

THE UNIVERSITY OF HULL

Public Participation in the Marine Spatial Planning Process: Lessons Learned from
Theoretical, Legal, and Empirical Perspectives

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by

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Abstract

Public participation is a crucial component in environmental decision-making. The accepted wisdom is that participatory decision-making is a good thing. However, there is no single solution for designing and implementing public participation. The participation pattern in the marine planning context should be different from those applied in other decision-making processes in order to address the particular challenges and demands of marine management. Few studies have focused on public participation in marine planning, especially in the English marine planning context. This thesis fills this knowledge gap by studying public participation in English marine planning from theoretical, legal and empirical perspectives.

This thesis addresses three research questions. First, what is the appropriate participation strategy for English marine planning? Second, to what extent does the current legal regime ensure effective public participation in marine planning and other marine-related decision-making? Third, how have the requirements for participation been implemented in marine planning practices?

To investigate these questions, this thesis constructs a pluralist rationale for participation, including normative, substantive and instrumental dimensions, which fits the English marine planning context. The appropriate strategy for participation is identified. This strategy will contribute to fulfil the pluralist rationale for participation in marine planning process. The thesis also reviews the relevant legal framework at the international and domestic levels, to examine to what extent these legal regimes can support the implementation of public participation in the marine decision-making context. Finally, as a qualitative case study, the process and outcome of participation in producing the English East Inshore and Offshore Marine Plans are evaluated to reveal the deficiencies regarding participation in the English marine planning regime.

Table of Treaties

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, UNTS, vol 2161, no. 37770, 447

Convention on Biological Diversity, 1992, UNTS, vol 1760, 79

Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974, UNTS, vol 1507, no. 25986, 168 (1974 Helsinki Convention)

Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992. Amendments to the 1974 Helsinki Convention are recorded in UNTS, vol 2117, no. 36495, 479; vol, 1861, no. 25986, 489; vol 1721, no. 25986, 492; vol 1724, no. 25986, 329

Convention for the protection of the marine environment of the North-East Atlantic, 1998, UNTS, vol 2354, no. 42279, 67

Convention for the protection of the Mediterranean Sea against pollution, 1976, UNTS, vol 1102, no.16908, 44 (1976 Barcelona Convention)

Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean 1995. Amendments to the 1976 Barcelona Convention are recorded as UNTS no. 16908 and no. 22281

Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L169/19

Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L257/135

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2003, UNTS, vol 2226, No. 30619, 208

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010, UNTS, A-30619

Protocol on Integrated Coastal Zone Management in the Mediterranean, 2008, UNTS vol 2742, No. 48455, 197

Table of Statutes and Regulations

Statutes:

Town and Country Planning Act 1947

Town and Country Planning Act 1968

Town and Country Planning Act 1971

Town and Country Planning Act 1990

Planning and Compulsory Purchase Act 2004

Marine and Coastal Access Act 2009

Localism Act 2011

Neighbourhood Planning Act 2017

Regulations:

Town and Country Planning (Local Development)(England)(Amendment) Regulations
2008

Town and Country Planning (Local Planning) (England) Regulations 2012

Table of other Instruments

Rio Declaration on Environment and Development (1992)

Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010)

The Future We Want (2012)

Sustainable Development Goals (2016)

OSPAR's Guidance for Good Practice for Communicating with Stakeholders on the Establishment & Management of Marine Protected Areas (2008)

HELCOM's Guideline for the Implementation of Ecosystem-based Approach in Maritime Spatial Planning (MSP) in the Baltic Sea Area (2016)

HELCOM's Guidelines on Transboundary Consultations, Public Participation and Co-operation (2016)

Glossary

BAT	Best Available Technology
BEP	Best Environmental Practice
BIS	Department for Business Innovation and Skills
CBD	Convention on Biological Diversity
COP	Conference of the Parties Decision
DECC	Department of Energy and Climate Change
DEFRA	Department of Environment, Food and Rural Affairs
EC	European Commission
EIA	Environmental Impact Assessment
GMO	Genetically Modified Organisms
HELCOM	Helsinki Commission
ICZM	Integrated Coastal Zone Management
IFCA	Inshore Fisheries and Conservation Authorities
LDF	Local Development Framework
MCAA 2009	Marine and Coastal Access Act 2009
MCZ	Marine Conservation Zone
MFA	Marine and Fisheries Agency
MMO	Marine Management Organisation
MPA	Marine Protected Areas
MPS	Marine Policy Statement
MSFD	Marine Strategy Framework Directive (Directive 2008/56/EC)
MSPD	Marine Spatial Planning Directive (Directive 2014/89/EU)
NDO	Neighbourhood Development Order
NDP	Neighbourhood Development Plan
NDPB	Non Departmental Public Body
NFFO	National Federation of Fishermen's Organisations
NIP	National Implementation Report
NPPF	National Planning Policy Framework

NPS	National Policy Statements
OGA	Oil and Gas Authority
PPS	Planning Policy Statements
RSS	Regional Spatial Strategies
SA	Sustainability Appraisal
SAC	Special Areas of Conservation
SCI	Statement of Community Involvement
SEA	Strategic Environmental Assessment
SoS	Secretary of State
SPA	Special Protection Area
SPP	Statements of Public Participation
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Education, Scientific and Cultural Organisation

Chapter 1. Introduction

‘The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you’.¹

The idea of public participation is not new. The accepted wisdom is that participation is a good thing. However, there is not a one-size-fits-all solution for designing and implementing participation. Therefore, issues regarding public participation should always be discussed in relation to particular contexts. This thesis will investigate public participation in English marine spatial planning, from theoretical, legal, and empirical perspectives.

1.1. Research Background

Demand for resources and space as the result of population growth is rapidly increasing. Land-based resources can no longer satisfy the sharp increase in human needs; therefore, competition for marine space and resources is becoming fierce.² As a result, a range of problems regarding the marine environment and marine management has emerged. At the European level, the marine environment is “not in a good status” due to the increasing pressure from human activities.³ Overfishing, marine pollution, marine litter, and climate change are severe threats to the European marine environment at present.⁴ At the English domestic level, marine environmental problems include the decline of biodiversity and fish resources, the loss or decline of habitats, land-source pollution, and climate change.⁵ In addition, marine-related socioeconomic problems

¹ Sherry R Arnstein, ‘A Ladder Of Citizen Participation’ (1969) 35 *Journal of the American Institute of Planners* 216, 216.

² Intergovernmental Oceanographic Commission and the Man and the Biosphere Programme, ‘Visions for A Sea Change: A Report of the First International Workshop on Marine Spatial Planning’ (2006) 8 <<http://msp.ioc-unesco.org/wp-content/uploads/2016/02/Visions-for-a-Sea-Change.pdf>> accessed 11 March 2017.

³ European Commission, ‘The First Phase of Implementation of the Marine Strategy Framework Directive (2008/56/EC): The European Commission’s Assessment and Guidance {SWD(2014) 49 Final}’ (2014) 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0097&from=EN>> accessed 30 June 2017.

⁴ *ibid.*

⁵ Marine Management Organisation, ‘Information Sheet for North East Marine Plan Areas: Environment’ (2016); Marine Management Organisation, ‘Information Sheet for North East Marine Plans Areas: Social’ (2016); Marine Management Organisation, ‘Information Sheet for North East Marine Plans Areas: Economy’ (2016); Marine Management Organisation, ‘Information Sheet for North West Marine Plan Areas: Environment’ (2016); Marine Management Organisation, ‘Information Sheet for South East Marine

such as deprivation, conflicts between different sectors, and conflicts between human activities and marine environmental protection need to be addressed.⁶ Figure 1 below shows how busy and crowded the marine areas are/will be alongside part of the East Riding of Yorkshire and the Lincolnshire area in the east of England.

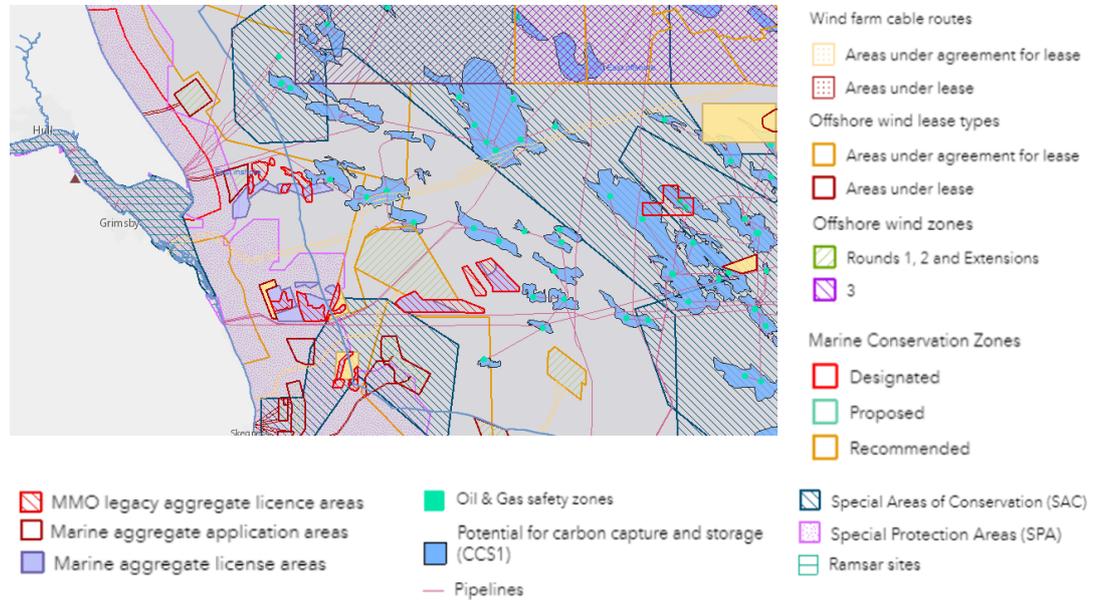


Figure 1. Interactive map of the current/ proposed use of marine areas in part of east England⁷

It is commonly accepted in academia that the traditional sector-based, isolated marine governance pattern and the lack of integrated conservation actions are responsible for the failure of marine resource sustainability and environmental protection.⁸ Accordingly, coordinating existing sectoral governance patterns or establishing new

Plan Areas: Social’ (2016); Marine Management Organisation, ‘Information Sheet for South East Marine Plan Area: Environment’ (2016); Marine Management Organisation, ‘Information Sheet for South West Marine Plan Areas: Environment’ (2016); Marine Management Organisation, ‘Information Sheet for South West Marine Plan Areas: Social’ (2016); Marine Management Organisation, ‘Information Sheet for North West Marine Plan Areas: Economy’ (2016). All available at <<https://www.gov.uk/government/collections/marine-planning-issues-information-sheets>> accessed 1 July 2017.

⁶ *ibid.*

⁷ Figure 1 does not show all of the current and proposed marine use and activities in this area. Activities or uses of the marine area shown in this map include oil and gas, aggregates, offshore wind, pipelines, Marine Conservation Zones, European and ramsar sites, and carbon capture and storage. Information about fisheries, cables, aquaculture, shipping, recreation, and other activities is not shown. An interactive map of the current and proposed use of English marine areas can be found at the Marine Management Organisations’ Marine Information System <<http://mis.marinemanagement.org.uk/>> accessed 20 September 2017.

⁸ Richard Curtin and Raul Pallezo, ‘Understanding Marine Ecosystem Based Management: A Literature Review’ (2010) 34 *Marine Policy* 821, 821; Stephen Jay, ‘Built at Sea: Marine Management and the Construction of Marine Spatial Planning’ (2010) 18 *Town Planning Review* 173, 178–179; Tundi Agardy, Giuseppe Notarbartolo di Sciara and Patrick Christie, ‘Mind the Gap: Addressing the Shortcomings of Marine Protected Areas through Large Scale Marine Spatial Planning’ (2011) 35 *Marine Policy* 226, 228.

management approaches, which apply more holistic and integrated views on the management of marine resources and spaces, have become a trend for marine management.⁹ Since the early 2000s, Marine Spatial Planning (hereafter referred to as marine planning) has gradually become a significant approach to managing marine activities and protecting the marine environment around the world.¹⁰ In the four nations of the UK, marine planning is underway. England applies a single-tier regional marine planning system. The first English marine plans, the East Inshore and East Offshore Marine Plans (East Marine Plans), were published in April 2014.¹¹ The South Inshore and South Offshore Marine Plans (South Marine Plans) began early in 2013. The formal public consultation on the draft South Marine Plans finished at the end of January 2017.¹² The North East Marine Plan, the North West Marine Plan, the South West Marine Plan, and the South East Marine Plans are now at the scoping stage.¹³ Similar to England, Northern Ireland and Wales have one-tier national marine planning systems. Both the Marine Plan for Northern Ireland and the Wales National Marine Plan are at the developmental stage and will soon be brought for formal consultation.¹⁴ Scotland has a two-tier marine planning system, at the national level and regional level.¹⁵ Scotland's National Marine Plan was completed and adopted in 2015. The first two

⁹ See Jesper Raakjaer and others, 'Ecosystem-Based Marine Management in European Regional Seas Calls for Nested Governance Structures and coordination—A Policy Brief' (2014) 50 *Marine Policy* 373, 376; Oran R. Young and others, 'Solving the Crisis in Ocean Governance: Place-Based Management of Marine Ecosystems' (2007) 49 *Environment: Science and Policy for Sustainable Development* 20; Fanny Douvère, 'The Importance of Marine Spatial Planning in Advancing Ecosystem-Based Sea Use Management' (2008) 32 *Marine Policy* 762.

¹⁰ About 60 countries have marine spatial planning initiatives so far. Information about the world application of marine spatial planning can be found on the UNESCO website. <http://www.unesco-ioc-marinesp.be/msp_around_the_world> accessed 11 March 2017.

¹¹ Information on the progress of the English marine plans is available at the MMO's website. <<https://www.gov.uk/topic/planning-development/marine-planning>> accessed 11 August 2017.

¹² Information is available at: <<https://www.gov.uk/government/collections/south-marine-plans>> accessed 11 August 2017.

¹³ Information is available at: <<https://www.gov.uk/government/publications/marine-plan-areas-in-england>> accessed 11 August 2017.

¹⁴ Welsh Government, 'The Welsh National Marine Plan' (2016) <<http://gov.wales/topics/environmentcountryside/marineandfisheries/marine-planning/welsh-national-marine-plan/?lang=en>> accessed 10 August 2017; Department of Agriculture Environment and Rural Affairs, 'Marine Plan for Northern Ireland Stakeholder Newsletter February 2017' (2017) <[https://www.daera-ni.gov.uk/sites/default/files/publications/daera/Marine Plan January 2017 newsletter %28with logo%29.pdf](https://www.daera-ni.gov.uk/sites/default/files/publications/daera/Marine%20Plan%20January%202017%20newsletter%20with%20logo.pdf)> accessed 10 August 2017.

¹⁵ Marine (Scotland) Act 2010 s 5.

regional marine plans in Scotland at Shetland Isles and Clyde are under preparation.¹⁶ Therefore, marine planning has become a key strategy for marine management in the UK.

Definitions of marine planning are quite similar under different regulatory levels. UNESCO defines marine planning as ‘a public process of analysing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process’.¹⁷ At the EU level, marine planning is defined as a process in which relevant authorities ‘analyse and organise human activities in marine areas to achieve ecological, economic and social objective’.¹⁸ At the UK level, marine planning will ‘ensure that different and potentially competing activities are managed in such a way that they contribute to the achievement of sustainable development. A key principle will be to promote compatibility and reduce conflict’.¹⁹ Therefore, in brief, marine planning is a process of allocating resources, space, and activities in the sea to achieve multiple sustainability objectives. Therefore, it seems unlikely that a successful marine plan can be produced without the involvement of individuals and groups who use and are connected to the sea.

Academic studies on public participation in environmental decision-making are common, particularly in recent decades.²⁰ However, studies on the issue of public participation in the marine planning context are few. A review of the literature on public participation

¹⁶ Information is available at the Scottish Government’s website: <<http://www.gov.scot/Topics/marine/seamanagement/regional/partnerships/Shetland>> accessed 11 March 2017; <<http://www.gov.scot/Topics/marine/seamanagement/regional/partnerships/Clyde>> accessed 11 March 2017.

¹⁷ Charles Ehler and Fanny Douvere, ‘Marine Spatial Planning – A Step-by-Step Approach toward Ecosystem-Based Management’ (2009) 18 <<http://www.unesco-ioc-marinesp.be/uploads/documentenbank/d87c0c421da4593fd93bbee1898e1d51.pdf>> accessed 24 May 2016.

¹⁸ Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L257/135 art 3(2). (Marine Spatial Planning Directive)

¹⁹ Marine Policy Statement (MPS), 10.

²⁰ See Thomas C Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Resources for the Future 2002); National Research Council, *Public Participation in Environmental Assessment and Decision Making* (Thomas Dietz and Paul C Stern eds, National Academies Press 2008); Ortwin Renn and others, ‘Public Participation in Decision Making: A Three-Step Procedure’ (1993) 26 Policy Sciences 189; Mark S Reed, ‘Stakeholder Participation for Environmental Management: A Literature Review’ (2008) 141 Biological Conservation 2417.

in the marine planning context reveals three gaps. First, a comprehensive theoretical framework for public participation in marine planning has not been established by previous studies. There is no doubt that, in a general sense, public participation is a good thing. It is also the case that the marine planning system in the UK draws heavily on its land planning system.²¹ Accordingly, some key participatory approaches in the terrestrial planning system, such as the production of a statement of participation and a consultation method, are applied in the marine planning system.²² However, whether and to what extent the participation strategy applied in land planning can be transferred to marine planning is an important question. Kidd and other researchers have realised that the participatory pattern of marine planning should not completely copy the strategy of public participation in land planning due to the different legal, environmental, historical, and cultural contexts of the two planning systems.²³ However, no existing studies have questioned the theoretical basis that underpins this issue: whether public participation in these two planning systems share the same rationales and motivations. As will be emphasised throughout this thesis, public participation has different rationales with different purposes for participation. Therefore, the rationale for public participation is the basis for creating, implementing, and evaluating a public participation strategy in a decision-making context. This should not be neglected when identifying the differences in the participation strategies between the two planning systems.

A review of the literature finds that public participation has been commonly recognised as an essential for marine planning.²⁴ However, existing studies normally ask “when”, “who”, and “how” questions for public participation in the marine planning context but do not question why public and stakeholder participation is indispensable in the marine

²¹ Sue Kidd and Geraint Ellis, ‘From the Land to Sea and Back Again? Using Terrestrial Planning to Understand the Process of Marine Spatial Planning’ (2012) 14 *Journal of Environmental Policy & Planning* 49, 61; Heather Ritchie and Geraint Ellis, ‘“A System That Works for the Sea”? Exploring Stakeholder Engagement in Marine Spatial Planning’ (2010) 53 *Journal of Environmental Planning and Management* 701, 707.

²² Ritchie and Ellis (n 21) 706–707.

²³ Kidd and Ellis (n 21) 51; Ritchie and Ellis (n 21) 706.

²⁴ See Bernadine Maguire, Jonathan Potts and Stephen Fletcher, ‘The Role of Stakeholders in the Marine Planning process—Stakeholder Analysis within the Solent, United Kingdom’ (2012) 36 *Marine Policy* 246; Morgan Gopnik and others, ‘Coming to the Table: Early Stakeholder Engagement in Marine Spatial Planning’ (2012) 36 *Marine Policy* 1139; Paul M Gilliland and Dan Laffoley, ‘Key Elements and Steps in the Process of Developing Ecosystem-Based Marine Spatial Planning’ (2008) 32 *Marine Policy* 787.

planning context, or ask what potential benefits participation is expected to achieve. Gilliland and Laffoley, for example, highlight that stakeholders should be involved early and throughout the entire marine planning process.²⁵ They also point out that the identification of “the right stakeholders” is challenging, and therefore should be considered carefully.²⁶ Collie and others look into the international practice of marine planning.²⁷ They investigate three issues regarding participation: whether stakeholders were included, whether a formal stakeholder analysis was conducted, and whether the stakeholders were engaged the whole process. Ritchie and other researchers focus on the expectations and views of stakeholders on marine planning.²⁸ Pomeroy and Douvere’s study is the most referenced work on stakeholder participation in marine planning. It particularly focuses on stakeholder analysis in the marine planning process.²⁹ Similarly, in Rees and others’ research, a range of challenges and priorities for UK marine planning have been identified. However, the only focus with regard to the participation issue in marine planning is about how to ensure the representation of stakeholders in the marine planning process.³⁰ Pomeroy and some researchers briefly point out some benefits of public participation in marine planning, such as addressing conflicts and increasing the compatibility of marine use, or having better understanding or knowledge about marine use and the marine environment.³¹ However, as will be explained in chapter 3 below, these benefits are only partial reasons for carrying out public participation in marine planning processes. Flannery and Cinnéide remind us that the potential benefits of participation and the way to approach such benefits need to be

²⁵ Gilliland and Laffoley (n 24) 794–795.

²⁶ *ibid.*

²⁷ Jeremy S Collie and others, ‘Marine Spatial Planning in Practice’ (2013) 117 *Estuarine, Coastal and Shelf Science* 1, 4.

²⁸ Ritchie and Ellis (n 21); Gopnik and others (n 24).

²⁹ Robert Pomeroy and Fanny Douvere, ‘The Engagement of Stakeholders in the Marine Spatial Planning Process’ (2008) 32 *Marine Policy* 816.

³⁰ Siân Rees and others, ‘Priority Questions to Shape the Marine and Coastal Policy Research Agenda in the United Kingdom’ (2013) 38 *Marine Policy* 531, 535.

³¹ Robert Pomeroy and Fanny Douvere, ‘The Engagement of Stakeholders in the Marine Spatial Planning Process’ (2008) 32 *Marine Policy* 816, 816; Ritchie and Ellis (n 21).

clarified; otherwise, the functions of participation will be undermined.³² Therefore, the rationales for public participation in marine planning need to be established.

The second research gap identified through a review of the literature is that it is not clear how requirements for public participation have been set in international and national regulatory regimes regarding marine planning. Existing studies concerning marine planning under the international legal framework mainly focus on very general issues concerning marine planning, such as the legal backing for ecosystem-based approaches and transboundary planning issues.³³ These have not paid much attention to any specific approaches or elements of the marine planning process, such as public participation. Studies about requirements for public participation in marine related international laws, such as the United Nations Convention on the Law of the Sea (UNCLOS)³⁴ and regional marine conventions, are very few.³⁵ At the domestic level, the UK marine planning system was set in the Marine and Coastal Access Act 2009 (MCAA 2009) and Marine Policy Statement (MPS).³⁶ Existing research about the MCAA 2009 usually concentrates on the changes it brought to the marine environmental protection and the integration of marine governance in the UK.³⁷ Some researchers point out the importance of public participation in English marine regulatory regime but without further investigation into the legal requirements concerning public participation in

³² Wesley Flannery and Micheá Cinnéide, 'A Roadmap for Marine Spatial Planning: A Critical Examination of the European Commission's Guiding Principles Based on Their Application in the Clyde MSP Pilot Project' (2011) 36 *Marine Policy* 265, 270–271.

³³ See Stelios Katsanevakis and others, 'Ecosystem-Based Marine Spatial Management: Review of Concepts, Policies, Tools, and Critical Issues' (2011) 54 *Ocean & Coastal Management* 807, 809–811; Frank Maes, 'The International Legal Framework for Marine Spatial Planning' (2008) 32 *Marine Policy* 797; Hermanni Backer, 'Transboundary Maritime Spatial Planning: A Baltic Sea Perspective' (2011) 15 *Journal of Coastal Conservation* 279; Daud Hassan and Niko Soininen, 'United Nations Convention of Law of the Sea as a Framework for Marine Spatial Planning' in Daud Hasson, Tuomas Kuokkanen and Niko Soininen (eds), *Transboundary Marine Spatial Planning and International Law* (Routledge 2015).

³⁴ UNCLOS, 1982, UNTS, vol 1833, 396.

³⁵ See ss 4.4.1–4.4.5 in ch 4 below.

³⁶ MPS is the framework for preparing Marine Plans in the UK.

³⁷ See Gotthard Mark Gauci, 'The U.K. Marine and Coastal Access Bill—A Missed Opportunity to Enhance Protection from Marine Environmental Pollution?' (2010) 34 *Marine Policy* 498; Stephen Fletcher and others, 'England's Evolving Marine and Coastal Governance Framework' (2014) 45 *Marine Policy* 261; Suzanne J Boyes and Michael Elliott, 'The Excessive Complexity of National Marine Governance Systems – Has This Decreased in England since the Introduction of the Marine and Coastal Access Act 2009?' (2015) 51 *Marine Policy* 57; LD Rodwell and others, 'Marine and Coastal Policy in the UK: Challenges and Opportunities in a New Era' (2014) 45 *Marine Policy* 251; Tom Appleby and Peter JS Jones, 'The Marine and Coastal Access act—A Hornets' Nest?' (2012) 36 *Marine Policy* 73.

marine planning under the MCAA 2009.³⁸ Therefore, there is a gap in knowledge about how the system of public participation in marine planning under English domestic regulations and international law works.

The third research gap identified through the literature review is the lack of primary data about the performance of public participation in the English marine planning process. It is fair to say that the development of marine planning is in its initial stage, particularly in the UK. The issue of marine planning has gradually moved from a theoretical level to a practical level. As a result, extensive studies on the theory of marine planning can be found in existing literature but reviews on marine planning practice are far less evident.³⁹ Thus, research on public participation in marine planning practice is even less.⁴⁰ Therefore, effective strategies, levels, and approaches for public and stakeholder participation in marine planning remain to be addressed.⁴¹ Since English marine planning is still in its infancy, English marine planners also face the same problem concerning seeking effective mechanisms for participation.⁴² However, so far, the available data about English marine planning is limited to two pilot projects: the Irish Sea pilot project and the Solent pilot project.

A consortium commissioned by Department of Environment, Food & Rural Affairs (DEFRA) launched the Irish Sea pilot in 2004.⁴³ This project aimed to establish a framework for marine planning in the UK and to test the practicality and feasibility of this framework.⁴⁴ The two-year pilot project identified the general procedures of marine planning,⁴⁵ provided suggestions on practical issues (such as the identification of

³⁸ See Appleby and Jones (n 37); Fletcher and others, 'England's Evolving Marine and Coastal Governance Framework' (n 37); Rodwell and others (n 37).

³⁹ Peter JS Jones, LM Lieberknecht and W Qiu, 'Marine Spatial Planning in Reality: Introduction to Case Studies and Discussion of Findings' (2016) 71 *Marine Policy* 256, 263.

⁴⁰ Paola Gazzola, Maggie H Roe and Paul J Cowie, 'Marine Spatial Planning and Terrestrial Spatial Planning: Reflecting on New Agendas' (2015) 33 *Environment and Planning C: Government and Policy* 1156, 1164; Elizabeth M De Santo, 'Environmental Justice Implications of Maritime Spatial Planning in the European Union' (2011) 35 *Marine Policy* 34, 34.

⁴¹ Nicole Schaefer and Vittorio Barale, 'Maritime Spatial Planning: Opportunities and Challenges in the Framework of the EU Integrated Maritime Policy' (2011) 15 *Journal of Coastal Conservation* 237, 244.

⁴² Maguire, Potts and Fletcher, 'The Role of Stakeholders in the Marine Planning process—Stakeholder Analysis within the Solent, United Kingdom' (n 24) 246.

⁴³ Marine Spatial Planning Pilot Consortium, 'Marine Spatial Planning Pilot: Final Report' (2006) 1 <http://www.abpmer.net/mspp/docs/finals/MSPFinal_report.pdf> accessed 29 June 2017.

⁴⁴ *ibid.*

⁴⁵ *ibid.* 19.

the scale and duration of marine plans),⁴⁶ and identified information gaps in producing marine plans in the UK.⁴⁷ The findings of the Irish Sea pilot project substantively influenced the formulation of the obligations of marine planning set in the MCAA 2009.⁴⁸ However, due to its limited time and scale, this pilot study neither established a comprehensive data basis nor fully went through every stage of marine planning.⁴⁹ Relevant participation activities in this pilot project were limited. For example, in a real plan-making process, a formal public consultation is conducted before a marine plan is adopted. In the Irish Sea pilot project, however, the consultation activity was ‘restricted to knowledgeable stakeholders and was information and time constrained’.⁵⁰ Since the Marine Management Organisation (the MMO) was not established at the time of the Irish Sea pilot project, it was unable to estimate its capacity and power or to consider the role that the MMO should play in facilitating public participation.⁵¹ All of the above-mentioned limitations will be illustrated in this thesis, since they are key factors for public participation in the real marine planning context. As a result of these constraints, the empirical data regarding both marine planning and public participation provided by the Irish Sea pilot is limited and inadequate.

In addition to the Irish Sea pilot project, a small-scale marine planning project was carried out at the Solent in the south of England in 2010. The Solent pilot project has been documented in some studies.⁵² As a preparation for formal marine planning, the Solent pilot marine planning project mainly aimed at understanding stakeholders’ concerns and the data demands of marine planning rather than developing a complete

⁴⁶ *ibid* 26-34.

⁴⁷ *ibid* 18.

⁴⁸ Fanny Douvere and Charles N Ehler, ‘New Perspectives on Sea Use Management: Initial Findings from European Experience with Marine Spatial Planning’ (2009) 90 *Journal of Environmental Management* 77, 83.

⁴⁹ Marine Spatial Planning Pilot Consortium (n 43) 17–19.

⁵⁰ *ibid* 19.

⁵¹ More detailed information about the MMO can be found in ch 3, p 55.

⁵² See Stephen Fletcher and others, ‘Effective Practice in Marine Spatial Planning: A Participatory Evaluation of Experience in Southern England’ (2013) 39 *Marine Policy* 341; Bernadine Maguire, Jonathan Potts and Stephen Fletcher, ‘Who, When, and How? Marine Planning Stakeholder Involvement Preferences – A Case Study of the Solent, United Kingdom’ (2011) 62 *Marine Pollution Bulletin* 2288; Maguire, Potts and Fletcher, ‘The Role of Stakeholders in the Marine Planning process—Stakeholder Analysis within the Solent, United Kingdom’ (n 24).

planning project.⁵³ Accordingly, this pilot marine planning project could only provide limited information about public participation in marine planning practice, such as stakeholder analysis and the investigation of the awareness of interested parties concerning the Solent project.⁵⁴ However, since it did not intend to produce a real plan, this pilot project was not able to reveal practical problems and barriers concerning public participation, such as balancing conflicts among stakeholders or addressing participation fatigue, during the planning process. Therefore, as shown above, empirical data on public participation in formal and genuine marine planning processes in England are still lacking.

As mentioned above, the first English marine plan was completed in 2014. At the time of writing, the experiences and lessons gained from a formal marine planning process in England are still unknown. Collecting and analysing empirical data on public participation is of great importance to the English marine planning system. First, according to the MCAA 2009, the Secretary of State (SoS) may issue guidance to guide the MMO's practice.⁵⁵ Supporting an effective public participation process is one of the objectives of the statutory guidance.⁵⁶ However, statutory guidance on public participation has not yet been developed even though the first English marine plans have been completed. Therefore, empirical data on public participation in marine planning would provide practical perspectives for the creation of statutory guidance on participation issues. Second, marine plans are not one-off events; they "may be amended from time to time".⁵⁷ Legal requirements for the preparation, adoption, and publication of a marine plan also apply to amendment of a marine plan.⁵⁸ Therefore, investigations into empirical data in the first English marine plan would benefit participation activities not only in the subsequent creation of marine plans in other

⁵³ The Solent Forum, 'Towards Marine Planning in the Solent Final Project Report: Evaluation and Recommendations' (2010) <http://solentforum.geodata.soton.ac.uk/forum/SoMaP/Resources/SoMaP_Final_Report.pdf> accessed 12 February 2017.

⁵⁴ See Maguire, Potts and Fletcher, 'Who, When, and How? Marine Planning Stakeholder Involvement Preferences – A Case Study of the Solent, United Kingdom' (n 52); Maguire, Potts and Fletcher, 'The Role of Stakeholders in the Marine Planning process—Stakeholder Analysis within the Solent, United Kingdom' (n 24).

⁵⁵ MCAA 2009, s 38.

⁵⁶ DEFRA, 'A Sea Change: A Marine Bill White Paper' (2007), para 4.101.

⁵⁷ MCAA 2009, s 52(1).

⁵⁸ MCAA 2009, s 52(2).

English marine areas but also in the process of amendment of marine plans. Therefore, this gap in empirical data on public participation in the first English marine plans needs to be filled.

It is worth noting that the core focus of this thesis is public participation in marine planning rather than in other UK marine management approaches such as Marine Protected Areas (MPAs) and Integrated Coastal Zone Management (ICZM). These approaches are useful measures of marine management and marine environmental protection but these marine-related management approaches have different focuses and priorities. MPAs prioritise marine conservation, or certain areas. ICZM has a particular focus on coastal areas. Marine planning applies, however, to a wide range of marine activities and interests and normally covers both inshore and offshore areas. Therefore, marine planning has more holistic and integrated perspectives and objectives for marine management. As will be illustrated in chapter 2 below, the nature of decision-making is a key factor in determining an appropriate strategy for public participation. Therefore, this thesis does not intend to investigate participation matters in all marine-related decision-making, but will only concentrate on public participation in producing marine plans.

1.2. Research Questions and Methodology

In order to address the research gaps identified above, this thesis seeks to investigate public participation from theoretical, legal, and empirical perspectives. Three main research questions will be addressed:

- What strategy of public participation is appropriate for the English marine planning?⁵⁹ Do the terrestrial and the marine planning systems in England share the same motivations for participation?
- What are the current regulatory requirements for public participation in marine planning at the international level and the English domestic level? Can this participation strategy be ensured, and if so, to what extent, under the current regulatory system?

⁵⁹ In this thesis, participation strategy includes the level of participation and the specific procedural criteria for participation to support such level of participation.

- Under the current regulatory system, how is public participation implemented in the English marine planning process? Can the motivations for public participation in marine planning be achieved under this regulatory system? Are there any weaknesses in the current policies and obligations concerning public participation in the production of marine plans?

This study combines a desk-based review of literature, an analysis of the current legal obligations, and qualitative empirical research on the East Marine Plans in order to investigate how the regulatory requirements for public participation work in reality, and whether weaknesses or gaps exist in the current regulatory system concerning public participation in marine planning in England. Although literature and legal obligations are analysed, on the whole, this study applies an empirical legal research methodology. Empirical legal research serves various purposes. Gibson used empirical research to investigate ordinary people’s knowledge of law and courts and their attitudes towards them.⁶⁰ Baldwin and Davis consider that empirical legal research can explore the performance of legal institutions, rules, and procedures.⁶¹ Epstein and Martin focus more on the data collection function of empirical legal studies. They suggest that empirical legal research contributes to summarising data, making descriptive or causal inferences, and establishing public multi-user datasets.⁶² Partington argues that empirical legal studies can explore necessary changes in regulatory regimes or consider better applications of existing legal provisions.⁶³ Despite the various purposes, these arguments have one thing in common, which is, as Galligan states, that they all “examine how law works in practice”.⁶⁴ This thesis aims to examine the performance of implementing legal requirements for public participation in English marine planning practice and to identify gaps and weakness of the system of public participation under the current regulatory regime. Therefore, empirical legal research is the main

⁶⁰ James L Gibson, ‘Public Images and Understandings of Courts’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 829.

⁶¹ John Baldwin and Davis Gwynn, ‘Empirical Research in Law’ in Peter Cane and Mark Tushnet (ed), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 880–881.

⁶² Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) 15.

⁶³ Martin Partington, ‘Empirical Legal Research and Policy-Making’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 1003.

⁶⁴ Denis J Galligan, ‘Legal Theory and Empirical Research’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 978.

methodology in this thesis. The specific research method and research design of the qualitative research on the East Marine Plans are explained in chapter 6 of this thesis.

1.3. Structure

To address its three research questions, this thesis is divided into nine chapters (including this introductory chapter). The remaining chapters of this thesis are organised as follows:

Chapter 2 provides a theoretical analysis of public participation. It aims to map a comprehensive picture of the rationales for public participation in a general sense. Normative, substantive and instrumental rationales for participation are discussed in this chapter. Based on the interactive connections of these rationales, the application of a pluralist rationale for participation is advocated. The necessity and feasibility of applying a pluralist rationale for participation are justified in chapter 2. Having identified the rationales for public participation in general circumstances, this thesis moves to identify how the rationale for public participation fits the English marine planning context.

Chapter 3 focuses on identifying the rationales for public participation and constructing an appropriate strategy for public participation in the English marine planning process. This chapter insists that the identification of a proper rationale and strategy of participation should be based on the investigation of the nature of marine planning and the challenges that English marine planners might face. Grounded in the nature and challenges of English marine planning identified in chapter 3, it is suggested that a pluralist rationale for participation and collaborative participation should be applied in the English marine planning context. The key procedural criteria for fulfilling collaborative participation include early and broad participation, easy access to information and participation, interaction, and transparency. These procedural criteria for participation will be used to provide an analytical framework for legal requirements for public participation surveyed in chapters 4 and 5.

Chapter 4 examines the requirements for public participation under international law and aims to investigate the extent to which procedural criteria for collaborative participation have been set in international regulatory regimes. Special attention is paid

to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998,⁶⁵ since this is the most comprehensive international instrument for regulating public participation at present. The Convention on Biological Diversity,⁶⁶ the UNCLOS, the Helsinki Conventions,⁶⁷ the OSPAR Convention,⁶⁸ the Barcelona Convention,⁶⁹ the Marine Strategy Framework Directive (MSFD),⁷⁰ and Marine Spatial Planning Directive (MSPD) are also examined. Although the Helsinki Conventions and the Barcelona Convention are not binding on the UK, the investigation of these two Conventions provides a general viewpoint for the development of the requirements for public participation in regional sea conventions. A range of soft law instruments related to public participation is also reviewed. An investigation on the status of the norm “public participation” in customary law and general principles of law is presented in this chapter. After considering these international laws, this thesis moves to an investigation of English domestic obligations.

Chapter 5 investigates regulatory requirements for public participation under the land planning and marine planning regimes in England. The investigation of the system of public participation in land planning has two purposes: first, to identify the differences of rationales for public participation between the land and marine planning systems; second, to draw lessons from the development of public participation in the English land planning system. There are also two aims of examining regulatory requirements for public participation in the marine planning context. First, to map the statutory and non-statutory requirements for public participation in producing marine plans. Second, to

⁶⁵ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, UNTS, vol 2161, no. 37770, 447 (Aarhus Convention).

⁶⁶ Convention on Biological Diversity, 1992, UNTS, vol 1760, 79 (CBD Convention).

⁶⁷ Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974, UNTS, vol 1507, no. 25986, 168 (1974 Helsinki Convention); The Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992 (1992 Helsinki Convention). Amendments to the 1974 Helsinki Convention are recorded in UNTS, vol 2117, no. 36495, 479; vol, 1861, no. 25986, 489; vol 1721, no. 25986, 492; vol 1724, no. 25986, 329.

⁶⁸ Convention for the protection of the marine environment of the North-East Atlantic, 1998, UNTS, vol 2354, no. 42279, 67 (OSPAR Convention).

⁶⁹ Convention for the protection of the Mediterranean Sea against pollution, 1976, UNTS, vol 1102, no.16908, 44. (1976 Barcelona Convention); Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1995 Barcelona Convention). Amendments to the 1976 Barcelona Convention are recorded as UNTS no. 16908 and no. 22281.

⁷⁰ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L169/19 (Marine Strategy Framework Directive).

investigate the extent to which the importance of applying a pluralist rationale for participation and the corresponding procedural criteria for collaborative participation have been recognised in English marine policies and legislation.

As mentioned above, the lack of empirical data and studies on the implementation of marine planning, especially regarding public participation in the plan-making process, is one of the knowledge gaps in this research field. Thus, subsequent chapters in this thesis present a qualitative case study on the East Marine Plans in England to address the third research question of this thesis.

The first part of chapter 6 maps the background and procedures used to make the East Marine Plans. Particular attention is paid to the process when it involved the public. A key document, the Statement of Public Participation (SPP), which is the instruction for implementing public participation in creating marine plans, is analysed. The second part of the chapter explains the research method, including the research design, sampling, ethical considerations, and data collection methods. The data collection process used for this research is also presented.

Chapters 7 and 8 provide analysis of the data. Chapter 7 focuses on evaluating the fulfilment of the procedural criteria for collaborative participation used in producing the East Marine Plans. Several barriers to achieving easy access to information and participation, transparency, and interactive participation in the East Marine Plans case are identified in this chapter. An evaluation of the extent to which the procedural criteria for collaborative participation are fulfilled is crucial, since it closely relates to the achievement of multi-benefits under the pluralist rationale for participation. Based on the findings of chapter 7, chapter 8 assesses the extent to which the pluralist rationale for participation was achieved in the production of the East Marine Plans. It also identifies the practical obstacles to the achievement of the multiple benefits of public participation, and finds regulatory gaps concerning participation issues in the English marine planning process. Chapter 9 offers the conclusions of the thesis and suggests ways to enhance participation in the marine planning process.

