that an NGO submit a written request that it be granted observer status.<sup>23</sup> Other RFMOs specify items an NGO must include in its application. For example, ICCAT requires contact information and addresses for all of the NGO's national and regional offices, the "aims and purposes of the organization and an indication as to how they relate to the objectives of [the Convention]," "a brief history of the organization and a description of its activities," copies of papers the NGO has commissioned or produced on "the conservation, management or science of tunas or tuna-like species," a history of observer status at ICCAT, and a description of what the NGO hopes to present at the ICCAT meeting.<sup>24</sup>

Once accredited, NGOs usually must register for meetings and pay fees to support attendance. Typically, NGOs must also pay a small fee to offset the additional administrative costs associated with observer attendance and the accreditation process itself.<sup>25</sup> Upon accreditation, an observer usually has access to all meetings, except executive sessions.<sup>26</sup> Frequently, an accredited NGO remains accredited for all meetings for that year or even year after year, but must notify the RFMO's administrative body of its intention to attend in advance of each meeting.<sup>27</sup> Such accreditation and registration processes allow Parties—and potentially other members of the public if participant lists are published—to know in advance which groups will be in attendance.

At present, PSC has no accreditation or registration process to admit members of the public, nor does PSC charge observers fees for their attendance. If the PSC were to consider such procedures, it would have advance notice of NGO intent to attend PSC meetings and could plan its agenda and executive sessions accordingly. This process could help further eliminate any confusion or misinterpretation of what meetings are open or closed to the public. Further, adopting an accreditation and registration process would shift the financial burden of public participation to those who wish to participate.

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investigations for submission to IATTC members for consideration at least 120 days prior to a subject meeting. The Director of Investigations shall issue such invitations 60 days prior to the meeting, provided no objection has been made by any IATTC member in writing, explaining the reason for such objection. Any such objection shall be discussed at an executive session of the Commission immediately prior to the meeting in question. If the Commission holds a meeting with less than 120 days notice, the Director of Investigations shall have greater flexibility concerning the timing of sending of the invitations." IATTC, *supra* note 10, at R. VIII(2).

<sup>23</sup> See, e.g., IWC, *supra* note 14, at § C(1)(b) (requiring, in addition to written request, only that the NGO have offices in more than three countries). See also CCAMLR, *supra* note 13, at pt. VI, R. 30(e) (stating that Commission may invite NGOs to apply for observer status without specifying what NGO should include in application).

<sup>24</sup> ICCAT, *Guidelines and Criteria for Granting Observer Status at ICCAT Meetings*, at § 3 (last amended Nov. 2005), available at <http://www.iccat.es/main.htm> [hereinafter ICCAT Guidelines] (follow "Guidelines for Observer Status" link located in pop-down menu under "Meetings" in left-hand column). See also NAFO, *supra* note 14, at R. 9.3 (requiring nearly identical items in application).

<sup>25</sup> See, e.g., NAFO, *supra* note 14, at R. 9.6 ("Observers will be required to pay a fee, which will cover the additional expenses generated by their participation, as determined annually by the Executive Secretary.").

<sup>26</sup> See, e.g., IWC, *supra* note 14, at § C(1)(b) ("Once an international organization is accredited, it remains accredited until the Commission decides otherwise.").

<sup>27</sup> *Id.* at § C(1)(c) (describing registration fee as an annual fee for all meetings between registration and next annual meeting). See also CCAMLR, *supra* note 13, at pt. VI, R. 31 ("Each Observer invited . . . shall notify the Executive Secretary as far as possible in advance of any meeting of the name of its representative and before or at the beginning of the meeting the names of its alternate representatives and advisers.").

### III. Advance Notice of Meetings and Agenda Items

Adopting a few simple elements from other RFMOs can enable efficient and meaningful NGO participation in PSC decision-making. The simple steps include notifying the public of the date, time, and location of meetings open to the public and granting access to a reasonably detailed agenda in order to prepare for the meeting. This section examines PSC's notification process, identifies points of confusion arising from the process, and suggests solutions to resolve uncertainty in the future. It then examines other RFMOs' agenda procedures and concludes that such procedures could help NGOs meaningfully prepare for PSC's open meetings.