Chapter 2. Rationales for Public Participation

Introduction:

This chapter aims to study the rationales for public participation and the levels of public participation from a general theoretical perspective. This chapter is presented in four sections. Section 2.1 investigates the three main rationales for public participation, namely the normative, substantive and instrumental rationales, and identifies their characteristics. Section 2.2 aims to demonstrate the reasonability and necessity of applying a pluralist rationale for participation in decision-making contexts. Having identified the motivations and feasibility of applying a pluralist rationale for participation, section 2.3 moves to investigate levels of public participation since not all of them can support the achievement of the pluralist rationale for participation. Section 2.4 summarises the research findings and arguments of this chapter. Before starting an investigation of the rationales for public participation, an issue needs to be addressed: which term will be used throughout this thesis, “public participation” or “stakeholder participation”?

The definition of the term “the public” applied in this thesis mainly follows the meaning of “interested persons” employed under the MCAA 2009, which means members of the general public and any persons who are likely to be interested in, or affected by marine planning.¹ By reviewing the literature, it was found that scholars who address participation issues in marine planning prefer the term “stakeholder participation” rather than “public participation”, although the general public is included in their research.² This thesis, however, will apply the term “public participation” rather than “stakeholder participation” for the following reasons: first, the term “stakeholder” has various interpretations in different research fields. In business studies, it can be broadly

¹ According to this definition, members of the general public, local communities, environmental NGOs, marine users, and other stakeholders related to marine planning are all covered under this definition. In addition, representatives of general public and local communities, such as local authorities, are included in this definition.

² See Robert Pomeroy and Fanny Douvere, ‘The Engagement of Stakeholders in the Marine Spatial Planning Process’ (2008) 32 *Marine Policy* 816; Charles Ehler and Fanny Douvere, ‘Marine Spatial Planning – A Step-by-Step Approach toward Ecosystem-Based Management’ (2009) <<http://www.unesco-ioc-marinesp.be/uploads/documentenbank/d87c0c421da4593fd93bbee1898e1d51.pdf>> accessed 24 May 2016; Morgan Gopnik and others, ‘Coming to the Table: Early Stakeholder Engagement in Marine Spatial Planning’ (2012) 36 *Marine Policy* 1139.

defined as all living or non-living entities (such as future generations), or can be strictly limited to individuals or groups who are crucial for an organisation's existence and development.³ In studies concerning sustainability of natural resources, the term "stakeholder" refers to users and managers of natural resources.⁴ In this sense, the concept of stakeholders is not as limited as it is in the business discipline. Every human being is a stakeholder in natural resource management circumstances. Second, applying the term "public participation" corresponds with binding/non-binding instruments at the international level, such as the Aarhus Convention and Principle 10 of the Rio Declaration. Using "public participation" is also in line with the terms applied in marine planning documents and obligations, such as the Statement of Public Participation.⁵ Third, as will be explained in section 2.1.3, one of the key rationales for the participation-instrumental rationale focuses on a broader impact on the development of society rather than merely on certain or limited groups of stakeholders. Based on these considerations, the term "public participation" is applied in this thesis.

2.1. The Norms of Participation Rationales

Many studies address participation issues in different disciplines, such as politics and public administration,⁶ geography,⁷ healthcare,⁸ planning issues,⁹ and environmental

³ Andrew L Friedman and Samantha Miles, *Stakeholders: Theory and Practice* (Oxford University Press 2006) 4-15.

⁴ Niels G Röling and Maria Annemarie Elisabeth Wagemakers, 'A New Practice: Facilitating Sustainable Agriculture' in Niels G Röling and Maria Annemarie Elisabeth Wagemakers (eds), *Facilitating Sustainable Agriculture: Participatory Learning and Adaptive Management in Times of Environmental Uncertainty* (Cambridge University Press 1998) 7.

⁵ According to the MCAA 2009 sch6 para5, the marine plan authority must prepare a document called the Statement of public participation for every marine plan.

⁶ See Patrick Bishop and Glyn Davis, 'Mapping Public Participation in Policy Choices' (2002) 61 *Australian Journal of Public Administration* 14; Marian Barnes, Janet Newman and Helen Sullivan, 'Power, Participation, and Political Renewal: Theoretical Perspectives on Public Participation under New Labour in Britain' (2004) 11 *Social Politics: International Studies in Gender, State & Society* 267.

⁷ The public participation issue discussed most in geography is about the Public Participation Geographic Information Systems (PPGIS). See Nancy Obermeyer, 'The Evolution of Public Participation GIS' (1998) 25 *Cartography and Geographic Information Systems* 65; Renee Sieber, 'Public Participation Geographic Information Systems: A Literature Review and Framework' (2006) 96 *Annals of the Association of American Geographers* 491.

⁸ See Craig Mitton and others, 'Public Participation in Health Care Priority Setting: A Scoping Review' (2009) 91 *Health Policy* 219; Julia Abelson and others, 'Deliberations about Deliberative Methods: Issues in the Design and Evaluation of Public Participation Processes' (2003) 57 *Social Science & Medicine* 239.

⁹ See Ray E McDevitt, 'Public Participation in the English Land Use Planning System: Part I' (1974) 6 *Urban Lawyer* 483; Yvonne Rydin, 'Public Participation in Planning' in John Barry Cullingworth (ed), *British Planning : 50 Years of Urban and Regional Policy* (Athlone Press 1999).

and natural resource management.¹⁰ The most comprehensive literature review on public participation in environmental management issues was conducted by Reed.¹¹ Reed summarises four typologies of public participation discussed in existing studies: a typology based on different degrees of participation; a typology based on the direction of information flows; a typology based on normative and pragmatic participation; and a typology based on the objectives of participation.¹² Among these typologies, as this thesis will illustrate, *normative and pragmatic participation are the most fundamental classifications of public participation*. Issues under the other three typologies of participation are dependent on the classification of normative and pragmatic participation.

Whether public participation is a means to an end or an end in itself is a controversial topic issue among scholars.¹³ This debate is grounded on the typology based on normative participation and pragmatic participation. From the normative perspective, public participation is considered as an end. The interpretation of participation is deeply rooted in the theory of political democracy (especially in direct democracy).¹⁴ The public is involved because they are “the best judge of their own interests”.¹⁵ Therefore, public participation is a way to deliver a commitment to democracy. In this case, power plays a central role in decision-making processes.¹⁶ Participants are eager to share power and influence in the participatory process and might pay less attention to the outcome of decisions.¹⁷

¹⁰ See Thomas C Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Resources for the Future 2002); Anne Shepherd and Christi Bowler, ‘Beyond the Requirements: Improving Public Participation in EIA’ (1997) 40 *Journal of Environmental Planning and Management* 725; John R Parkins and Ross E Mitchell, ‘Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management’ (2005) 18 *Society & Natural Resources* 529.

¹¹ Mark S Reed, ‘Stakeholder Participation for Environmental Management: A Literature Review’ (2008) 141 *Biological Conservation* 2417.

¹² *ibid* 2419.

¹³ See Marlene Buchy and Suzanne Hoverman, ‘Understanding Public Participation in Forest Planning: A Review’ (2000) 1 *Forest Policy and Economics* 15; Yvonne Rydin and Mark Pennington, ‘Public Participation and Local Environmental Planning: The Collective Action Problem and the Potential of Social Capital’ (2000) 5 *Local Environment* 153; Judy B Rosener, ‘Citizen Participation: Can We Measure Its Effectiveness?’ (1978) 38 *Public Administration Review* 457.

¹⁴ Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970) 104.

¹⁵ Daniel J Fiorino, ‘Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms’ (1990) 15 *Science, Technology, & Human Values* 226, 227.

¹⁶ Buchy and Hoverman (n 13) 16.

¹⁷ Pateman (n 14) 43.

However, from the pragmatic perspective, public participation is a tool rather than an outcome of decision-making.¹⁸ More specifically, pragmatic participation can be divided into *participation based on the substantive rationale* and *participation based on the instrumental rationale*. The substantive rationale is more concerned about *the decision-making itself*. Thomas Dietz, one of the leading experts working on the interactions between humans and the environment, believes participation can improve the quality of decision-making and legitimacy.¹⁹ In contrast, from the instrumental rationale perspective, it is claimed that the effect of public participation *goes far beyond the decision-making itself* and has an impact on the capacity, understanding, and values of participants and decision-makers, such as promoting learning, increasing capacity, and building consensus.²⁰ Therefore, three rationales for participation, *normative*, *substantive*, and *instrumental* are the main modes for participation discussed in the literature related to public participation. Having a clear understanding of the participation rationales is very important since they are the benchmark for determining the appropriate levels of and approaches to participation. They are therefore crucial for identifying the evaluation strategies and criteria for participation.²¹ The following sections will review the three rationales for participation in a general context. A specific investigation of the rationales for participation in English marine planning will be presented in the next chapter.

2.1.1. Normative Rationale

The normative rationale for participation is based on the idea of democracy. Legal researchers, such as Ebbesson and McAuslan, consider democracy to be a crucial reason

¹⁸ National Research Council, *Public Participation in Environmental Assessment and Decision Making* (Thomas Dietz and Paul C Stern eds, National Academies Press 2008) 12.

¹⁹ *ibid* 44.

²⁰ See Ortwin Renn, Thomas Webler and Peter M Wiedemann, *Fairness and Competence in Citizen Participation : Evaluating Models for Environmental Discourse* (Kluwer Academic 1995) 2; Steve Selin and Deborah Chevez, 'Developing a Collaborative Model for Environmental Planning and Management' (1995) 19 *Environmental Management* 189; Geoff A Wilson, 'Assessing the Environmental Impact of the Environmentally Sensitive Areas Scheme: A Case for Using Farmers' Environmental Knowledge?' (1997) 22 *Landscape Research* 303; Kirsty L Blackstock, Gail J Kelly and Bronwyn L Horsey, 'Developing and Applying a Framework to Evaluate Participatory Research for Sustainability' (2007) 60 *Ecological Economics* 726.

²¹ Rosener (n 13) 458.

for public participation in environmental and planning issues.²² Studies that focus on public participation from the democratic perspective usually emphasise two components: the participants' influence on the outcome of decisions and the process or form of participation. The influence of public participation on the outcome of decisions is a key concern under the normative rationale for participation.²³ The key point of this concern is *power sharing between decision-makers and participants*.²⁴ In this context, participants should feel "powerful" and "masterful", and be allowed to influence decision makers and the outcome of decisions.²⁵ Some researchers deem the impact of the participation as a criterion for real participation.²⁶ Without authentic power sharing among participants in decision-making, public participation is limited and meaningless. The amount of influence and power that is shared with the public is the basis for distinguishing different levels of participation. This will be reviewed in section 2.3. Therefore, allowing participants to have a real influence on decision-making is key to the normative rationale for participation.

Another key element under the normative rationale for participation is that a "good" procedure of participation enables democracy. Scholars have various opinions on what constitutes a good participation process. According to Fiorino, this process should ensure direct participation of amateurs, collective decision-making, face-to-face communication, and equality between the public and professionals.²⁷ Rowe and Frewer consider that a democratic process of decision-making should include criteria such as

²² Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980) 5; Robert Stokes, 'Defining the Ideology of Public Participation: Democracy, Devolution, Deliberation, Dispute Resolution and a New System for Identifying Public Participation in Planning Law' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 1, 6; Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Burnnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 687.

²³ See Gene Rowe and Lynn J Frewer, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 *Science, Technology & Human Values* 3; Ned Crosby, Janet M Kelly and Paul Schaefer, 'Citizens Panels: A New Approach to Citizen Participation' (1986) 46 *Public Administration Review* 170; Fiorino (n 15).

²⁴ Sherry R Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216; Pateman (n 14) 43.

²⁵ John Pløger, 'Strife: Urban Planning and Agonism' (2004) 3 *Planning Theory* 71, 86.

²⁶ Cheryl Simrell King, Kathryn M Feltey and Bridget O'Neill Susel, 'The Question of Participation: Toward Authentic Public Participation in Public Administration' (1998) 58 *Public Administration Review* 317, 323-324; Margaret A Moote, Mitchel P Mcclaran and Donna K Chickering, 'Theory in Practice: Applying Participatory Democracy Theory to Public Land Planning' (1997) 21 *Environmental Management* 877, 880.

²⁷ Fiorino (n 15) 229-230.

representativeness, independence, early participation, and transparency.²⁸ Concluding a set of standard procedural criteria for democratic decision-making is quite difficult, since different forms of democracy require different processes to achieve their objectives. For example, deliberation-based democracy aims to generate solutions through a collective discussion among the public.²⁹ However, voting-centric democracy means that the public is empowered to make a choice from fixed preferences: this is very different from deliberative democracy.³⁰ Thus, without considering the specific context and purpose of the decision-making, it is unlikely that a fixed paradigm of a good participation process for all decision-making contexts can be identified.³¹ It also has to be mentioned that the discussion of democracy in this thesis is based on a mid-level of democracy theory rather than a relatively higher level of democracy theory, such as the theory of deliberative democracy and communicative action which advocated by Habermas and Young.³² Habermas advocates participation based on communicative action, through which participants “seek to reach an understanding about the action situation and their plans of action in order to coordinate their actions by way of agreement”.³³ Similarly, deliberative democracy is an “open discussion and the exchange of views leading to agreed-upon policies” rather than an aggregation of individual preferences.³⁴ The key of deliberation and communication action is that participants are willing to have sincere communications with others, without asserting their own interests above others’, and with the aim of reaching consensus.³⁵ However, as will be discussed in chapter 3, due to the tension between marine environmental protection and marine development, the intense competition among marine users, and the overlapping regulatory pattern on the English sea, deliberative participation or communicative action seems too ideal to be performed in the marine planning context.

²⁸ Rowe and Frewer (n 23) 12–15.

²⁹ Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach’ (2001) 21 *Oxford Journal of Legal Studies* 415, 428.

³⁰ Yannis Papadopoulos and Philippe Warin, ‘Are Innovative, Participatory and Deliberative Procedures in Policy Making Democratic and Effective?’ (2007) 46 *European Journal of Political Research* 445, 451.

³¹ The procedure criteria for participation in marine planning will be investigated in ch 3 below.

³² Jürgen Habermas, *The Theory of Communicative Action: Reasons and the Rationalisation of Society* (Thomas McCarthy, Polity Press 1984); Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000).

³³ Habermas (n 32) 96.

³⁴ Young (n 32) 19–23.

³⁵ *ibid* 25.

Thus, this thesis is largely based on a set of mid-level theories of participation. Also, as will be illustrated later in section 2.3 and chapter 3, the appropriate level of public participation recommended in this thesis sits at the mid-level of participation.

2.1.2. Substantive Rationale

The substantive rationale for participation argues that the involvement of the public and stakeholders can improve the quality of decision-making.³⁶ However, existing studies argue that measuring the impact of public participation on the change of the quality of decision making remains a challenge.³⁷ This is because there are many uncertainties and external factors that can influence the outcome and implementation of decisions.³⁸ Therefore, it is difficult to determine if public participation is the only factor that substantively influences the outcome of a decision. The measurement of changes of decision-making because of public participation is therefore rather problematic.

Despite the difficulties of measuring the impact of public participation on the outcome of a decision, researchers have verified that public participation can broaden the data basis for decision-making. Beierle examined 239 environmental decision-making cases and found that more than 70% of cases which had an adequate evidence basis benefited from innovative ideas, new information, and useful analysis provided by relevant stakeholders and the public.³⁹ Becker and others' research documents that community participation delivers more local-specific data to cover the shortage of standardised data provided by technical assessment tools.⁴⁰ Similarly, Raymond and other researchers

³⁶ See John Clayton Thomas, 'Public Involvement in Public Management: Adapting and Testing a Borrowed Theory.' (1990) 50 *Public Administration Review* 435; Dennis R Becker and others, 'A Comparison of a Technical and a Participatory Application of Social Impact Assessment' (2004) 22 *Impact Assessment and Project Appraisal* 177; Judith E Innes, 'Information in Communicative Planning' (1998) 64 *Journal of the American Planning Association* 52; Leena A Leskinen, 'Purposes and Challenges of Public Participation in Regional and Local Forestry in Finland' (2004) 6 *Forest Policy and Economics* 605.

³⁷ Thomas C Beierle, 'Using Social Goals to Evaluate Public Participation in Environment Decisions' (1999) 16 *Review of Policy Research* 75, 84; Terry F Yosie and Timothy D Herbst, 'Using Stakeholder Processes in Environmental Decisionmaking' (1998) 48–49 <<http://gdrc.org/decision/nr98ab01.pdf>> accessed 16 August 2016.

³⁸ Thomas C Beierle and David M Konisky, 'What Are We Gaining from Stakeholder Involvement? Observations from Environmental Planning in the Great Lakes' (2001) 19 *Environment and Planning C: Government and Policy* 515, 525; Juliette C Young and others, 'Does Stakeholder Involvement Really Benefit Biodiversity Conservation?' (2013) 158 *Biological Conservation* 359, 368.

³⁹ Thomas C Beierle, 'The Quality of Stakeholder-Based Decisions' (2002) 22 *Risk Analysis* 739, 745.

⁴⁰ Dennis R Becker and others, 'A Comparison of a Technical and a Participatory Application of Social Impact Assessment' (2004) 22 *Impact Assessment and Project Appraisal* 177, 187.

advocate the necessity of integrating local knowledge and scientific evidence in making environmental decisions.⁴¹ Therefore, bringing new information and innovative ideas into decision-making through public participation is a possible reason for the improved quality of decision-making.⁴² However, it is worth noting here that more evidence does not necessarily mean good evidence. Evidence collected from the public and stakeholders needs to be verified. How to verify the quality of data provided by the public, however, is a highly technical issue and therefore beyond the focus of this thesis. Citizen science studies may provide some valuable insights on this issue.⁴³

In addition to knowledge and information, researchers also advocate that values provided by participants should be considered during decision-making, particularly in environmental decision-making.⁴⁴ It seems that the added values might be able to contribute to the quality of decision-making. They are therefore an element under the substantive rationale for participation. However, whether the values of the public would be considered or used in a decision-making process depends on whether the public is allowed to influence decision-making.⁴⁵ Therefore, the broader values, opinions and views brought by the public through participation are considered more relevant to the elements under the normative rationale for participation than the substantive rationale for participation in this thesis. The substantive rationale for participation referred to in this thesis mainly concentrates on the improved quality of decision-making due to the objective data, knowledge and information given by the public.

2.1.3. Instrumental Rationale

⁴¹ Christopher M Raymond and others, 'Integrating Local and Scientific Knowledge for Environmental Management' (2010) 91 *Journal of Environmental Management* 1766; Patrick Christie and Alan T White, 'Trends in Development of Coastal Area Management in Tropical Countries: From Central to Community Orientation' (1997) 25 *Coastal Management* 155.

⁴² Reed (n 11) 2426.

⁴³ See the significance of marine citizen science and possible approaches to control quality of lay data for marine policies in Kieran Hyder and others, 'Can Citizen Science Contribute to the Evidence-Base That Underpins Marine Policy?' (2015) 59 *Marine Policy* 112.

⁴⁴ See Steele (n 29); Thomas C Beierle and David M Konisky, 'Values, Conflict, and Trust in Participatory Environmental Planning' (2000) 19 *Journal of Policy Analysis and Management* 587.

⁴⁵ Beierle and Cayford (n 10) 23; Anna Davies, 'What Silence Knows – Planning, Public Participation and Environmental Values' (2001) 10 *Environmental Values* 77, 80.

Compared with the substantive rationale, which mainly focuses on the quality of decision-making itself, the instrumental rationale for participation concentrates on the broader impact on participants, decision-makers, and even the society as a whole. A review of the literature finds that social learning, relationship building, trust, and conflict management are the main manifestations commonly discussed under the instrumental rationale for participation. These manifestations will be investigated in detail below.

2.1.3.1. Social Learning

It is very difficult to gain a clear and consistent idea of the definition of social learning by reviewing existing literature. This is mainly because the concept is extensively used in a wide range of research contexts which have different emphases.⁴⁶ Initially, social learning referred to individual learning based on observation or group interaction.⁴⁷ The scope of this concept has been broadly expanded from learning at the individual level to the social level. This refers to the growing capacity of social sectors to take joint actions to manage natural resources or to address environmental uncertainty.⁴⁸ Whether social learning should be defined as a process or an outcome is controversial. Some scholars define or explain social learning based on its outcomes, such as the capacity of institutions to develop sustainability.⁴⁹ However, this outcome-oriented explanation of social learning is criticised by Reed and others.⁵⁰ They are surely right to point out that social learning does have potential outcomes; however, these outcomes are not guaranteed.⁵¹ Therefore, the definition of social learning should not be linked to certain outcomes. Despite the continuing debate about the definition of social learning, researchers commonly acknowledge that a process of knowledge and information

⁴⁶ See Harold Glasser, 'Minding the Gap: The Role of Social Learning in Linking Our Stated Desire for a More Sustainable World to Our Everyday Actions and Policies' in Arjen EJ Wals (ed), *Social Learning Towards a Sustainable World: Principles, Perspectives, and Praxis* (Wageningen Academic Publishers 2007) 47; Eneko Garmendia and Sigrid Stagl, 'Public Participation for Sustainability and Social Learning: Concepts and Lessons from Three Case Studies in Europe' (2010) 69 *Ecological Economics* 1712; Edward A Parson and William C Clark, 'Sustainable Development as Social Learning: Theoretical Perspective and Practical Challenges for the Design of a Research Program' in Lance H Gunderson, CS Holling and Stephen S Light (eds), *Barriers and Bridges to the Renewal of Regional Ecosystems* (Columbia University Press 1995) 429.

⁴⁷ Albert Bandura, *Social Learning Theory* (Prentice-Hall 1977) 9-16.

⁴⁸ Claudia Pahl-Wostl and others, 'The Importance of Social Learning and Culture for Sustainable Water Management' (2008) 64 *Ecological Economics* 484, 493.

⁴⁹ Claudia Pahl-Wostl, Erik Mostert and David Tàbara, 'The Growing Importance of Social Learning in Water Resources Management and Sustainability Science' (2008) 13 *Ecology and Society* 24, 24-25.

⁵⁰ Mark S Reed and others, 'What Is Social Learning?' (2010) 15 *Ecology and Society*.

⁵¹ *ibid.*

exchange based on interaction with other social sectors is essential for social learning.⁵² “Learning” and “interaction” are two keywords in this process. In judicial practice, the importance of facilitating “learning” through public participation has been recognised by judges. As Judge Lord Reed stated in *R (on the application of Moseley) v Haringey London Borough Council*:

Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme.⁵³

The above judgment indicates that public participation in decision-making is never a simple activity for informing the public about a preferred decision. It educates or empowers the public with knowledge of why this decision is reasonable or better than the other choices. In a social learning context, it is also always important to bear in mind that the learning and educating process should not be regarded as one-way but as an exchange and communication process among all of the participants. From this perspective, social learning, based on its interactive feature, is used to challenge top-down decision-making on social development and sustainability.⁵⁴ In this thesis, an interactive learning process and the potential outcomes of learning (change in actions) are both considered crucial for social learning. Thus, in theory, social learning should include three stages: interactive communication and learning (at the individual level), understanding and value change (at the societal level), and changing actions/carrying out joint actions (at the societal level). In the first stage, individuals’ knowledge,

⁵² Mark S Reed and others (n 50); Patrick Steyaert and others, ‘The Role of Knowledge and Research in Facilitating Social Learning among Stakeholders in Natural Resources Management in the French Atlantic Coastal Wetlands’ (2007) 10 *Environmental Science & Policy* 537; Tania M Schusler, Daniel J Decker and Max J Pfeffer, ‘Social Learning for Collaborative Natural Resource Management’ (2003) 16 *Society & Natural Resources* 309.

⁵³ *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2015] 1 ALL ER 495 [39].

⁵⁴ Christine King and Janice Jiggins, ‘A Systemic Model and Theory for Facilitating Social Learning’ in Cees Leeuwis and Rhiannon Pyburn (eds), *Wheelbarrows Full of Frogs: Social Learning in Rural Resource* (Van Gorcum 2002) 55.

information, skills, and even values will be changed through interactive communication. In the second stage, changes in individuals becomes a change at the societal level. Based on knowledge or value changes in society, in the last stage, ideally, original actions might be altered or new actions might be generated.

2.1.3.2. Social Network and Institutional Trust

Establishing or strengthening social networks (which also refers to social relationships) and promoting trust are two elements that fall under the instrumental rationale for participation. Social networks and trust are considered two components of social capital in academia,⁵⁵ although there is no commonly accepted definition of social capital.⁵⁶ Social capital can facilitate joint actions and lower transaction and monitoring costs among different social sectors.⁵⁷ Therefore, social capital is highly valued in studies concerning natural resource management and sustainability.⁵⁸ Since sustainability is also the key purpose of marine planning, two components of social capital, namely social networks and trust, will be investigated as components of the instrumental rationale for participation in this thesis.

Social networks, briefly speaking, refer to the relationships between individuals and groups in an internal network or/and in a broader (external) network.⁵⁹ Social networks include three layers of relationship networks: the relationship within a homogeneous group, the relationships among heterogeneous groups, and the relationship between different levels of a hierarchy.⁶⁰ The development of relationship within homogeneous groups or among heterogeneous groups is the process of “bonding” or “bridging” social

⁵⁵ See Jules Pretty and Hugh Ward, ‘Social Capital and the Environment’ (2001) 29 *World Development* 209; Jules Pretty and David Smith, ‘Social Capital in Biodiversity Conservation and Management’ (2004) 18 *Conservation Biology* 631; Yvonne Rydin and Nancy Holman, ‘Re-Evaluating the Contribution of Social Capital in Achieving Sustainable Development’ (2004) 9 *Local Environment: The international Journal of Justice and Sustainability* 117; Kenneth Newton, ‘Trust, Social Capital, Civil Society, and Democracy’ (2001) 22 *International Political Science Review* 201.

⁵⁶ Pretty and Ward (n 55) 211; Rydin and Holman (n 55) 117.

⁵⁷ Rydin and Holman (n 55) 127; Jules Pretty, ‘Social Capital and the Collective Management of Resources’ (2003) 302 *Science* 1912, 1913.

⁵⁸ See Pretty and Smith (n 55); Pretty, ‘Social Capital and the Collective Management of Resources’ (n 57).

⁵⁹ Paul S Adler, ‘Social Capital: The Good, the Bad, and the Ugly’ in Eric Lesser (ed), *Knowledge and Social capital : Foundations and Applications* (Butterworth-Heinemann 2000) 97.

⁶⁰ Quentin Grafton, ‘Social Capital and Fisheries Governance’ (2005) 48 *Ocean & Coastal Management* 753, 756.

capital.⁶¹ Previous studies have pointed out the necessity of social networks in facilitating natural resource management through exchanging information and promoting trust.⁶² Therefore, promoting social networks (or social relationships) is identified as one of the key elements of the instrumental rationale for participation in this thesis.

Trust is defined as the belief that people will protect other people's interests and act to avoid damaging other people's interests deliberately.⁶³ Political trust, namely, trust in government, is the main concern of this thesis, since public participation is commonly organised and carried out by public authorities.⁶⁴ However, Levi and Stoker remind us that the study of political trust should not be limited to trust in central government, but needs to extend to particular organisations, institutions or local authorities, since ordinary people are closely connected with local issues and specific organisations.⁶⁵ Therefore, as a subset of political trust, institutional trust, also called organisational trust, becomes the focus of this thesis. Institutional trust refers to the public's trust that relevant institutions will share its values and serve its interests.⁶⁶ In the natural resource management context, institutional trust is defined as 'stakeholders' perceptions of the management agency as a whole and its overall ability to manage resources'.⁶⁷ Scholars have identified the positive impact of institutional trust on the public's pro-

⁶¹ Rory Eames, 'Partnerships in Civil Society: Linking Bridging and Bonding Social Capital' in Keen Meg, Valerie A. Brown and Rob Dyball (eds), *Social Learning in Environmental Management: Towards a Sustainable Future* (Earthscan 2005) 78.

⁶² Örjan Bodin and others, 'A Social Relational Approach to Nature Resource Governance' in Örjan Bodin and Christina Prell (eds), *Social Networks and Natural Resource Management: Uncovering the Social Fabric of Environmental Governance* (Cambridge University Press 2011) 6–7; Örjan Bodin and Beatrice I Crona, 'The Role of Social Networks in Natural Resource Governance: What Relational Patterns Make a Difference?' (2009) 19 *Global Environmental Change* 366, 369.

⁶³ Kenneth Newton, 'Social and Political Trust' in Russell J. Dalton and Hans-Dieter Klingemann (eds), *The Oxford Handbook of Political Behavior* (Oxford University Press 2007) 344.

⁶⁴ Newton, 'Trust, Social Capital, Civil Society, and Democracy' (n 55) 206.

⁶⁵ Margaret Levi and Laura Stoker, 'Political Trust and Trustworthiness' (2000) 3 *Annual Review of Political Science* 475, 495-496.

⁶⁶ Mae A Davenport and others, 'Building Trust in Natural Resource Management Within Local Communities: A Case Study of the Midewin National Tallgrass Prairie' (2007) 39 *Environmental Management* 353; Beierle and Cayford (n 10) 30.

⁶⁷ Christopher J Wynveen and Stephen G Sutton, 'Engaging the Public in Climate Change-Related pro-Environmental Behaviors to Protect Coral Reefs: The Role of Public Trust in the Management Agency' (2015) 53 *Marine Policy* 131, 132.

environmental behaviour and the acceptance of marine projects.⁶⁸ Therefore, institutional trust, more specifically the public's trust in marine planning authorities, is identified in this thesis as a component of the instrumental rationale for participation.

However, it is worth mentioning that trust building is not ensured in every participatory decision-making process. The quality and form of participation, such as adequate participatory opportunities, transparency, and deliberation, can influence trust building.⁶⁹ Furthermore, as mentioned above, the capacity of decision-making institutions is also a crucial factor that affects institutional trust building.⁷⁰ If there is a huge deficit in trust between the public and decision-makers, a good participatory process is unlikely to change the mistrust situation immediately.⁷¹ Public participation will contribute to promoting trust when the public has already held an intermediate level of confidence in the decision makers.⁷² Institutional trust building might be the most challenging objective under the instrumental rationale for participation.

2.1.3.3. Conflict Management

The last element of the instrumental rationale for participation covered in this thesis is conflict resolution. According to Wittmer, the complexity of natural ecosystems and human society is the main reason for environmental conflicts.⁷³ Therefore, public participation is a key approach for addressing the complexity of the human dimension. First, public participation can contribute to addressing and avoiding conflicts by creating a friendly atmosphere for decision-making, generating shared values and co-actions, or

⁶⁸ See Wynveen and Sutton (n 67); Jaime Matera, 'Livelihood Diversification and Institutional (Dis-)Trust: Artisanal Fishing Communities under Resource Management Programs in Providencia and Santa Catalina, Colombia' (2016) 67 *Marine Policy* 22.

⁶⁹ See Annie Booth and Greg Halseth, 'Why the Public Thinks Natural Resources Public Participation Processes Fail: A Case Study of British Columbia Communities' (2011) 28 *Land Use Policy* 898; Marc J Stern, 'The Power of Trust: Toward a Theory of Local Opposition to Neighboring Protected Areas' (2008) 21 *Society & Natural Resources* 859; Jessica E Leahy and Dorothy H Anderson, 'Trust Factors in Community-water Resource Management Agency Relationships' (2008) 87 *Landscape and Urban Planning* 100; Smith and McDonough; Tracey Morin Dalton, 'Beyond Biogeography: A Framework for Involving the Public in Planning of U.S. Marine Protected Areas' (2005) 19 *Conservation Biology* 1392.

⁷⁰ Wynveen and Sutton (n 67) 132.

⁷¹ Lynn A Maguire and E Allan Lind, 'Public Participation in Environmental Decisions: Stakeholders, Authorities and Procedural Justice' (2003) 3 *International Journal of Global Environmental Issues* 133, 146; Rick L Lawrence, Steven E Daniels and George H Stankey, 'Procedural Justice and Public Involvement in Natural Resource Decision Making' (1997) 10 *Society & Natural Resources* 577, 586.

⁷² *ibid.*

⁷³ Heidi Wittmer, Felix Rauschmayer and Bernd Klauer, 'How to Select Instruments for the Resolution of Environmental Conflicts?' (2006) 23 *Land Use Policy* 1, 2.

facilitating mutual understanding and relationship building.⁷⁴ This implies that the achievement of the other components of the instrumental rationale for participation, such as social learning and relationship building, is able to contribute to conflict management. Second, participants can identify existing and potential conflicts of resources use and raise their preferences and real demands through participation.⁷⁵ If these issues are considered or accepted by decision-makers, policies or decisions will be more realistically and practically adopted. This will reduce potential opposition to and conflict with the decisions in the implementation stage.⁷⁶ Therefore, the improved quality of decision-making could also help to address conflicts. Accordingly, there is a multi-channel process allowing conflicts to be addressed through public participation.

2.2. The Pluralist Rationale for Public Participation

Following the above explanation of the three main rationales for participation individually, this section aims to justify the feasibility and necessity of applying a pluralist rationale for participation in a specific decision-making process.

There are no commonly acknowledged and clear-cut boundaries among the elements under the three rationales for participation in existing studies. Taking social learning as an example: social learning is generally considered an element of the instrumental rationale for participation. However, Stirling states that social learning could also serve the achievement of the substantive rationale.⁷⁷ Similarly, Fritsch and Newig's study documented how creative solutions and win-win solutions were discovered through social learning in the decision-making process, thereby improving the quality of the decision-making.⁷⁸ According to Coenen and other researchers, however, social learning is a component of the normative rationale for participation since it can enhance the public's capacity to be reasonable citizens, therefore meeting the needs of delivering

⁷⁴ Juliette C Young and others, 'The Role of Trust in the Resolution of Conservation Conflicts' (2016) 195 *Biological Conservation* 196; Thomas C Beierle and David M Konisky, 'Values, Conflict, and Trust in Participatory Environmental Planning' (2000) 19 *Journal of Policy Analysis and Management* 587, 589.

⁷⁵ Young and others, 'Does Stakeholder Involvement Really Benefit Biodiversity Conservation?' (n 38).

⁷⁶ Raymond J Burby, 'Making Plans That Matter: Citizen Involvement and Government Action' (2003) 69 *Journal of the American Planning Association* 33.

⁷⁷ Andy Stirling, "'Opening Up" and "Closing Down": Power, Participation, and Pluralism in the Social Appraisal of Technology' (2008) 33 *Science, Technology & Human Values* 262, 272.

⁷⁸ Oliver Fritsch and Jens Newig, 'Participatory Governance and Sustainability: Findings of a Meta-Analysis of Stakeholder Involvement in Environmental Decision Making' in Eric Brousseau, Tom Dedeurwaerdere and Bernd Siebenhüner (eds), *Reflexive Governance for Global Public Goods* (MIT Press 2012) 192.

democracy.⁷⁹ Dryzek and Romina identify overlaps between social learning and deliberative democracy, since both social learning and deliberative democracy are based on interactive communication and value exchange.⁸⁰ From this perspective, the social learning process could facilitate the fulfilment of a commitment to democracy, which is the key motivation of the normative rationale for participation. This debate indicates that social learning can contribute to all of the three participation rationales, depending on the contexts and objectives of participation. It is unlikely that a clear distinction can be made among the three rationales for participation since they share common elements.

Second, the three rationales for participation are closely related. The fulfilment of the normative rationale is fundamentally important for achieving the instrumental and substantive rationales. Furthermore, the instrumental and substantive rationales interact with each other. The normative rationale focuses on the quality of the participation procedure and power sharing of decision-making.⁸¹ The procedure of participation substantively influences the outcome of decision-making.⁸² As Reed observes,

[T]he quality of decisions made through stakeholder participation is strongly dependant on the nature of the process leading to them. Deficiencies in this process are most commonly blamed for the failures that have led to disillusionment in stakeholder participation.⁸³

⁷⁹ Frans Coenen, 'Introduction' in Frans HJM Coenen (ed), *Public Participation and Better Environmental Decisions* (Springer Netherlands 2008) 2-8; Blackstock, Kelly and Horsey (n 20); Rodela Romina, 'Social Learning, Natural Resource Management, and Participatory Activities: A Reflection on Construct Development and Testing' (2014) 69 NJAS - Wageningen Journal of Life Sciences 15.

⁸⁰ Romina (n 79) 15; John S Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42 *Comparative Political Studies* 1379, 1391.

⁸¹ See s 2.1.1 above 19-21.

⁸² Miriam Cuppen, Bertien Broekhans and Bert Enserink, 'Public Participation in EIA and Attitude Formation' (2012) 30 *Impact Assessment and Project Appraisal* 63; Catherine Gross, 'Community Perspectives of Wind Energy in Australia: The Application of a Justice and Community Fairness Framework to Increase Social Acceptance' (2007) 35 *Energy Policy* 2727; Wolfgang Haider Len Hunt, 'Fair and Effective Decision Making in Forest Management Planning' (2001) 14 *Society & Natural Resources* 873; Peter M Wiedemann and Susanne Femers, 'Public Participation in Waste Management Decision Making: Analysis and Management of Conflicts' (1993) 33 *Journal of Hazardous Materials* 355.

⁸³ Reed (n 11) 2426.

The fulfilment of social learning largely depends on an interactive participation process and the transparency of the decision-making might have an impact on trust building. The benefits of the substantive and instrumental rationales for participation cannot be fully achieved without the support of a proper participation procedure. However, it is worth pointing out that a good participation procedure may not guarantee good outcomes of participation. Institutional trust will not be established through a good participation process if a serious trust deficit already exists. However, a bad participation procedure definitely cannot yield good outcomes. Therefore, the link between the participation process and outcomes of participation should not be neglected.

The importance of the participation procedure and the relevant outcomes of participation have been gradually acknowledged in judicial practice. At the initial period of the implementation of environmental impact assessment in the UK, the connection between the process of public participation and its likely influence on the outcome of decision-making was overlooked in judicial practice.⁸⁴ A decision would not be challenged by courts merely based on failures in procedure unless there were substantive issues as the result of improper processes.⁸⁵ The judgments that Lord Hoffmann made in *R v North Yorkshire Country Council ex parte Brown and Cartwright* and *Berkeley v Secretary of State for the Environment and others* seems to indicate a turning point in the court's attitude towards the importance of participation procedure.⁸⁶ Lord Hoffmann states in *Berkeley v Secretary of State for the Environment and others* that

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public,

⁸⁴ Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press 2004) 256–266.

⁸⁵ *ibid.*

⁸⁶ William Upton, 'The EIA Process and the Directly Enforceable Rights of Citizens' (2001) 13 *Journal of Environmental Law* 89, 104; *R v North Yorkshire County Council exp. Brown and Cartwright* [2000] 1 AC 397, [1999] 2 WLR 452, [1999] Env LR 623; *Berkeley v Secretary of State for the Environment and Others* [2001] AC 603, [2000] 3 WLR 420, [2001] 2 CMLR 38, [2001] Env LR 16.

however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.⁸⁷

Lord Reed points out the substantive rationale for participation in his judgment; he comments that ‘There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested’.⁸⁸ Furthermore, judges have recognised that participation is not merely a notification activity, but a process for improving the public’s knowledge and understanding of certain issues. Lord Woolf MR notes that

Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.⁸⁹

In this sense, empowering the public or participants with knowledge of the proposed decision is required during participation. Therefore, the connection between the process (normative rationale) and outcomes (substantive and instrumental rationales) of participation have been acknowledged in judicial practice.

The instrumental and substantive rationales for participation are interrelated. Trust and social networks, which are the key components of the instrumental rationale, can enhance communication and information exchange between decision-makers, and stakeholders and yield a better quality of decision-making.⁹⁰ The improved quality of the decision-making could also avoid or reduce conflicts at the implementation stage.⁹¹ The purpose of information and data exchange, which is to achieve a good quality decision, is a fundamental requirement for triggering the social learning process.

⁸⁷ *Berkeley v Secretary of State for the Environment and Others* (n 86) [8].

⁸⁸ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] 1 All ER 369, [2013] 3 WLR 1020 [67].

⁸⁹ *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2001] QB 213, [2000] 3 All ER 850 [112].

⁹⁰ See s 2.1.3.2 above, 26.

⁹¹ See s 2.1.3.3 above, 28.

Therefore, the instrumental rationale can facilitate the achievement of the substantive rationale for participation, and vice versa.