#### A. Meeting Notification

The PSC's bylaws and current practices provide for notification to the public of meeting times and places. For example, the bylaws provide that "[u]pon advice of the Chair and the Vice-Chair, the Executive Secretary shall issue a press release announcing an open meeting as far in advance of the meeting date as practicable."<sup>28</sup> Further, "the Executive Secretary shall issue, as far in advance of the meeting date as practicable, a press release announcing if a portion of an open meeting of a Panel or the Commission is to be held in executive session."<sup>29</sup> Whether the PSC issues press releases is unclear, but the PSC does provide a comprehensive website on which interested members of the public are able to find notification of meeting times. The PSC publishes meeting dates on its user-friendly website, prominently displaying links from its homepage to a "Meetings" page where the user can see currently scheduled meeting dates and obtain a copy of the "Commissioners' Forward-Looking Agenda."<sup>30</sup> In order to bring its bylaws in line with its practice, the bylaws could be amended to indicate that the meeting schedule is available on the PSC's website.

While the PSC bylaws provide basic meeting notification, and the PSC supports an excellent website, the notifications are lacking in sufficient substantive detail to apprise the public of the information necessary to understand which meetings are open and which are not. Currently, the website describes the October 2007 meeting as an "Executive Session,"<sup>31</sup> which, under the bylaws, means the meeting will be closed to observers. However, the "Commissioners' Forward Looking Agenda" seems to indicate that the PSC will only have closed—"in-camera"—sessions "if necessary."<sup>32</sup> Further confusion arises because the forward-looking agenda's subtitle is "Executive Session," but it provides the agendas for meetings described as "Executive Session," "Post-Season Meeting," and "23rd Annual Meeting," respectively. Are all of these meetings "executive sessions," as the term is used in the bylaws? Or are the post-season and annual meetings open meetings? That the agenda is labeled "Executive Session" suggests that they are all closed meetings, but the agenda point that an "in-

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<sup>28</sup> PSC Bylaws, *supra* note 7, at ch. II, § E, R. 22.

<sup>29</sup> *Id.* at ch. VII, § A, R. 2. Note, too, that this provision emphasizes the presumption of open meetings discussed earlier. See *supra* Part II.A.

<sup>30</sup> Pacific Salmon Commission, *Meeting Schedule*, [http://www.psc.org/meetings\\_schedule.htm](http://www.psc.org/meetings_schedule.htm) (last visited Oct. 15, 2007).

<sup>31</sup> *Id.* (containing meeting titles, dates and locations from 2006 through 2010).

<sup>32</sup> PACIFIC SALMON COMMISSION, DRAFT *FORWARD-LOOKING AGENDA* (Feb. 28, 2007), [http://www.psc.org/Meetings/Draft\\_Forward\\_Looking\\_Agenda.pdf](http://www.psc.org/Meetings/Draft_Forward_Looking_Agenda.pdf) (last accessed Oct. 15, 2007).

camera” session will occur if necessary suggests that the meetings are otherwise open. These types of inconsistencies severely inhibit public participation and cause unnecessary strife in PSC meetings because they cause confusion among would-be observers and administrators as to when the public may attend. The PSC could amend the bylaws to provide for more accurate notification.

## **B. Agendas**

In addition to public access to meeting times and locations, it must also have access to a reasonably detailed agenda in advance of the meeting. Only by examining an agenda can an NGO meaningfully prepare for a meeting, engage in substantive discussion, and generally support the PSC’s work. At present, the PSC’s bylaws do not provide for public access to meeting agendas sufficiently in advance of meeting times. The PSC’s bylaws provide only that the Executive Secretary provide a provisional agenda to Commissioners and Alternate Commissioners at least 21 days before a meeting.<sup>33</sup> After a round of additions from the Commissioners, the Executive Secretary must then send a draft agenda no later than 7 days before a meeting.<sup>34</sup> The only level of detail required is that the agenda “specify whether the meeting is open or will be conducted in whole or in part in executive session.”<sup>35</sup> Similar to the PSC’s practice with respect to meeting notification, basic agendas for PSC meetings are posted on-line in an accessible manner. Thus, the PSC makes some effort to make agendas available despite the fact that no bylaw makes such effort necessary.