The final motivation for applying a pluralist rationale for participation is due to the consideration of the cost. A common criticism of public participation is that it is expensive.⁹² The point about the cost issue of participation made in this thesis is that public participation does need a certain amount of resource input; however, whether this is “costly” is hard to say. Generally, the resources, including financial, human, and time, invested in public participation are considered the main cost of public participation.⁹³ The cost of participation, such as the expense of notifying the public through the media and the press, paying for venues for participation activities, and staff's working hours and relevant salaries, can be quantified and calculated. Not all, but most of the cost of a participation activity can be estimated.

However, the benefits of participation discussed above, such as the improvement of the quality of the decision, the enhancement of social capital, and social cohesion, cannot be quantified or monetised. Intangible benefits are often ignored when measuring the costs and benefits of participation.⁹⁴ Whether we think a thing is costly or not depends on how much benefit we can get from it. In the case of public participation, the cost of participation is calculable. However, the benefits of participation cannot be quantified and are easily neglected. It is not fair to claim participation is expensive under this circumstance. There is, as yet, no comprehensive and appropriate management tool for measuring the costs and benefits of public participation.⁹⁵ Therefore, whether public participation is expensive or not is open to debate. In this context, applying a pluralist rationale to participation practice would help to defend against the cost concerns of participation, since this advocates achieving multiple benefits of participation.

⁹² See Renee A Irvin and John Stansbury, ‘Citizen Participation in Decision Making: Is It Worth the Effort?’ (2004) 64 *Public Administration Review* 55; Lucie Laurian, ‘Public Participation in Environmental Decision Making: Findings from Communities Facing Toxic Waste Cleanup’ (2004) 70 *Journal of the American Planning Association* 53.

⁹³ Involve, ‘The True Costs of Public Participation’ (2005) 14–18 <<http://www.involve.org.uk/wp-content/uploads/2011/03/True-Costs-Full-Report2.pdf>> accessed 3 November 2016.

⁹⁴ *ibid* 97–99.

⁹⁵ *ibid* 41–44.

The cost of public participation is not limited to the measurable cost of carrying out participation activities, but also covers the unquantifiable cost resulting from potential adverse impacts due to poor quality participation.⁹⁶ These adverse influences could happen on decisions, such as public protest on proposed projects, on participants, such as participation fatigue resulting from ineffective participation, and on decision-making institutions, such as the decline of public trust in decision-makers. The instrumental and substantive rationales for participation have potential long-term benefits. The cost of implementation and performance of decisions will be decreased due to the greater legitimacy and rationality brought into decision-making through public participation.⁹⁷ Some studies have investigated the cost and benefits of public participation in marine related issues.⁹⁸ The general conclusion is that the cost of enforcement is much higher if a decision fails to gain support from the community. As participation and decision-making regimes become mature, and the knowledge and capacity of both participants and decision-makers increases, the costs of participation will decrease. Therefore, participation activities directed under the pluralist rationale can maximise cost efficiency.

This investigation shows the feasibility and necessity of applying a pluralist rationale for participation. First, there are no clear lines among the three rationales for participation. Second, the fulfilment of the substantive and instrumental rationales for participation depends much on a good participation process, a key element of the normative rationale for participation. A better quality of decision-making (the substantive rationale) can contribute to reaching the instrumental goals, such as conflict resolution and social learning, of participation. In turn, components of the instrumental rationale promote the substantive rationale for participation. Third, applying a pluralist rationale can maximise all of the potential benefits of participation in decision-making and protect against criticism of the cost of public participation. This thesis argues that these three

⁹⁶ *ibid* 78–79.

⁹⁷ James L Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (Jossey-Bass 2005) 18.

⁹⁸ See Aurélie Thomassin and others, 'Social Acceptability of a Marine Protected Area: The Case of Reunion Island' (2010) 53 *Ocean & Coastal Management* 169; Jackie Alder, 'Costs and Effectiveness of Education and Enforcement, Cairns Section of the Great Barrier Reef Marine Park' (1996) 20 *Environmental Management* 541.

rationales for participation should not be considered separately when we design or perform a participatory decision-making process. To reinforce the importance of applying the pluralist rationale for participation, McAuslan's research on English land planning will be analysed here to show the limitations caused by paying attention to only one rationale for participation.

McAuslan conducted classic research on the ideologies of land planning laws.⁹⁹ Ideology indicates the philosophical basis, purposes, and application approaches of certain activities.¹⁰⁰ McAuslan put forward the idea that the planning legal regime is formed and influenced by three competing ideologies: public interest, private interest, and public participation.¹⁰¹ According to McAuslan, the ideology of private interest, which is rooted in the long history of common law approaches, argues that land planning laws should contribute to the protection of private interests. The ideology of public interest, which is backed by public authorities and planners, argues that the nature of land planning law is to promote public interests.¹⁰² The ideology of public participation, which is supported by constituencies, aims to break this overemphasis on public and private interests and thereby achieve democracy and justice.¹⁰³

However, a major limitation in McAuslan's argument about the ideology of public participation is that the normative rationale for participation is the only rationale that he recognised. He stated that democracy and justice are the main reasons for setting requirements for public participation in land planning laws.¹⁰⁴ Democracy, indeed, is the term most commonly mentioned by researchers who are looking into public participation in land planning matters. Making the land planning system more democratic and more effective is exactly the fundamental objective of the localism strategy applied at present in England.¹⁰⁵ However, taking democracy as the only

⁹⁹ McAuslan (n 22).

¹⁰⁰ Donald L Foley, 'British Town Planning: One Ideology of Three' (1960) 11 *British Journal of Sociology* 211, 211–212.

¹⁰¹ McAuslan (n 22) 2.

¹⁰² *ibid* 3-5.

¹⁰³ *ibid*.

¹⁰⁴ *ibid* 5.

¹⁰⁵ Department for Communities and Local Government, 'A Plain English Guide to the Localism Act' (2011) 3.

motivation for participation in land planning limits the performance of public participation.

The term “democracy” used by McAuslan refers to direct democracy. As he stated, “this ideology [of public participation] differs from that of public interest by denying that the public interests can be identified and acted upon by public servants on the basis of their own views and assumptions as to what is right and wrong”.¹⁰⁶ By doing this, McAuslan brought the ideology of public participation into opposition to governmental structures, processes, and policies.¹⁰⁷ Therefore, it is not hard to understand why McAuslan found that the ideology of public participation is undesirable among planning authorities and the least developed ideology in land planning laws at that time.¹⁰⁸ As discussed above in this chapter, the substantive rationale for participation focuses on improving the quality of proposed decisions. The instrumental rationale for participation, however, has broader societal benefits. Taking the instrumental and substantive functions of participation into consideration, such as building institutional trust, public participation in land planning could support the promotion of the public interest and the public authorities rather than oppose them. Therefore, with a broader and more comprehensive understanding of the rationale for public participation in land planning, the ideology of public interests and the ideology of public participation would find some common ground and so be less in conflict.

The term “democracy” has different meanings in different contexts and during different periods. Some of them, such as direct democracy and representative democracy, even have contrary claims. Taking democracy as the only emphasised motivation for participation brings uncertainty to the commitment to public participation. Some researchers have recognised this issue. Brownill and Carpenter remind us that the investigation of public participation in land planning matters should be based on the consideration of the democratic or governance pattern applied at the time.¹⁰⁹ Similarly,

¹⁰⁶ McAuslan (n 22) 5.

¹⁰⁷ *ibid* 6.

¹⁰⁸ *ibid* 38, 73.

¹⁰⁹ Sue Brownill and Juliet Carpenter, ‘Increasing Participation in Planning: Emergent Experiences of the Reformed Planning System in England’ (2007) 22 *Planning Practice and Research* 619, 623.

Pattison has investigated public participation in the production of a Regional Planning Guidance (RPG) document, and comments that

If democracy is about consensus building amongst a small elite with privileged access and knowledge of how to utilise their position, then the partnership arrangements surrounding the process of RPG can clearly be seen to be successful. If, on the other hand, democratic structure is about developing and enabling as broad a public input into the policy-making procedure as possible... then RPG has failed to maximise potentials.¹¹⁰

There is no doubt that the planning system serves different governance patterns with various functions and purposes for social-economic development.¹¹¹ As a key component in planning strategy, the pattern of public participation is of course greatly impacted by the political pattern applied by the government. A centralised governance pattern and a decentralised pattern have different attitudes and methods towards to participation issues.¹¹² If the achievement of democracy is the only acknowledged and highlighted rationale for participation in land planning contexts, in a representative democracy pattern, broad-based public participation is hard to guarantee. Therefore, raising the significance of the substantive and instrumental rationales for participation in land planning issues can reduce the uncertainties brought by the different democratic patterns applied in the governmental system. This is because the fulfilment of the substantive and instrumental rationales for participation requires a wide range of the public to be involved in decision-making in order to have wide information resources and to achieve relevant societal benefits. In this way, even in a representative democracy context, the requirement and performance of broad and direct participation in land planning could gain much stronger support at the theoretical level.

The feasibility of applying a pluralist rationale for participation has been justified above. However, it is worth pointing out that these participation rationales can also be in conflict with each other, depending on different understanding and definitions of the

¹¹⁰ Gary Pattison, 'The Role of Participants in Producing Regional Planning Guidance in England' (2001) 16 *Planning Practice & Research* 349, 359.

¹¹¹ See Jenny Poxon, 'Solving the Development Plan Puzzle in Britain: Learning Lessons from History' (2000) 15 *Planning Perspectives* 73.

¹¹² This issue will be further explained in s 5.1 in ch 5.

three rationales. Wesselink and other researchers state that these three rationales are independent and, to some extent, contradict each other, since these rationales have different participants, contents, and conditions of implementation.¹¹³ For example, Wesselink et al. identified the participants under the normative rationale as people “who have a stake”. Under the substantive rationale, participants are “those who have additional knowledge”. People “who have blocking power and those who are needed for implementation” are identified as participants under the instrumental rationale. In this way, the three rationales can be in conflict, since they target different participants. However, this point can be challenged by a simple argument: it is rather difficult to map out an accurate and full list of people who have additional knowledge on or will implement the proposed decision. Such prediction on participants is even impossible in the marine planning context, due to its infancy and long-term implementation. As Ritchie and Ellis correctly argue, “in the absence of any sound understanding of how different interests will react to the MSP process, it is essential to begin from a position where the views of all stakeholders are central to the participation process and that none are neglected nor presumed”.¹¹⁴ Similarly, given the fact that the issue of marine planning is rather new and the database of marine planning is limited in England,¹¹⁵ it is unlikely that it will be possible to identify a comprehensive picture of who have information and data regarding marine planning. In addition, marine plans not only address existing marine-related issues but also consider and anticipate future marine use. Thus, a prediction on prospective marine users who will play a role in the implementation of marine plans seems unlikely.

So far, this chapter has reviewed the normative, substantive, and instrumental rationales for participation and analysed the feasibility and benefits of a pluralist rationale for participation. The last issue to address in this chapter is the levels of public participation. The importance of investigation of the levels of participation is that the degree of participation mirrors the extent of power sharing in the decision-making

¹¹³ Anna Wesselink and others, ‘Rationales for Public Participation in Environmental Policy and Governance: Practitioners’ Perspectives’ (2011) 43 *Environment and Planning A* 2688.

¹¹⁴ Heather Ritchie and Geraint Ellis, “‘A System That Works for the Sea’? Exploring Stakeholder Engagement in Marine Spatial Planning’ (2010) 53 *Journal of Environmental Planning and Management* 701, 710-711.

¹¹⁵ This issue will be further discussion in ch 3, ss 3.1.2.3 and 3.1.2.4.

process,¹¹⁶ which is one of the key concerns under the normative rationale for participation. The fulfilment of some objectives under the substantive and instrumental rationales, such as value exchange, social learning, and relationship building among participants and decision-makers, requires interactive participation opportunities. However, as will be explained in the next section, interactive participation does not happen at all participation levels and requires a relatively high level of participation. Therefore, examining different degrees of participation is necessary.

2.3. Levels of Public Participation

Studies focused on levels of public participation are not difficult to find.¹¹⁷ The most influential study regarding this matter is Arnstein’s ladder of public participation (see Figure 2).¹¹⁸



Figure 2 The Ladder of Participation

Arnstein gives several examples of participation practice and divides them into eight levels: from symbolic participation (the bottom part of the ladder) to initiative participation (the top part of the ladder).¹¹⁹ From bottom to top, at the “manipulation” and “therapy” levels, participants are educated and required to alter their own opinions to cater to the values and views of decision-makers. Moving from the “informing” the “consultation” levels, the pattern of participation evolves from a one-way flow of

¹¹⁶ Arnstein (n 24) 216.

¹¹⁷ Arnstein (n 24); Jules Pretty, ‘Participatory Learning for Sustainable Agriculture’ (1995) 23 World Development 1247; Scott Davidson, ‘Spinning the Wheel of Empowerment’ (1998) 1262 Planning 14.

¹¹⁸ Arnstein (n 24) 217.

¹¹⁹ *ibid.*

information from decision makers to participants to two-way flow of information between them. At the “placation” level, participants begin to have some influence on decision-making. However, this influence is not guaranteed, since the final decision is still determined by the decision-makers. From the “partnership” level to the top level - “citizen control” - participants begin to have power in the decision-making process and therefore to have real influence on decision-making. The key difference among the three top levels is how much power that participants have to make decisions, from having some power to having complete power. Some scholars have criticised Arnstein’s ladder, claiming that it neglects the complexity of the circumstance of decision-making and the complex nature of power transfer in reality.¹²⁰ However, at least, Arnstein gets to the heart of participation matters and points out that how much power that participants have in making decisions is the main difference between different participatory modes.

There are eight steps in Arnstein’s ladder. However, it is inappropriate to say that a higher-ranked engagement pattern is better than or superior to a lower-ranked one.¹²¹ Each of these “ranks” could be conducted in a participatory way and contribute to effective participation.¹²² Therefore, a debate that does not consider the specific contexts of decision-making and participation but only focuses on the level of participation is ineffective and meaningless. Both the selection and evaluation of a level of participation should be based on specific contexts. As will be explained below, this thesis argues that the selection of the appropriate level of participation should depend on the *purpose of participation and the nature/main characteristics of the proposed decision*.

¹²⁰ See Helen Ross, Marlene Buchy and Wendy Proctor, ‘Laying Down the Ladder: A Typology of Public Participation in Australian Natural Resource Management’ (2002) 9 Australian Journal of Environmental Management 205; John Abbott, *Sharing the City: Community Participation in Urban Management* (Earthscan Publications Limited 1996) 34; Thomas Webler, ‘The Craft and Theory of Public Participation: A Dialectical Process’ (1999) 2 Journal of Risk Research 55.

¹²¹ See Julia M Wondolleck, Nancy J Manring and James E Crowfoot, ‘Teetering at the Top of the Ladder: The Experience of Citizen Group Participants in Alternative Dispute Resolution Processes’ (1996) 39 Source: Sociological Perspectives Sociological Perspectives 249.

¹²² Joanne Tippett, John F Handley and Joe Ravetz, ‘Meeting the Challenges of Sustainable development— A Conceptual Appraisal of a New Methodology for Participatory Ecological Planning’ (2007) 67 Progress in Planning 9, 19.

Investigation into the purpose of participation is not novel in environmental and planning studies. Table 1 shows the specific purposes of participation raised in existing studies. All of these purposes can be categorised into the three rationales for participation. Purposes such as exercising and building civic capacity/democratic capacity, influencing decision-making, and empowering the less powerful are contents of the normative rationale for participation. Collecting information, identifying preferences, generating alternatives, and gaining acceptance are components of the substantive rationale for participation. Social learning and conflict management fall into the category of the instrumental rationale for participation.

Table 1. Specific Purposes of Public Participation

Glucker and others ¹²³	Influencing decision-making; developing and exercising democratic capacity; social learning; empowering marginalised individuals and groups; gaining local information and knowledge; gaining experimental and value-based knowledge; testing data; providing legitimacy; and managing conflicts.
Innes and Booher ¹²⁴	Identifying public preference; collecting local information; advancing fairness and justice; getting legitimacy; meeting legal requirements; building civic society; and generating better polity.
O’Faircheallaigh ¹²⁵	Informing the public; filling information gaps; testing information; social learning; influencing decision-making; practising and developing civic capacity; taking various and wide interests into consideration; and empowering marginalised groups.
Creighton ¹²⁶	Collecting and identifying public opinion and concerns on proposed decisions; assessing and determining alternatives; getting agreement on proposed decisions; and getting public acceptance.
Glass ¹²⁷	Exchanging information; educating; building support; and bringing individuals’ and communities’ input into decision-making.

¹²³ Anne N Glucker and others, ‘Public Participation in Environmental Impact Assessment: Why, Who and How?’ (2013) 43 *Environmental Impact Assessment Review* 104.

¹²⁴ Judith E Innes and David E Booher, ‘Reframing Public Participation: Strategies for the 21st Century’ (2004) 5 *Planning Theory & Practice* 419.

¹²⁵ Ciaran O’Faircheallaigh, ‘Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making’ (2010) 30 *Environmental Impact Assessment Review* 19.

¹²⁶ Creighton (n 97) 62.

¹²⁷ James Glass, ‘Citizen Participation in Planning: The Relationship Between Objectives and Techniques’ (1979) 45 *Journal of the American Planning Association* 180.

National Research Council ¹²⁸	Collecting information and preferences of the public; reaching consensus; exploring new norms and preferences; empowering the less powerful; demonstrating plurality and enhancing legitimacy; improving decision quality; and building capacity.
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However, it needs to be clarified that there is a slight difference in the meaning of “legitimacy” discussed in these studies. According to Fung and some other researchers, legitimacy mainly refers to procedural legitimacy.¹²⁹ In this context, public participation is a form of democracy in action.¹³⁰ Therefore, ensuring inclusiveness and broad representation, and facilitating interactive communication between the public and decision makers are useful tools for enhancing legitimacy.¹³¹ According to Glucker and others, legitimate decision-making not only refers to a transparent and participatory decision-making process but also means participants are able to influence decision-making by adding input into decision-making.¹³² Although these researchers have different understandings of the meaning of legitimacy, the procedural requirements that Fung and others suggest, such as inclusiveness and openness, and outcome requirements that Glucker and others advocate, such as allowing participants to influence decisions, are components of the normative rationale for participation. Therefore, the purpose of facilitating the legitimacy of decision-making can be categorised into the normative rationale for participation.

The connections among the purposes of participation, the level of participation and specific participation approaches have been established in previous studies.¹³³ One of the commonly referenced works regarding this matter is Davidson’s wheel model of participation (see Figure 3). Davidson clarifies that the levels of participation depend on its purposes and suggests typical participatory approaches to fit these levels.¹³⁴

¹²⁸ National Research Council (n 18) 49-51.

¹²⁹ Archon Fung, ‘Varieties of Participation in Complex Governance’ (2006) 66 *Public Administration Review* 66, 70; Innes and Booher (n 124) 423.

¹³⁰ *ibid.*

¹³¹ Fung (n 129) 70.

¹³² Glucker and others (n 123) 108.

¹³³ Stephen F McCool and Kathleen Guthrie, ‘Mapping the Dimensions of Successful Public Participation in Messy Natural Resources Management Situations’ (2001) 14 *Society & Natural Resources* 309; Creighton (n 97) 62 ; Buchy and Hoverman (n 13) 22; National Research Council (n 18) 73.

¹³⁴ Davidson (n 117) 15.

Davidson’s wheel, however, shows no concern about the nature and features of proposed issues, which could bring risk to public participation at the implementation stage.¹³⁵ Therefore, when determining the level of participation, in addition to the purposes of participation, the real nature and characteristics of proposed decisions have to be recognised and considered.

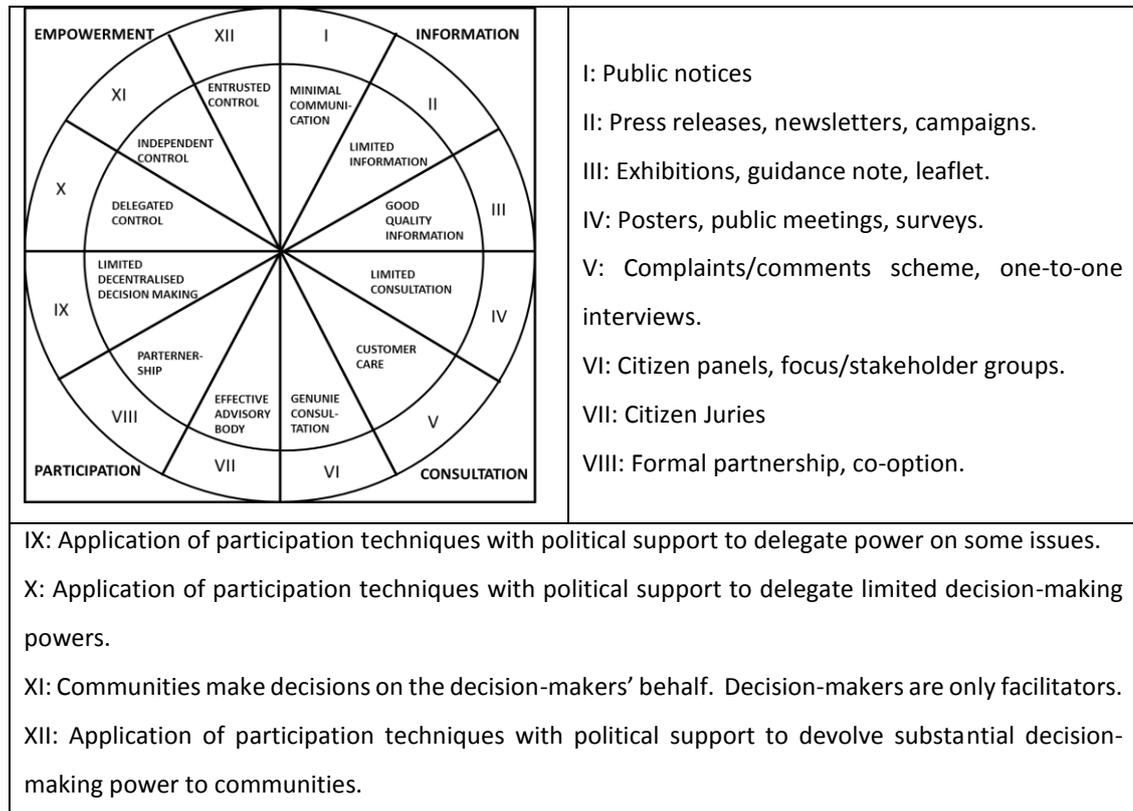


Figure 3. Participatory approaches suggested in the Davidson’s wheel¹³⁶

The most typical and influential study investigating the connection between the nature of decision-making and the level of participation was done by Vroom and Yetton.¹³⁷ They established the Vroom-Yetton model to assist managers in achieving high quality and widely accepted decisions by suggesting appropriate participatory strategies. A range of “yes” or “no” questions in the model is used to help decision makers to determine types of problems and to select the most appropriate participatory

¹³⁵ See s 5.1.3 the identified barriers to neighbourhood planning in the current English land planning system, 156-160.

¹³⁶ Davidson (n 117) 15.

¹³⁷ Victor H Vroom and Philip W Yetton, *Leadership and Decision-Making* (University of Pittsburgh Press 1973) 32–40.

approaches.¹³⁸ The characteristics of decision-making suggested to be considered under this model include: the quality requirement of decision-making; the sufficiency of the evidence basis posed by the decision makers; the extent to which the main issues of decision-making are structured; the necessity for public acceptance on decision-making; the relevancy between public acceptance and participation; the extent to which the public share objectives of decision-making; and the issue of conflict management.¹³⁹ According to these characteristics, the degrees of participation in this model range from non-participation to collaborative participation.¹⁴⁰ This model has been widely tested and applied in research fields including business, psychology, natural resource management, and environmental management studies.¹⁴¹ Since it was originally created in a business context, researchers have modified some questions of this model, based on the nature of the proposed decision-making, to fit in their own research fields.¹⁴² Critics of the Vroom-Yetton model argue that the model neglects other characteristics of decision-making, such as the decision-makers' behaviour and skills, and that it relies too heavily on the subjective judgment of decision-makers rather than objective criteria.¹⁴³ However, it is fair to say that making a thorough list of all characteristics in a model for decision-making in different contexts is quite difficult. Therefore, the contribution of this model is to remind us of the significance of taking the nature of proposed decisions into consideration when determining the appropriate level

¹³⁸The questions include: Does the decision possess any quality requirement? Does the decision maker have enough information to make a quality decision? Is the problem structured? Is public acceptance important for effective implementation? Is public acceptance reasonably certain if the decision maker decides alone? Does the public share agency goals? Is conflict among the public likely?

¹³⁹ Vroom and Yetton (n 137) 39.

¹⁴⁰ *ibid.*

¹⁴¹ See Salim Momtaz, 'Public Participation and Community Involvement in Environmental and Social Impact Assessment in Developing Countries: An Application of the Vroom-Yetton Model Using Bangladesh as a Case Study' (2006) 2 *The international journal of environmental, cultural, economic & social sustainability* 89; Steven E Daniels, Rick L Lawrence and Ralph J Alig, 'Decision-Making and Ecosystem-Based Management: Applying the Vroom-Yetton Model to Public Participation Strategy' (1996) 16 *Environmental Impact Assessment Review* 13; Steve L McMullin, 'Natural Resource Management and Leadership in Public Arena Decision Making: A Prescriptive Framework' (1996) 16 *American Fisheries Society Symposium* 54; Vincent Luyet and others, 'A Framework to Implement Stakeholder Participation in Environmental Projects' (2012) 111 *Journal of Environmental Management* 213.

¹⁴² *ibid.*

¹⁴³ See RH George Field, 'A Critique of the Vroom-Yetton Contingency Model of Leadership Behavior' (1979) 4 *Academy of Management Review* 249; Larry E Pate and Donald C Heiman, 'A Test of the Vroom-Yetton Decision Model in Seven Field Settings' (1987) 16 *Personnel Review* 22; Andrew Crouch and Philip Yetton, 'Manager Behavior, Leadership Style, and Subordinate Performance: An Empirical Extension of the Vroom-Yetton Conflict Rule' (1987) 39 *Organizational Behavior and Human Decision Processes* 384.

of participation for decision-making. Therefore, in this thesis, both the purposes of participation and the nature of proposed decision are regarded as necessary for identifying the level of participation.

2.4. Conclusion

This chapter has investigated the rationales for and levels of public participation. First, it argued that the rationales for participation are the fundamental typologies of all participation issues. The normative, substantive, and instrumental rationales for participation were investigated in this section. Key elements under the three rationales for participation were also analysed. Democracy is the main theme under the normative rationale for participation. Therefore, having a proper participation process and allowing participants to influence decision-making are the two main elements under the normative rationale for participation. The substantive rationale for participation concerns the benefits that public participation can bring to the improvement of quality of decision-making. The instrumental rationale for participation focuses on the broader and long-term benefits that public participation can produce, such as social learning, social network building, and conflict resolution, rather than the decision itself. This thesis argues that due to the unclear boundaries set among them, the interrelated relationship of the elements of these three rationales for participation, and the consideration of cost and benefits of participation a pluralist rationale for participation can and should be applied in the participatory decision-making process. It should be borne in mind that although decision-makers and organisers may have different priorities or preferred aims of participatory decision-making, such as meeting the commitments of democracy, achieving social goals, or improving the substantive quality of decision-making, the relationship and interaction among the three rationales for participation should not be neglected or overlooked. This chapter then moved to investigate the levels of participation and suggested that both the purpose of the participation and the nature of proposed decision-making should be considered when determining the appropriate level of participation for certain decision-making contexts.

Based on the investigation of this chapter, the process of identifying a participation strategy for a particular decision-making context, which is established and used in this thesis, is shown as Figure 4 below. Figure 4 shows that the investigation of the rationales

for participation in a general context in this chapter maps *what public participation can do* in a decision-making context. Then, in a specific context, the nature of decision-making and the purpose of public participation in this context shows *what public participation is expected to do*. The level of participation and specific approaches will be identified based on the purposes of public participation.

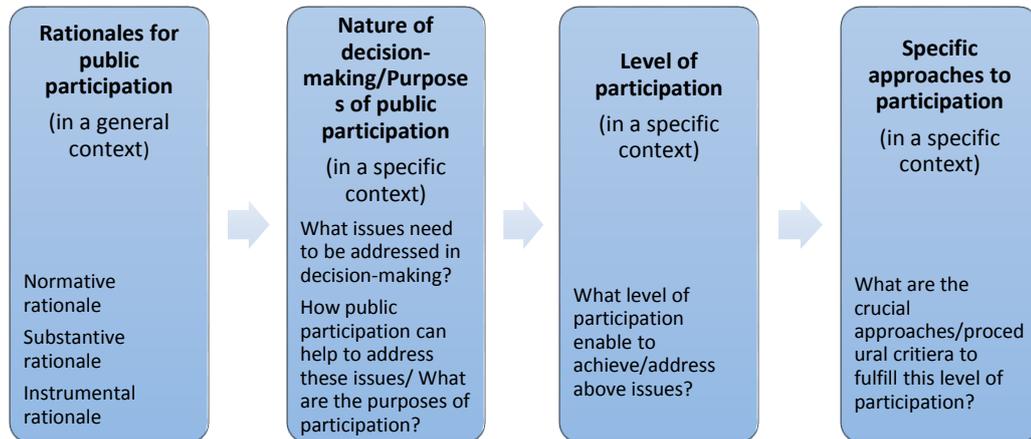


Figure 4. Decision-making Process of the Strategy of Public Participation

The rationale for public participation and level of participation having been addressed in a general context in this chapter, the next chapter will investigate the purpose, level, and specific approaches to public participation in the English marine planning context.

Chapter 3. Rationales, Level, and Procedural Criteria for Public Participation in the English Marine Planning Context

Introduction:

Chapter 2 provided general research about the rationales for public participation. It reviewed the normative, substantive, and instrumental rationales for participation. It advocated the necessity of applying a pluralist rationale for participation to maximise the potential benefits of participation activities. It also argued that, when identifying a proper level of participation for supporting pluralist participation rationales, the purpose of the participation and the nature of proposed decisions should be considered. As described in chapter 1 above, an objective of this thesis is to fill the knowledge gap in the theoretical study of public participation in marine planning, with a particular focus on England. Therefore, based on the overview of the rationales and levels of public participation given in chapter 2, this chapter aims to identify the rationale, level and specific approaches for public participation in the English marine planning process.

This chapter consists of three sections. Section 3.1 identifies the nature of English marine planning and the challenges that English marine planners face. Accordingly, the rationale and specific purpose for public participation in English marine planning will be determined. In section 3.2, based on the main features of English marine planning and the purposes of participation, the appropriate level of participation will be suggested. Relevant procedural criteria for participation will be suggested to meet this level of participation. A complete participation strategy for English marine planning will be established in this chapter and summarised in section 3.3.

3.1. Characteristics of and Challenges to English Marine Planning

According to the MCAA 2009, UK marine areas cover inshore areas and offshore areas. The inshore marine areas cover the area which is submerged at mean high water spring tide up to the limits of the territorial sea.¹ The offshore marine area stretches from territorial lines to the limits of the UK exclusive economic zone or continental shelf.² As

¹ MCAA 2009, s 42.

² *ibid.*

a map produced by the MMO shows (Figure 5), English sea waters are divided into eleven inshore and offshore areas. Where appropriate, adjacent inshore marine plan areas and offshore marine plan areas should be developed concurrently to reduce stakeholders' burdens of participation and to meet the requirements of ecosystem-based planning.³ Another advantage of combining inshore and offshore marine areas in a single project, as will be illustrated in chapter 8, is that such a planning process provides inshore-based and offshore-based stakeholders with a valuable opportunity to meet and communicate with each other, promoting mutual understanding. At the time of writing, only the East Inshore and Offshore Marine Plans have been completed. Plans for other English marine areas are in progress.⁴

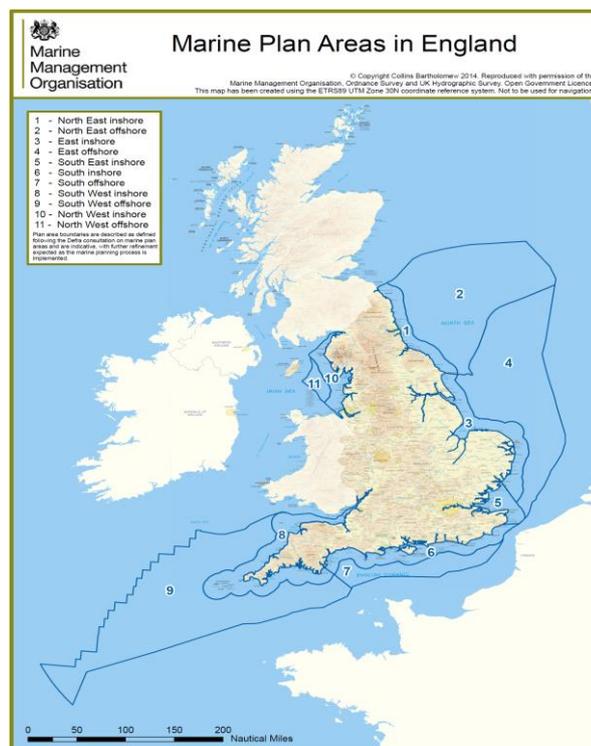


Figure 5. English Marine Plan Areas⁵

³ MMO, 'Decision on First Marine Plan Areas' (2010) 15–16 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312364/east_selection.pdf>; DEFRA, 'A Description of the Marine Planning System for England' (2011) 21 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183195/110318-marine-planning-descript.pdf>.

⁴ For the progress of other English marine plans see s 1.1 in ch 1 above, 3-4.

⁵ This map is available at < <https://www.gov.uk/government/publications/marine-plan-areas-in-england> > accessed 28 June 2016.

There are similarities between the land and marine planning systems in the UK. Both systems aim to achieve multiple sustainability goals. Second, they are plan-led systems. This means that the applications for projects and the design of lower tier planning strategies should comply with higher tier planning strategies.⁶ The two planning systems also have similar production processes, such as setting out visions for the plan area, carrying out sustainability appraisals, and conducting public participation activities. Although there are some parallels between the two planning systems, the differences between the marine domain and land areas should not be overlooked during the creation and implementation of marine plans.⁷ Kearney and others have criticised the inadequacy of studies of the substantial differences between the marine and terrestrial ecosystems, stating that this has led to inappropriate goals for marine conservation.⁸ As a result, in some cases, the strategies of marine management and conservation are distorted.⁹ Therefore, bearing in mind the features and contexts of marine planning is very important when investigating specific issues, such as public participation.

As discussed in chapter 2 above, public participation is used to meet public authorities' democratic commitments (the normative rationale), to improve quality of decision-making (the substantive rationale), or to achieve certain social goals (the instrumental rationale). Different decision-making contexts have different priorities and issues to consider. The strategy for participation in a marine planning context should be designed and implemented to meet the specific needs and contexts of marine planning. Therefore, the following section aims to identify the main characteristics of and the current obstacles to marine planning in England.

3.1.1. Main Characteristics of Marine Planning

This section examines the main characteristic of marine planning to support the selection of the proper level of participation for English marine planning. As will be illustrated, "integration" is considered a key feature of marine planning in this thesis.

⁶ Marine Spatial Planning Pilot Consortium, 'Marine Spatial Planning Literature Review' (2005) 75 <http://www.abpmer.net/mspp/docs/finals/mspliteraturereview_final.pdf> accessed 28 July 2016.

⁷ Paul M Gilliland and Dan Laffoley, 'Key Elements and Steps in the Process of Developing Ecosystem-Based Marine Spatial Planning' (2008) 32 *Marine Policy* 787, 788.

⁸ Robert E Kearney and others, 'How Terrestrial Management Concepts Have Led to Unrealistic Expectations of Marine Protected Areas' (2013) 38 *Marine Policy* 304, 309-310.

⁹ *ibid.*

This section will map out all of the characteristics of marine planning discussed in the literature and illustrate why integration is considered the core characteristic of marine planning.

There are many theoretical studies of marine planning. When reviewing this literature, it is found that ecosystem-based, comprehensive/holistic, and integration/integrated are the terms most frequently used to describe marine planning.¹⁰ Comprehensive planning and integrated planning actually mean the same thing, that all the uses and interests related to the marine environment, both temporal and spatial, should be considered and managed in a holistic manner rather than on a sectoral basis. Ecosystem-based management (sometimes referred to as an ecosystem or ecosystem-based approach) is another commonly used term in marine planning literature. The ecosystem approach was defined at the first joint OSPAR-HELCOM Ministerial Meeting as

[T]he comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.¹¹

Similarly, DEFRA defined an ecosystem-based approach as ‘the integrated management of human activities based on knowledge of ecosystem dynamics to achieve sustainable use of ecosystem goods and services, and maintenance of ecosystem integrity.’¹² Arkema and other researchers reviewed the definition of ecosystem-based management in literature and found that sustainability, ecological health, and the

¹⁰ See Benjamin S Halpern and others, ‘Near-Term Priorities for the Science, Policy and Practice of Coastal and Marine Spatial Planning (CMSP)’ (2012) 36 *Marine Policy* 198; Wesley Flannery and Micheál Ó Cinnéide, ‘Marine Spatial Planning from the Perspective of a Small Seaside Community in Ireland’ (2008) 32 *Marine Policy* 980; Gilliland and Laffoley (n 7); Stephen Jay, ‘Built at Sea: Marine Management and the Construction of Marine Spatial Planning’ (2010) 18 *Town Planning Review* 173; Nicole Schaefer and Vittorio Barale, ‘Maritime Spatial Planning: Opportunities and Challenges in the Framework of the EU Integrated Maritime Policy’ (2011) 15 *Journal of Coastal Conservation* 237; Gonçalo Carneiro, ‘Evaluation of Marine Spatial Planning’ (2013) 37 *Marine Policy* 214.

¹¹ OSPAR-HELCOM, ‘Statement on the Ecosystem Approach to the Management of Human Activities. First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions’ (2003).

¹² DEFRA, *A Sea Change: A Marine Bill White Paper 2007 (Marine Bill)*, 159.

inclusion of humans are three general criteria set in the definition of ecosystem-based management.¹³ In addition, Mcleod and others emphasise that the distinctive feature of ecosystem-based management is that it focuses on the cumulative impacts of all activities, instead of concentrating on a single sector, activity, or concern.¹⁴ Therefore, the process of ecosystem-based management is a process of integration which combines the concerns of promoting and maintaining ecological health and the needs of all different human activities into a management process to achieve sustainability. Therefore, “integration” is essential for ecosystem-based management.

Douvere, one of the leading researchers of marine planning, concludes that there are five main characteristics of marine planning. These are adaptation, participation, ecosystem-based, integration, and future orientation.¹⁵ The adaptation characteristic means that marine planning is not limited to a “planning” process but also involves implementation and monitoring.¹⁶ The future orientation characteristic requires marine planners not only to address present marine management issues but also to consider and anticipate potential opportunities and conflicts that might happen in the future.¹⁷ Therefore, marine planners are required to take a long-term perspective on marine management and development. The adaptation and future orientation characteristics both involve “integration”, since the former implies an integration of theoretical knowledge and practice of marine planning while the latter requires an integration of current marine use and demands for future development.

UNESCO’s guidance on marine planning provides six characteristics for marine planning. In addition to the five characteristics given above, being place-based or area-based is considered a characteristic of marine planning. The place-based characteristic is an inherent feature and an applied approach for ecosystem-based management.¹⁸ The place-based approach advocates defining marine areas based on bio-region and

¹³ Katie K Arkema, Sarah C Abramson and Bryan M Dewsbury, ‘Marine Ecosystem-Based Management: From Characterization to Implementation’ (2005) 4 *Frontiers in Ecology and the Environment* 525, 528.

¹⁴ Karen L Mcleod and others, ‘Scientific Consensus Statement on Marine Ecosystem-Based Management’ 1 <<http://www.marineplanning.org/pdf/Consensusstatement.pdf>> accessed 15 July 2017.

¹⁵ Fanny Douvere, ‘Marine Spatial Planning: Concepts, Current Practice and Linkages to Other Management Approaches’ (PhD thesis, Ghent University 2010) 59-67.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Mcleod and others (n 14) 1; Douvere (n 15) 26.

ecosystem boundaries. Collecting and identifying ecological, biophysical, and economic data of each bio-region is the first step and also the basis for marine planning.¹⁹ Thus, the place-based characteristic is a crucial element under the ecosystem-based characteristic.

In addition to the above materials, which point out its characteristics, closely investigating the general and specific objectives of marine planning also helps to explore its key features. Marine plans are considered to be the primary approach to achieving the UK's vision for the marine environment.²⁰ More detailed roles of marine planning are set out in the UK Marine Policy Statement (MPS). According to the MPS, marine planning in the UK will:

Achieve integration between different objectives; Recognise that the demand for use of our seas and the resulting pressures on them will continue to increase; Manage competing demands on the marine area, taking an ecosystem-based approach; Enable the co-existence of compatible activities wherever possible; and Integrate with terrestrial planning.²¹

The above statement gives five objectives: the integration of multiple sustainability objectives; the integration of the existing and future uses of marine spaces and resources; the integration of marine environmental concerns and marine development; the integration of different needs of marine activities; and the integration of marine and land planning systems. Thus, the marine planning process is an integrated process.