While the PSC’s efforts to go above and beyond the bylaws by making agendas publicly accessible is commendable, the bylaws could be improved by specifically making this a regular commitment of the PSC, and, moreover, the bylaws could also make clear that the level of detail in the final agenda should be sufficient for public observers to prepare and engage effectively and efficiently in meetings. This means that the agendas should detail not only the topics up for discussion but also indicate where and when the PSC plans to hold each discussion. ICCAT provides the most detailed agendas of the RFMOs and provides agendas for each of the committees that will convene during the meeting.<sup>36</sup> Without doubt, ICCAT observers are better able to prepare for substantive discussions in these meetings than are the observers of the other RFMOs.

NAFO provides model rules for public access to relevant meeting agendas. Like the PSC, NAFO requires that the Executive Secretary prepare and circulate a draft provisional agenda and later a revised agenda following a comment period for recipients.<sup>37</sup> In contrast to the PSC’s bylaws, however, NAFO mandates that the Executive Secretary send both the draft and revised agendas not only to Parties, but also to invited observers.<sup>38</sup> Because this process ensures

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<sup>33</sup> PSC Bylaws, *supra* note 7, at ch. II, § D, R. 14.

<sup>34</sup> *Id.* at ch. II, § D, R. 15–16.

<sup>35</sup> *Id.*

<sup>36</sup> ICCAT Homepage, <http://www.iccat.es/> (last visited Oct. 15, 2007) (follow any link under “ICCAT 2007 Meetings” section and download agenda for that meeting).

<sup>37</sup> NAFO, *supra* note 14, at R. 4.1–4.2 (requiring Executive Secretary to send draft and provisional agendas to all participants ninety and sixty days prior to the meeting, respectively).

<sup>38</sup> *Id.* Of course, this procedure requires that an RFMO have an accreditation process, so that the Executive Secretary will know to whom to send the agenda.



that observers have a sense of what topics the commission will discuss and at which times throughout the course of the meeting, these rules ensure that participants are able to meaningfully prepare for meetings.

Standardizing procedures to aid public participation at the PSC meetings will not only make the PSC meetings accessible, but they will maximize the value of public participation for the PSC as well as the public observers. Providing adequate meeting notification and a sufficiently detailed agenda, although fairly simply, is imperative for the PSC and the participants to reap the benefits of the public participation process.

#### **IV. Document Availability**

Just as meeting notification and agenda availability are fundamental to an NGO's ability to meaningfully participate in a meeting, so, too, is access to documents on which decision-makers make their decisions. Without having access to the documents available to the PSC before, during, and after meetings, the public is unable to adequately prepare for a meeting, engage in substantive discussions, or effectively contribute to an RFMO's work. The PSC's bylaws conflict with other RFMOs' rules of procedure in that they lack a rule protecting this interest.

The PSC's bylaws discuss documents only in the context of meeting reports. The bylaws provide that "[a] report of each meeting of the Commission shall be prepared by the Executive Secretary and shall include all decisions and recommendations adopted at the meeting. For executive sessions, the report shall be limited to the attendance, date, time and place of a meeting, and the decisions made. All attendant documents shall be considered a part of the report."<sup>39</sup> In addition, the bylaws indicate that "A final report shall be circulated to all Commissioners, Alternate Commissioners and, when appropriate, to the Panels and joint technical committees."<sup>40</sup> Finally, the bylaws also provide for document confidentiality: "The Chair, with the concurrence of the Vice-Chair, may restrict access to reports or take other measures necessary to ensure confidentiality."<sup>41</sup> Thus, the bylaws do not provide for public access to meeting documentation—neither the documents presented and discussed at the meeting, nor the reports arising from the meeting.