The integrated nature of marine planning is also closely related to marine sustainable development. As mentioned earlier, delivering sustainable development is the goal of the ecosystem-based approach and the primary purpose of English marine planning.²² The term sustainable development discussed here is defined as “development that enables all people through the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations”,²³ which

¹⁹ Douvere (n 15) 16-17.

²⁰ MPS, 10.

²¹ *ibid* 4.

²² See n 12

²³ Marine Bill, 165

follows the definition of sustainable development applied in the Marine Bill. Accordingly, to achieve sustainable development in the UK marine area, integrated consideration of the marine-related interests and welfare of both the present and future generations is essential. In addition, sustainable development has three pillars, namely, social, environmental and economic.²⁴ Hence, marine sustainable development requires integration of social, environmental and economic considerations in the marine management and planning process. More specifically, sectoral/activity specific policy objectives need to be integrated within a framework of economic, social and environmental considerations to achieve the goal of sustainability.²⁵ Thus, integration- the main characteristic of marine planning- is strongly linked to sustainable development.

A review of the general characteristics of marine planning raised in the literature and the investigation of the common themes of the objectives of marine planning set out in the MPS has identified that marine planning can be explained *as an integrated process with goals of integration in marine management*. Thus, this thesis argues that *integration* is the primary characteristic of marine planning.

3.1.2. Challenges to English Marine Planning

As discussed in chapter 2 above, every public participation activity should have clear motivations and purposes. Public participation in marine planning should have objectives, such as promoting the legitimacy of marine plans, serving the goal of marine planning, or assisting marine planners in addressing particular challenges. The challenges to English marine planning discussed in this section are not technical issues, such as assessment of cumulative effects or the interactions among marine use activities, but are challenges that can be resolved through public participation.

3.1.2.1. Conflict Management in Marine Planning

Managing competing and conflicting demands on the marine area and facilitating the co-existence of marine uses are two objectives for marine planning in the UK.²⁶ Marine planning is a three-layered and three-dimensional system includes the seabed and

²⁴ Marine Bill, 142

²⁵ MPS,10

²⁶ *ibid.*

below, the water column, and the atmosphere above the water.²⁷ Therefore, compared with land planners, marine planners face a more difficult task regarding addressing the conflicting demands on spaces and resources. First, land-based projects are usually constrained by a specific site with an exclusive use; however, multifunctional uses of an area are commonplace in the marine planning context.²⁸ While terrestrial land use is relatively permanent, marine use is changeable and mobile and can vary on a daily, monthly, or seasonal basis.²⁹ The sea offers a complicated picture for conflict management. In this context, strengthening networks among marine stakeholders can be a useful approach to addressing conflicts. The UK government has realised the necessity of promoting social networks in marine society. A good example of this cooperative approach is the establishment of the Inshore Fisheries and Conservation Authorities (IFCA), which intends to establish networks among local stakeholders.³⁰ However, a lack of trust, communication and cooperation among marine users is still reported and deemed as a factor hindering the co-existence of marine activities in UK waters.³¹

English marine planners may face more challenges regarding conflict management during marine planning due to the fragmented marine management system in England. The MCAA 2009 has made some progress in integrating marine management in the UK. One of the examples of this is that the MCAA 2009 established the MMO. The MMO is

²⁷ Robert W Duck, 'Marine Spatial Planning: Managing a Dynamic Environment' (2012) 14 *Journal of Environmental Policy & Planning* 67, 69.

²⁸ Marine Management Organisation, 'Marine Planning: A Guide for Local Authority Planners' 6 <<http://www.greensuffolk.org/assets/Greenest-County/Water--Coast/General-Information/Marine-Planning-for-LPAs.pdf>> accessed 26 April 2017.

²⁹ David Tyldesley, 'Making the Case for Marine Spatial Planning in Scotland' (2004) 11 <https://www.rspb.org.uk/Images/marineplanning_tcm9-132919.pdf> accessed 12 August 2016.

³⁰ Lynda D Rodwell and others, 'Fisheries Co-Management in a New Era of Marine Policy in the UK: A Preliminary Assessment of Stakeholder Perceptions' (2014) 45 *Marine Policy* 279, 280; DEFRA, 'Guidance to Inshore Fisheries and Conservation Authorities on Their Contribution to the Achievement of Sustainable Development' (2011) 13 <<http://www.association-ifca.org.uk/Upload/About/2011-ifca-guide-sustainable-development.pdf>> accessed 11 July 2016.

³¹ Tara Hooper, Matthew Ashley and Melanie Austen, 'Perceptions of Fishers and Developers on the Co-Location of Offshore Wind Farms and Decapod Fisheries in the UK' (2015) 61 *Marine Policy* 16, 20; Tara Hooper, Caroline Hattam and Melanie Austen, 'Recreational Use of Offshore Wind Farms: Experiences and Opinions of Sea Anglers in the UK' (2017) 78 *Marine Policy* 55, 59.

responsible for marine planning,³² marine licensing,³³ fisheries management, monitoring and enforcement,³⁴ and marine environmental protection³⁵ in English seas. Some functions that formerly belonged to the Department of Energy and Climate Change (DECC) and the Department for Transport,³⁶ such as granting harbour orders and consent for renewable energy projects (<100MW), are covered under the MMO's remit. However, the fragmented and overlapping governance pattern in the UK has not been fully resolved by the creation of the MMO. Examples of fragmented governance can be seen in nationally significant infrastructure projects (such as the renewable energy project > 100MW), licences for projects regarding oil and gas exploration, and carbon capture and storage in the sea, which are all excluded from the MMO's remit and regulated by Planning Inspectorates and the Oil and Gas Authority (OGA).³⁷ More examples of overlapping remits in regulatory authorities, such as inshore marine conservation and inshore fishery management, can be found in Boyes and Elliott's research.³⁸ Overlapping and fragmented governance results in less efficiency and consistency in regulatory bodies' decision-making. It also demands extra financial, time, and human resource input from marine use applicants. The Department for Business Innovation and Skills (BIS)³⁹ published a review of coastal projects and investments that

³² The Guidance of Delegation of functions relating to marine plans can be found on the MMO's website: <https://www.gov.uk/government/publications/delegation-of-functions-relating-to-marine-plans> accessed 11 August 2016

³³ DEFRA has delegated most of the licensing functions regulated under Part 4 of the MCAA 2009 to the MMO. See Marine Licensing (Delegation of Functions) Order 2011 and Marine Licensing (Delegation of Functions (Amendment) Order 2015. Excepted functions are regulated under the MCAA 2009, s 98(6). In addition, according to ss12-13 of the MCAA 2009, the MMO is entitled to issue consents to certain renewable energy installations under the s36 of the Electricity Act 1989 and s95 of the Energy Act 2004.

³⁴ MCAA 2009, ss 4-8 and s 238.

³⁵ According to MCAA 2009, ss 9-11 and 129, the MMO is responsible for enforcing nature conservation legislation, issuing wildlife licences, and making byelaws for Marine Conservations Zones in England.

³⁶ The Department of Energy and Climate Change (DECC) and the Department for Business, Innovation and Skills (BIS) merged to form the Department for Business, Energy and Industrial Strategy (BEIS) in July 2016.

³⁷ The OGA is an executive agency of BEIS, which is responsible for offshore oil and gas licensing and carbon storage licensing.

³⁸ Suzanne J Boyes and Michael Elliott, 'The Excessive Complexity of National Marine Governance Systems – Has This Decreased in England since the Introduction of the Marine and Coastal Access Act 2009?' (2015) 51 *Marine Policy* 57, 62–63.

³⁹ The BIS and the DECC merged to form the Department for Business, Energy and Industrial Strategy (BEIS) in July 2016.

revealed these problems.⁴⁰ The BIS review found that applicants were required to conduct duplicate consultations with different regulators on the same project. This led to extra cost and delays.⁴¹ Different advisory authorities sometimes provided conflicting opinions about the same project and therefore brought uncertainty and delay to applications.⁴² To address these issues, DEFRA published a Coastal Concordat in November 2013 to reduce regulatory duplication and promote coordination of regulatory bodies on coastal development applications.⁴³ However, Turner and Essex's research found that marine business sectors do not think their regulatory burdens have been reduced as the result of the Concordat.⁴⁴ Duplicated consultations still exist, which lead to extra cost and delays.⁴⁵ Thus, a holistic marine management system in England is currently far from being achieved.

The marine planning process is a reallocation of the spaces and resources relating to the sea.⁴⁶ However, the recollection and rearrangement of marine areas under an overlapping and fragmented governance pattern is not easy. As Plasman reminds us, 'Nobody is anxious to give up power, and each thinks his domain is the most important. In this situation, there is not a lot of 'give-and-take' possible. Self-preservation and the status quo are too often the main concerns of institutions and administrations.'⁴⁷ Therefore, balancing the demands of different marine users and regulators is a major challenge faced by the MMO. In this situation, facilitating communication and cooperation among marine regulators and marine users at the policy or planning level might offer a positive solution. Broad participation with all of the interested parties in

⁴⁰ Department for Business Innovation and Skills, 'Review of Coastal Projects and Investments' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/88425/bis-13-616-review-of-coastal-projects-and-investments-focus-on-enforcement.pdf> accessed 18 July 2017.

⁴¹ *ibid* 18.

⁴² *ibid* 17.

⁴³ DEFRA, 'A Coastal Concordat for England' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/256234/coastal-concordat-20131111.pdf> accessed 19 July 2017.

⁴⁴ Jonathan Turner and Stephen Essex, 'Integrated Terrestrial and Marine Planning in England's Coastal Inter-Tidal Zone: Assessing the Operational Effectiveness of the Coastal Concordat' (2016) 72 *Marine Policy* 166.

⁴⁵ *ibid* 173.

⁴⁶ Sandy Kerr, Kate Johnson and Jonathan Side, 'Planning at the Edge: Integrating across the Land Sea Divide' (2014) 47 *Marine Policy* 118, 120.

⁴⁷ Ir Cathy Plasman, 'Implementing Marine Spatial Planning: A Policy Perspective' (2008) 32 *Marine Policy* 811, 812–813.

the marine planning process will provide the platform for this improvement in communication and cooperation.

3.1.2.2. Deficiency of Trust in the Marine Management Organisation (MMO)

The MMO is an Executive Non Departmental Public Body (NDPB) on behalf of SoS. It is the marine authority in England and is responsible for leading marine plans, licensing marine activities, protecting the marine environment, and managing fishing resources. As a newly established marine authority in England, the MMO faces challenges in institutional trust. First, due to its limited remit in marine governance, the MMO's capacity for leading integrated marine management is questioned by some researchers.⁴⁸ Not only does its limited responsibility weaken trust in its abilities, but also, the MMO's dramatically reduced financial resources are another challenge for it. According to its annual report and accounts for 2015/2016, since its formation in 2010, the MMO's annual budget allocation has been reduced dramatically from £32.0 million to £17.0 million.⁴⁹ The MMO's annual budget keeps decreasing. During 2016-2017, its annual budget was reduced to £15.5 million.⁵⁰ Second, in England, land planning authorities usually have a direct local democratic mandate. However, the MMO is responsible to the SoS, and therefore has little connection with the electorate. Although its democratic accountability can be maintained indirectly via the SoS, the legitimacy of MMO's decisions is suspect.⁵¹ The most severe problem that the MMO confronts is its capacity and expertise in marine issues. The MMO took over the duties of the Marine and Fisheries Agency (MFA) which was located in London. When the MMO was established in Newcastle, the new organisation lost many experienced staff. The

⁴⁸ DM Fleming and PJS Jones, 'Challenges to Achieving Greater and Fairer Stakeholder Involvement in Marine Spatial Planning as Illustrated by the Lyme Bay Scallop Dredging Closure' (2012) 36 *Marine Policy* 370, 376.

⁴⁹ MMO, 'Marine Management Organisation Annual Report and Accounts for the Financial Year Ended 31 March 2016' (2016) 19 <<https://www.gov.uk/government/publications/marine-management-organisation-annual-report-and-accounts-2015-to-2016>> accessed 11 August 2016.

⁵⁰ MMO, 'Marine Management Organisation Annual Report and Accounts for the Financial Year Ended 31 March 2017' (2017) 20 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629905/Marine_Management_Organisation_annual_report_and_accounts_for_the_financial_year_ended_31_March_2017.pdf>.

⁵¹ Paola Gazzola, Maggie H Roe and Paul J Cowie, 'Marine Spatial Planning and Terrestrial Spatial Planning: Reflecting on New Agendas' (2015) 33 *Environment and Planning C: Government and Policy* 1156, 1163–1164.

expertise and capacity of the MMO is therefore questioned by stakeholders.⁵² DEFRA launched a Triennial Review of the MMO to examine its performance and functions in September 2013. Its report was published in March 2015.⁵³ This report shows that even though the MMO has been established for more than three years, insufficient capacity is still a problem for this organisation. The report records that

Many stakeholders commented on the skills and experience of the staff in the MMO. While the need for specialist skills is recognised, and appreciated, it is clear that stakeholders have seen a period of development by staff as they bed into the new organisation.⁵⁴

The National Federation of Fishermen's Organisations (NFFO) submitted a request to the Fisheries Minister in 2014 to suggest an independent review of the MMO's fisheries function. This was because the NFFO considered that the personnel issue in the MMO meant that the organisation "shows no sign of getting a grip on its central functions" and therefore could not meet the severe challenges to the fishing industry.⁵⁵ The NFFO's request was rejected by the Fisheries Minister with the reason that "if there have been problems with the MMO in the past, they are now on the way to being resolved".⁵⁶ However, the loss of staff remains a problem for the MMO. According to its latest Annual Report, losing suitably qualified and experienced staff has been identified as one of the three main risks that the MMO is experiencing.⁵⁷ Due to the continuing loss of experienced staff, whether the MMO possesses sufficient capacity and expertise to support its decision-making is open to question. Therefore, based on the above investigation, building trust in the MMO is also a challenge that must be addressed during the English marine planning process.

⁵² The stakeholders' concern on the capacity of the MMO is confirmed by many interviewees during empirical research of this study. See s 8.3.2 in ch 8, 259-260.

⁵³ DEFRA, 'Triennial Review of the Marine Management Organisation' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411064/mmo-triennial-review.pdf> accessed 22 July 2017.

⁵⁴ *ibid* 19.

⁵⁵ NFFO, 'Minister Should Rethink Decision on an Independent Review of the MMO' (2014) <<http://nffo.org.uk/news/minister-should-rethink-decision-on-an-independent-review-of-the-mmo.html>> accessed 22 July 2017.

⁵⁶ *ibid*.

⁵⁷ MMO, 'Marine Management Organisation Annual Report and Accounts for the Financial Year Ended 31 March 2016' (n 49) 10.

Public participation in marine decision-making can, to some extent, help address the problems outlined above. First, according to the substantive rationale for participation,⁵⁸ a broad involvement of the public, stakeholders, and other marine professionals in the decision-making process could fill the knowledge and expertise gaps in the MMO and reinforce the evidence base for proposed projects. This would largely remedy the insufficiency of marine experts in the MMO. The normative motivation for participation is achieving a commitment to democracy in the decision-making process.⁵⁹ Therefore, effective engagement with broad public and local planning authorities in marine-related issues could strengthen the democratic basis of the MMO's decisions.

Although public participation can bridge the lack of trust in the MMO, the effectiveness of public participation can possibly be challenged by its independence. Theoretically, the MMO is an NDPB, which is only accountable to the SoS. An NDPB 'is a body which has a role in the process of national government but is not a government department, or part of one and therefore operates to a greater or lesser extent at arm's length from ministers'.⁶⁰ Executive NDPBs, which perform "regulatory, executive, administrative and/or commercial functions", are established to deliver public services and enjoy some autonomy, such as recruiting staff and distributing budgets.⁶¹ Therefore, they possess a certain independence from ministers and sponsors.

However, the MMO's independence has been questioned by some researchers since it is required to make decisions depending on national priorities with other governmental departments, particularly its sponsor, DEFRA.⁶² The lack of independence of the MMO can also be demonstrated by its main work during marine planning. The MMO's responsibility for marine planning can be divided into three categories. Under the first category, the MMO can perform independently. Issues that fall into this category are

⁵⁸ See s 2.1.2 in ch 2, 21-22.

⁵⁹ See s 2.1.1 in ch 2, 19-20.

⁶⁰ Cabinet Office, 'Public Bodies 2015' (2015) 14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506880/Public_Bodies_2015_Web_9_Mar_2016.pdf> accessed 11 August 2016.

⁶¹ Cabinet Office, 'The Approval Process for the Creation of Non Departmental Public Bodies' (2012) 6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80074/Approval_process_for_the_creation_of_NDPBs_Dec12_0.pdf> accessed 11 August 2016.

⁶² Gavin Scarff, Clare Fitzsimmons and Tim Gray, 'The New Mode of Marine Planning in the UK: Aspirations and Challenges' (2015) 51 *Marine Policy* 96, 98.

mainly about building up an evidence base for plan areas, such as organising consultative groups, carrying out a Sustainability Appraisal (SA), and considering comments from experts and the public. In the second category, the MMO is allowed to publish certain documents with the agreement of the SoS. These documents include Statements of Public Participation (SPPs) and draft marine plans. Issues covered in the third category mainly refer to the determination of marine plans at the final stage of marine plan making. At this stage, the SoS, rather than the MMO, plays the dominant role.⁶³ The delegation document clearly states that the ‘MMO must liaise very closely with the Secretary of State and must not settle the final text without the approval of the Secretary of State’.⁶⁴ The MMO is therefore responsible for carrying out public participation, preparing an evidence base and support documents, and identifying proposed issues for marine plans. However, the SoS dominates the decisions at the final stage of marine planning. Therefore, there is a risk that the consensus that participants and the MMO have reached and the effort that participants have made will be not accepted in the final marine plan. In this way, the achievements of public participation are undermined. Therefore, the lack of independence of the MMO in marine planning is considered in this thesis a potential threat to public participation. This argument will be justified in the empirical research of this thesis, which will be presented below.

Issues of the MMO’s accountability and expertise have been discussed above. However, this thesis does not intend to further the investigation of the MMO under a regulatory theory context.⁶⁵ This is because the primary focus of this subsection is to explain the potential value of public participation, such as providing a more democratic basis for the MMO’s decisions and facilitating institutional trust for English marine planning, rather than evaluating the MMO’s role /position in the government regulatory hierarchy.

⁶³ HM Government, ‘East Inshore and East Offshore Marine Plans’ (2014) 9 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312496/east-plan.pdf> accessed 11 August 2016.

⁶⁴ The delegation document and more information can be found on the MMO’s website: <<https://www.gov.uk/government/publications/delegation-of-functions-relating-to-marine-plans>> accessed 11 August 2016.

⁶⁵ More discussion regarding regulatory theory can be found in Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 26-34.

3.1.2.3. Insufficient Awareness and Knowledge of Marine Issues among the Public and Stakeholders

Insufficient understanding, ineffective communication, and inadequate cooperation among marine users have been reported and deemed as factors hindering the co-existence of marine activities in UK waters.⁶⁶ Maguire et al.'s research found that land-based stakeholders and authorities mainly focus on coastal issues and show very limited concerns for offshore marine areas.⁶⁷ The limited understanding and awareness of the marine use of other sectors is not only revealed among stakeholders. The MMO has also been criticised for lacking a comprehensive understanding of marine related issues. The BIS report reveals criticism of the MMO's staff for their insufficient experience and lack of focus on marine business.⁶⁸ The MMO has also been criticised for its lack of judgment and understanding of the marine environment when issuing marine licensing. It is reported in the BIS report that when proposed projects receive objections, the MMO usually transfers these objections into licensing conditions rather than evaluating and addressing them.⁶⁹ Therefore, enhancing mutual understanding among marine stakeholders and the MMO is necessary.

In addition to the inadequate understanding among marine users and the MMO, the inadequate marine literacy and outdated knowledge regarding marine issues among the public has been identified as a problem in the UK.⁷⁰ The low level of marine literacy has been attributed to the idea that the marine environment is "out of sight, out of mind".⁷¹ Land planning issues are always closely related to the social and personal lives of the local population. A sense of community and place attachment are important

⁶⁶ Tim Gray, Claire Haggett and Derek Bell, 'Offshore Wind Farms and Commercial Fisheries in the UK: A Study in Stakeholder Consultation' (2005) 8 *Ethics, Place & Environment* 127, 133–134.

⁶⁷ Bernadine Maguire, Jonathan Potts and Stephen Fletcher, 'The Role of Stakeholders in the Marine Planning process—Stakeholder Analysis within the Solent, United Kingdom' (2012) 36 *Marine Policy* 246, 250.

⁶⁸ Department for Business Innovation and Skills (n 40) 19.

⁶⁹ *ibid* 12.

⁷⁰ Peter JS Jones and Jacquelin Burgess, 'Building Partnership Capacity for the Collaborative Management of Marine Protected Areas in the UK: A Preliminary Analysis' (2005) 77 *Journal of Environmental Management* 227, 234.

⁷¹ Julie P Hawkins and others, 'Public Awareness and Attitudes towards Marine Protection in the United Kingdom' (2016) 111 *Marine Pollution Bulletin* 231, 232.

motivations for local people to become involved in local planning matters.⁷² However, concerns and understanding about the marine environment are mainly due to people's own experiences, values, and dependence on the sea.⁷³ Therefore, strong concerns about the marine environment and issues related to it largely come from core coastal communities, such as fishermen, rather than a large number of the public.⁷⁴ The public might notice more visible marine problems (such as coastal erosion and flooding) than invisible issues (like ocean acidification).⁷⁵ In addition to the insufficient knowledge on the marine environment, the public's unfamiliarity with the UK marine regulations has also been documented.⁷⁶ The public has inadequate knowledge about the impact of marine policies or marine management approaches.⁷⁷ Credible sources of marine environment information have a low profile among the majority of the UK public.⁷⁸

Insufficient understanding and a low level of marine literacy are considered as barriers to marine management.⁷⁹ These create an obstacle to English marine planning. Maguire and others have found that participants who have less knowledge about marine planning are less interested in participating.⁸⁰ From a long-term perspective, the low level of marine literacy among the general public and main stakeholders could hinder the achievement of sustainable development in the marine area. As Schoedinger and other scholars point out, 'without an ocean literate public, we would never solve our most critical ocean resource management issues'.⁸¹ Therefore, enhancing the level

⁷² Lynne C Manzo and Douglas D Perkins, 'Finding Common Ground: The Importance of Place Attachment to Community Participation and Planning' (2006) 20 *Journal of Planning Literature* 335.

⁷³ RL Jefferson and others, 'Public Perceptions of the UK Marine Environment' (2014) 43 *Marine Policy* 327, 336.

⁷⁴ Sue Kidd and Geraint Ellis, 'From the Land to Sea and Back Again? Using Terrestrial Planning to Understand the Process of Marine Spatial Planning' (2012) *Journal of Environmental Policy & Planning* 49, 51.

⁷⁵ Jason Chilvers and others, 'Public Engagement with Marine Climate Change Issues: (Re)framings, Understandings and Responses' (2014) 29 *Global Environmental Change* 165, 176.

⁷⁶ Hawkins and others (n 71) 233.

⁷⁷ *ibid* 235.

⁷⁸ Stephen Fletcher and others, 'Public Awareness of Marine Environmental Issues in the UK' (2009) 33 *Marine Policy* 370, 374.

⁷⁹ Emma McKinley and Stephen Fletcher, 'Improving Marine Environmental Health through Marine Citizenship: A Call for Debate' (2012) 36 *Marine Policy* 839, 840-842.

⁸⁰ Bernadine Maguire, Jonathan Potts and Stephen Fletcher, 'Who, When, and How? Marine Planning Stakeholder Involvement Preferences – A Case Study of the Solent, United Kingdom' (2011) 62 *Marine Pollution Bulletin* 2288, 2291.

⁸¹ Sarah Schoedinger, Lynn Uyen Tran and Lynn Whitley, 'From the Principles to the Scope and Sequence: A Brief History of the Ocean Literacy Campaign' (2010) 3 *NMEA Special Report on the Ocean Literacy Campaign* featuring the Ocean Literacy Scope and Sequence 3, 4.

of marine knowledge and awareness among the general public is important for both the marine planning process and sustainable marine development in England.

Based on the instrumental rationale for participation, facilitating social learning through public participation could be a useful way to address the inadequate public awareness of marine issues. Social learning could also foster marine sustainability. The relationships between social learning and sustainable development have been investigated in a range of literature.⁸² The conclusion of these studies was very encouraging; they demonstrated that social learning could and has had an impact on sustainability.⁸³ As Röling and Jiggins point out, 'social learning is about a dialogue to encourage people to learn together with an ecosystem what is sensible to do to sustain the ecological capacity that supports human life'.⁸⁴ Therefore, promoting social learning regarding marine matters among the public and marine users would not only increase the level of low marine literacy but also benefit marine sustainability.

The option of facilitating social learning on marine issues accords with the goal of establishing marine citizenship. Marine citizenship is also deemed as a priority research area in the UK.⁸⁵ The term marine citizenship, which is derived from "environmental citizenship", refers to the responsibility for individuals to contribute to solving marine environmental problems and delivering marine policies through their personal behaviour.⁸⁶ The level of the public's knowledge and awareness regarding the marine environment, and the level of public engagement in marine decision-making are closely related to the formation of marine citizenship.⁸⁷ Increased marine literacy and

⁸² Anne Loeber, Barbara van Mierlo and John Grin and Cees Leeuwis, 'The Practical Value of Theory: Conceptualising Learning in the Pursuit of a Sustainable Development' in Arjen EJ Wals (ed), *Social Learning Towards a Sustainable World: Principles, Perspectives, and Praxis* (Wageningen Academic Publishers 2007) 93–94; Daniella Tibury, 'Learning Based Change for Sustainability: Perspectives and Pathways' in Arjen EJ Wals (ed), *Social Learning Towards a Sustainable World: Principles, Perspectives, and Praxis* (Wageningen Academic Publishers 2007) 118–119.

⁸³ *ibid.*

⁸⁴ Niels G Röling and Janice Jiggins, 'Agents in Adaptive Collaborative Management: The Logic of Collective Cognition' in Louise E Buck and others (eds), *Biological Diversity: Balancing Interests Through Adaptive Collaborative Management* (CRC Press 2001) 149.

⁸⁵ Siân Rees and others, 'Priority Questions to Shape the Marine and Coastal Policy Research Agenda in the United Kingdom' (2013) 38 *Marine Policy* 531, 534.

⁸⁶ Rees and others, 'Priority Questions to Shape the Marine and Coastal Policy Research Agenda in the United Kingdom' (n 85) 534; McKinley and Fletcher, 'Improving Marine Environmental Health through Marine Citizenship: A Call for Debate' (n 79) 840–841.

⁸⁷ *ibid.*

awareness can contribute to better marine citizenship by altering personal behaviour.⁸⁸ In this way, the delivery of marine governance and the implementation of marine environmental policies will be facilitated by improved marine citizenship in the long term.⁸⁹ Therefore, the objective of establishing marine citizenship is in accordance with the social learning goal advocated in this thesis.

One issue that needs to be emphasised here is that the generally low level of the public's marine literacy should not be taken as an excuse to exclude the public from marine planning. Gopnik et al.'s research has demonstrated that the public and relevant stakeholders could be competent as participants if sufficient time and educational opportunities were provided.⁹⁰ As Kemmis states, 'given the right circumstances, ordinary people have a substantial capacity to overcome differences and discover common ground'.⁹¹ Therefore, the public is capable of more complex decision-making participation than is generally recognised or acknowledged.⁹² The most urgent issue that needs to be resolved is how to communicate complex issues to the public efficiently rather than complaining about their limited capacity while excluding them from participation.

3.1.2.4. Weak Evidence Basis for Marine Planning

The establishment and implementation of marine planning require robust evidence. The essential role that environmental information takes in determining the direction and focus of the policy-making process has been documented.⁹³ However, the consistency and quality of data on marine areas lag far behind the evidence base for

⁸⁸ Stephen Fletcher and Jonathan Potts, 'Ocean Citizenship: An Emergent Geographical Concept' (2007) 35 *Coastal Management* 511, 522.

⁸⁹ McKinley and Fletcher, 'Improving Marine Environmental Health through Marine Citizenship: A Call for Debate' (n 79) 840.

⁹⁰ Morgan Gopnik and others, 'Coming to the Table: Early Stakeholder Engagement in Marine Spatial Planning' (2012) 36 *Marine Policy* 1139; Gerad Middendorf and Lawrence Busch, 'Inquiry for the Public Good: Democratic Participation in Agricultural Research' (1997) 14 *Agriculture and Human Values* 45.

⁹¹ Daniel Kemmis and Matthew McKinney, 'Collaboration as an Emerging Form of Democracy' (2011) 100 *National Civic Review* 2, 4.

⁹² Frank Fischer, *Citizens, Experts, and the Environment: The Politics of Local Knowledge* (Duke University Press 2000) xi.

⁹³ See Robert G Healy and William Ascher, 'Knowledge in the Policy Process: Incorporating New Environmental Information in Natural Resources Policy Making' (1995) 28 *Policy Sciences* 1.

land issues.⁹⁴ The deficiency of marine environmental data in the UK has been documented.⁹⁵ In addition to launching new studies to collect new data, gathering available data has become a key method for addressing data gaps in marine planning. A large amount of existing data is already held by stakeholders. Local authorities, for example, particularly coastal local authorities, hold local information and data related to the marine environment, such as the Historic Environment Records.⁹⁶ NGOs also possess data related to the marine environment.⁹⁷ Marine industries, who are required to prepare Environmental Impact Assessments to apply for marine licences, and relevant regulators who are responsible for issuing licences or granting consent for marine activities, also hold data on the marine environment.⁹⁸ Therefore, marine-related stakeholders and related regulators should be involved in filling the data gaps in marine planning.

Social and economic data are also important when making marine plans. Failing to address the human dimensions in marine-related decision-makings weakens the effectiveness of marine management.⁹⁹ However, the gaps in social-economic data for marine planning have been documented.¹⁰⁰ Researchers have found that the human dimension is often neglected in marine management practice.¹⁰¹ Therefore, the lack of

⁹⁴ MMO, 'Marine Planning: A Guide for Local Councils' (2016) <<https://www.gov.uk/government/publications/marine-planning-a-guide-for-local-councils/marine-planning-a-guide-for-local-councils>> accessed 12 August 2016.

⁹⁵ Cefas, 'ME5408: Marine Survey Needs to Underpin Defra Policy' (2010) 16 <http://www.oceandtm.com/ME5408_Marine_Survey_Needs_Final_Report.pdf> accessed 24 April 2017; Fletcher and others, 'Effective Practice in Marine Spatial Planning: A Participatory Evaluation of Experience in Southern England' (n 114) 344-345.

⁹⁶ More information see <<http://www.heritagegateway.org.uk/Gateway/CHR/>>.

⁹⁷ See guidance produced by the Royal Society for the Protection of Birds (RSPB) on the use of bird data to support marine planning. Available at <http://www.rspb.org.uk/Images/marine_planning_tcm9-338699.pdf> accessed 4 September 2017.

⁹⁸ Parliamentary Office of Science and Technology, *Marine Planning*, POSTNOTE 388, 2011, 4. <http://www.parliament.uk/documents/post/postpn388_Marine-Planning.pdf> accessed 23 September 2017.

⁹⁹ Charles Wahle and others, 'Social Science Research Strategy for Marine Protect Area' (2003) 7–8 <http://marineprotectedareas.noaa.gov/pdf/publications/ssr_strategy.pdf> accessed 4 July 2016.

¹⁰⁰ Kevin St Martin and Madeleine Hall-Arber, 'The Missing Layer: Geo-Technologies, Communities, and Implications for Marine Spatial Planning' (2008) 32 *Marine Policy* 779.

¹⁰¹ See Fanny Douvere and Charles N Ehler, 'New Perspectives on Sea Use Management: Initial Findings from European Experience with Marine Spatial Planning' (2009) 90 *Journal of Environmental Management* 77; Matt Reed, Paul Courtney and Natalie Ross, 'Beyond Fish as Commodities: Understanding the Socio-Cultural Role of Inshore Fisheries in England' (2013) 37 *Marine Policy* 62.

both data and attention to social-economic matters needs to be addressed during the English marine planning process.

As discussed above, the insufficiency of evidence for decision-making can be partly addressed through public participation. Based on the substantive rationale for participation, the involvement of a wide range of marine stakeholders and the public brings extensive information and local knowledge of the marine environment into marine related decision-making.¹⁰² Improved social relationships and trust among stakeholders can also facilitate information sharing and exchange. Wide social engagement can also push marine planners to become more aware of the impact that their plans will have on local communities.

In summary, based on an investigation of the concept and objectives of marine planning, this section has determined that the key theme of marine planning is integration. This includes the integration of different objectives of sustainable development, of different marine demands, of the land planning system and marine matters, and of marine conservation and marine development. Four challenges to English marine planning were identified in this section, including the difficulty of conflict management, insufficient trust in the MMO, the low level of marine literacy among the public and insufficient mutual understanding among relevant stakeholders, and the inadequate evidence base for marine plan making. Based on the discussion regarding the rationales for participation in section 2.1 in chapter 2, it is evident that all the three main rationales for participation can be applied to the English marine planning context. Therefore, a pluralist rationale for participation should be applied when making English marine plans. Given that the need for public participation has been identified, the next section will explore the appropriate participation strategy for English marine planning.

3.2. Participation Strategy for English Marine Planning

¹⁰² See Rebecca M Jarvis and others, 'Citizen Science and the Power of Public Participation in Marine Spatial Planning' (2015) 57 *Marine Policy* 21; Christine H Close and G Brent Hall, 'A GIS-Based Protocol for the Collection and Use of Local Knowledge in Fisheries Management Planning' (2006) 78 *Journal of Environmental Management* 341; Chris Caldow and others, 'Biogeographic Assessments: A Framework for Information Synthesis in Marine Spatial Planning' (2015) 51 *Marine Policy* 423; Rachel Shucksmith and others, 'Regional Marine Spatial Planning – The Data Collection and Mapping Process' (2014) 50 *Marine Policy* 1.

The term participation strategy used here includes two elements: the degree of participation and the specific participatory approaches that match that degree of participation. This section will address two issues: the selection of the appropriate degree of participation for English marine planning and the identification of the procedural criteria needed to support this level of participation.

3.2.1. Collaborative Participation in English Marine Planning

Collaborative participation, as will be illustrated below, is suggested in this thesis as an appropriate level of participation for English marine planning. Although some researchers have recommended collaborative participation, they have neither explained why collaborative participation is superior to other levels of participation nor suggested specific participation approaches to serve collaborative participation.¹⁰³ To fill this research gap, the following section will illustrate the reasons for applying collaborative participation, based on the purpose of participation and the nature of marine planning.

3.2.1.1. Characteristics of English Marine Planning

Integration is the most notable characteristic of marine planning. Accordingly, collaboration among all related parties is needed for producing successful marine plans. The current marine management regime in England is fragmented. Therefore, the current marine activities and any future marine development in English seas cannot be managed or determined by the MMO only. As the strategic plans for certain marine areas, marine plans should be created through the negotiation and collaboration of a range of marine regulators such as the Inshore Fisheries and Conservation Authorities (IFCAs), and governmental departments like the Department for Transport (DFT), the Department for Business, Innovation and Skills (BIS), and other bodies such as the Joint Nature Conservation Committee, Natural England, and Historic England.

¹⁰³ See Maguire, Potts and Fletcher, 'Who, When, and How? Marine Planning Stakeholder Involvement Preferences – A Case Study of the Solent, United Kingdom' (n 71); Sara Singleton, 'Native People and Planning for Marine Protected Areas: How "Stakeholder" Processes Fail to Address Conflicts in Complex, Real-World Environments' (2009) 37 Coastal Management 421; John F Kearney and others, 'The Role of Participatory Governance and Community-Based Management in Integrated Coastal and Ocean Management in Canada' (2007) 35 Coastal Management 79.

One of the key issues for marine planning is to achieve the integration of the marine and land planning regimes.¹⁰⁴ The land and marine planning systems are not parallel systems. The marine planning system is required to be compatible with the existing UK land-use planning system, and in accordance with the Planning Act 2008, the National Planning Policy Framework (NPPF), and National Policy Statements (NPSs). Kerr et al. argue that the integration of land and marine planning system is quite difficult, even impossible, due to the differences of natural characteristics, property rights, planning objectives, and regulatory patterns between the two systems.¹⁰⁵ However, this argument shows a misunderstanding about the integration between the land and marine planning systems. Integration, as this thesis argues, does not mean combining the physical nature or administrative patterns of the two systems, but refers to sharing common values of development and sustainability goals and showing concern for the other planning system. The goal of the integration of marine and terrestrial planning requires land planners to consider the impact on the marine and coastal environment or development when they are making land plans or considering project applications. Similarly, when marine authorities make decisions or plans, land-based and coastal issues should be considered. The integration of the two planning systems can be achieved by using strategic approaches, such as Integrated Coastal Zone Management (ICZM) and Strategic Environmental Assessment (SEA), or facilitating mutual understanding and respect between land and marine authorities.¹⁰⁶ Since they are both covered under the NPPF, marine and land planning have strong common ground. Therefore, the integration of land and marine planning is possible. However, Kerr et al. quite rightly point out that effective coordination and balance are the main approaches for addressing transboundary issues between land and sea.¹⁰⁷ Therefore, in order to achieve integration of the two planning systems, collaboration between marine planners and land authorities and communities is important in the marine planning process.

¹⁰⁴ MPS, 8.

¹⁰⁵ Kerr, Johnson and Side (n 46) 124.

¹⁰⁶ Hance D Smith and others, 'The Integration of Land and Marine Spatial Planning' (2011) 15 *Journal of Coastal Conservation* 291, 298.

¹⁰⁷ Kerr, Johnson and Side (n 46) 125.

The modern English land-planning system was established in the 1940s with the introduction of the Town and Country Planning Act 1947.¹⁰⁸ As a result, the English land planning system has rather mature planning strategies and approaches, a complete data base, and relatively high levels of familiarity among the public.¹⁰⁹ The English marine planning system, however, was created under the MCAA in 2009 and is still in its infancy.¹¹⁰ Therefore, the knowledge, practical skills, and experience of marine planning are developing. Rees and other researchers have conducted a study with a group of marine experts to identify the priorities of UK marine matters. According to this research, the present key issues for marine planning in the UK are about transforming the concept into concrete approaches, such as integrating existing policies and marine plans and measuring the net environmental impact of marine planning.¹¹¹ Kidd and Ellis remind us that marine planners not only are responsible for producing plans but also need to ensure that plans are compatible with the existing regulatory framework and are able to be implemented at licensing levels and in other enforcement activities.¹¹² Therefore, marine planners should collaborate with relevant parties who are subject to and affected by marine plans to identify issues or problems they have met in using or managing marine resources. This will ensure the effectiveness and practicability of marine plans.

English marine planning is required to be ecosystem-based. Ecosystem-based management means conserving and maintaining the ecosystem in a healthy condition that can support human needs and development.¹¹³ Therefore, marine planning should ensure a productive and healthy marine ecosystem that can meet human requirements. Trade-offs between marine conservation and social-economic development are

¹⁰⁸ For discussion on the English land planning system see s 5.1 in ch 5 below, 146.

¹⁰⁹ MMO, 'Marine Planning: A Guide for Local Authority Planners' (n 28) 4.

¹¹⁰ Deborah Peel and M Greg Lloyd, 'The Social Reconstruction of the Marine Environment: Towards Marine Spatial Planning?' (2004) 75 *Town Planning Review* 359; Plasman (n 47).

¹¹¹ Rees and others, 'Priority Questions to Shape the Marine and Coastal Policy Research Agenda in the United Kingdom' (n 85) 535.

¹¹² Kidd and Ellis (n 74) 59–60.

¹¹³ Charles Ehler and Fanny Douvere, 'Marine Spatial Planning – A Step-by-Step Approach toward Ecosystem-Based Management' (2009) 24 <<http://www.unesco-ioc-marinesp.be/uploads/documentenbank/d87c0c421da4593fd93bbee1898e1d51.pdf>> accessed 24 May 2016.

inevitable during this process.¹¹⁴ As a result, negotiation and collaboration among marine regulators, scientists, users, and environmental sectors are needed for reaching compromises to ensure a balance between marine development and conservation.

The necessity of applying collaborative participation depends on the integrative nature of marine planning. A simple top-down or bottom-up decision-making process cannot meet the complexity of marine planning; a more interactive and collaborative strategy is needed. The degree of participation in English marine planning should be set in an upper-middle position in the participation ladder with the aim of facilitating communication and collaboration among the participants and allowing them to influence, to a certain extent, the formation and production of marine plans.

3.2.1.2. Purpose of Participation in English Marine Planning Process

As detailed in section 3.1.2, the complexity of conflict management, inadequate institutional trust in the MMO, weak data, a low level of marine literacy among the public, and inadequate mutual understanding among stakeholders and the MMO are identified as the main challenges for English marine planning. These challenges, to some extent, can be addressed through collaborative participation. Communication, interaction, and collaboration among marine users will contribute to conflict management in marine planning, especially in facilitating co-existence among different marine uses and promoting mutual understanding and respect among stakeholders. Researchers have investigated the possibilities and potential opportunities for marine users to achieve win-win situations.¹¹⁵ They have found that, in addition to scientific support, increasing collaboration and communication among marine sectors is the solution for this problem.¹¹⁶ Hartley and Robertson's research shows that collaboration and interactive communication improved the understanding and relationships between

¹¹⁴ See Thomas O McShane and others, 'Hard Choices: Making Trade-Offs between Biodiversity Conservation and Human Well-Being' (2011) 144 *Biological Conservation* 966; Siân E Rees and others, 'Is There a Win-win Scenario for Marine Nature Conservation? A Case Study of Lyme Bay, England' (2010) 53 *Ocean and Coastal Management* 135.

¹¹⁵ Jiska de Groot and others, 'Investigating the Co-Existence of Fisheries and Offshore Renewable Energy in the UK: Identification of a Mitigation Agenda for Fishing Effort Displacement' (2014) 102 *Ocean & Coastal Management* 7; Tanja Michler-Cieluch, Gesche Krause and Bela H Buck, 'Reflections on Integrating Operation and Maintenance Activities of Offshore Wind Farms and Mariculture' (2009) 52 *Ocean & Coastal Management* 57.

¹¹⁶ de Groot and others (n 115) 15; Michler-Cieluch, Krause and Buck (n 115) 63.

fishermen and scientists.¹¹⁷ Improved relationships among stakeholders and decision-makers in a natural resources management context can promote data and information exchange and enhance the stakeholders' trust in the resource management authorities.¹¹⁸ Thus, collaboration among stakeholders and decision-makers plays an important role in conflict management, relationship building, and information exchange. Interaction among participants is also crucial for achieving social learning. Although social learning is a component under the instrumental rationale for participation, no causality has been found between public participation and social learning. Public participation is merely an approach to facilitate social learning but it cannot ensure that social learning will occur in all public participation contexts.¹¹⁹ The achievement of social learning largely depends on the selection and implementation of an appropriate level of participatory approach during the public engagement.¹²⁰ Daniels and Walker find that an interactive learning process can stimulate more direct communication and information exchange among participants.¹²¹ Social learning can be stimulated through collaborative processes by breaking down the hierarchy and providing a relevant equal learning environment for decision-makers and stakeholders.¹²² A level of participation that does not include a two-way flow of information exchange and interaction among participants and decision-makers is unlikely to fulfil the goal of social learning.

Therefore, both due to the integrated nature of marine planning and for the purposes of participation, this thesis argues that *collaborative participation* is the appropriate level of participation for English marine planning. Collaborative participation lets

¹¹⁷ Troy W Hartley and Robert A Robertson, 'Stakeholder Collaboration in Fisheries Research: Integrating Knowledge Among Fishing Leaders and Science Partners in Northern New England' (2008) 22 *Society & Natural Resources* 42.

¹¹⁸ Örjan Bodin and Beatrice I Crona, 'The Role of Social Networks in Natural Resource Governance: What Relational Patterns Make a Difference?' (2009) 19 *Global Environmental Change* 366, 369.

¹¹⁹ Harold Glasser, 'Minding the Gap: The Role of Social Learning in Linking Our Stated Desire for a More Sustainable World to Our Everyday Actions and Policies' in Arjen EJ Wals (ed), *Social Learning towards a Sustainable World: Principles, Perspectives, and Praxis* (Wageningen Academic Publishers 2007) 49; Mark S Reed and others, 'What Is Social Learning?' (2010) 15 *Ecology and Society*.

¹²⁰ Glasser (n 119) 49.

¹²¹ Steven E Daniels and Gregg B Walker, 'Collaborative Learning: Improving Public Deliberation in Ecosystem-Based Management' (1996) 16 *Environmental Impact Assessment Review* 71, 96.

¹²² Anne Loeber, Barbara van Mierlo and John Grin and Cees Leeuwis; Danny Wildemeersch, 'Social Learning Revisited: Lessons Learned from North and South' in Arjen EJ Wals (ed), *Social Learning towards a Sustainable World: Principles, Perspectives, and Praxis* (Wageningen Academic Publishers 2007) 114; Tibury (n 82) 120.

decision-makers and participants work interactively to identify and address significant issues in decision-making.¹²³ It goes beyond the general consultation level of participation in which stakeholders are only invited to provide comments on existing proposes, but has not reached a fully empowered level of participation. Given that collaborative participation has been justified as the appropriate level of participation for English marine planning, the next section will focus on the procedural criteria for collaborative participation.

3.2.2. Procedural Criteria for Participation in English Marine Planning

Many studies have tried to explore the criteria for assessing participation activities. Rowe and Frewer have established process and acceptance criteria to evaluate participation.¹²⁴ Acceptance criteria are representativeness, independence, early involvement, influence and transparency, while process criteria include resource accessibility, task definition, structured decision-making, and cost-effectiveness.¹²⁵ Other researchers have considered evaluation criteria from a democratic perspective. Fiorino believes that direct participation, face-to-face discussion, and the public's status and influence in participation are important criteria.¹²⁶ Based on a broad literature review, Blackstock et al. conclude that there are twenty-two frequently used evaluative criteria which include both procedural and outcome criteria.¹²⁷ On the contrary, Stern only considers three major criteria, namely, quality, legitimacy, and capacity, as enough to evaluate most participatory decision-making processes.¹²⁸ Four procedural criteria, namely, *early and broad participation, easy access to information and participation, interaction, and transparency*, have been selected for application in this thesis. They

¹²³ 'Collaborative participation' as discussed in this thesis is similar to the 'partnership' rank in Aronstein's ladder and the 'participation' category in Scott's wheel model.

¹²⁴ Gene Rowe and Lynn J Frewer, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 *Science, Technology & Human Values* 3, 12-17.

¹²⁵ *ibid.*

¹²⁶ Daniel J Fiorino, 'Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms' (1990) 15 *Science, Technology, & Human Values* 226, 229-230.

¹²⁷ Blackstock, Kelly and Horsey (n 20) 730. The criteria identified in Blackstock et al.'s study are access to resources, accountability, capacity building, capacity to influence, capacity to participate, leadership, conflict resolution, context, cost effectiveness, consensus, legitimacy, acceptance of data, opportunity to influence, ownership of outcomes, quality of decision, quality of provided information, recognised impacts, relationships, representation, social justice, social learning, and transparency.

¹²⁸ National Research Council, *Public Participation in Environmental Assessment and Decision Making* (Thomas Dietz and Paul C Stern eds, National Academies Press 2008) 73.

match the level of collaborative participation and enable fulfilment of the purposes of participation appropriate for English marine planning.

3.2.2.1. Early and Broad Participation

In marine management contexts, basically, every individual should have an opportunity to be involved in the decision-making process. UNESCO suggests that ‘all individuals, groups, or organisations that are in one way or another affected, involved or interested in MSP can be considered stakeholders’.¹²⁹ Thus, broad participation should be applied in the marine planning context. Another reason for broad participation in English marine planning is that it has social goals, such as increasing the level of marine literacy among the public and promoting social learning. Therefore, participatory opportunities in marine planning should be open and accessible to all individuals, groups, and institutions, rather than being exclusive to certain stakeholders and individuals. Early participation is another crucial procedural criterion for public participation in marine planning. The process of making marine plans in England includes several stages: preparation, scoping, developing, public consultation, independent investigation (optional), and adaptation.¹³⁰ The scoping stage targets the collection of data and identification of the issues to be addressed in the marine plan. Participation in the scoping stage enables the public and stakeholders to bring data and information into plan making at the initial period and to influence the plan when its content has not been determined. Goals under the instrumental rationale such as social learning, trust building, and relationship building require a relatively long period to be achieved or established. Thus, involving the public at an early stage triggers the process of achieving the instrumental benefits of participation during decision-making.

3.2.2.2. Easy Access to Information and Participation

Easy access to information is another of the most basic criteria for public participation. Particular attention should be given to the quality of the information provided and the timeframe for participation. Due to the remote nature of the marine environment and the infancy of marine planning, inadequate awareness and knowledge of marine issues

¹²⁹ Ehler and Douvère (n 113) 43.

¹³⁰ More further discussion regarding the procedure of English marine planning see s 5.2.1.2 in ch 5, 166-167.

among the public have been identified as a barrier to English marine planning, as discussed in section 3.1.2. Therefore, in order to educate or consult the public, marine planning information and relevant documents should be prepared in an easy-to-read and understandable format and be easy to access.

The criterion for easy access to participation is relevant to the broad participation criterion. It aims to ensure that the participation of the public is not hindered by internal reasons, such as lack of resources or capacities, or external factors, such as an unreasonable time arrangement for participation or any thresholds set for a certain group's participation. Scholars suggest that special support could be offered for groups and individuals who are vulnerable or less competent.¹³¹ As Barton writes, 'public participation can be criticised if it simply holds a mirror up to the pattern of power in the community; if the rich and well-organised are heard, while the poor and minorities are weakly represented'.¹³² In terms of the timing for participation, as will be further explained in chapter 5 below,¹³³ since the issue of marine planning is new, complex, and of concern to diverse interested parties, enough time for participation should be guaranteed.

3.2.2.3. Transparency

The term transparency in this thesis focuses on two elements: the decision-making process and a clear link between the participants' input and the outcome of the decision-making process. Transparency in English marine planning is significant for two reasons. First, it is a crucial factor in achieving benefits under the instrumental rationale for participation, such as social learning.¹³⁴ Second, demonstrating that participants have had an influence on decision-making is required under the normative rationale for participation. Transparent decision-making allows participants to have a

¹³¹ Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a Pillar of Empowerment' (2008) 10 *Environmental Law Review* 28, 33–36; Juan R Palerm, 'Public Participation in Environmental Decision Making: Examining the Aarhus Convention' (1999) 1 *Journal of Environmental Assessment Policy and Management* 229, 241.

¹³² Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Donald M Zillman, Alistair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 109.

¹³³ See s 5.2.1 in ch 5, 171-173; and Annex 1 about UK non-statutory consultation guidance.

¹³⁴ Erik Mostert and others, 'Social Learning in European River-Basin Management: Barriers and Fostering Mechanisms from 10 River Basins' (2007) 12 *Ecology and Society* 19, 28.

clear idea of how their data, comments, and concerns have been considered throughout the process.

3.2.2.4. Interaction

Interaction is another fundamental feature of collaborative participation. This means that different interested parties should be gathered and provided with opportunities to communicate, discuss, negotiate, and make determinations on proposed issues. It aims to break a one-way flow of information or a one-to-one communication format between decision makers and individual participants in the decision-making process and to establish a communication network among different participants instead. As shown in chapter 2,¹³⁵ interaction among participants is a basic condition for social learning. It also contributes to information exchange, conflict management, and social network building. Therefore, opportunities for interaction among decision-makers and participants should be ensured to support collaborative participation.

3.3. Conclusion

In chapter 2, the discussion on the rationales for public participation indicates what public participation is able to do in a general sense. In this chapter, it concentrates on the nature of marine planning and the purpose of public participation in English marine planning (*what public participation is expected to do* in the English marine planning context). The identification of the purpose of public participation is based on the challenges of English marine planning. These challenges include: the complexity of conflict management, the lack of institutional trust in the MMO, the insufficient evidence base for marine planning and the inadequate awareness and knowledge concerning marine matters among the general public and relevant stakeholders. Accordingly, all the three rationales for participation have been identified as necessary for English marine planning, for example, public participation is able to enhance the democratic basis for decision-making (the normative rationale), to strengthen the evidence base for marine planning (the substantive rationale), and to improve institutional trust and marine literacy among the general public and stakeholders (the instrumental rationale). Thus, a pluralist rationale for participation is suggested to be

¹³⁵ See s 2.1.3.1 in ch 2, 24-25.

applied in the English marine planning process. In order to achieve the above purpose and meet the integrated nature of marine planning, collaborative participation has been selected as the appropriate level of participation. Accordingly, four procedural criteria for collaborative participation have been determined, including early and broad participation, transparency, easy access to information and participation, and interaction.

However, it is worth mentioning that although the four procedural criteria are selected to serve public participation in the English marine planning context, most of the four criteria are very basic and essential criteria for public participation in a general sense, such as easy access to information and participation, early participation, and transparency. Therefore, as will be illustrated in chapters 4 and 5, these criteria, more or less, have been explicitly required/ implied as procedural rights of public participation at the international law and domestic law levels. The interactive criterion is specifically crucial to collaborative participation, however, it is also an important criterion that can be used to challenge a top-down participation/decision-making process, which is normally considered as “tokenism participation”, and therefore to facilitate a “real participation”. The following chapter will focus on requirements for public participation under the international legal regime related to marine issues and will investigate the extent to which the procedural criteria for collaborative participation have been set in international law.

Chapter 4. Requirements for Public Participation under International Law

Introduction:

Land planning and decision-making are mostly influenced by national needs or local demands.¹ With the exception of transboundary issues, most land planning matters are regulated within national jurisdictions.² The marine environment is, however, more open and interconnected than the terrestrial environment due to the fluid physical nature of sea waters. The preamble of the United Nations Conference on the Law of the Sea (UNCLOS) states that 'the problems of ocean space are closely interrelated and need to be considered as a whole'.³ Thus, marine matters, such as the prevention of marine pollution and the conservation of marine biodiversity or specific species are regulated under not only domestic rules but also international regulations. In line with the UNCLOS, coastal states have sovereignty in their internal waters and their territorial sea. However, according to Article 2(3) under the UNCLOS, sovereignty over the territorial sea is exercised subject to the UNCLOS, such as a right of innocent passage in the territorial sea⁴ and other international laws. Where the baseline as determined based on the straight baseline method regulated under Article 7 of the UNCLOS has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage shall exist in those waters.⁵ Thus, the marine environment is not as exclusive as the terrestrial environment. Looking into relevant requirements under international regulations is the first step for investigating public participation in marine planning from a legal perspective.

The drivers for establishing the marine planning system in the UK come from the general requirements brought by international law, such as the UNCLOS and the Convention on Biological Diversity (CBD),⁶ and European requirements regarding marine conservation

¹ Hance D Smith and others, 'The Integration of Land and Marine Spatial Planning' (2011) 15 *Journal of Coastal Conservation* 291, 296.

² *ibid.*

³ United Nations Convention on the Law of the Sea, 1982, UNTS, vol 1833, 396 (UNCLOS).

⁴ Innocent passage in the territorial sea is regulated under UNCLOS s 3.

⁵ UNCLOS, art 8(2).

⁶ The Convention on Biological Diversity, 1992, UNTS, vol 1760, 79 (CBD Convention).

and marine spatial planning.⁷ The UNCLOS provides no specific requirement for marine planning. However, it does establish a framework for marine conservation and the management of marine spaces and resources and it emphasises the importance of the integration of marine management, which are also the main purposes of marine planning.⁸ The CBD Convention is a key international instrument that supports marine planning.⁹ Both the main body of the CBD Convention and its Conference of the Parties Decisions (COP Decisions) provide requirements for an ecosystem-based approach to managing and conserving marine biodiversity.¹⁰ At the EU level, the Helsinki Commission and the OSPAR Commission have made a joint statement on ecosystem-based marine management and have recognised the importance of spatial planning as a tool for implementing ecosystem-based approaches.¹¹ The European Parliament and Council adopted the Marine Strategy Framework Directive to facilitate ecosystem-based management in EU marine areas and the Marine Spatial Planning Directive to establish a framework for marine spatial planning in EU waters.¹² Other EU regulation tools, such as the Birds Directive¹³ and the Habitats Directive,¹⁴ have important implications for marine planning.¹⁵ Therefore, marine planning initiatives have a robust legal basis at the international and regional levels.

A requirement for participation has been set in international law to serve various purposes in marine management. In the marine planning context, apart from complying

⁷ DEFRA, 'A Description of the Marine Planning System for England' (2011) 14 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183195/110318-marine-planning-descript.pdf>; Wanfei Qiu and Peter JS Jones, 'The Emerging Policy Landscape for Marine Spatial Planning in Europe' (2013) 39 *Marine Policy* 182, 184.

⁸ Frank Maes, 'The International Legal Framework for Marine Spatial Planning' (2008) 32 *Marine Policy* 797, 799.

⁹ *ibid* 807-808.

¹⁰ *ibid*.

¹¹ OSPAR-HELCOM, 'Statement on the Ecosystem Approach to the Management of Human Activities. First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions' (2003) 6.

¹² Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L169/19 (Marine Strategy Framework Directive); Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L257/135 (Marine Spatial Planning Directive).

¹³ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7 (Birds Directive).

¹⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (Habitats Directive).

¹⁵ Qiu and Jones (n 7) 184-185.

with the provisions regarding participation under domestic regulations, meeting the objectives and forms of participation regulated by marine-related international law is a driving force for the enforcement of public participation in marine decision-making.

Chapter 3 above identified the motivations for public participation and the participation strategy for English marine planning. Based on the nature and challenges of English marine planning, chapter 3 suggested that collaborative participation should be applied in the marine plan making process. *Early and broad participation, easy access to information and participation, transparency, and interaction* were identified as key procedural criteria for public participation in English marine planning process. This chapter aims to map out what requirements for public participation have been settled in international law related to marine matters and investigate whether the procedural criteria for collaborative participation are required/implied under these obligations. Although issues of public participation are mostly regulated at the domestic law level, an investigation on requirements for public participation at the international law level is necessary. International law does not generally generate rights and duties for individuals and private parties. International law only binds states, and it has to be transposed into national law. Individuals have rights and duties through that transposition. Thus, if strong and explicit obligations concerning public participation are settled in marine-related international laws, the public of contracting parties will have a robust legal basis to be engaged in marine-related decision-making. This chapter has six sections. Sections 4.1 and 4.2 concentrate on the requirements for public participation in general environmental laws, including the Aarhus Convention¹⁶ and the CBD Convention. Section 4.3 concentrates on the requirements for public participation in specific marine regulations, including the UNCLOS, the Helsinki Conventions,¹⁷ the

¹⁶ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, UNTS, vol 2161, No. 37770, 447.

¹⁷ The Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974, UNTS, vol 1507, no. 25986, 168 (1974 Helsinki Convention); The Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992 (1992 Helsinki Convention). Amendments to the 1974 Helsinki Convention are recorded in UNTS, vol 2117, no. 36495, 479; vol, 1861, no. 25986, 489; vol 1721, no. 25986, 492; vol 1724, no. 25986, 329.

OSPAR Convention,¹⁸ the Barcelona Conventions,¹⁹ the MSFD, and the MSPD. Although the Helsinki Convention and Barcelona Convention do not bind the UK, research on the requirements for public participation in these two EU regional marine conventions is necessary. Investigation of the two conventions will help to map out the general awareness of and attitude towards the issue of public participation in marine management at the EU level. Advanced legislative skills or good practical experience concerning public participation issues can be learned from others. Section 4.4 focuses on the requirements for public participation in soft law instruments. Section 4.5 investigates the status of the norm of public participation in international customary law and general principles. The final section will conclude the chapter.

4.1. The Aarhus Convention

The Aarhus Convention was adopted on 25 June 1998. At the time of writing, the Convention has 47 Parties.²⁰ The UK is one of the member states. The Aarhus Convention is the most advanced and far-reaching international instrument for regulating public participation.²¹ It is considered as the cornerstone of environmental democracy and the bridge between human rights and environmental issues.²² Although it is a regional convention, the Aarhus Convention has an international scope. The Aarhus Convention is not limited to the United Nations Economic Commission for Europe (UNECE) region. It is open to accession by non-ECE countries, subject to the approval of the Meeting of the Parties.²³ The Convention has a general requirement regarding facilitating its implementation within the framework of international

¹⁸ Convention for the protection of the marine environment of the North-East Atlantic, 1998, UNTS, vol 2354, No.42279, 67.

¹⁹ Convention for the protection of the Mediterranean Sea against pollution, 1976, UNTS, vol 1102, NO.16908, 44 (1976 Barcelona Convention); Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1995 Barcelona Convention). Amendments to the Convention for the protection of the Mediterranean sea against pollution, 1995, No. 16908.

²⁰ UNECE, 'Status of Ratification' <<https://www.unece.org/env/pp/ratification.html>> accessed 12 December 2016.

²¹ Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1998) 8 Oxford Handbook of International Environmental Law 51, 53; Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (Cambridge University Press 2007) 97.

²² Elisa Morgera, 'An Update on the Aarhus Convention and Its Continued Global Relevance' (2005) 14 Review of European Community and International Environmental Law 138; Benjamin W Cramer, 'The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention' (2009) 14 Communication Law and Policy 73.

²³ Aarhus Convention, art 19(3).

organisations in environmental related matters.²⁴ Consequently, public participation in international forums has been improved.²⁵ One example is that a workshop on information and public participation was carried out under the framework of the UNECE-WHO/Europe Protocol on Water and Health in 2010 to facilitate the cooperation between public authorities and NGOs in the implementation of the Protocol.²⁶ Therefore, the Aarhus Convention is considered a key piece of legislation regarding public participation at the international level.

The Convention contains three pillars of access rights regarding environmental matters: access to information,²⁷ to environmental decision-making,²⁸ and to justice.²⁹ According to Article 1, the objective of the Convention is that

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

There are some different understandings of the motivations for the Aarhus Convention in academia. Wates states that the Aarhus Convention grants not only procedural rights but also substantive rights to the public on environmental matters: the rights for the present and future generations to live in a healthy environment.³⁰ However, it seems that the argument of “substantive rights” has not been acknowledged by all contracting parties of the Convention.³¹ The UK, for example, made a declaration that

²⁴ Aarhus Convention, art 3(7).

²⁵ Examples of the improvement of public participation in international forums are available at UNECE’s website, see: UNECE, ‘Compendium of Case Studies of Good Practice on Promoting Public Participation in International Forums’ <<https://www.unece.org/env/pp/ppif.compendium.html>> accessed 23 July 2017.

²⁶ More information of this workshop is available at UNECE’s website: <[http://www.unece.org/env/water/meetings/public_participation_protocol_workshop.html#/>](http://www.unece.org/env/water/meetings/public_participation_protocol_workshop.html#/) accessed 22 July 2017.

²⁷ Aarhus Convention, arts 4-5.

²⁸ Aarhus Convention, arts 6-8.

²⁹ Aarhus Convention, art 9.

³⁰ Jeremy Wates, ‘The Aarhus Convention: A Driving Force for Environmental Democracy’ (2005) 2 *Journal for European Environmental & Planning Law* 2, 2.

³¹ Michael Mason, ‘Information Disclosure and Environmental Rights: The Aarhus Convention’ (2010) 10 *Global Environmental Politics* 10, 25.

The United Kingdom understands the references in article 1 and the seventh preamble paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.³²

Mason points out that a clear connection between the “substantive rights” and “procedural rights” under the Convention is missing.³³ Lee and Abbot indicate that the aim of the Convention is to improve levels of environmental protection since the Convention pays much attention to the participation of environmental interest groups, who have direct influences on environmental protection matters in environmental decision-making.³⁴ However, this argument could possibly be challenged to some extent. For example, Articles 6 and 7 regulate public participation in licensing systems for proposed projects, plans, programmes, and policies. However, these articles do not impose obligations on contracting parties to establish environmental assessment systems in their licensing and decision-making systems but only require contracting parties to ensure public participation in the case that environmental assessments have been set in their licensing and decision-making systems at the national level.³⁵ Thus, this thesis argues that the main aim of the Aarhus Convention is to guarantee procedural rights for the public in environmental matters.

The research on the Aarhus Convention in this section focuses on the obligations relating to public participation, namely Articles 6, 7, and 8 of the Convention. Since publicising relevant information is an essential component of the public participation process,

³² Related information on Declarations and Reservations of contracting parties is available at United Nations Treaty Collection homepage, ‘UK’s Declarations and Reservations’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec> accessed 23 October 2016.

³³ Mason (n 31) 25.

³⁴ Maria Lee and Carolyn Abbot, ‘The Usual Suspects? Public Participation Under the Aarhus Convention’ (2003) 66 *Modern Law Review* 80, 86.

³⁵ Jonas Ebbesson and others, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations Publication 2014) 174.

obligations regarding access to information, namely, Articles 4 and 5, will also be covered here. However, this is not to say that the third pillar of the Convention - access to justice - is less important. It is not included because this thesis is about the participation process itself, rather than the remedy of the right to participate. This section will also investigate the implementation of the requirements for public participation under the Convention by analysing thirty-seven National Implementation Reports published in 2014 (NIPs of 2014).³⁶ According to Article 10(2) of the Convention, contracting parties are required to report their implementation of the Convention regularly. Measures that contracting parties have taken to apply Article 3 to Article 9 of the Convention are required in NIPs of 2014.³⁷ Contracting parties are also encouraged to report the obstacles that they have met when attempting implementation.³⁸ Therefore, the review of NIPs not only provides a comprehensive view of the extent to which the Convention has been implemented at the domestic level, but also reveals barriers to implementation. Most existing studies regarding the implementation of the Convention have concentrated on EU law, EC institutions, and individual member states.³⁹ A comprehensive review of the most recent implementation of the Convention among the majority of the member states is lacking. Therefore, this analysis of the NIPs of 2014 will fill a gap in knowledge.

³⁶ At the time of writing, the latest reports are the National Implementation Reports from 2014. The next submission of the reports will take place in 2017. Although the Convention has 47 contracting parties, only 37 of the reports are in English. More information about the Aarhus reporting mechanism and national reports is available at UNECE's website: <<http://www.unece.org/env/pp/reports.html>> accessed 23 May 2017.

³⁷ Economic Commission for Europe, 'Decision IV/4 on Reporting Requirements' (2011) <http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/Excerpts/Decision_IV-4_Reporting_requirements_e.pdf> accessed 24 July 2017.

³⁸ *ibid.*

³⁹ See Nicola Hartley and Christopher Wood, 'Public Participation in Environmental Impact Assessment — implementing the Aarhus Convention' (2005) 25 *Environmental Impact Assessment Review* 319; Tatiana R Zaharchenko and Gretta Goldenman, 'Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia' (2004) 4 *International Environmental Agreements* 229; Teall Crossen and Veronique Niessen, 'NGO Standing in the European Court of Justice - Does the Aarhus Regulation Open the Door?' (2008) 16 *Review of European Community & International Environmental Law* 332; Bende Toth, 'Public Participation and Democracy in Practice - Aarhus Convention Principles as Democratic Institution Building in the Developing World' (2010) 30 *Journal of Land, Resources and Environmental Law* 295; Vera Rodenhoff, 'The Aarhus Convention and Its Implications for the "Institutions" of the European Community' (2002) 11 *Review of European Community and International Environmental Law* 343.

4.1.1. Regulations and Implementation of Public Participation under the Aarhus Convention

This section will begin with a general review of the obligations of the second pillar of the Aarhus Convention. It will then turn to an examination of the specific procedural criteria for participation under these regulations. The requirements for public participation in decision-making process are covered by Articles 6, 7 and 8. Article 6 regulates public notification and participation in the application/permission process of specific projects and activities related to the environment. Activities listed in annex I to the Convention, or that may have significant environmental effects, also fall within Article 6.⁴⁰ Not only Environmental Impact Assessment (EIA) procedures, but also other decision-making procedures such as permits issued under the Industrial Emissions Directive are covered by Article 6.⁴¹ Compared with Articles 7 and 8, Article 6 gives the most detailed provision regarding public participation under the Convention. Article 6(2) requires that *the public concerned* should be informed “early” in the decision-making procedure in an “adequate, timely and effective manner”. Article 6(3) requires that “reasonable time-frames” should be set for public participation and “sufficient time” should be given for public notification in accordance with Article 6(2). Article 6(4) requires that contracting parties provide “early public participation when all opinions are open and effective public participation can take place”. Article 6(5) instructs contracting parties to encourage applicants to provide information to and conduct discussions with *the public concerned* before the application, where appropriate. Article 6(6) requires that *the public concerned* should have access to all information relevant to decision-making. Article 6(7) requires that *the public* should be allowed to submit comments regarding decision-making. Article 6(8) requires that the outcomes of participation should be taken into account. Article 6(9) is about notifying the public about the final decision.

There are two main issues regarding the content given in italics under Article 6. The first issue is the ambiguous terms applied in Article 6, such as “reasonable time-frames”, “sufficient time” and “early public participation”. These can bring inconsistent

⁴⁰ Aarhus Convention, arts 6(1)(a) and 6(1)(b).

⁴¹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17; Ebbesson and others (n 35) 128.

applications at the domestic level which undermine the effectiveness of Article 6. Second, Article 6 classifies “the public” and “the public concerned” differently and grants more and more detailed participatory rights to “the public concerned”. Given the fact that more detailed requirements are set for “the public concerned”, Lee and Abbot argue that Environmental NGOs (ENGOS) are the beneficiaries of the Aarhus Convention, since ENGOS are deemed as “the public concerned” under the Convention.⁴² Jendrośka, however, states that the motivation of public participation under the Aarhus Convention is the protection of private interests, such as property rights.⁴³ No matter how the term “the public concerned” is understood by researchers, one thing is quite certain – that the participation regulated under Article 6 tends to serve particular groups rather than the broad public. The limited scope of participation would possibly hinder the fulfilment of the procedural criteria identified in chapter 3, such as broad participation and easy access to participation. There is also a potential risk to the transparency criterion, if the standard or process for identifying “the public concerned” is not clear.

Article 7 focuses on public participation in environmental assessments for plans, programmes and policies.⁴⁴ It provides a much broader scope of participation than the Strategic Environmental Assessment (SEA) Directive and SEA Protocol since these SEA instruments focus only on plans and programmes.⁴⁵ Article 7 also covers plans and programmes “relating to the environment” rather than “likely to have significant environmental effects”.⁴⁶ Therefore, the public may not have access to all plans and programmes related to the environment due to the limited scope of SEA instruments

⁴² Lee and Abbot (n 34) 108.

⁴³ Jerzy Jendrośka, ‘Public Participation in the Preparation of Plans and Programs: Some Reflections on the Scope of Obligations under Article 7 of the Aarhus Convention’ (2009) 6 *Journal for European Environmental & Planning Law* 495, 501.

⁴⁴ Art 7 states: ‘Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.’

⁴⁵ Ebbesson and others (n 35) 175; Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, 2003, UNTS, vol 2685, 140; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30 (SEA Directive).

⁴⁶ SEA Directive, art 3(5).

applied at the national level. In terms of public participation in preparing environmental policy-making, Article 7 requires that “to the extent appropriate” each party shall “endeavour” to provide opportunities for public participation. Thus, public participation in environmental policy-making is not mandatory. Therefore, Article 7 is criticised for regulating differential requirements for participation between environmental plans/programmes and environmental policy-making.⁴⁷ Consequently, the EU Commission considered that it was not necessary to require any EU legislation on this issue.⁴⁸ Article 7 provides less explicit requirements for participation when compared with Article 6. Article 7 cross-references paragraphs 2,⁴⁹ 3, 4, and 8 of Article 6 and suggests that these obligations should be applied within the context of Article 7. Jendroška questions the compatibility of these paragraphs under Article 6 with Article 7 since Article 6 places more emphasis on the participation of “the public concerned”, while Article 7 focuses on the participation of “the public”.⁵⁰ Therefore, whether the weak and vague requirements set in Article 7 can support the practice of public participation in environmental planning, programmes, and policy making is doubtful.

Article 8 addresses public participation in the preparation of legal obligations related to the environment.⁵¹ A review of NIPs of 2014 regarding the implementation of Article 8 finds that the performance of Article 8 is relatively weak when compared with the implementation of Articles 6 and 7. Some countries reported that the participation mechanisms recommended under Article 8 had not been fully established at the national level.⁵² The Czech Republic’s NIP of 2014 states that ‘In principle, generally

⁴⁷ Jendroška (n 43) 501.

⁴⁸ Proposal for a Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC, 2001, OJ C 154 E/123.

⁴⁹ Art 7 does not cite art 6(2) directly. However, art 6(2) is referenced by art 6(3); therefore, art 6(2) also applies to art 7. This argument is supported by the implementation guide for the Aarhus Convention, see Ebbesson and others (n 35) 178.

⁵⁰ Jendroška (n 43) 513–514.

⁵¹ Art 8: ‘Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken: (a) Time-frames sufficient for effective participation should be fixed; (b) Draft rules should be published or otherwise made publicly available; and (c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible.’

⁵² Czech Republic, ‘National Implementation Report’ (2014) para 25; Kazakhstan, ‘National Implementation Report’ (2014) para 25.

binding legal regulations issued by the executive are not systematically discussed with the public ... [therefore] article 8 has not been implemented into the Czech system of law so far'.⁵³ The participation in the preparation of national regulations related to the environment in some contracting parties mainly targets specific groups, such as the public concerned or the stakeholder groups concerned.⁵⁴ Norway reported that

This provision [section 37 of the Norwegian Public Administration Act, which requires public consultation in the preparation of regulations] requires that public and private institutions and organisations that the regulations concern or whose interests are particularly affected shall be given an opportunity to express their opinions.⁵⁵

Although Article 8(c) suggests that the public can participate directly or through a representative, whether the public's views and opinions can be fully represented by these institutions and organisations is open to question.

4.1.1.1. Early and Broad Participation⁵⁶

Requirements for early information and participation are regulated under Article 6 of the Aarhus Convention. Specifically, the public concerned shall be informed early in the decision-making procedure.⁵⁷ Information provision and communication between the public concerned and the project applicants are encouraged before application.⁵⁸ Furthermore, early participation opportunities should be offered when all decisions are open.⁵⁹

However, the analysis of NIPs of 2014 on the implementation of Article 6 found that the goal of early participation is difficult to achieve in practice. This is for two reasons: first, there is a lack of a clear definition of "early" in the decision-making process and no legal

⁵³ Czech Republic (n 52) para 24-25

⁵⁴ Germany, 'National Implementation Report' (2014) para 24; Norway, 'National Implementation Report' (2014) para 24.

⁵⁵ Norway (n 54) para 24

⁵⁶ This section only addresses early participation. For the issue of broad participation see the discussion about 'the public' and 'the public concerned' in s 4.1.1.2 below.

⁵⁷ Aarhus Convention, art 6(2).

⁵⁸ Aarhus Convention, art 6(5).

⁵⁹ Aarhus Convention, art 6(4).

requirement for early participation in the national laws of some contracting parties.⁶⁰

Kazakhstan reported that

Problems may occur with regard to fulfilling the provisions of Art. 6 on the timely and adequate participation of all interested groups of society at the earliest stage of decision making, as this requirement does not feature in the Environmental Code, relevant articles of the Land Code, nor the Roles on the conduct of State Environmental Review.⁶¹

Thus, some contracting parties reported that public participation commonly happens at a late stage in the decision-making process when the public is unlikely to be able to make any substantive change to proposed plans and programmes.⁶² Second, the opportunity for early participation required under Article 6(5), which is information provision and communications between the public concerned and applicants before permit application, has not been applied in some contracting parties since it is not required under domestic laws.⁶³ Poland replied in its NIP that ‘The provisions of law do not impose on public authorities nor the investors the obligation to identify the range of interested society and providing it with information before making the request’.⁶⁴ In addition to the data collected from the NIPs of 2014, the challenge of achieving the goal of early participation in decision-making is also documented in many EIAs’ studies.⁶⁵ Furthermore, this issue is pointed out in a European Commission (EC) report on the application and effectiveness of the EIA Directive. The report notes that

There is no common reference point for the beginning of the consultation (in EIA processes). In several member states the public is already consulted at an early

⁶⁰ Croatia, ‘National Implementation Report’ (2014) para 16; Kazakhstan (n 52) para 16; Slovenia, ‘National Implementation Report’ (2014) para 16.

⁶¹ Kazakhstan (n 52) para 16.

⁶² Kazakhstan (n 52) para 16; Croatia (n 60) para 16.

⁶³ Croatia (n 60) para 16; Czech Republic (n 52) para 15; Poland, ‘National Implementation Report’ (2014) para 15; Spain, ‘National Implementation Report’ (2014) para 15.

⁶⁴ Poland (n 63) para 15

⁶⁵ Carla Lostarnau and others, ‘Stakeholder Participation within the Public Environmental System in Chile: Major Gaps between Theory and Practice’ (2011) 92 *Journal of Environmental Management* 2470; Anne Shepherd and Christi Bowler, ‘Beyond the Requirements: Improving Public Participation in EIA’ (1997) 40 *Journal of Environmental Planning and Management* 725; Constanca Vasconcelos, Andy Hamilton and Peter Barrett, ‘Public Participation in EIA: A Study from A Portuguese Perspective’ (2000) 2 *Journal of Environmental Assessment Policy and Management* 561.

stage (at the screening stage or at the scoping stage). However, in most cases, the public is consulted for the first time on the information gathered pursuant to Article 5, which corresponds to the minimum requirement laid down by the Directive.⁶⁶

Therefore, early participation in environmental decision-making is still far from being achieved. As discussed in chapter 3 above, the purpose of carrying out early participation is mapping out potential conflicts and improving the quality of the evidence base for decision-making by collecting data and information from the public.⁶⁷ A learning process can also be triggered in an earlier period of decision-making which prepares both the decision-makers and participants for the subsequent decision-making process. Therefore, one possible solution for this issue is identifying what an “early stage” is in the relevant domestic instruments. An early stage can be the scoping or screening stage in an EIA process or a parallel stage when public authorities/applicants begin to collect information or identify issues to be considered in proposed projects, plans, or environmental regulations.

4.1.1.2. Easy Access to Information and Participation

Requirements regarding easy access to information during decision-making are set in Article 6(2) and Article 6(6). Article 6(2) focuses on the approaches for releasing information at an early stage of decision-making, which requires that the public concerned should be informed in an adequate, timely and effective manner. Article 6(6) requires that the public concerned has access to all of the information relevant to decision-making. Ensuring a broad scope of information disclosure and effective methods for information dissemination to the public concerned are needed to fulfil the requirements of easy access to information under the Convention, but this is not the whole story. Holder and Lee remind us that the lack of requirements on the quality of

⁶⁶ Communication of the European Communities, ‘On the Application and Effectiveness of the EIA Directive (Directive 85/337/EEC, as Amended by Directives 97/11/EC and 2003/35/EC)’ (2009) 6 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0378&from=EN>> accessed 17 October 2016. According to art 5 of EIA Directive 97/11/EC, developers are required to submit relevant information on the proposed applications. Art6(2) of EIA Directive 97/11/EC requires member parties to ensure request for development consent and information gathered pursuant to art 5 are made available to the public to allow the public concerned the opportunity to express an opinion before the development consent is granted.

⁶⁷ See s 3.2.2.1 in ch 3, 73.

information could be a barrier to easy access to information under the Aarhus Convention.⁶⁸ Their warning was confirmed via the review of the NIPs of 2014. Several national reports reported that published environmental information, which is regulated under Articles 4 and 5 of the Convention, is often not suitable for most of the public due to the technical nature of the information provided.⁶⁹ The Netherlands reported that

[T]he environmental information required to be published on the PRTR (Pollutant Release and Transfer Register)-website (annual emissions of specific substances) is often not suitable for most citizens. Given the rather technical nature of the information, it is mainly used by professional users and Environmental NGOs.⁷⁰

It is also reported in Latvia's NIP that 'the public and NGOs considered it difficult to receive understandable information on the proposed or implemented activities having effect on the environment'.⁷¹ The technical nature of information has been identified as a barrier to implement effective public participation under Article 6 of the Convention.⁷² Poland reported that the low quality of, sometimes even incorrect information hindered effective public participation in practice.⁷³ Similarly, Latvia raised the issue of quality of consultation documents in its NIP, and stated that 'public participation in the EIA procedure is frequently hampered by low-quality EIA reports, for example, by insufficiently describing the expected impacts and by providing only superficial information during the public discussion meeting'.⁷⁴ Therefore, the lack of requirements for the quality of information has become a barrier to easy access to information under the Convention.

As mentioned above, the inadequate classifications of "the public" and "the public concerned" under the Convention can hinder easy access to participation. This is

⁶⁸ Holder and Lee (n 21) 105.

⁶⁹ Netherlands, 'National Implementation Report' (2014) para 12; Latvia, 'National Implementation Report' (2014) para 8; Lithuania, 'National Implementation Report' (2014) para 8; Bosnia and Herzegovina, 'National Implementation Report' (2014) para 12.