Unlike the PSC, other RFMOs recognize the need for public access to documents in their rules of procedure. But like the PSC's recognition that certain documents may need to be kept private, they have built in procedural safeguards to protect documents that must remain confidential. For example, ICCAT's rules provide that "[a]ll observers admitted to a meeting shall be sent or otherwise receive the same documentation generally available to Contracting Parties and their delegations, except those documents deemed confidential by the Parties."<sup>42</sup>

RFMOs generally carry out their commitment to document access by making the documents available online. Some RFMOs make the documents available to the public at large

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<sup>39</sup> PSC Bylaws, *supra* note 7, at ch. II, R. 25(a).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> ICCAT Guidelines, *supra* note 25, at § 8. *See also* NAFO, *supra* note 14, at R. 9.8.

by posting them on their “Meeting” websites.<sup>43</sup> However, others limit access to documents to Parties and accredited observers by posting documents on password-protected websites.<sup>44</sup> While making all documents widely available online is perhaps the most transparent approach to document dissemination, having restricted access to uploaded documents may best support the needs of a body charged with negotiating and making highly sensitive resource management decisions. The PSC’s bylaws could better support public participation by providing that documents to be discussed or presented at meetings are made available online—whether in a password-protected forum or not—as soon as practicable and within a reasonable time prior to each meeting. Additionally, the bylaws should provide that meeting reports are disseminated similarly within a reasonable time after each meeting. Other RFMOs specifically provide meeting reports to observers.<sup>45</sup>

A password-protected website maintains a certain level of confidentiality, but in certain circumstances even greater confidentiality may be necessary. Like the need for closed meetings in narrow circumstances, the PSC may find that certain documents must be kept entirely confidential from accredited observers, and possibly even from others more directly involved in PSC negotiations, as the bylaws now suggest.<sup>46</sup> Other RFMOs also recognize this legitimate need, but to ensure as much transparency as possible, at minimum, the public should be informed that the PSC has withheld from public purview certain documents deemed confidential. To best support the PSC’s needs, as well as public participation, the public should be informed as to the general subject matter of withheld documents.

By making documents available online, RFMOs reduce the administrative burdens of copying and sending documents en masse. They also potentially save financial resources by encouraging participants to print and bring their own documents to meetings, thus placing the burdens of public participation squarely on the public. In addition, registration fees cover any additional costs that document production may impose.

## **V. Participation at Meetings**

The right of observers to actively participate in meeting proceedings is a common feature of all RFMOs’ rules of procedure, including the PSC’s. This right is paramount because it allows the decision-making body access to outside expertise and public perspectives on issues arising during a meeting. In short, in order for an RFMO to reap the benefits from public participation, the RFMO must allow for some form of active participation in meeting discussion. The specific procedures through which observers may participate vary between RFMOs, but they often include the ability to address the decision-making body on the floor, circulate documents, and make opening statements. This section compares and contrasts the provisions of PSC’s bylaws and other RFMOs’ rules of procedure related to observer participation during meetings

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<sup>43</sup> For example, anyone can easily download documents from IATTC’s “Meetings” page. IATTC, *IATTC and AIDCP Meetings*, <http://www.iattc.org/MeetingsENG.htm> (last visited Oct. 15, 2007).

<sup>44</sup> For instance, NAFO, CCAMLR, and CITES each have password-protected “Members Only” sections.

<sup>45</sup> CCAMLR, *supra* note 13, at pt. IX, R. 38. See also IWC, *supra* note 14, at § Q(1) (same).

<sup>46</sup> See PSC Bylaws, *supra* note 7, at ch. II, R. 25(a) (noting that confidentiality may be necessary, even though the bylaws only provide for circulation to the Commissioners, Alternate Commissioners, and sometimes the Panels and technical committees).

and ultimately concludes that the PSC could benefit from incorporating additional procedures for active participation into its bylaws.