⁷⁰ Netherlands (n 69) para 12.

⁷¹ Latvia (n 69) Para 8.

⁷² Estonia, 'National Implementation Report' (2014) para 16; France, 'National Implementation Report' (2014) para 16.

⁷³ Poland (n 63) para 16.

⁷⁴ Latvia (n 69) para 16.

because the identification of “the public concerned” is based on the subjective views of relevant authorities or developers. Therefore, there is a risk that certain groups of individuals will be excluded from participation due to the discretion granted to the contracting parties regarding the scope of “the public concerned”.⁷⁵ In judicial practice, the geographical location is generally the main consideration for the identification of the public concerned.⁷⁶ However, as shown in Communication ACCC/C/2004/02,⁷⁷ a geographical criterion does not prevent some individuals and groups, who should be covered in the scope of “the public concerned”, from being excluded from the decision-making process. Therefore, the classification of “the public” and “the public concerned” not only potentially limits broad participation in the decision-making process, but also possibly hinders the participation of those who have real and substantive interests in the proposed decision-making by an error of judgment.

The analysis of NIPs of 2014 also found that easy access to participation in making environmental related plans and programmes under Article 7 of the Convention is limited in some contracting parties. This is because of the thresholds that contracting parties set for conducting environmental assessments on certain plans or programmes at the domestic level.⁷⁸ As a result, the requirements for public participation have not been embedded in environment-related plans and programmes. Some contracting parties have no regulations at all regarding public participation in environment-related plans and programmes at the domestic level.⁷⁹ Therefore, easy access to participation

⁷⁵ Peter Davies, ‘Public Participation, the Aarhus Convention, and the European Community’ in Donald M Zillman, Alastair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 171–172.

⁷⁶ Leslie-Anne Duvic-Paoli, ‘The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence’ (2012) 23 *Yearbook of International Environmental Law* 80, 87.

⁷⁷ In Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan)), the Compliance Committee of the Aarhus Convention found that Kazakhstan failed in compliance with Article 6 since residents who lived along the proposed route of a power line had been excluded from the group of “the public concerned”. Residents had not been informed of the process and had not been invited to participate in the decision-making. Compliance Committee of Aarhus Convention, ‘Findings and Recommendations with Regard to Compliance by Kazakhstan with the Obligations under the Aarhus Convention in the Case Construction of High-Voltage Power Line (Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan))’ (2005) paras 24–25
<<http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf>> accessed 17 March 2017.

⁷⁸ Croatia (n 60) para 21; Poland (n 63) para 21.

⁷⁹ Bosnia and Herzegovina (n 69) para 19; Georgia, ‘National Implementation Report’ (2014) para 21.

for the preparation of plans and programmes relating to the environment has not been fully realised at the domestic level. In addition to these obstacles, inadequate participatory opportunities and limited timeframes for participation are common problems reported by contracting parties.⁸⁰

4.1.1.3. Opportunities for Interactions among Participants and Decision-makers

Most of the measures of participation regulated under Article 6 are for one-way flows of information such as the notification of the public concerned under Article 6(2) and the submission of public comments under Article 6(7). The only requirement for interaction is set in Article 6(5) of the Convention, which requires that contracting parties ‘should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit’. Since this provision applies weak phrases such as “where appropriate” and “encourage”, Ebbesson and others comment that this Article has an “advisory nature”.⁸¹ Because of this advisory nature, some contracting parties reported that they had not set this article in their domestic laws; and therefore they have no legal requirements for pre-consultation.⁸² As discussed in chapter 2 above, interaction is essential for achieving the societal benefits that result from participation.⁸³ Although Articles 6 and 8 repeatedly stress that “effective public participation” should be achieved, the Convention only provides very basic approaches for participation, such as notification and consultation, rather than requiring collaborative approaches to participation.

The lack of effective participation approaches under the Aarhus Convention has been criticised by Palerm.⁸⁴ Palerm comments that

⁸⁰ Bosnia and Herzegovina (n 69) para 16; Croatia (n 60) para 16; Estonia (n 72) para 16; Hungary ‘National Implementation Report’ (2014) para 16; Spain ‘National Implementation Report’ (2014) para 21.

⁸¹ Ebbesson and others (n 35) 147.

⁸² Czech Republic (n 52) para 15; Poland (n 63) para 15; Spain (n 80) para 15.

⁸³ See s 3.2.2.4 in ch 3, 75.

⁸⁴ Juan R Palerm, ‘Public Participation in Environmental Decision Making: Examining the Aarhus Convention’ (1999) 1 *Journal of Environmental Assessment Policy and Management* 229, 240.

[the Convention] falls short of reflecting the empirical/ theoretical principles for public participation in environmental decision making' since it only applies less effective participation methods, such as a one-way flow of information, and pays no attention to key issues regarding participation, such as promoting of social learning and encouraging consensus.⁸⁵

Jendroška made a similar comment on this issue, pointing out that 'Most of the multiple 'ladders' of participation that have been presented in academic literature...focus on the effectiveness of various approaches and techniques. The Convention seems to be far from recognising such subtleties'.⁸⁶ Therefore, although the Convention intends to address public participation issues, the system of public participation established under the Aarhus Convention falls behind the theoretical and empirical studies of public participation. Without requiring and applying effective methods of participation, it is difficult to see how the Convention can ensure real public participation in environmental decision-making.

It is undeniable that the Convention has a good intention to encourage "real participation" by regulating a broad range of participation at all levels of environmental decision-making and attempting to overcome the traditional obstacles of the participation processes.⁸⁷ However, instead of establishing a higher level of participatory approach, the Aarhus Convention regulates only public notification and consultation as the mandatory approaches for participation. Although the Convention claims to provide only a "floor" rather than a "ceiling" for the requirements for public participation, the "floor" level set in the Aarhus Convention is too low. As a consequence, the true value and potential benefits of public participation are neglected and undermined. As Nadal points out, 'the Convention's public participation provisions can end up serving to legitimate the acceptance of the project rather than to promote respect for the intrinsic value of participation'.⁸⁸ Duvic-Paoli finds that the protection of the right to participation has become the protection of the right to meaningful

⁸⁵ *ibid* 238-240.

⁸⁶ Jendroška (n 43) 497–498.

⁸⁷ Jendroška (n 43) 498.

⁸⁸ Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a Pillar of Empowerment' (2008) 10 *Environmental Law Review* 28, 38.

consultation in judicial practice.⁸⁹ There is a risk that, since consultation participation is the only type of participation on offer, it will be commonly acknowledged and performed as the standard form of participation. The low level of participation level set in the Aarhus Convention would not only mislead contracting parties' understanding and practice of the "real participation" that they are expected to apply at the national level, but will also undermine the real values of participation.

4.1.1.4. Transparency in Decision-making

The importance of keeping transparency in decision-making is mentioned in both the preamble and in Article 7 of the Convention. However, the Convention provides few instructions on how to ensure transparency in the specific procedures of public participation. The transparent decision-making process required in the Convention means a process that provides access to information and participation to the public or the public concerned. Therefore, the Convention regulates transparency in decision-making in a very general and strategic manner, rather than providing specific procedural requirements, such as how to keep transparency on the determination of "the public concerned", to ensure transparent decision-making processes. As a result, Bosnia and Herzegovina comments in its NIP that 'Representatives of the NGOs have made considerable objections to the lack of transparency in electing NGOs into advisory councils.'⁹⁰

In addition, an opaque process of considering the comments of the public in decision-making is reported by contracting parties as an obstacle to effective public participation. The Convention requires that 'Each party shall ensure that in the decision due account is taken of the outcome of the public participation.'⁹¹ However, the Convention fails to establish a transparent decision-making procedure to enable the public understand how their comments have been considered. According to the NIPs of 2014, the lack of reporting and of supervision mechanisms for the quality of participation, including detailing how the public's comments or objections have been used in final decisions, are

⁸⁹ Leslie-Anne Duvic-Paoli, 'The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence' (2012) 23 Yearbook of International Environmental Law 80, 88-90.

⁹⁰ Bosnia and Herzegovina (n 69) para 21.

⁹¹ Aarhus Convention, art 6(8).

barriers to effective participation.⁹² Estonia reported in its NIP that ‘those who have made proposals in the course of public participation are not always answered regarding whether and how their proposals have been taken into account’.⁹³ It is also reported by some contracting parties that the outcomes of public participation are rarely considered.⁹⁴ Therefore, as the implementation guide of the Convention has suggested, a feedback mechanism for the comments of the public should be established.⁹⁵

4.1.1.5. Other Challenges for the Enforcement of Public Participation under the Convention

An analysis of the NIPs of 2014 also reveals other obstacles to the implementation of effective participation. Although the Convention has emphasised the importance of promoting environmental education and awareness among the public,⁹⁶ the low level of public awareness about the environment and inadequate support or effort on environmental education has been raised by contracting parties.⁹⁷ Specifically, the public is unclear about how and where to get environmental information or not fully aware of the domestic regulations on environmental information disclosure.⁹⁸ The low level of familiarity, awareness, and interest in participation among the public or NGOs in the decision-making related to projects, plans, and programmes is reported as a common obstacle for implementing effective public participation.⁹⁹ Moreover, the public is unfamiliar with participation mechanisms and judicial remedies.¹⁰⁰ The problem of insufficient public awareness and public education on environmental issues has lasted for many years and has not been properly settled to date. France’s report for 2008 reported on the problem of deficient environmental education among the

⁹² Bosnia and Herzegovina (n 69) para 16; Croatia (n 60) para 16; Estonia (n 72) para 16; France (n 72) para 16; Albania, ‘National Implementation Report’ (2014) para 16.

⁹³ Estonia (n 72) para 16.

⁹⁴ Slovenia (n 60) para 16; Albania (n 92) para 16.

⁹⁵ Ebbesson and others (n 35) 155.

⁹⁶ Aarhus Convention, art 3(3).

⁹⁷ Georgia, (n 79) para 5; Montenegro, ‘National Implementation Report’ (2014) para 5; Serbia, ‘National Implementation Report’ (2014) para 5; Slovenia (n 60) para 5.

⁹⁸ EU, ‘Implementation Report’ (2014) para 5; Italy ‘National Implementation Report’ (2014) para 8.

⁹⁹ Latvia (n 69) para 16; Georgia, (n 79) para 16; Croatia (n 60) para 16; Malta, ‘National Implementation Report’ (2014) para 16; Spain (n 80) para 16; Belgium, ‘National Implementation Report’ (2014) para 21; Greece, ‘National Implementation Report’ (2014) para 21; Portugal ‘National Implementation Report’ (2014) para 21; Romania, ‘National Implementation Report’ (2014) para 21

¹⁰⁰ France (n 72) para 5; Lithuania (n 69) para 5; Belgium (n 99) para 29; Czech Republic (n 52) para 29; Kazakhstan (n 52) para 29.

public.¹⁰¹ France's 2011 report showed that owing to inadequate environmental training and education, the level of public environmental awareness remained low.¹⁰² According to France's 2014 report, efforts for raising public awareness remained inadequate.¹⁰³ Georgia, Montenegro, Serbia, and the Netherlands also reported insufficient public awareness and public education on environmental matters.¹⁰⁴ The low level of public awareness is largely due to insufficient financial support for environmental education and activities on national or local levels.¹⁰⁵ Environmental NGOs tasked with raising public environmental awareness failed to perform their duties due to the continuing inadequacy or current decline in funding from governments.¹⁰⁶ The deficiency in human resources to provide information and assist the public respecting environmental issues is another obstacle to better public environmental awareness.¹⁰⁷ Promoting public education and awareness on environmental issues is quite crucial because the purpose of the Aarhus Convention cannot be achieved if the public fail to realise the necessity of environmental protection or their rights regarding environmental matters. According to the national reports, carrying out adequate environmental education activities and events to raise public awareness was hindered for financial reasons. Apart from inputting extra resources or organising specific environmental events effectively involving the civil society and relevant stakeholders in decision-making could also contribute to promoting environmental awareness and facilitating environmental education in society.

4.1.2. Conclusion

¹⁰¹ France, 'National Implementation Report' (2008) para 19.

¹⁰² France, 'National Implementation Report' (2011) para 22.

¹⁰³ France (n 72) para 27.

¹⁰⁴ Albania, 'National Implementation Report' (2005) para 4; Albania, 'National Implementation Report' (2008) para 14; Georgia (n 79) para 4; Georgia, 'National Implementation Report' (2005) para 4; Montenegro, 'National Implementation Report' (2011) para 4; Montenegro (n 76) para 4; Serbia, 'National Implementation Report' (2011) para 4; Serbia, 'National Implementation Report' (2014) para 4; Netherlands, 'National Implementation Report' (2008) para 13; Netherlands, 'National Implementation Report' (2011) para 4; Netherlands (n 69) para 4.

¹⁰⁵ Albania (n 72) para 5; Greece (n 99) para 5; Romania (n 99) para 5; Slovenia (n 60) para 5; Poland (n 63) para 5; Tajikistan, 'National Implementation Report' (2014) para 5.

¹⁰⁶ Croatia (n 60) para 5; Italy (n 98) para 5; Slovenia (n 60) para 5.

¹⁰⁷ Spain (n 80) para 5; Italy (n 98) para 5; France (n 72) para 5; Greece (n 99) para 5; Romania (n 99) para 5; Slovenia (n 60) para 5.

Based on the above investigation of the procedural criteria for collaborative participation, several barriers have been identified: first, inadequate requirements for early participation and transparency are set in the Aarhus Convention. Without detailed obligations on these issues, in practice, public participation usually occurs too late in the decision-making process. Due to the lack of supervision or a feedback system, it is not clear whether and how the public's comments have been considered by decision-makers or used in final decisions. Second, the lack of requirements on the quality of published information prevents easy access to information. Third, the implementation of broad participation and easy access to participation is hindered by the loose classification of "the public" and "the public concern" under the Convention. Participation opportunities in preparing plans and programmes are also limited due to the threshold set for carrying out environmental assessments in plans and programmes at the domestic level. Finally, since it only provides the "floor" requirements for public participation, interactive participatory approaches and the collaborative level of participation are not required under the Convention. Although it is considered the most advanced legal instruments regarding public participation, the Aarhus Convention provides only limited procedural guarantees for collaborative participation.

4.2. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD Convention) is the first international legal instrument to conduct a comprehensive approach to protecting biological resources.¹⁰⁸ The CBD Convention has three aims: the conservation of biodiversity, the sustainable use of biodiversity, and fair and equitable sharing of the benefits arising from the utilisation of genetic resources.¹⁰⁹ The marine environment is also covered under the CBD Convention.¹¹⁰ This section investigates the participatory system regulated under the CBD framework, including the Convention itself, its protocols, and Conference of the Parties (COP Decisions) of the Convention.¹¹¹ It aims to map the participation system of

¹⁰⁸ Lyle Glowka and others, *A Guide to the Convention on Biological Diversity* (International Union for Conservation of Nature and Natural Resources 1995) 1.

¹⁰⁹ CBD Convention, art 1.

¹¹⁰ CBD Convention, art 2.

¹¹¹ The COP is the governing body of the CBD Convention. COP has meetings once every two years and makes Decisions to facilitate the implementation of the Convention. The latest thirteenth meeting of COP was held in December 2016. More information about COP Decisions can be found on CBD's official website <<https://www.cbd.int/decisions/cop/>> accessed 12 May 2017.

the CBD framework and to investigate the extent to which the four procedural criteria have been set out in it.

4.2.1. Regulations for Public Participation under the CBD Convention

The requirements regarding participation are set out in Articles 8, 10, 13, and 14 of the Convention. This section will provide a general analysis of these obligations first and then move to the examination of the four procedural criteria for collaborative participation under these provisions.

The significance of local participation in successful biodiversity conservation and sustainable management has gradually been realised.¹¹² One of the main reasons for involving local populations in biodiversity governance is that local communities, such as fishermen, possess first-hand information about their area and they have experience of using biological resources which can renew, supplement, or confirm the evidence base for decision-makers.¹¹³ The CBD Convention recognises the role that local communities can play in biodiversity conservation.¹¹⁴ It acknowledges the rights of indigenous and local communities regarding conservation and the sustainable use of biological diversity in Article 8(j).¹¹⁵ The participation of indigenous and local communities in biodiversity conservation is mentioned not only in the main Convention but also in COP Decisions and the Protocols under the Convention. However, the definition of the term “indigenous and local communities” is not clarified. “Indigenous peoples” is an internationally accepted term and has been defined broadly at the international level.¹¹⁶

¹¹² A Charlotte De Fontaubert, David R Downes and Tundi S Agardy, ‘Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats’ (1998) 10 *Georgetown International Environmental Law Review* 753.

¹¹³ See Christopher M Raymond and others, ‘Integrating Local and Scientific Knowledge for Environmental Management’ (2010) 91 *Journal of Environmental Management* 1766; Patrick Christie and Alan T White, ‘Trends in Development of Coastal Area Management in Tropical Countries: From Central to Community Orientation’ (1997) 25 *Coastal Management* 155.

¹¹⁴ The CBD Convention, preamble, para12.

¹¹⁵ Article 8(j): ‘Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.’

¹¹⁶ Francesco Mauro and Preston D Hardison, ‘Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives’ (2000) 10 *Ecological Applications* 1263, 1264–1265.

However, “local community” is a very ambiguous term.¹¹⁷ The Working Group on Article 8(j) held a meeting to identify the definition of “local communities”. Experts in that meeting raised a list with a range of characteristics to identify local communities.¹¹⁸ People who identify themselves as local communities and whose lifestyle, traditions, knowledge, culture, values, and practices closely depend on biological resources are considered as the local community.¹¹⁹ In the marine planning context, a local population whose livelihood depends on marine biological resources, such as fishery, aquaculture, and recreation, and the general coastal population, who have strong spiritual and cultural values of marine biodiversity and marine/coastal areas, should be regarded as “local communities”. They, therefore, should be granted rights of participation under the Convention. However, how the term “local community” is used in national legislation and policies needs to be investigated further.

Article 10(e) requires contracting parties to encourage cooperation between governmental authorities and private sectors on sustainable uses of biodiversity. Private sectors are critical in responding to public decisions relevant to conserving biodiversity.¹²⁰ However, the Convention does not define “private sectors”, and leaves the term to be interpreted at the national level. The World Business Council for Sustainable Development and the World Conservation Union published a joint guide to call upon and assist private sectors, particularly business sectors such as pharmaceuticals, biotechnology, agriculture, petroleum, mining, fisheries, retail, tourism, banking, energy, manufacturing, and forestry, to be involved in the implementation of the CBD Convention.¹²¹ Business sectors could contribute to conservation and sustainable uses of biodiversity by providing biodiversity-friendly services or products rather than conducting non-sustainable approaches to achieve

¹¹⁷ Working Group on Article 8(j), ‘Compilation of Views Received on Use of the Term Indigenous Peoples and Local Communities, UNEP/CBD/WG8J/8/INF/10/Add.1’ (2013) <<https://www.cbd.int/doc/meetings/tk/wg8j-08/information/wg8j-08-inf-10-add1-en.pdf>> accessed 30 October 2016.

¹¹⁸ Working Group on Article 8(j), ‘Report of the Expert Group Meeting of Local Community Representatives within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, UNEP/CBD/WG8J/7/8/Add.1*’ (2011) <<https://www.cbd.int/doc/meetings/tk/wg8j-07/official/wg8j-07-08-add1-en.pdf>> accessed 30 October 2016.

¹¹⁹ *ibid.*

¹²⁰ David Stone, Kristina Ringwood and Frank Vorhies, ‘A Guide for the Private Sector’ (1997) <<https://portals.iucn.org/library/sites/library/files/documents/1997-008.pdf>> accessed 26 July 2017.

¹²¹ *ibid.* 30.

short-term economic benefits.¹²² As consumers of such services and products, individuals can also contribute to conserving biological diversity by changing their purchasing decisions and consumption habits (such as by consuming environmentally-friendly products).¹²³ From this perspective, the private sector should not only refer to the business and industry sectors but also include individuals.

Article 13(a) requires contracting parties to promote an understanding of the importance and measures of biodiversity conservation through media and education. Article 13(b) encourages cooperation between contracting parties with other states and international organisations in developing educational and public awareness programmes regarding the conservation and sustainability of biodiversity. Although these requirements for public awareness and education have been set in the CBD Convention, it is interesting to note that there is no provision regarding the public's access to biodiversity-related information. The Convention intends to improve the public's awareness of the conservation of biodiversity through an educational approach and the media but neglects that open biodiversity information for the public is another useful approach for enhancing the public's knowledge and understanding of biodiversity issues.

The last obligation regarding participation issues is set in Article 14. Article 14 (1)(a) requires contracting parties to 'introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity...where appropriate, allow for public participation in such procedures'. In the EIA context, the scope of participants is not limited to "local communities" or "private parties" as in the other Articles, but extends to "the public". However, according to Article 14, only proposed projects that are likely to have "significant adverse effects" require an EIA. Furthermore, public participation is only to be conducted "where appropriate". Redgwell criticises the high threshold for

¹²² Alvin Chandra and others, 'Convention on Biological Diversity: A Review of National Challenges and Opportunities for Implementation' (2011) 20 *Biodiversity and Conservation* 3295, 3311.

¹²³ Glowka and others (n 108) 62.

triggering EIAs and the weak provisions on the requirements for public participation.¹²⁴ Thus, public participation is not guaranteed under Article 14.

A review of the obligations related to public participation under the CBD Convention reveals two major weaknesses: first, no general provisions are provided regarding public information and participation under the Convention. Public participation is not deemed as a general strategy or approach under the CBD Convention. The Convention requires contracting parties to develop national strategies, plans, or programmes for the conservation and the sustainable use of biodiversity or adaptation to the purpose of the Convention in existing strategies, plan, or programmes.¹²⁵ However, public participation is not required in this process. A second weakness is that requirements for participation under the Convention refer to different inadequately defined groups, such as “indigenous and local communities” and “private sectors”. If contracting parties apply narrow and limited definitions of stakeholder groups in domestic laws, the participation of these stakeholders in biodiversity conservation will not be ensured at the national level.

4.2.2. Procedural Criteria for Public Participation under the Convention

The procedural criteria for collaborative participation identified in chapter 3 include early and broad participation, easy access to information and participation, opportunities for interaction, and transparency in decision-making. The CBD Convention does not provide general rules for information disclosure and public participation, nor does it establishes a detailed and collaborative participation system for biodiversity conservation and management. Specifically, having early and broad participation in biodiversity conservation is challenging since the Convention provides no requirements on early participation and applies limited participatory opportunities to undefined stakeholder groups. Although EIAs are required for projects that are likely to have significant adverse impacts on biodiversity, public participation is not a compulsory component in such EIAs. The limited participatory opportunities regulated

¹²⁴ Catherine Redgwell, ‘The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity’ in Donald M Zillman, Alastair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 124–125.

¹²⁵ CBD Convention, art 6.

under the Convention also fail to grant the public and stakeholders easy access to participation in biodiversity conservation. In addition to the limited access to participation, easy access to information is not ensured since the Convention only requires information exchange between contracting parties but keeps silent on the disclosure of information to the public.¹²⁶ Therefore, as shown above, very basic procedural rights for public participation are not regulated under the Convention, let alone the requirements for interaction and transparency during the participation process. Thus, the CBD Convention is unable to guarantee the procedural criteria for collaborative participation identified in chapter 3.

Existing studies do not show a positive picture of the implementation of the CBD Convention. Silva points out that the implementation of the CBD and its protocols is limited since they only require public participation in biodiversity-related projects through EIA and in Genetically Modified Organisms (GMO) related decisions.¹²⁷ Therefore, as pointed above, public participation is not required in the preparation of biodiversity-related policies at the international or domestic levels.¹²⁸ Blackstock et al. identify a wide gap between the requirements for public participation in biodiversity conservation at policy and legislation levels and the implementation of these requirements at the EU level.¹²⁹ Paloniemi and others find powerful stakeholders are normally rule-makers and key players in biodiversity governance in European countries, while the public only has limited influence on this issue.¹³⁰ In terms of the scope of the application of the CBD Convention, De Oliveira points out the Convention largely focuses on the protection of the source of the biodiversity, such as protected areas; as a result, insufficient publicity and education activities have been carried out in urban areas.¹³¹ It is not appropriate to jump to the conclusion that there is a certain connection between

¹²⁶ CBD Convention, art 17.

¹²⁷ Lalanath de Silva, 'Public Participation in Biodiversity Conservation' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 475.

¹²⁸ *ibid.*

¹²⁹ Kirsty L Blackstock, Gail J Kelly and Bronwyn L Horsey, 'Developing and Applying a Framework to Evaluate Participatory Research for Sustainability' (2007) 60 *Ecological Economics* 726.

¹³⁰ Riikka Paloniemi and others, 'Public Participation and Environmental Justice in Biodiversity Governance in Finland, Greece, Poland and the UK' (2015) 25 *Environmental Policy and Governance* 330, 338–339.

¹³¹ JA Puppim de Oliveira and others, 'Cities and Biodiversity: Perspectives and Governance Challenges for Implementing the Convention on Biological Diversity (CBD) at the City Level' (2011) 144 *Biological Conservation* 1302, 1310.

the above research findings and the loose and inadequate obligations for public participation set in CBD Convention. However, one thing is quite certain - the CBD Convention has made little effort to provide a firm legal basis for public participation in biodiversity matters.

The ongoing loss of biodiversity has not been stopped as a result of the introduction of CBD Convention.¹³² Some researchers blame the loose obligations regulated under the Convention for the failure of the CBD system to achieve its expected objectives.¹³³ Harrop and Pritchard even state that the CBD Convention has gradually become a soft policy instrument, although it was produced as a hard international law.¹³⁴ One possible argument to explain the soft and vague obligations set in the CBD Convention is that the convention is a framework convention, and therefore only provides overall goals and policies rather than hard and precise obligations. Thus, the next section will focus on the Protocols of the CBD Convention and marine related COP Decisions to examine whether the inadequate and vague requirements for public participation under the CBD Convention are detailed or improved under these instruments.

4.2.3. Regulations of Public Participation in Cartagena Protocol, Nagoya Protocol, and Marine Related COP Decisions

Only two protocols have so far been introduced to support the enforcement of the Convention: The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits (Nagoya Protocol) and The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol).¹³⁵ However, these two protocols of the Convention are criticised for their failure to cover the main concerns and purpose of the CBD Convention or clarify its vague provisions.¹³⁶ As a result, requirements for public participation are neither strengthened nor detailed in these two

¹³² Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (2010) 9.

¹³³ Pip Wallace, 'The Reduced Effect of International Conservation Agreements: A New Zealand Case Study' (2015) 27 *Journal of Environmental Law* 489, 502; Stuart R Harrop and Diana J Pritchard, 'A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory' (2011) 21 *Global Environmental Change* 474, 476–478.

¹³⁴ Harrop and Pritchard (n 133).

¹³⁵ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2003, UNTS, vol 2226, No. 30619, 208; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010, UNTS, A-30619.

¹³⁶ Harrop and Pritchard (n 133) 476–478.

protocols. A general strategy for public participation was not set in the Nagoya Protocol since it focuses only on the participation of “indigenous and local communities” and “the indigenous and local communities concerned” rather than the broad participation of the public.¹³⁷ Under the Cartagena Protocol, requirements of public participation are set out in Article 23. The parties are only required to ‘endeavour to ensure that public awareness and education encompass access to information on living modified organisms’ or ‘consult the public in the decision-making process (in accordance with their respective law and regulations)’.¹³⁸ The soft requirements on information disclosure and the discretion granted to contracting parties to interpret and implement public participation are criticised.¹³⁹ Due to the weak legal requirements for public participation, the low enforcement of the legal requirements regarding public access to information, and the failure to consider the public’s comments in decision-making are reported as key barriers to the application of public participation in the implementation of the Cartagena Protocol.¹⁴⁰ Therefore, neither the Nagoya Protocol nor the Cartagena Protocol reinforced and detailed the insufficient requirements for public participation under the CBD Convention.

As mentioned above, COP Decisions are crucial instruments for implementing the CBD Convention. So far, 13 COPs have been held and more than 300 COP Decisions have been made on specific issues regarding biodiversity conservation: sixteen of them address marine issues particularly.¹⁴¹ However, statements concerning participation issues in these COP Decisions are not clear and detailed enough to back up the incomplete and weak system of public participation under the CBD Convention. Only general requirements regarding public participation are mentioned; no further detailed procedure or approaches are provided. For example, at the time of writing, the most

¹³⁷ Nagoya Protocol, arts 5,6,7,11 and 12.

¹³⁸ Cartagena Protocol, arts 23(1)(b) and 23(2).

¹³⁹ Ruth Mackenzie and others, *An Explanatory Guide to the Cartagena Protocol on Biosafety* (IUCN 2003) 150–151.

¹⁴⁰ Economic Commission for Europe, ‘Joint Round Table on Access to Information, Public Participation and Access to Justice Regarding Living Modified Organisms/genetically Modified Organisms ECE/MP.PP/WG.1/2014/6’ (2013) 6–10 <http://www.unece.org/fileadmin/DAM/env/pp/wgp/WGP_17/ece.mp.pp.wg.1.2014.6_aec.pdf>.

¹⁴¹ These particular marine-related COP Decisions include Decision II/10, Decision IV/5, Decision V/3, Decision VI/3, Decision VII/5, Decision VIII/21, Decision VIII/22, Decision IX/20, Decision X/29, Decision XI/17, Decision XI/18, Decision XII/22, Decision XII/23, Decision XIII/9, and Decision XIII/10.

recent marine-related COP Decision is Decision XIII/ 9 in COP 13, which concentrates on marine planning matters.¹⁴² It encourages contracting parties to ‘promote the full and effective participation of indigenous peoples and local communities’ in developing and implementing marine plans in conformity with domestic law.¹⁴³ It requires contracting parties to engage with ‘relevant stakeholders and sectors as well as indigenous people and local communities’ in developing and implementing marine plans.¹⁴⁴ These statements neither require broad participation in the marine planning process, nor provide specific processes and approaches for information discourse and participation for non-defined stakeholders, sectors, and local communities. The Decision provides little practical and instrumental value to public participation in the marine planning process.

Another example is found in Decision VIII/22 in COP 8.¹⁴⁵ This COP Decision addresses issues regarding the integrated marine and coastal area management (IMCAM). In terms of public access to information, parties are urged to ensure information about marine and coastal management ‘are widely disseminated among government officials, policy makers, users of coastal resources and the general public’.¹⁴⁶ Therefore, information disclosure is open to everyone. However, in terms of participation, only “indigenous and local communities” and “relevant stakeholders” are encouraged to provide input into the integration of IMCAM into the domestic and regional regime.¹⁴⁷ Thus, participation is only encouraged among particular groups and stakeholders. The Decision urges parties to ‘improve collection, collation, interpretation, communication, and dissemination of information and participation of stakeholders and the full and effective participation of indigenous and local communities in the implementation of management decisions’.¹⁴⁸ Therefore, the requirement for public participation in Decision VIII/22 in COP 8 remains very general. Thus, although the significance of public

¹⁴² COP, Decision XIII/9: Marine spatial planning and training initiatives, 2016, CBD/COP/DEC/XIII/9.

¹⁴³ *ibid*, para 3(b).

¹⁴⁴ *ibid*, para 3(d).

¹⁴⁵ COP, Decision VIII/22: Marine and Coastal Biological Diversity: Enhancing the Implementation of Integrated Marine and Coastal Area Management, 2006, UNEP/CBD/COP/DEC/VIII/22.

¹⁴⁶ *ibid*, para 4(e).

¹⁴⁷ *ibid*, para 3(a).

¹⁴⁸ *ibid*, para 6(a).

participation is emphasised in marine related COP Decisions, practical and detailed procedures for implementing public participation are absent in these Decisions.

In summary, since it only concentrates on participation of certain groups of people, namely the indigenous and local communities, the Nagoya Protocol does not require a participation strategy for a wide range of groups and individuals. In terms of the Cartagena Protocol, provisions of public information and participation have been set out in the Protocol. These provisions, however, are too general and thin to establish a strong legal basis for public participation in the implementation of the Cartagena Protocol, let alone to support any detailed procedural criteria for collaborative participation. Similarly, suggestions regarding public participation under COP Decisions have the same problem, which is a lack of clear and practical instructions on the scope and procedure for participation. Thus, neither the protocols nor the COP Decisions have strengthened or elaborated the weak and deficient requirements for public participation under the CBD convention or have offered specific procedural criteria for participation.

4.2.4. Conclusion

The CBD Convention does not provide robust and clear obligations for public participation in biodiversity conservation. Provisions regarding public participation under the CBD Convention are general and fragmented and therefore cannot meet the detailed procedural criteria needed for collaborative participation. Protocols to the Convention and marine-related COP Decisions make little effort to detail and strengthen the requirements for public participation under the Convention. Therefore, neither the CBD Convention itself nor its Protocols and COP Decisions provide clear and coherent requirements on public participation, much less offering procedures for collaborative participation.

This review of the obligations and implementation of public participation under the Aarhus Convention and the CBD Convention has found that the importance of public participation is generally recognised by the two key international instruments. However, procedures of public participation regulated by the Aarhus Convention and the CBD Convention are ineffective and inadequate. Therefore, the legal basis of public participation provided by the Aarhus Convention and the CBD Convention seems

unlikely to support the procedural criteria for collaborative participation in marine planning. However, the Aarhus Convention and the CBD Convention only regulate environmental decision-making and biodiversity issues generally. Therefore, the following section will investigate marine regulations at the international and regional levels, to examine the extent to which the importance of public participation and procedural criteria for collaborative participation have been recognised and regulated in international and regional marine obligations.

4.3. Marine Conventions

4.3.1. The United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS is the most fundamental legal document for marine matters. It divides the ocean space into several zones and establishes a comprehensive legal framework to ocean governance.¹⁴⁹ Therefore, it covers almost all matters related to the sea. As Barrett comments, ‘it deals with age-old problems, such as navigation and piracy, and modern problems, ranging from climate change and marine pollution by greenhouse gases, to search and rescue in the context of mass migration and human trafficking by sea’.¹⁵⁰ Despite the wide range of issues regulated by the UNCLOS, the Convention sets no particular regulations on the issue of public participation in marine governance. Only some implications regarding participation can be found in some articles of the UNCLOS. Article 244, for example, regulates the publication and dissemination of information and knowledge. Although the main aim of this article is to facilitate the dissemination and transfer of marine information and data between contracting states, the publication and dissemination of marine information, to some extent, contributes to the promotion of the public’s awareness and knowledge of marine issues. Article 206 meanwhile addresses the assessment of activities that have potential effects on the marine

¹⁴⁹ The UNCLOS divided the sea into the territorial sea and the contiguous zone, the exclusive economic zone (EEZ), the continental shelf, and the high seas. The UNCLOS’s preamble states that it will “facilitate international communication, and will promote the peaceful uses of the sea and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”.

¹⁵⁰ Jill Barrett, ‘The UN Convention on the Law of the Sea: A “Living” Treaty?’ in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 3.

environment.¹⁵¹ EIAs fall into this category.¹⁵² Therefore, the public could potentially have opportunities for participation in EIA processes according to domestic regulations.

Numerous articles can be found regarding various topics of the UNCLOS, but very few of them concern the issues of public participation. This is mainly because the UNCLOS attributes rights and duties directly to states rather than to individuals.¹⁵³ As the “constitution for the oceans”, the UNCLOS should have attributed duties to states to ensure broad public involvement in marine management and environmental protection. However, as a “living instrument”, the UNCLOS evolves through the practice of states and institutions, and other binding or non-binding instruments, such as the CBD Convention, regional marine conventions, and soft laws.¹⁵⁴ Therefore, the participatory mechanisms established by these external instruments could to some extent cover the shortage of the lack of requirements for public participation under the UNCLOS.¹⁵⁵ However, the significance of public participation in marine management, such as marine environmental protection regulated under Part XII, should not be neglected under the UNCLOS.

4.3.2. The Helsinki Conventions

The Convention on the Protection of the Marine Environment of the Baltic Sea Area 1974 (1974 Helsinki Convention) was the first regional-seas treaty to address all marine pollution causes in the Baltic Sea area through regional cooperation.¹⁵⁶ The new Helsinki Convention - the Convention on the Protection of the Marine Environment of the Baltic

¹⁵¹ Art 206 of the UNCLOS states that “When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.”

¹⁵² Alan Boyle, ‘Climate Change, Ocean Governance and UNCLOS’ in Jill Barrett and Richard Barnes (ed), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 225.

¹⁵³ Irini Papanicolopulu, ‘The Law of the Sea Convention: No Place for Persons?’ (2012) 27 *The International Journal of Marine and Coastal Law* 867.

¹⁵⁴ Barrett (n 150) 15–36; Richard Barnes, ‘The Continuing Vitality of UNCLOS’ in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 467–470.

¹⁵⁵ Catherine Redgwell, ‘The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector’ in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 167.

¹⁵⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press 2009) 395.

Sea Area 1992 (1992 Helsinki Convention) was signed by all Baltic Sea bordering countries and the European Community to adopt dramatic changes in the legal and political spheres at the international level. Compared with the 1974 Convention, the 1992 Helsinki Convention expands the geographical scope of the obliged areas (internal waters were included), applies much stricter regulations for dealing with harmful substances, and adopts the precautionary principle and the polluter pays principle.¹⁵⁷

4.3.2.1. Regulations for Public Participation under the Helsinki Convention

The lack of requirements for information disclosure was criticised as one of the main weaknesses of the 1974 Helsinki Convention.¹⁵⁸ Thus, in the 1992 Helsinki Convention, obligations regarding information disclosure are set out in Article 17 and Annex II (which provides criteria for implementing the Best Environmental Practice (BEP) and the Best Available Technology (BAT)). Specifically, contracting parties are required to ensure that information about water quality, issued permits, and planned measures is made available to the public at a “reasonable” time with “reasonable” facilities.¹⁵⁹ Although the provision of environmental information and education to the public are required under the BEP, the provision of education to the public is believed to be a form of guidance rather than a legal requirement.¹⁶⁰ In addition, information disclosure relies heavily on domestic laws regarding relevant requirements of information protection.¹⁶¹ Therefore, whether the public has easy access to information largely depends on domestic regulations.

There were no relevant requirements for public participation in the 1974 Helsinki Convention. In the 1992 Helsinki Convention also, little concern is given to participation issues. Without general requirements for participation, the public is only allowed to be involved in the implementation of the 1992 Helsinki Convention through EIA processes.¹⁶² However, an EIA is required only when a proposed activity is likely to cause

¹⁵⁷ 1992 Helsinki Convention, arts 1, 3 and 4.

¹⁵⁸ Malgosia Fitzmaurice, ‘The New Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area’ (1993) 26 *Marine Pollution Bulletin* 64, 66.

¹⁵⁹ 1992 Helsinki Convention, art 17(1).

¹⁶⁰ Melvin Woodhouse, ‘Is Public Participation a Rule of the Law of International Watercourses?’ (2003) 43 *Natural Resources Journal* 137, 151.

¹⁶¹ 1992 Helsinki Convention, art 18.

¹⁶² 1992 Helsinki Convention, art 17(1).

a “significant adverse impact” on the Baltic Sea Area. Thus, the threshold of triggering an EIA under the Convention is high.¹⁶³ Participation opportunities would be limited because of such a threshold.

NGOs are allowed to engage in the Baltic Marine Environment Protection Commission (also known as the Helsinki Commission or HELCOM) as observers of the implementation of the Convention. However, observers are only entitled to have access to relevant documents, to attend meetings, and to present written or oral statements.¹⁶⁴ They do not have substantive rights to vote or make decisions.¹⁶⁵ Therefore, the role of non-governmental actors is restricted in the Helsinki Commission. Kern and Loffelsend point out that HELCOM conducts too many meetings, about 40-50, per year, which requires a huge amount of resource input from participants, which of course includes NGOs.¹⁶⁶ Some small NGOs cannot afford this expensive participation only bigger NGOs can participate regularly in HELCOM.¹⁶⁷ Therefore, the NGOs’ participation is limited in the Helsinki system.

The above investigation showed that the criteria for early participation, transparency and interaction are not covered under the 1992 Helsinki Convention. Due to the limited requirements for public information and public participation (through EIAs and NGOs) in the 1992 Convention, the criteria for broad participation and easy access to information and participation are not ensured under the 1992 Convention.

It is worth mentioning that most of the existing studies on the Helsinki Convention focus on the ecological status of the Baltic Sea, the consistency of the Convention and other EU legislation, and comparison between the 1974 and 1992 Helsinki Conventions.¹⁶⁸

¹⁶³ Philippe Sands and others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 800.

¹⁶⁴ Helsinki Commission, ‘Guidance on Granting Observer Status to Intergovernmental Organisations and International Non-Governmental Organisations to the Helsinki Commission’ (2015) <http://www.helcom.fi/Documents/About_us/Observers/Observer_Guidelines.pdf> accessed 27 September 2016.

¹⁶⁵ *ibid.*

¹⁶⁶ Kristine Kern and Tina Loffelsend, ‘Sustainable Development in the Baltic Sea Region. Governance beyond the Nation State’ (2004) 9 *Local Environment* 451, 457.

¹⁶⁷ *ibid.*

¹⁶⁸ See Hermanni Backer and Juha-Markku Leppanen, ‘The HELCOM System of a Vision, Strategic Goals Andecological Objectives: Implementing an Ecosystem Approach Tothe Management of Human Activities in the Baltic Sea’ (2008) 18 *Aquatic Conservation: Marine and Freshwater Ecosystems* 321; Katarina Elofsson, ‘Cost-Effectiveness of the Baltic Sea Action Plan’ (2010) 34 *Marine Policy* 1043; Harriet

Little attention has been paid to public participation issues under this convention. Scholars have reported the lack of public participation and limited cooperation between governmental organisations and non-state originations as one of the challenges of environmental protection around the Baltic Sea Region.¹⁶⁹ Therefore, as the pattern of environmental governance around the Baltic Sea countries has gradually been transformed from the traditional intergovernmental cooperation to non-governmental actors' cooperation,¹⁷⁰ the obligations regarding public participation under the 1992 Helsinki Convention should be reviewed and improved.

The insufficient requirements for public participation in the 1992 Helsinki Convention could be attributed to the fact that the issue of public participation was not so prevalent in international law at the early 1990s. Therefore, as will be presented below, an examination of the latest development on issues concerning public participation under the regime of Helsinki Convention becomes necessary.

4.3.2.2. Requirements for Public Participation under the Regional Baltic MSP Roadmap 2013-2020

In 2013, the Regional Baltic MSP Roadmap 2013-2020 was adopted by the HELCOM Ministerial Meeting to map out the steps of preparing, creating and implementing marine planning in Baltic Sea areas by 2020.¹⁷¹ According to the Roadmap, in June 2016, two important documents regarding marine spatial planning in the Baltic marine area were adopted. The *Guidelines on transboundary consultations, public participation and co-operation* (hereafter referred to as the HELCOM's Guidelines on Public

Silfverberg and Elizabeth Kirk, 'Harmonisation in the Baltic Sea Region' (2006) 21 *The International Journal of Marine and Coastal Law* 235; Fitzmaurice, 'The New Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area'; Harry Liiv and Peeter Marksoo, 'The Helsinki Conventions 1974 and 1992: Implementation in the Baltic States' (1998) 13 *International Journal of Marine & Coastal Law* 413; Skirmantė Klumbytė, 'Comparative Analysis of 1974 and 1972 Convention on the Protection of the Marine Environment of the Baltic Sea Area' (2007) 4 *Jurisprudencija* 67.

¹⁶⁹ Ragnar Elmgren, Thorsten Blenckner and Agneta Andersson, 'Baltic Sea Management: Successes and Failures' (2015) 44 *AMBIO* 335, 341.

¹⁷⁰ Ieva Kapaciauskaite, 'Environmental Governance in the Baltic Sea Region and the Role of Non-Governmental Actors' (2011) 14 *Procedia Social and Behavioral Sciences* 90; Kern and Loffelsend (n 165) 457.

¹⁷¹ Information is available at: <http://helcom.fi/Documents/Ministerial2013/Ministerial%20declaration/Adopted_endorsed%20documents/Regional%20Baltic%20MSP%20Roadmap.pdf> accessed 27 September 2017.

Participation)¹⁷² address consultation and cooperation between governmental bodies, stakeholder involvement, and public participation in the transboundary marine planning context. The *Guideline for the implementation of ecosystem-based approach in Maritime Spatial Planning (MSP) in the Baltic Sea area* (hereafter referred to as the HELCOM's Guideline on Marine Planning)¹⁷³ illustrates key elements and processes for applying ecosystem-based marine planning. As an important element in ecosystem-based marine planning, public participation is, of course, covered in this guideline. Therefore, although of a non-binding nature, these two guidelines present the latest developments of public participation in the Baltic marine management scheme.

Some good advice for public participation is set out in the two guidelines. Specifically, HELCOM's Guidelines on Public Participation state that public participation is 'two-way communication and collaborative problem solving with the goal of achieving better and more acceptable decisions'.¹⁷⁴ They encourage direct communication to stakeholders on proposed planning issues.¹⁷⁵ Furthermore, they suggest that understandable information or documents regarding marine planning should be provided.¹⁷⁶ HELCOM's Guideline on Marine Planning advises that the public and stakeholders should be involved at an early stage.¹⁷⁷ It also suggests that, in addition to formal consultation methods, informal participation approaches should be used in the marine planning process.¹⁷⁸ Therefore, compared with the thin obligations for public participation set out in the Helsinki Conventions, the importance of public participation in Baltic marine management has been recognised in both of these guideline documents. However, when a closer look is taken at the requirements for public participation under these

¹⁷² HELCOM's Guidelines on Public Participation is available at :<
http://www.helcom.fi/Documents/Action%20areas/Maritime%20spatial%20planning/Guidelines%20on%20transboundary%20consultations%20public%20participation%20and%20co-operation%20_June%202016.pdf > accessed 27 September 2017.

¹⁷³ HELCOM's Guideline on Marine Planning is available at :<
http://www.helcom.fi/Documents/Action%20areas/Maritime%20spatial%20planning/Guideline%20for%20the%20implementation%20of%20ecosystem-based%20approach%20in%20MSP%20in%20the%20Baltic%20Sea%20area_June%202016.pdf > accessed 27 September 2017.

¹⁷⁴ HELCOM, 'Guidelines on Transboundary Consultations, Public Participation and Co-Operation' (n 172) 2.

¹⁷⁵ *ibid* 6.

¹⁷⁶ *ibid*.

¹⁷⁷ *ibid* 4–6.

¹⁷⁸ *ibid* 7.

guidelines, it seems that it is quite challenging to fulfil the four procedural criteria for collaborative participation in the marine planning context.

HELCOM's Guideline on Marine Planning maps out general stages for marine planning and details the specific steps for each stage.¹⁷⁹ As mentioned above, involving the public and stakeholders at an early stage is suggested under this guideline.¹⁸⁰ The public is required to be informed at the starting stage of the marine planning process.¹⁸¹ However, participation is also suggested as the last step of each stage.¹⁸² Therefore, early participation at each stage is difficult to ensure under the guideline. In terms of the broad participation criterion, both of the guidelines differentiate public participation from stakeholder involvement, and put more emphasis on stakeholder involvement than public participation. Specifically, under HELCOM's Guideline on Marine Planning, not all marine planning stages require public participation. Public participation is only suggested at the starting, proposal, and approval stages. However, stakeholders are required to be involved throughout all of the stages of marine plan making. Similarly, HELCOM's Guidelines on Public Participation cover guidelines of cooperation between government bodies, stakeholder involvement, and public participation. However, they mainly focus on governmental cooperation and stakeholder involvement in transboundary marine planning and grant little attention to public participation. Thus, the criterion for broad participation cannot be guaranteed.

In terms of easy access to information and participation, the extent to which this procedural criterion can be ensured in Baltic marine planning is not very clear. This is mainly because HELCOM's Guidelines on Public Participation only require consultation and information dissemination among Baltic Sea countries and does not intend to advise public participation and information at the domestic level. It states that

¹⁷⁹ HELCOM, 'Guideline for the Implementation of Ecosystem-Based Approach in Maritime Spatial Planning (MSP) in the Baltic Sea Area' (n 173) 12–18. Seven general stages are suggested under HELCOM's Guidelines on Marine Planning: starting, setting goals, preparing, proposing, approving, monitoring, and revising. Every stage contains several detailed steps on how to complete the stage.

¹⁸⁰ HELCOM, 'Guideline for the Implementation of Ecosystem-Based Approach in Maritime Spatial Planning (MSP) in the Baltic Sea Area' (n 173) 7.

¹⁸¹ Public participation is required in the first five stages, but not required in the monitoring and revision stages.

¹⁸² HELCOM, 'Guideline for the Implementation of Ecosystem-Based Approach in Maritime Spatial Planning (MSP) in the Baltic Sea Area' (n 173) 12–13.

Stakeholder involvement is organised best at national level, as each country has a different culture and legislation (regulations) on public participation and different settings on how stakeholders are organised. It therefore needs to find its own way of involving stakeholders and general public and engaging them in the MSP process in line with a subsidiarity principle.¹⁸³

HELCOM's Guideline on Marine Planning provides no relevant requirements for easy access to information and participation. Thus, it is not clear how the criterion for easy access to information and participation is/will be regulated and implemented at the domestic level. Nevertheless, HELCOM's Guidelines on Public Participation advise that competent authorities should provide non-technical information and documents in consultation: this is a subset of easy access to information.¹⁸⁴ In terms of the criterion for easy access to participation, both of these guidelines make a distinction between public participation and stakeholder involvement. This classification could become a potential barrier for certain groups' and individuals' participation.¹⁸⁵

Some general suggestions regarding interactive participation and transparent decision-making are set out in the two guidelines. In terms of transparency, HELCOM's Guidelines on Public Participation require that in the transboundary marine planning context, competent authorities (who are creating marine plans) should inform relevant authorities (who run transboundary consultations in their countries) how and to what extent the result of neighbouring countries' consultation have been taken into account in drawing up draft marine plans; if the result has not been used, competent authorities should provide a justification.¹⁸⁶ With regard to interactive participation, both the guidelines use terms such as "communication" and "cooperation" when they discuss issues regarding public participation and stakeholder involvement.¹⁸⁷ However, specific

¹⁸³ HELCOM, 'Guidelines on Transboundary Consultations, Public Participation and Co-Operation' (n 172) 5.

¹⁸⁴ *ibid* 6.

¹⁸⁵ See the discussion on a similar issue on the classification of "the public" and "the public concerned" under the Aarhus Convention in s 4.1.1.2 above, 86-87.

¹⁸⁶ HELCOM, 'Guidelines on Transboundary Consultations, Public Participation and Co-Operation' (n 172) 5-6.

¹⁸⁷ HELCOM, 'Guidelines on Transboundary Consultations, Public Participation and Co-Operation' (n 172) 6,8; HELCOM, 'Guideline for the Implementation of Ecosystem-Based Approach in Maritime Spatial Planning (MSP) in the Baltic Sea Area' (n 173) 7,15.

approaches to communication and cooperation between authorities and the public/stakeholders are not offered in these guidelines. Therefore, whether the general requirement for communication and cooperation set out in the guidelines can support interactive participation in practice remains unknown.

In summary, compared with the legal provisions on public information and participation under the 1992 Helsinki Convention, the two HELCOM Guidelines do make a big step forward in improving the requirements for public participation in Baltic marine management schemes. However, the procedural criterion for collaborative participation has not been fully embedded in these guidelines.

4.3.3. The OSPAR Convention

The OSPAR Convention, adopted in 1992, is the current legal instrument used to protect the marine environment in the North-East Atlantic. It replaced the Convention for Prevention of Marine Pollution by Dumping from Ships and Aircraft (1972 Oslo Convention) and the Convention for the Prevention of Marine Pollution from Land-Based Sources (1974 Paris Convention), and aims to provide a comprehensive strategy for protecting the marine environment in the North Sea. In the OSPAR Convention, there is no general provision concerning public participation. Requirements related to public participation are set out in Articles 9 and 11. Article 9 regulates information disclosure, which will be further illustrated through the UK vs Ireland case in the following content. Article 11(2) requires the participation of observers, including NGOs, of the Convention. Although limited seats are provided to NGOs, the OSPAR was the first convention that did not distinguish between NGOs and other originations in granting the right to observer status.¹⁸⁸ Observers are allowed to participate in the work of the Commission and to present information or reports related to the Convention to the Commission.¹⁸⁹ More detailed requirements regarding the participation of observers are regulated by Rules of Procedure of the Commission.¹⁹⁰ Some scholars held a very optimistic view on the NGOs' function of supervision at the Convention's

¹⁸⁸ Louise de La Fayette, 'The OSPAR Convention Comes into Force: Continuity and Progress.' (1999) 14 *International Journal of Marine and Coastal Law* 247, 264.

¹⁸⁹ OSPAR Convention, art 11(2).

¹⁹⁰ OSPAR Convention, art 11(3).

implementation.¹⁹¹ However, NGO observer status is only granted by a unanimous decision of a Commission meeting, and the Convention has raised the threshold of inclusion and limited the number of available seats for NGOs.¹⁹² Furthermore, NGOs are excluded from formal decision-making since observers can neither vote on nor veto decisions under the Convention.¹⁹³ Therefore, the NGOs' function and access to the OSPAR Convention is limited.

The following section addresses two issues: first, a review of the UK and Ireland case investigates the performance of information disclosure under Article 9 of the OSPAR Convention.¹⁹⁴ Second, as mentioned, only limited requirements for public participation have been set out in the OSPAR Convention. The Guidance for Good Practice for Communicating with Stakeholders on the Establishment & Management of Marine Protected Areas (hereafter referred to as OSPAR Agreement 2008-2) is so far the most specific document that addresses the issue of public participation within the framework of the OSPAR Convention. Therefore, it will be examined to investigate whether and how procedural criteria for collaborative participation have been embedded in the OSPAR regulatory regime.

4.3.3.1. The MOX Plant Case: A Dispute between Ireland and the UK Concerning Access to Information under Article 9 of the OSPAR Convention

To investigate the requirement for access to information under the OSPAR Convention, a dispute concerning access to information under Article 9 of the Convention between Ireland and the UK in 2003 will be reviewed in this section.¹⁹⁵ In 1993, a UK-based

¹⁹¹ Ellen Hey, Ton IJlstra and Andre Nolikaemper, '1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic: A Critical Analysis' (1993) 8 *International Journal of Marine and Coastal Law* 1, 48.

¹⁹² La Fayette (n 188) 264.

¹⁹³ SOPAR Convention, art 11(2).

¹⁹⁴ Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award) (Permanent Court of Arbitration, 2 July 2003).

¹⁹⁵ Art 9(1): 'The contracting parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interests, without unreasonable charges, as soon as possible and at the latest within two months.'

Art 9(2): 'The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.'

company applied for permission to build a MOX Plant, which was to be located at Sellafield to produce mixed-oxide fuel for nuclear power plants. The company got consent for construction under domestic law and finished the building work in 1996. The UK is a party to the Treaty Establishing the European Atomic Energy Community (EURATOM). Thus, according to Article 6(1) of Directive 96/26 EURATOM,¹⁹⁶ before the MOX Plant could be operated, the UK needed to ensure that the plant was justified by economic, social, or other benefits that outweighed the environmental damage it might cause. Several public consultations and two reports were made to meet this requirement. However, some information was removed when the reports were made public. A dispute arose when the UK rejected Ireland's request to gain access to the removed information.

Three main issues arose in the MOX Plant dispute. First, whether other international regulations were applicable in this dispute, particularly, whether the broad definition of environmental information set out in the Aarhus Convention falls into the definition of "applicable international regulations" regulated under Article 9(3) of the OSPAR Convention and Article 31(3)(c) of the Vienna Convention; and therefore should be applied to inform the interpretation of Article 9(2) of the OSPAR Convention. Second, whether Article 9(1) is meant to ensure an obligated result or a domestic legal system which can deliver this result. Third, whether the removed information required by Ireland fell into the categories of information disclosure under Article 9(2). The tribunal's findings were as follows: first, the OSPAR Convention was the only applicable law in the dispute; second, Article 9(1) requires an outcome of result; and third, the

Art 9(3): 'The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects: (a) the confidentiality of the proceedings of public authorities, international relations and national defence; (b) public security; (c) matters which are, or have been, sub judice, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings; (d) commercial and industrial confidentiality, including intellectual property; (e) the confidentiality of personal data and/or files; (f) material supplied by a third party without that party being under a legal obligation to do so; (g) material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.'

Art 9(4): 'The reasons for a refusal to provide the information requested must be given.'

¹⁹⁶ Council Directive 96/26/EURATOM of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation [1996] OJ L159/1

information requested by Ireland exceeded the scope of information disclosure set out in Article 9(2).¹⁹⁷

The first and the third issues are related to the application of the Aarhus Convention and the scope of information disclosure under the OSPAR Convention, and therefore will be discussed here. In terms of the first issue, the majority of the tribunal found that although both Ireland and the UK had signed the Aarhus Convention, neither of the two parties had ratified the Aarhus Convention when this dispute arose. Thus, the Tribunal could not go beyond existing law and use “‘almost’ law” without instructions and authorisations from the parties.¹⁹⁸ Therefore, the majority of the tribunal refused to apply the Aarhus Convention to inform the meaning of Article 9(2) of the OSPAR Convention. Dr Gavan Griffith submitted a dissenting opinion on above point and made a thorough justification for his dissent.¹⁹⁹ He pointed out that the Aarhus Convention had entered into force in 2001. Therefore, although the parties had not ratified the Aarhus Convention, the Convention was not “‘almost’ law” but an existing law.²⁰⁰ Furthermore, Griffith argued that signed but unratified treaties “may possess an evidentiary value that helps establish and identify the views and intentions of signatories”.²⁰¹ Therefore, the signing of the Aarhus Convention shows the understanding of Ireland and the UK about the scope of the definition of providing environmental information. In addition, the UK had shown an intention to obey the Aarhus Convention at the domestic level.²⁰² Therefore, the Aarhus Convention should be applied to inform the scope of information disclosure regulated under Article 9(2) of the OSPAR Convention. Similarly, Sands and others point out that the Tribunal’s restrictive judgment mirrors the limited awareness of international lawyers about the development of environmental considerations and international environmental law.²⁰³ Some scholars, however, have different opinions on this issue. Fitzmaurice maintains that the OSPAR Tribunal correctly followed the cautious attitude towards applicable

¹⁹⁷ OSPAR Arbitration (n 194) paras 78 and 104.

¹⁹⁸ *ibid* paras 99-101.

¹⁹⁹ *ibid* dissenting opinion Gavan Griffith QC.

²⁰⁰ *ibid* para 11.

²⁰¹ *ibid* para 15.

²⁰² *ibid* paras 17-18.

²⁰³ Sands and others (n 163) 651.

law.²⁰⁴ Similarly, focusing on the nature of litigating approaches to environmental law, McDorman comments that

Given that international litigation arises only with the consent of the disputant states, a tribunal is naturally motivated - more than are domestic institutions - to act within the constraints defined by the agreement that gave rise to the consent to litigate and also by the legal obligations that the disputants agree are part of the litigation. Context and evolving practice necessarily plays a minor role.²⁰⁵

However, if McDorman's comment is indicative, does it mean that that international tribunals and courts would only play very limited, or even conservative, roles in the development of international environmental law, since they are reluctant to recognise evolving practice of international environmental law? As discussed in section 4.3.1, although UNCLOS's provisions are not able to cover all issues related to the sea, as a "living instrument", the UNCLOS evolves through the practice of states and institutions, and other binding or non-binding instruments.²⁰⁶ In addition, Lavranos warns that the OSPAR Tribunal limited itself to the provisions of the OSPAR Convention. This would not only dilute the effectiveness of other related international environmental instruments, such as the Aarhus Convention, but also widen authority fragmentation, which would encourage contracting parties to 'select the dispute settlement forum that provides for the lowest common denominator regarding the level of environmental protection'.²⁰⁷ Therefore, this thesis argues that the OSPAR Tribunal should not have adopted its limited interpretation of the applicable law in the MOX Plant dispute.

In terms of the scope of information disclosure under Article 9(2) of the OSPAR Convention, the tribunal focused on whether the information required by Ireland fell

²⁰⁴ Malgosia Fitzmaurice, 'Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom and Northern Ireland)' (2003) 18 *International Journal of Marine and Coastal Law* 541, 557.

²⁰⁵ Ted L McDorman, 'Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)' (2004) 98 *The American Journal of International Law* 330, 338.

²⁰⁶ See s 4.3.1 above, 107-108.

²⁰⁷ Nikolaos Lavranos, 'The OSPAR Convention, the Aarhus Convention and EC Law: Normative and Institutional Fragmentation on the Right of Access to Environmental Information' in Tomer Brode and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011) 167.

into the second category of information disclosure of Article 9(2).²⁰⁸ An interesting argument about this issue is whether the demonstration that an activity is *likely to adversely* affect the marine area requires a higher or lower threshold for proof. The tribunal judges that a higher threshold is required. It stated that

By including those two adverbs the drafters have excluded from the scope of the obligations of Article 9 current activities or measures that affected or were likely to affect the maritime area, but did not affect it adversely and prospective activities that were not likely to affect adversely the maritime area.²⁰⁹

However, again, Griffith did not agree with the majority's conclusion. He argued that the phrase "likely adverse effect" set a lower threshold of proof compared with adverse effect due to the likelihood of adverse effect.²¹⁰ Griffith's argument seems more reasonable if the general goal and principles applied in the OSPAR Convention are taken into consideration. The OSPAR Convention requires contracting parties to "take all possible steps" and "necessary measures" to prevent pollution and protect the marine environment. The precautionary principle is also applied under the OSPAR Convention.²¹¹ It implies that the Convention has subjected itself to a pre-damage control of risks to the marine environment. Information disclosure falls into the "possible steps" and "necessary measures" for preventing marine pollution and protecting the marine environment. However, applying a high threshold for information disclosure seems inconsistent with the goal of the Convention.

As discussed above, the OSPAR tribunal limited itself to the obligations of OSPAR Convention and applied a restricted interpretation of the scope of information disclosure under Article 9 of the Convention. Therefore, although provisions regarding

²⁰⁸ According to the tribunal (para 168), the second category of information under art 9(2) is "any available information" on "activities or measures adversely affecting or likely to affect...the maritime area".

²⁰⁹ OSPAR Arbitration (n 194) para 175.

²¹⁰ OSPAR Arbitration (n 194) dissenting opinion Gavan Griffith QC, para 82.

²¹¹ Art 2(a) of the OSPAR Convention requires contracting parties to take measures when "there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment *may* bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, *even when there is no conclusive evidence of a causal relationship between the inputs and the effects*".

access to information were set out in the OSPAR Convention, easy access to information is difficult to ensure in practice.

4.3.3.2. The Guidance for Good Practice for Communicating with Stakeholders on the Establishment & Management of Marine Protected Areas (OSPAR agreement 2008-2)

The OSPAR Agreement 2008-2 is, so far, the most specific document that addresses the issue of public participation within the framework of the OSPAR Convention.²¹² It gives relatively comprehensive advice, from both theoretical and practical perspectives, to Marine Protect Areas (MPA) authorities. From a theoretical perspective, it maps out the substantive and instrumental benefits of public participation.²¹³ It also points out the normative rationale for participation by emphasising that stakeholders should be allowed to influence decision-making. It states that, 'an essential aspect of the participation process is that stakeholders view their involvement as meaningful and as making a difference...Meaningful participation occurs when peoples see that their contributions to the process have helped shape a decision'.²¹⁴ In addition, it maps out different levels of participation and suggests that the ideal participation approach should be a combination of top-down and bottom-up approaches.²¹⁵ Furthermore, the OSPAR Agreement 2008-2 reminds MPA authorities to consider the nature of specific MPA decision-making, such as local conditions and the capacity of decision-makers and stakeholders, in developing participation strategy.²¹⁶ From a practical perspective, it offers checklists for stakeholder analysis and on the effectiveness of stakeholder participation in establishing and managing MPAs.²¹⁷

Criteria for broad and interactive participation are set in the OSPAR Agreement 2008-2. The agreement states that anyone who lives next to or relies on resources related to MPAs, who has an interest in MPAs, and anyone who is interested in or affected by MPAs

²¹² The OSPAR Agreement 2008-2 is available at:< <https://www.ospar.org/work-areas/bdc/marine-protected-areas/guidance-for-the-development-and-management-of-the-ospar-network> >.

²¹³ *ibid* 6 box 1.

²¹⁴ *ibid* 5.

²¹⁵ *ibid* 9.

²¹⁶ *ibid* 8.

²¹⁷ *ibid* Practical Tool I and II.

should be included in their establishment and management.²¹⁸ This broad scope of participation also implies that easy access to participation, at least, will not be hindered by the thresholds set for certain participants. In terms of interactive participation, the agreement uses the broad term “communication” to cover all related terms of participation.²¹⁹ Communication is defined as ‘a process by which individuals and groups come together in some way to interact, exchange information, provide input around a particular set of issues, problems, or decisions, and share in decision-making to one degree or another’.²²⁰ This indicates that the general participation strategy set out in this agreement goes beyond a traditional consultation approach and extends to interactive participation. Therefore, the two procedural criteria - broad participation and interactive participation - are required by the OSPAR Agreement 2008-2.

While the criterion for transparency is not stated directly, the agreement stresses that participants should see how their contributions have been used in making decisions. In this way, transparent decision-making can be ensured to some extent. The agreement also mentions using plain language and ensuring readability when applying information to participants.²²¹ This partly meets the criterion for easy access to information. The criterion for early participation, however, is not covered in the agreement. Therefore, most of the procedural criteria for collaborative participation can be ensured under the OSPAR Agreement 2008-2.

The procedural criteria for collaborative participation have not been well set out in the OSPAR Convention, since the obligations concerning public information and participation described in the Convention are very thin.²²² Although requirements for access to information have been embedded in the Convention, the OSPAR Tribunal’s judgment on the MOX Plant dispute revealed that such access is difficult to obtain since the scope of information discourse is tightly limited. The OSPAR Agreement 2008-2 shows an encouraging improvement in the requirements for public participation in marine environmental management. In addition to early participation, almost all

²¹⁸ *ibid* 1.

²¹⁹ *ibid* 2.

²²⁰ *ibid*.

²²¹ *ibid* 11.

²²² The only requirement set in the OSPAR Convention concerning public participation is art 11 which states that NGOs can be involved as observers in the OSPAR regulatory regime.

procedural criteria have been realised in the agreement. However, since the OSPAR Agreement 2008-2 particularly concentrates on MPAs issues and with a non-binding nature, improving binding obligations concerning public participation under the OSPAR system or building connections with other international environmental instruments concerning public participation is still necessary.

4.3.4. The Barcelona Convention

The 1976 Barcelona Convention provided the legal basis for environmental protection in the Mediterranean Sea. In response to the appeal for sustainable development raised during the Rio Earth Summit in 1992, the 1976 Convention was revised: a new Barcelona Convention was adopted in 1995. The 1995 Barcelona Convention is a framework treaty and only regulates general roles; detailed requirements are settled in a series of protocols to the Convention. So far, seven protocols have been adopted to back up the legal system for Mediterranean Sea protection.²²³ Compared with the OSPAR Convention and the revised Helsinki Convention, the 1995 Barcelona Convention and its protocols have made a major improvement on the binding requirements for public participation.

The 1995 Barcelona Convention has a general requirement for public information and participation in its Article 15.²²⁴ Although the scope of information disclosure largely depends on domestic regulations and the obligation for participation is weak to some

²²³ Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (1976); Protocol Concerning Cooperation in Preventing pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (2002); Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (1980); Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995); Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (1994); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (1996); Protocol on Integrated Coastal Zone Management in the Mediterranean (2008).

²²⁴ Art 15(1): 'The Contracting Parties shall ensure that their competent authorities shall give to the public appropriate access to information on the environmental state in the field of application of the Convention and the Protocols, on activities or measures adversely affecting or likely to affect it and on activities carried out or measures taken in accordance with the Convention and the Protocols.'

Art 15(2): 'The Contracting Parties shall ensure that the opportunity is given to the public to participate in decision-making processes relevant to the field of application of the Convention and the Protocols, as appropriate.'

Art 15(3): 'The provision of paragraph 1 of this Article shall not prejudice the right of Contracting Parties to refuse, in accordance with their legal systems and applicable international regulations, to provide access to such information on the ground of confidentiality, public security or investigation proceedings, stating the reasons for such a refusal.'

extent,²²⁵ Article 15 of the 1995 Barcelona Convention is the only general requirement for public information and participation, set out in the three regional marine conventions discussed in this chapter. Another obligation concerning public participation under the 1995 Barcelona Convention is Article 20 which allows NGOs to participate in the operation of the Convention. However, as with the Helsinki Conventions and the OSPAR Convention, NGOs are allowed to present information or report relevant to the objectives of the Convention but are not allowed to have any direct impact on the decision-making process.²²⁶ Therefore, NGOs are only provided limited participation opportunities according to the 1995 Barcelona Convention.

Specific requirements for public participation are contained in its protocols, such as the Protocol on Integrated Coastal Zone Management in the Mediterranean (ICZM Protocol).²²⁷ The ICZM Protocol, which was adopted in 2008 and entered into force in 2011, identifies public participation as a general principle of integrated coastal zone management. Article 6(5) of the ICZM Protocol states that ‘appropriate governance allowing adequate and timely participation in a transparent decision-making process by local population and stakeholders in civil society concerned with coastal zones shall be ensured’. Specific requirements for public information and participation are set out in Article 14 of the protocol.²²⁸ Article 15 requires contracting parties to carry out activities concerning awareness-raising, training, public education, and research on the ICZM; this

²²⁵ Art 15(2) requires contracting parties to ensure participation in decision-making process, ‘as appropriate’.

²²⁶ 1995 Barcelona Convention, art 20(2).

²²⁷ Protocol on Integrated Coastal Zone Management in the Mediterranean, 2008, UNTS vol 2742, No. 48455, 197. In addition to the ICZM protocol, requirements for participation are also set in arts 7(2)(c) and 19 of the Protocol Concerning Specifically Protected Areas and Biological Diversity in the Mediterranean, 1995, UNTS vol 2102, No. 36553, 181.

²²⁸ Art 14: ‘1. With a view to ensuring efficient governance throughout the process of the integrated management of coastal zones, the Parties shall take the necessary measures to ensure the appropriate involvement in the phases of the formulation and implementation of coastal and marine strategies, plans and programmes or projects, as well as the issuing of the various authorisations, of the various stakeholders, including: the territorial communities and public entities concerned, economic operators, non-governmental organisations, social actors, the public concerned.

Such participation shall involve, inter alia, consultative bodies, inquiries or public hearings, and may extend to partnerships.

2. With a view to ensuring such participation, the Parties shall provide information in an adequate, timely and effective manner.

3. Mediation or conciliation procedures and a right of administrative or legal recourse should be available to any stakeholder challenging decisions, acts or omissions, subject to the participation provisions established by the Parties with respect to plans, programmes or projects concerning the coastal zone.’

can facilitate public participation. Under the ICZM protocol, easy access to information can be ensured to some extent since Article 14(2) requires parties to provide information in an “adequate, timely and effective manner”. In terms of easy access to participation, Article 14(1) requires that stakeholders should be involved in both ‘the formulation and implementation of coastal and marine strategies, plans and programmes or projects, as well as the issuing of the various authorisations’. The term “stakeholders” is broadly defined. Furthermore, as investigated in chapter 2, depending on what extent participants can influence decision-making, public participation can be divided into different levels, from notification to empowerment.²²⁹ The term “consultation” normally means that the public and stakeholders are entitled to comment on draft proposals. This is the degree of participation most commonly applied or suggested in international laws and domestic regulations. The ICZM protocol has recognised the issue of different levels of participation and the importance of using interactive approaches in participation since it states that ‘participation shall involve, inter alia, consultative bodies, inquiries or public hearings, and may extend to partnerships’.²³⁰ Therefore, some obligations concerning the criteria for broad participation, easy access to information and participation, and interaction are set out in the ICZM protocol. However, there is no requirement for early participation. With regard to the transparency criterion, although it is required as a general principle under Article 6(d) of the protocol, there are no specific obligations set out in the protocol to ensure a transparent decision-making process. Therefore, although not all procedural criteria for collaborative participation are set out in the legal framework of the 1995 Barcelona Convention, it has shown a substantive improvement on the requirements for public participation compared with the other regional marine Conventions discussed in this chapter.

Although the ICZM protocol shows good intentions for facilitating public and stakeholder participation in Mediterranean coastal management, a review of the literature finds that the implementation of public participation in the ICZM seems

²²⁹ See the discussion of the levels of public participation in s 2.3 ch 2 above, 39-40.

²³⁰ ICZM protocol, art 14(1).

problematic.²³¹ This is mostly due to the less participatory culture and governance pattern applied in Mediterranean countries.²³² It is also reported that the Barcelona Convention has a low profile among the public.²³³ Despite these implementation obstacles at the domestic level, it is fair to say that the 1995 Barcelona Convention and its ICZM protocol have made significant efforts to improve the legal obligations that concern public participation in regional marine conventions.

4.3.5. EU Marine Directives

EU regulatory instruments and policy goals play an important role in facilitating marine management and marine environmental protection in UK waters.²³⁴ Two significant Directives related to marine planning issues, namely, the Marine Strategy Framework Directive (MSFD) and the Marine Spatial Planning Directive (MSPD), will be discussed here. The MSPD aims to establish a framework for marine spatial planning to support sustainable development in EU marine areas.²³⁵ The MSFD requires member states (MSs) to achieve a good environmental status in their marine environments and to take ecosystem-based approaches to manage the marine environment.²³⁶ As discussed in chapter 3 above, marine planning is an approach to implementing ecosystem-based management. Therefore, the MSFD is closely related to marine planning. Requirements for public participation have been set out in both of the Directives. Therefore, the aim of this section is to examine whether procedural criteria for collaborative participation have been embedded in these instruments.

Although the production of marine plans in the UK requires a Sustainable Appraisal (SA), which incorporates the requirements of the SEA instruments, the SEA Directive will not

²³¹ Pino González-Riancho and others, 'A Contribution to the Implementation of ICZM in the Mediterranean Developing Countries' (2009) 52 *Ocean & Coastal Management* 545.

²³² Raphaël Billé and Julien Rochette, 'The Mediterranean ICZM Protocol: Paper Treaty or Wind of Change?' (2015) 105 *Ocean & Coastal Management* 84, 89; Ivica Trumbic, 'New Protocol on Integrated Coastal Zone Management' (2008) 38 *Environmental Policy and Law* 145, 149.

²³³ Sofia Frantzi, 'What Determines the Institutional Performance of Environmental Regimes?: A Case Study of the Mediterranean Action Plan' (2008) 32 *Marine Policy* 618, 625–626.

²³⁴ See Jonathon Brennan and others, 'EU Marine Strategy Framework Directive (MSFD) and Marine Spatial Planning (MSP): Which Is the More Dominant and Practicable Contributor to Maritime Policy in the UK?' (2014) 43 *Marine Policy* 359.

²³⁵ MSPD, art 1.

²³⁶ MSFD, art 1.

be examined in this section due to following reasons.²³⁷ First and foremost, in terms of requirements for public participation, the SEA Directive has a rather narrow focus on public consultation on the draft proposals and SEA report²³⁸ rather than public participation throughout the whole decision-making process, which is the focus of this thesis. Second, although Sustainability Appraisal (SA), which is statutorily required in the marine planning process, incorporates SEA requirements, SEAs only focus on the environmental effect of proposed plans whereas SAs have broader consideration of social and economic impacts. Thus, the SEA Directive is only able to provide limited focus on public participation in the marine planning process discussed in this thesis. Third, wide discretion is granted to MSs for carrying out public consultation and participation activities recommended in the SEA Directive at the national level.²³⁹ As a result, lessons learned from literature concerning the performance of public participation in the SEA Directive are mixed. Some positive feedback on public participation in SEA practice, such as public participation improving the credibility and final decisions, is documented.²⁴⁰ It is also reported, however, that public participation is limited to a strictly consultative nature.²⁴¹ Fischer, however, found that the impact of public participation on plan making is unclear.²⁴² Thus, public participation in SEA practice varies on a case-by-case basis. Accordingly, the SEA Directive will not be further examined in this section, although it is related to marine plan making.

In addition to the SEA Directive, Directive 2003/35/EC and Directive 2003/4/EC will not be covered under this section.²⁴³ Marine planning issues are regulated under SEA

²³⁷ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L193/30 (SEA Directive)

²³⁸ SEA Directive, art 6.

²³⁹ Nathalie Risse and others, 'Implementing the European SEA Directive: The Member States' Margin of Discretion' (2003) 23 *Environmental Impact Assessment Review* 453, 461–464.

²⁴⁰ Hens Runhaar and Peter PJ Driessen, 'What Makes Strategic Environmental Assessment Successful Environmental Assessment? The Role of Context in the Contribution of SEA to Decision-Making' (2007) 25 *Impact Assessment and Project Appraisal* 2, 5.

²⁴¹ Victor Lobos and Maria Partidario, 'Theory versus Practice in Strategic Environmental Assessment (SEA)' (2014) 48 *Environmental Impact Assessment Review* 34, 41.

²⁴² Thomas B Fischer, 'Reviewing the Quality of Strategic Environmental Assessment Reports for English Spatial Plan Core Strategies' (2010) 30 *Environmental Impact Assessment Review* 62, 68.

²⁴³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission, [2003], OJ L156, 17; Directive 2003/4/EC of

requirements because SAs are required for marine plans. Directive 2003/35/EC addresses public participation in certain plans and programmes.²⁴⁴ However, it does not apply to plans and programmes falling under the scope of the SEA Directive.²⁴⁵ Hence, this Directive is not included in this section. The reason for excluding Directive 2003/4/EC from this section is that this thesis mainly focuses on the issue of public participation. As explained earlier in the section of the Aarhus Convention, the investigation on the access to environmental information is due to the role that environmental information plays in public participation process rather than the value of its own. Thus, the Directive 2003/4/EC is not the main focus of this section. The focus will be placed only on the two EU Directives, namely the MSPD and the MSFD, which are closely related to the issue of marine planning.

Under the MSFD, requirements for public information and participation are set out in Articles 13 and 19. Article 13 requires MSs to publicise information on marine protected areas and areas having a significant impact on the marine environment. In terms of access to information, Directive 2003/4/EC²⁴⁶ is cited in article 19(3) to address the issue of information disclosure. Article 19(1) requires MSs to ensure that “all interested parties are given early and effective” participation opportunities in the implementation of the MSFD. However, terms such as “interested parties” and “effective” are not explained under the MSFD. Article 19(1) also mentions that such participation can be facilitated by existing management bodies or structures. Article 19(2) requires public consultation on every key stage, such as the initial assessment of marine waters, the determination of good environmental status, and the establishment of environmental targets.

Some researchers have correctly pointed out the weakness concerning the regulations for public participation under the MSFD. Fletcher highlights two main weaknesses: first, the terms used to describe who should participate in the MSFD are undefined and inconsistent; second, the level and specific procedures of participation are not clearly

the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003], OJ L41, 26.

²⁴⁴ Directive 2003/35/EC, art 2.

²⁴⁵ Directive 2003/35/EC, art 2(5).

²⁴⁶ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003], OJ L041, 26.

regulated.²⁴⁷ De Santo claims that although Article 19(1) of the MSFD advocates promoting participation through existing bodies and structures, the bodies suggested under Article 19, such as scientific advisory bodies and regional advisory councils, only have limited influence and focus on marine matters.²⁴⁸ Despite these criticisms, compared with the obligations on public participation under the MSPD that will be discussed below, a relevant comprehensive participation strategy is established under the MSFD, including a requirement for information disclosure, a general requirement for public participation, and public consultation on main elements of marine strategy. However, since the requirements for public participation are general and vague, except for early participation, other procedural criteria for collaborative participation are not directly required under the MSFD.

Under the MSPD, four general issues concerning public participation are regulated. First, MSs should identify participation approaches in marine planning with stakeholders at an early stage of marine planning.²⁴⁹ Second, MSs should encourage stakeholders to share data.²⁵⁰ Third, the public and stakeholders should be informed and consulted at an early stage in producing marine plans.²⁵¹ Fourth, stakeholders should have access to the finalised marine plans.²⁵² Therefore, the MSPD only provides a framework for public participation in marine planning, without regulating further detailed procedures. The terms used to describe who should be involved in the MSPD are inconsistent and lack a clear definition. Specifically, according to paragraph 21 of the preamble of the MSPD, “*stakeholders*”, “*authorities*” and “*the public*” should be consulted when developing marine plans. However, Article 9 of the MSPD requires MSs to identify participation strategies for marine planning by ‘informing all *interested parties* and by consulting the *relevant stakeholders and authorities, and the public concerned*’. Article 6 of the MSPD requires MSs to “ensure the involvement of *stakeholders* in accordance with Article 9”. The inconsistent and unclear terms applied in the MSPD could bring confusion and

²⁴⁷ Stephen Fletcher, ‘Converting Science to Policy through Stakeholder Involvement: An Analysis of the European Marine Strategy Directive’ (2007) 54 *Marine Pollution Bulletin* 1881, 1884-1885.

²⁴⁸ De Santo EM, ‘Environmental justice implications of maritime spatial planning in the European Union’ (2011) 35 *Marine Policy* 34, 35.

²⁴⁹ MSPD, art 9(1).