Currently, PSC bylaws contemplate active participation by observers in meetings. Rule 22 of Chapter II states that “[w]hen appropriate, and with the concurrence of the Vice-Chair, the Chair may provide time for public visitors to speak during the meeting.”<sup>47</sup> In this way, PSC has manifested its judgment that the public’s perspective and expertise are valuable to the PSC’s decision-making process, but the bylaws do not allow for as much public participation at meetings as other RFMOs. An example of observer rights typical of other RFMOs is the one found in both the NAFO and ICCAT rules of procedure:

Any eligible NGO admitted to a meeting<sup>48</sup> may:

- a) attend meetings . . . but may not vote;
- b) make oral statements during the meeting upon the invitation of the Chair;
- c) distribute documents at meetings through the Secretariat;
- d) engage in other activities as appropriate and as approved by the chair.<sup>49</sup>

Thus, although oral presentations are perhaps the most obvious form of participation, other RFMOs have uniformly adopted additional procedures through which the public can actively participate.

Most RFMOs encourage public participation by allowing observers to distribute documents either directly to participants at the meeting or through the Executive Secretary. The latter method affords the RFMO the opportunity to screen documents for relevance, and almost all RFMOs do require the approval of a presiding officer before a NGO may distribute documents. For example, IATTC’s rule provides that “[t]he circulation of documents by observers is subject to prior approval of the Chairman.”<sup>50</sup> The screening process ensures that Parties receive materials that are relevant to their decision-making without having to wade through a lot of extraneous information. Since many of the groups who will likely participate as observers are experts in the issues at hand, they will have valuable information that could help facilitate and enhance discussion. Allowing for the distribution of documents will not only provide a manner to disseminate critical information but will also streamline the process of participation.

In addition to making statements on the floor and circulating documents, some RFMOs allow observers to make an opening statement, which the Executive Secretary normally distributes to the Parties and other participants in the official documentation. For example, the IWC allows observers to “submit Opening Statements which will be included in the official documentation . . . . The content of the Opening Statements shall be relevant to the matters under

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<sup>47</sup> *Id.* at ch. II, R. 22.

<sup>48</sup> This phraseology assumes an accreditation and registration process. *See supra* note text accompanying notes 23–28.

<sup>49</sup> ICCAT Guidelines, *supra* note 25, at § 5; NAFO, *supra* note 14, at R. 9.5 (also stating “[o]bservers, experts and advisers may address plenary or subsidiary meetings, but shall not be entitled to vote”).

<sup>50</sup> IATTC, *supra* note 10, at R. XIII(5). *See also* CCAMLR, *supra* note 13, at pt. VI, R. 35 (“Observers may submit documents to the Secretariat for distribution to Members of the Commission as information documents. Such documents shall be relevant to matters under consideration in the Commission.”).

consideration by the Commission, and shall be in the form of views and comments made to the Commission rather than directed to any individual or group of Contracting Governments.”<sup>51</sup> Although IWC limits the statements for relevance and prohibits statements directed at a single Commissioner, the rules specifically provide that the Executive Secretary cannot merely anticipate that an opening statement will not be relevant.<sup>52</sup>

While PSC’s bylaws comport with RFMO standards for active participation in meetings in that they allow for oral presentations by observers, further expanding the bylaws to incorporate more participatory procedures would benefit both the PSC and the public. Specifically, such procedures could include allowing observers to circulate approved documents and submit opening statements. Adopting these simple, efficient procedures would afford the public an invaluable opportunity to present its research and beliefs, while providing PSC access to background materials and stakeholder views.

## **VI. Conclusion**

Public participation is an important element of natural resource decision-making. It provides transparency and accountability to decision-making processes that are often politically, environmentally, and economically sensitive. To provide stakeholders a meaningful seat at the table, most international natural resource management bodies employ a detailed set of rules that govern public engagement with State Parties. While the PSC’s bylaws provide the basic framework for effective and efficient participation, the PSC could draw from a number of other RFMOs’ rules to create a more detailed public participation structure. Such structure would ensure that both the public and the PSC understand the rules of engagement, and, significantly, the PSC could garner both stakeholder expertise and support for its decision-making.

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<sup>51</sup> IWC, *supra* note 14, at § Q(1).

<sup>52</sup> *Id.* at § Q(1) n. 1 (“There is no intention that the Secretariat should conduct advance or ex-ante reviews of such statements.”).