²⁵⁰ MSPD, preamble, para 24.

²⁵¹ MSPD, preamble, para 21.

²⁵² MSPD, art 9 (2).

uncertainty when it is transformed into national laws while meanwhile granting MSs wide discretion on interpreting these terms at the national level. There are no requirements for public consultation on draft decisions, such as draft marine plans, in the MSPD. Thus, the requirements concerning the issue of public participation set out in the MSPD are insufficient, unclear, and general. With the exception of early participation, the procedural criteria for collaborative participation are not required under the MSPD.

The defect of obligations regarding public participation under MSPD is even more apparent in Veidemane and others' research. Veidemane and others studied the requirements and implementation of public participation in EU water, marine, and coastal policies.²⁵³ They compared requirements for public information and participation in the Water Framework Directive,²⁵⁴ the Floods Directive,²⁵⁵ the MSFD, and the MSPD and found that the MSPD provides the most confusing and weak obligations. They found that obligations on public participation under the MSPD are confusing due to, as illustrated earlier, the different terms applied to describe participants. Table 2 illustrates this issue.²⁵⁶ Furthermore, Veidemane and others point out that "detailed, step-wise approaches" concerning public participation are regulated in the other three Directives while the MSPD only provides a very general requirement of participation.²⁵⁷ They identified that the other three Directives explicitly require "effective" or "active" participation in the implementation of the Directives,²⁵⁸ however, these requirements are not set out in the MSPD.²⁵⁹ Therefore, although it is the most significant EU instrument concerning marine planning, it seems that the MSPD provides the most insufficient and vague requirements concerning public participation among the four Directives.

²⁵³ Kristina Veidemane and others, 'Technical Paper on Public Participation and Marine and Coastal Policies' (2014) <[https://circabc.europa.eu/sd/a/3c56efaf-7e4e-4545-8462-9ec8825bc63c/Technical paper on PP_MSP_03_02_2015_CLEAN - formatted.pdf](https://circabc.europa.eu/sd/a/3c56efaf-7e4e-4545-8462-9ec8825bc63c/Technical%20paper%20on%20PP_MSP_03_02_2015_CLEAN_-_formatted.pdf)> accessed 6 September 2017.

²⁵⁴ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, [2000] OJ L327/01 (Water Framework Directive)

²⁵⁵ Directive 2007/60/EC on the assessment and management of flood risks, [2007] OJ L288/27 (Floods Directive)

²⁵⁶ Veidemane and others (n 253) Table: 4.1.2.A.

²⁵⁷ *ibid* 23.

²⁵⁸ Water Framework Directive, art 14; Floods Directive, art 10; MSFD, art 19(1).

²⁵⁹ Veidemane and others (n 253) 23.

Directive	Public	Public concerned	Interested parties	Stakeholders	Public authorities
Water Framework Directive	•		•		
Floods Directive	•		•		
MSFD	•		•	•	
MSPD	•	•	•	•	•

Table 2. Terms applied in EU water, coastal, and marine Directives

In summary, this section has reviewed the requirements for public participation in the MSFD and the MSPD. It found that requirements concerning public participation set out in the two Directives are insufficient and vague. Therefore, clear strategies for public participation, including the general level and specific procedures of participation, have not been established under the two Directives. Except for early participation, other procedural criteria, including easy access to information and participation, broad participation, transparency, and interaction are not clearly required under the MSPD and the MSFD.

4.3.6. Conclusion

The investigation in this section has shown that, except for the 1995 Barcelona Convention and its protocols, the legal obligations for public participation under the UNCLOS, regional marine conventions, and marine-related EU Directives are vague and inadequate. Even a general obligation for public participation has not been set out in some of the legal instruments investigated in this section, including the UNCLOS, Helsinki Conventions, and the OSPAR Convention. Under the MSPD and the MSFD, the issue of public participation is mentioned but there is a lack of clear and detailed obligations, such as the scope and the level of participation, to support the general requirements for participation. Consequently, procedural criteria for collaborative participation are not fully embedded in these marine regulations. Although some non-binding documents, such as guidelines and agreements, present some improvements concerning the requirements for public participation under the Helsinki Convention and OSPAR Convention have occurred, not all of the procedural criteria are covered in these non-binding documents.

4.4. Soft Law

It is not necessary to reaffirm the importance of soft law to environmental protection, or discuss the role that soft law has played in the international legal regime in this section, since this issue has been widely investigated in previous studies.²⁶⁰ The Rio Declaration on Environment and Development (Rio Declaration) was the first international instrument to address issues regarding public participation in environmental matters at the Earth Summit in 1992.²⁶¹ Although it neither solved any highly-controversial issues in an international environmental context nor reached the highest level of specific issues identified by previous instruments, the Rio Declaration made a notable contribution to the advance of international environmental law and to the promotion of sustainable development.²⁶² One of the most notable contributions of the Rio Declaration is that it established three pillars of public participation in its Principle 10. Although it was diluted due to the hard negotiation on its earlier proposal, Principle 10 is still considered a “substantive innovation with little precedential motivation”.²⁶³ The process of negotiating and creating the Rio Declaration was also an example of good practice of involving a wide civic society, especially NGOs.²⁶⁴ Principle 10 also promoted the development of binding instruments regarding public participation at the regional levels; the most notable achievement was the introduction of the Aarhus Convention. Therefore, this section concentrates on the latest soft law instruments, including the Guideline of Principle 10 of the Rio Declaration, Sustainable Development Goals 17, and Rio+20, to investigate whether these soft law instruments can contribute to the development and improvement of the requirement of public

²⁶⁰ See Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, ‘Soft Law, Hard Law, and Effective Implementation of International Environmental Norms’ (2006) 6 *Global Environmental Politics* 104; Kenneth W. Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421; Thomas A Mensah, ‘Soft Law: A Fresh Look at an Old Mechanism’ (2008) 38 *Environmental Policy and Law* 50.

²⁶¹ Volker Mauerhofer, ‘Public Participation in Environmental Matters: Compendium, Challenges and Chances Globally’ (2016) 52 *Land Use Policy* 481, 481.

²⁶² See David A Wirth, ‘The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa’ (1995) 29 *Georgia Law Review* 599; Mukul Sanwal, ‘Sustainable Development, the Rio Declaration and Multilateral Cooperation’ (1993) 4 *Colorado Journal of International Environmental Law and Policy* 45; Jeffrey D Kovar, ‘A Short Guide to the Rio Declaration’ (1993) 4 *Colorado Journal of International Environmental Law and Policy* 119.

²⁶³ Wirth (n 262) 645–648; Foo Kim Boon, ‘The Rio Declaration and Its Influence on International Environmental Law’ (1992) 1992 *Singapore Journal of Legal Studies* 347, 350–351.

²⁶⁴ Maurice F Strong, ‘Beyond Rio: Prospects and Portents’ (1993) 4 *Colorado Journal of International Environmental Law and Policy* 21, 35.

participation in legally binding instruments as the Rio Deceleration did more than twenty years ago.

4.4.1. The Guidelines for the implementation of Principle 10

Eighteen years after the introduction of the Rio Declaration, in 2010, the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) were adopted by the Governing Council of United Nations Environment Programme to support the implementation of Principle 10 of the Rio Declaration.²⁶⁵

However, the Guidelines make little effort to advance or specify the issue public participation in decision-making related to the environment. First, the Guidelines are only voluntary and therefore cannot be compulsorily implemented. Second, the Aarhus Convention is considered to be a consequence of Principle 10 of the Rio Declaration. Thus, most of the content of the Guidelines repeats similar instructions to those already set out in the Aarhus Convention. The Guidelines even provide more restrictions and less effective suggestions for public participation when compared with the Aarhus Convention. For example, guideline 9 notes that ‘states should make efforts to seek proactively public participation in a transparent and consultative manner’, which indicates the consultative nature of public participation. Thus, the Guidelines provide very little value and guidance for the contracting parties of the Aarhus Convention.

For countries not bound by the Aarhus Convention, the Guidelines offer vague and loose guidance on public participation, which is far behind that of the Aarhus Convention. For example, according to guideline 13, public input should be brought into the preparation of environmental regulations “at an appropriate stage”. However, there are no further instructions to identify what “an appropriate stage” is in the Guidelines. According to

²⁶⁵ United Nations Environment Programme, ‘Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters’ <http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf> accessed 11 October 2016; The Guidelines were adopted by Governing Council of the United Nations Environment Programme, ‘Proceedings of the Governing Council/Global Ministerial Environment Forum at Its Eleventh Special Session UNEP/GCSS.XI/11’ 11–15 <http://www.unep.org/delc/Portals/119/Proceedings_K1060433_final_11SSGCGMEF.pdf> accessed 11 October 2016.

the implementation guide of the Aarhus Convention, “an appropriate stage” refers to an early stage, when options are still open.²⁶⁶ Therefore, it seems that the Guidelines have not brought any substantive progress in or caused any significant impact on the development of binding legal instruments regarding public participation.

4.4.2. Rio+20

Twenty years after the 1992 Earth Summit, Rio+20 was organised in 2012 to address the green economy and poverty in a sustainable development context and to promote the implementation of sustainable development at an international level. Rio+20 was expected to make further contributions to the implementation of public participation by urging all countries to adopt Principle 10 at their national levels, thus making a commitment to introducing new global or regional conventions regarding public participation, or by calling for the expansion of the Aarhus Convention.²⁶⁷ However, the outcomes of the Rio+20 and its content regarding the development of public participation were disappointing.²⁶⁸ According to the outcome document of Rio+20, *The Future We Want*,²⁶⁹ the document merely reaffirmed existing commitments, including public participation, as listed in the Rio Declaration, without taking any further substantive measures or making new proposals. The main criticism of *The Future We Want* is that it is rather soft and based on a weak conceptual foundation.²⁷⁰ Without bringing any substantive changes or improvements regarding public participation in the outcome document, the positive feedback regarding public participation in Rio+20 is limited to the fact that the whole civic society and a wide range of stakeholders were engaged in various activities or events related to Rio+20.²⁷¹ Therefore, although

²⁶⁶ Ebbesson and others (n 35) 182.

²⁶⁷ David Banisar and others, ‘Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice’ (2012) 12 *Sustainable Development Law & Policy* 8, 12–13.

²⁶⁸ Eckard Reh binder, ‘UNCSD/ Rio+20: Contribution to the Development of Environmental Law’ (2012) 42 *Environmental Policy and Law* 210, 212–213.

²⁶⁹ United Nations General Assembly, ‘Resolution Adopted by the General Assembly on 27 July 2012: The Future We Want, A/RES/66/288’ (2012) <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E> accessed 16 December 2016.

²⁷⁰ Biliiana Cicin-Sain, ‘Rio+20 Implementation and Oceans: A Perspective’ (2014) 44 *Environmental Policy and Law* 142, 143.

²⁷¹ Ann Powers, ‘The Rio+20 Process: Forward Movement for the Environment?’ (2012) 1 *Transnational Environmental Law* 403, 411–412.

researchers had high expectations for Rio+20 regarding promoting the issues of public participation, the result was rather disappointing.

4.4.3. Sustainable Development Goals (SDG 17)

The latest reference to the significance of public participation in the soft law area is *17 Sustainable Development Goals (SDG 17)* which was adopted in the *Transforming our World: The 2030 Agenda for Sustainable Development* Agenda at the United Nations Sustainable Development Summit in 2016. The issue of participation and governance is addressed in SDG 17, particularly in goals 16.6 and 16.7, which concern the promotion of just, peaceful, and inclusive societies. Goal 16.6 requires developing “effective, accountable and transparent institutions at all levels”, and goal 16.7 calls for “responsive, inclusive, participatory and representative decision-making at all levels”.²⁷² It seems that these sub-goals map out an encouraging picture for promoting public participation at all levels of the decision-making process and in public institutions. However, the indicators applied for assessing the fulfilment of SDG 17 are rather narrow and limited.²⁷³ The indicators for Goals 16.6 and 16.7 are

16.6.1 Primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar).

16.6.2 Proportion of the population satisfied with their last experience of public services.

16.7.1 Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions.

16.7.2 Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group.²⁷⁴

²⁷² United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ 28 <https://sustainabledevelopment.un.org/content/documents/21252030_Agenda_for_Sustainable_Development_web.pdf> accessed 16 December 2016.

²⁷³ The indicator framework of SDGs is created by the Inter-Agency and Expert Group on SDG Indicators (IAEG-SDGs) and accepted by the UN Statistical Commission.

²⁷⁴ Inter-Agency and Expert Group on SDG Indicators, ‘Final List of Proposed Sustainable Development Goal Indicators’ 21 <http://unstats.un.org/sdgs/indicators/Official_List_of_Proposed_SDG_Indicators.pdf> accessed 17 December 2016.

The expenses and budget of the primary government and the public satisfaction of public services only provide very limited information about the effectiveness, accountability, and transparency of public institutions that goal 16.6 requires. The indicators applied in goal 16.7 actually aim at inclusive participation, which is an important component, but not the whole picture for participatory decision-making. Although participation is urged for at all levels of participation, the indicators are silent about the procedure and the outcomes of decision-making as the result of participation.²⁷⁵ Therefore, the enforcement and effects of SDG 17 is doubtful.

4.4.4. Conclusion

Soft law contributes to developing general principles of environmental law and indicates the future directions for the development of environmental law.²⁷⁶ As Mensah comments, 'soft law instruments may not merely point States to the direction of hard law, but may actually be designed to crystallise agreed principles and standards into applicable law'.²⁷⁷ The research finding of this section is that although the 1992 Rio Declaration had made a great contribution to embedding the requirement of public participation in international environmental instruments, the subsequent soft law instruments such as Rio +20, the Bali Guideline, and SDG 17 have made little effort to promote public participation at the international level. They have neither furthered principle 10 by providing clear and detailed requirements for public participation, nor proposed or suggested higher levels of participatory strategies, beyond the traditional pattern of consultation on environmental issues to influence the creation or the amendment of future hard laws.

4.5. Legal Status of the Norm of Public Participation

In addition to treaties, international custom and the general principles of law constitute the sources of international law.²⁷⁸ This section will present a brief investigation into

²⁷⁵ Indicators suggested here to address the quality of participation in decision-making can be the public's opinions on to what extent they have been heard and concerned by decision-makers; or the proportion of public input, including information, comments and opinions from the public and other stakeholders, have considered and applied in the making the decision.

²⁷⁶ Sands and others (n 163) 42–43.

²⁷⁷ Thomas A Mensah, 'Soft Law: A Fresh Look at an Old Mechanism' (2008) 38 *Environmental Policy and Law* 50, 50.

²⁷⁸ Statute of the International Court of Justice, art 38.

the status of the norm of public participation in custom and the general principles of international environmental law. This section will address general principles first, then move to customary law. It first needs to be pointed out that there are no clear lines among rules, principles, and customs.²⁷⁹ The arbitral tribunal of the *Iron Rhine* case found that ‘There is considerable debate as to what, within the field of environmental law, constitutes “rules” or “principles”; what is “soft law”; and which environmental treaty law or principles have contributed to the development of customary international law.’²⁸⁰ Therefore, it is common to find controversial views on the status of the norms applied in international environmental law, such as sustainable development.²⁸¹ Some researchers argue that the norm “public participation” is becoming/has become a general principle or custom in international law.²⁸² This section, however, argues that the norm of public participation is, at present, a treaty provision rather than a general principle or a custom of international environmental law.

4.5.1. Rules or General Principles

The first issue to be addressed is whether the norm of public participation is a rule or a principle. The distinction between rules and principles has been widely discussed in academia. Dworkin states that

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it

²⁷⁹ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 Yale Law Journal 823, 836; Ronald M Dworkin, ‘The Model of Rules’ (1967) 35 University of Chicago Law Review 14, 28; Pierre-Marie Dupuy, ‘Formation of Customary International Law and General Principles’ in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 461.

²⁸⁰ *Iron Rhine Arbitration Case (Belgium v Netherlands)* (2005) 27RIAA 58

²⁸¹ See Daniel Barstow Magraw and Lisa A Hawke, ‘Sustainable Development’ in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 614–638.

²⁸² Duvic-Paoli (n 89); Jeroen van Bekhoven, ‘Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact’ (2016) 11 National Taiwan University Law Review 219.

supplies must be accepted, or it is not in which case it contributes nothing to the decision.²⁸³

Therefore, rules are accurate and complete and point to particular decisions.²⁸⁴ Principles, he states, 'do not set out legal consequences that follow automatically when the conditions provided are met'.²⁸⁵ Some principles even do not set out conditions for their application.²⁸⁶ Therefore, Dworkin concludes that the major difference between rules and principles is that principles have a dimension of weight or importance but rules do not.²⁸⁷ Principles provide directions for states and judicial bodies to take into consideration and leave the results of the decision open. However, rules have direct legal consequences and require states and judicial bodies to follow them. Principles are applied to interpret rules or to fill gaps in existing rules.²⁸⁸ However, Sadeleer criticises Dworkin's limited view on the nature of rules.²⁸⁹ Sadeleer argues that not all rules are precise and lead to specific legal consequences.²⁹⁰ Rules of an indeterminate nature, such as many rules that have been set in international law, should not be neglected.²⁹¹ Sadeleer's argument is supported by Beyerlin, who divides rules into action-oriented rules, which impose loose and general obligations to contracting parties to achieve an objective, and result-oriented rules, which provide strictly worded instructions to achieve a clearly defined objective.²⁹² However, Beyerlin insists that Dworkin's fundamental view on rules is correct. Beyerlin argues that rules, both action-oriented and result-oriented, set out legal consequences but principles do not.²⁹³ Furthermore, he argues that both action-oriented and result-oriented rules allow or forbid certain

²⁸³ Dworkin (n 279) 25.

²⁸⁴ *ibid* 25–26.

²⁸⁵ *ibid* 25.

²⁸⁶ *ibid* 26.

²⁸⁷ *ibid* 27.

²⁸⁸ Sands and others (n 163) 117.

²⁸⁹ Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 308–309.

²⁹⁰ *ibid*.

²⁹¹ *ibid*.

²⁹² Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Policies, Principles, and Rules' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 436.

²⁹³ *ibid*.

behaviours.²⁹⁴ Thus, in terms of the difference between rules and principles, Beyerlin states that

[R]ules and principles may roughly be distinguished from each other by saying that the former are norms immediately aimed at making the addressees take action, refrain from action, or achieve a fixed result, while the latter only aim at influencing the states' decision-making, which otherwise remains open to choice, as well as their interpretation of rules.²⁹⁵

Therefore, categorising the norm “public participation” as a rule rather than a principle seems more appropriate. As discussed above, public participation consists of three pillars, namely, access to information, participation in decision-making, and access to justice. It requires public authorities or project developers to take certain actions to fulfil the goal of public participation, such as disclosing information, providing opportunities for participation in decision-making, and offering access to review procedures relating to information disclosure and decision-making. Therefore, based on the general features of rules and principles identified in academia, this thesis argues that public participation is a rule of law.

The above investigation on principle is based on a theoretical perspective. However, Bekhoven raises a practical point, which seems reasonable at first glance, to demonstrate that public participation is a principle of international environmental law. He argues that public participation is a principle of international environmental law because the norm of public participation ‘is clearly endorsed by the international community at domestic, regional, and international level’.²⁹⁶ This is a weak argument. If it has definitely been recognised as a principle of international law, a norm or a concept would be widely accepted and implemented at the international and domestic levels. However, just because it is widely mentioned in international and domestic legal/non-legal instruments, a norm cannot simply become a principle of international law. The norm “sustainable development” is a typical example used to explain this argument. Sustainable development is a generally accepted concept and commonly

²⁹⁴ *ibid* 437.

²⁹⁵ *ibid*.

²⁹⁶ Bekhoven (n 282) 248.

used in binding and non-binding environmental instruments at the international and the national levels.²⁹⁷ However, the legal status of sustainable development remains controversial in academia.²⁹⁸ Therefore, wide acceptance and implementation of public participation in international and domestic instruments are insufficient for justifying that public participation has been recognised as a general principle of international law.

4.5.2. Customary Rules

Customary rules are key components in international environmental law and exist either in unwritten form or alongside a conventional rule.²⁹⁹ Traditionally, for a norm to fall into the category of customary international law, it requires two conditions: state practice and *opinio juris*.³⁰⁰ State practice contains a wide range of sources, national policies, domestic laws and judicial decisions, and acts in international organisations.³⁰¹ Disputes submitted to international courts and tribunals are also considered a source of state practice.³⁰² Thus, Duvic-Paoli claims that international judicial bodies also contribute to recognising and consolidating customary rules.³⁰³ However, observing or demonstrating state practice is never easy. The difficulty of identifying state practice can be used to explain why researchers usually identify customary international law based on the verbal practice of states rather than their practical performance.³⁰⁴ In order to create a customary rule, states' practices should be consistent and general. These criteria were clearly required by the ICJ in the *North Sea Continental Shelf* case.³⁰⁵ However, proving consistent practice, referred to as "virtually uniform" practices in *North Sea Continental Shelf* case, of public participation in states seems very problematic. For example, the Aarhus Convention provides "floor requirements" for public participation and grants wide discretion to contracting parties. Thus, the scope

²⁹⁷ Magraw and Hawke (n 281) 637.

²⁹⁸ Beyerlin (292) 443–445; Magraw and Hawke (n 281) 637.

²⁹⁹ Sands and others (n 163)112.

³⁰⁰ Statute of the International Court of Justice, art 38.

³⁰¹ Sands and others (n 163)112.

³⁰² *ibid.*

³⁰³ Duvic-Paoli (n 89) 82.

³⁰⁴ Daniel Bodansky, 'Customary (And Not so Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105, 113–115.

³⁰⁵ *North Sea Continental Shelf Case (Germany v Denmark)* (1969) ICJ Rep 3, Judgment, paras 73 and 74.

and degree of public participation are implemented differently.³⁰⁶ Observing or summarising a consistent practice of public participation is very challenging.

In judicial practice, the right to public participation failed to gain customary law status in the *Pulp Mills* case. In this case, Argentina argued that Uruguay had not conducted sufficient participation activities with the affected populations in the EIA processes. Argentina cited the Espoo Convention, the International Law Commission draft Articles on Prevention of Transboundary Harm from Hazard Activities, and UNEP Goals and Principles to support its argument.³⁰⁷ However, the court judged that there was ‘no legal obligation to consult the affected populations [that] arises for the Parties from the instruments invoked by Argentina’.³⁰⁸ Boyle disagrees with this judgment and comments that

[I]t seems tenable only if confined literally to the instruments invoked by Argentina. Properly argued there should have been no difficulty persuading the Court of the general principle that public consultation is a necessary element of the EIA process, as it is under Article 2(6) of the Espoo Convention.³⁰⁹

Duvic-Paoli argues that Argentina could reinforce its argument based on the Rio Declaration and the Aarhus Convention.³¹⁰ However, neither Argentina nor Uruguay are contracting parties to the Aarhus Convention. The arbitral tribunal had refused to apply the Espoo Convention in this case because Argentina and Uruguay are not parties to the Espoo Convention.³¹¹ Thus, whether an argument based on the Aarhus Convention could be accepted by the court in this case is an open question. Despite what rules the arbitral tribunal considered that could be applied in *Pulp Mills* case, one thing is quite certain; as Duvic-Paoli argues, the right to public participation has not been recognised by the ICJ as customary law.³¹² She comments that ‘these texts [the Aarhus Convention and the Rio Declaration] could be mentioned by the ICJ if, or when, it decides to

³⁰⁶ See an example in s 4.1.1 on the performance of art 8 of the Aarhus Convention.

³⁰⁷ *Pulp Mills on the River Uruguay Case (Argentina v Uruguay)* (2010) ICJ Rep 14, Judgment para 215.

³⁰⁸ *ibid* para 216.

³⁰⁹ Alan Boyle, ‘Developments in the International Law of Environmental Impact Assessments and Their Relation to the Espoo Convention’ (2011) 20 *Review of European Community & International Environmental Law* 227, 231.

³¹⁰ Duvic-Paoli (n 89) 84–85.

³¹¹ Judgment on *Pulp Mills* case, paras 205 and 210.

³¹² Duvic-Paoli (n 89) 84.

acknowledge the customary nature of the participation principle'.³¹³ Therefore, based on above investigation, this thesis argues that, so far, the norm of public participation is neither a customary rule nor a general principle of international environmental law.

Alongside the development and practice of the norm of public participation in the international law sphere, more evidence and hints will be found regarding whether public participation is a customary rule or a general principle in international law. As investigated earlier in this chapter, gaps and flaws concerning public participation exist in treaty rules. Thus, at present, more attention should be granted to consolidating the requirements for public participation in treaty provisions and promoting the implementation of public participation within contracting parties. As Bodansky comments, 'Rather than continue them [the current debates over the status of norms], our time and efforts would be better spent attempting to translate the general norms of international environmental relations into concrete treaties and actions.'³¹⁴

4.6. Conclusion

This chapter has reviewed the requirements for public participation at an international environmental law level, with the purpose of investigating the extent to which the four procedural criteria for collaborative participation, *early and broad participation, easy access to information and participation, transparency, and interaction* have been set out in general environmental law instruments and marine related legal obligations. The Aarhus Convention was the first, and also the most important, regulation investigated in this chapter. The provisions and the implementation of the second pillar of the Aarhus Convention were the main focus of this investigation. It found that the procedural criteria for collaborative participation cannot be ensured under the Aarhus Convention since the effect of the Convention is diluted by its weak and general provisions. The Aarhus Convention is moderate and less ambitious since it grants too much discretion to contracting parties and requires a rather low level of participation in general. As a pioneer of international regulation of public participation in environmental issues, the Aarhus Convention should have provided more punchy and effective approaches to ensure the effectiveness of public participation. The Aarhus Convention's approach

³¹³ *ibid.*

³¹⁴ Bodansky (n 304) 119.

seems more like a tokenism that could undermine the true value of public participation discussed in chapter 2.

The investigation of requirements for public participation under the CBD Convention found that the importance of public participation in conservation and sustainable use of biological diversity has been realised. However, a complete system of public participation in biodiversity conservation has not been established under the CBD Convention and its protocols, let alone detailed procedural criteria for collaborative participation. Provisions related to participation under the Convention are fragmented and inconsistent. The Cartagena Protocol, the Nagoya Protocol, and the marine-related COP Decisions under the CBD Convention neither reinforce nor supplement the requirements for public participation offered in the main convention.

The investigation on the requirements for public participation under marine regulations found that a comprehensive, clear, and strong legal requirement for public participation has not been embedded in most of the marine regulations examined in this chapter. As a result, very few procedural criteria for collaborative participation have been set out in these regulations. Therefore, it is time to rethink and promote the requirements concerning public participation under current regulations related to marine environmental protection and marine management

In addition to treaty obligations, this chapter also reviewed the latest soft law instruments to explore whether these soft law materials could advance the current legal provisions concerning public participation. It found that these soft law instruments mainly reiterate the requirements for public participation set out in the existing legal instruments. They neither advocate substantive changes to the current participation system, such as calls for a more collaborative participation pattern which goes beyond the traditional consultation participation pattern, nor detail general and vague terms applied in the existing regulations with regard to public participation. In the last section of this chapter, the status of the norm of public participation in customary law and general principles was investigated. This thesis argues that, so far, the norm of public participation is neither a customary rule nor a general principle. Thus, completing, strengthening and improving the relevant provisions concerning public participation in

treaty obligations remain the primary means to guarantee the commitment of public participation at the international law level.

The international and regional regulatory instruments investigated in this chapter have not imposed strong and explicit requirements for public participation, nor have they established a collaborative participation pattern for marine decision-making. Therefore, contracting parties have been granted great flexibility to interpret and implement the relevant obligations of participation at the national level. Therefore, the procedural criteria for collaborative participation have not been fully supported at the international law level. The next chapter will investigate the English domestic laws regarding public participation, to examine whether or to what extent collaborative participation in marine decision-making can be ensured in the national legal system.

Chapter 5. English Domestic Requirements for Public Participation in Land-use Planning and Marine Planning

Introduction:

The previous chapter found that the current international legal system only provides general requirements for public participation and grants broad discretion to contracting parties. As a result, the responsibility for establishing a complete and effective participatory regime, especially for marine matters, remains at national levels. This chapter focuses on the participation system under both the land and marine planning regimes in England. Although this thesis mainly concentrates on public participation in English marine planning, the system of participation in land planning in general will be examined first. The investigation of the participation system of English land planning aims to address two questions: what is the main rationale for public participation in the land planning context,¹ and what lessons or inspiration could be drawn from the development of land-planning regarding public participation?

This chapter will be divided into two parts to investigate the participation system for planning issues in England. Section 5.1 concentrates on the issue of public participation in the land-planning system in England. Specifically, sections 5.1.1 and 5.1.2 provide a review of the development of the requirements of public participation and its implementation in land planning from the 1940s to the early 2000s. Section 5.1.3 investigates the system of public participation in the current land planning matters at the local level. Section 5.2 focuses on the requirements for public participation in English marine planning system. Section 5.2.1 concentrates on relevant binding obligations on public participation under the Marine Coastal Access Act 2009 (MCAA 2009). Section 5.2.2 reviews the requirements for public participation in non-statutory instruments related to marine planning. These two sections aim to map the system of public participation in the marine planning process and investigate the purpose of public participation in marine planning acknowledged in policies and governmental documents. The four procedural criteria for collaborative participation will be evaluated in section

¹ One of the research questions of this thesis is whether the English land and marine planning systems share the same motivations for public participation. See s 1.2 in ch 1, 11.

5.2.3 to examine the extent to which these criteria have been included in the regulatory regime of marine planning.

5.1. The System of Public Participation in Land-based Decision-making

‘Planning shapes the places where people work and live. So it is right that people should be enabled and empowered to take an active part in the process.’²

By reviewing the literature, it is found that summarising a fixed and precise purpose for English land planning is challenging. This is because planning constantly evolves and progresses; therefore, its purpose and emphasis change.³ The nature of planning is also different in different countries, depending on their various legal, administrative, historical, and cultural aspects.⁴ This section concentrates on the purposes of English land planning and its relevant participation strategies from the 1940s to the present.

5.1.1. Public Participation in Land Planning in England from the 1940s to 1970s

The modern planning system was established in England with the introduction of the Town and Country Planning Act 1947 (1947 Act).⁵ Numerous books and articles have intensively studied the legal regime and implementation of the land planning system in England and Wales since then.⁶ In the 1947 Act, there was no statutory requirement for public participation in planning matters: public participation was conducted voluntarily.⁷ During the early years, based on the strong scientific and objective nature of planning issues, it was mainly experts who participated in making planning decisions.⁸ This form

² Office of the Deputy Prime Minister, ‘Community Involvement in Planning: The Government’s Objectives’ (2004) preface
<<http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planningandbuilding/pdf/147588.pdf>> accessed 29 November 2016.

³ Barry Cullingworth and others, *Town and Country Planning in the UK* (15th edn, Routledge, Taylor & Francis Group 2015) 2–5.

⁴ *ibid* 5–6.

⁵ Robert Duxbury and Arthur Edward Telling, *Telling and Duxbury’s Planning Law and Procedure* (14th edn, Butterworths 2009) 10.

⁶ See John Barry Cullingworth, *British Planning : 50 Years of Urban and Regional Policy* (Athlone Press 1999); Geoff Vigar, ‘Planning, the Profession and the Public’, *Town and Country Planning in the UK* (15th edn, Routledge 2015); Duxbury and Telling (n 5); Victor Moore, *A Practical Approach to Planning Law* (11th edn, Oxford University Press 2010).

⁷ Ray E McDevitt, ‘Public Participation in the English Land Use Planning System: Part I’ (1974) 6 *Urban Lawyer* 483, 492.

⁸ Vigar (n 6) 508–509.

of planning is described as “master plan” by researchers.⁹ Master planning focuses on physical planning and design. Thus, owing to the highly technical threshold of planning matters, the public was excluded from planning matters.¹⁰ The participatory activities documented during that time were limited to consultations and public exhibitions.¹¹ Therefore, at the initial stage of land planning, public participation was not regulated or implemented as a component of the land-planning process. The exclusion of the public from planning during this period might be due to the dramatic social and economic growth and urgent demands for a variety of planning decisions in the post-war period. Therefore, at that time, public participation was not prevalent in planning matters.

During the 1960s, planning responsibility began to be transferred from experts to public authorities.¹² Expert planners had failed to solve social and economic problems, such as a distrust of the technocratic approach and the management of social diversity and equality, through planning.¹³ Thus, more attention was given to public participation in planning matters to ease social conflicts.¹⁴ Accordingly, the legal and political requirements for public participation experienced growth in England and Wales during the 1960s.¹⁵ This trend reached its peak at the end of the 1960s when the legal provisions of publicity and participation in structure plans were set out in the Town and Country Planning Act 1968 (1968 Act).¹⁶ Section 3(1) of the 1968 Act required that during the preparation of a Structure Plan or a Local Plan, local planning authorities should ensure

(a) that adequate publicity is given in their area to the report of the survey...and to the matters which they propose to include in the plan;

⁹ Trevor Hart, Geoff Vigar and Simin Davoudi, ‘The Nature of Planning’ in Barry Cullingworth and others (eds), *Town and Country Planning in the UK* (15th edn, Routledge 2015) 2; United Nations Human Settlements Programme, ‘Planning Sustainable Cities Global Report on Human Settlements 2009’ (2009) 19.

¹⁰ Sandy Kerr, Kate Johnson and Jonathan Side, ‘Planning at the Edge: Integrating across the Land Sea Divide’ (2014) 47 *Marine Policy* 118, 119.

¹¹ Yvonne Rydin, ‘Public Participation in Planning’ in John Barry Cullingworth (ed), *British Planning: 50 Years of Urban and Regional Policy* (Athlone Press 1999) 184; Peter J Larkham and Keith D Lilley, ‘Exhibiting the City: Planning Ideas and Public Involvement in Wartime and Early Post-War Britain’ (2012) 83 *Town Planning Review* 647.

¹² Vigar (n 6) 509–511; Hart, Vigar and Davoudi (n 9) 2–3.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Town and Country Planning Act 1968, ss 15 and 17.

¹⁶ Town and Country Planning Act 1968, s 3.

(b) that persons who may be expected to desire an opportunity of making representations to the authority with respect to those matters are made aware that they are entitled to an opportunity of doing so; and

(c) that such persons are given an adequate opportunity of making such representations;

And the authority shall consider any representations made to them within the prescribed period.

However, the participation obligations set in the 1968 Act neither regulated the timeframe for the publicity and making representations, nor did it provide clear instructions on the scope and method of participation. The government realised that setting the requirements for public participation in planning regulation was not enough to ensure the most effective practice of participation. Therefore, the Skeffington Committee was appointed in 1968 to provide suggestions on methods for increasing public participation in making local development plans, and thereby to assist with the implementation of the 1968 Act regarding participation issues.¹⁷ A report called *People and Planning* (Skeffington Report) was published in 1969.

The Skeffington Report is regarded as a turning point in public involvement in English land planning.¹⁸ It clarifies that notification is just the initial step, and not the whole story, of participation.¹⁹ The Skeffington Report emphasised the role of education in planning and highlighted the educational function of participation.²⁰ It stated that

There is little enough public knowledge about the present system...people will need to be able to distinguish, for example, between the opportunities to contribute at the formative stage of the structure plan and the opportunity to object when that plan is formally submitted to the Minister; and they will need

¹⁷ Skeffington Committee, 'People and Planning: Report of the Committee on Public Participation in Planning' (1969) 1.

¹⁸ Mark Baker, Stephen Hincks and Graeme Sherriff, 'Getting Involved in Plan Making: Participation and Stakeholder Involvement in Local and Regional Spatial Strategies in England' (2010) 28 *Environment and Planning C: Government and Policy* 574, 575; Vigar (n 6) 509.

¹⁹ Skeffington Committee (n 17) 1.

²⁰ *ibid* 43.

to be able to distinguish the equivalent opportunities in the procedure for preparation of the local plan.²¹

However, the Skeffington Report did not bring a fundamental change to the implementation of public participation in practice.²² The report's authors realised that 'most authorities have been far more successful in informing the public than in involving them'²³, but the report provided no clear strategy about the implementation of participation with the exception of providing public notification.²⁴ This deficiency has also been pointed out by Damer and Hague who comment that 'the feeling seems to be that the Skeffington is generally A Good Thing, but somehow the next steps towards a participatory planning are still unclear'.²⁵ The lack of clear recommendations on the process of participation might be partly because the rationales for public participation in planning were not completely recognised in the Skeffington report. The only objective of participation clearly mentioned in the Skeffington Report is to establish good understanding and relationship between the public and the planner:²⁶ this is only one component of the instrumental functions of participation. As discussed in chapter 2 above, the specific strategies and approaches of participation depend on the purposes and motivations for public participation. Therefore, without realising and identifying the rationales for participation in planning issues, it is difficult to determine the relevant approaches and methods for participation covered in the Skeffington Report. Damer and Hague criticise the report, as a whole, for its lack of a theoretical basis, either in the planning theories or in the theory of participation.²⁷

Another weakness of the Skeffington report is that it maintained that the production of local development plans is limited to experts and planning authorities rather than the

²¹ *ibid.*

²² Rydin (n 11) 187.

²³ Skeffington Committee (n 17) 3.

²⁴ Nine recommendations are suggested in the report. Recommendations I, II, and V regard the notification issues of participation; Recommendations III, V and VIII suggest participation through surveys, provision of comments, and the establishment of community forums; Recommendation VII suggests the way to address public comments; and Recommendations VI and IX emphasise the importance of the role of planning officers and education.

²⁵ Seán Damer and Cliff Hague, 'Public Participation in Planning: A Review' (1971) 42 *Town Planning Review* 217, 222.

²⁶ Skeffington Committee (n 17) 4.

²⁷ Damer and Hague (n 25) 223.

wider public and other interested bodies.²⁸ It stated that ‘the responsibility for preparing a plan is, and must remain, that of the local planning authority...the completion of plans is a task demanding the highest standard of professional skill, and must be undertaken by the professional staff of the local planning authority’.²⁹ Therefore, the Skeffington Report does not touch the issue of power sharing in planning matters, which is the core argument regarding the normative rationale for participation and the levels of participation discussed in chapter 2.

Consequently, although requirements for participation were set out in the 1968 Act and the Skeffington Report, the performance of participation was weakened because of a lack of detailed legal provisions and the absence of an understanding of the rationales and purposes of participation.³⁰ As a result, based on their own understanding and knowledge of participation, local planning authorities applied various levels of participation and participatory approaches in making structure plans.³¹ In practice, public participation still remained at the notification level rather than amounting to real involvement.³² The performance of public participation throughout this period was thin and inconsistent.

Two issues concerning public participation in land planning during the 1940s to 1970s have been revealed in this investigation. The first issue is about the primary rationale for public participation during this period. Specifically, given the fact that planning issues were exclusive to experts at the beginning of the modern planning system, the substantive rationale for participation was unacknowledged. Since the planning power was exclusive to local planning authorities,³³ the normative rationale for participation was not the main purpose for involving the public at that period. However, the Skeffington Report did note that public participation could contribute to establishing understanding and building relationships building between the public and planners.³⁴

²⁸ Skeffington Committee (n 17) 1; McDevitt (n 7) 509.

²⁹ Skeffington Committee (n 17) 1.

³⁰ McDevitt (n 7) 505; Mary Benwell, ‘Public Participation in Planning— A Research Report’ (1980) 13 Long Range Planning 71, 72.

³¹ McDevitt (n 7) 505.

³² Michael Fagence, *Citizen Participation in Planning* (Pergamon Press 1977) 261–263.

³³ Skeffington Committee (n 17) 1.

³⁴ Skeffington Committee (n 17) 43.

Therefore, the instrumental rationale was the main rationale for participation for planning during the 1940s to the 1970s.

The second issue is that, when the idea of public participation is introduced into a planning system, it is important to identify the rationales for participation involved. Decision-makers and the public should both have a clear understanding of why public participation is necessary and important in the decision-making process. Otherwise, the performance of participation will bring confusion and ineffective outcomes.

5.1.2. Public Participation in Land Planning in England from the 1980s to 1990s

The second key phase of the evolution of modern English planning was from the late 1970s to the late 1990s. During this period, business and industries were granted priority and experienced rapid growth.³⁵ The introduction of the terms “privatization” and “liberalization” in energy policy is an example that illustrates the market-based approach applied by the Conservative government during the 1980s.³⁶ Researchers describe the nature of planning during this phase as a “market-led” approach or a “market friendly” approach.³⁷ Thornley comments that ‘the intention of government is to retain the bones of the planning system but to give it a new shape and purpose. This purpose is one which has as its primary aim that of aiding the market. The planning system must keep up with the current trends in that market and foster and nurture them’.³⁸ As a result, the implementation of effective public involvement in planning issues at both the national and local levels was sacrificed to a demand for social-economic development and a streamlined decision-making process.³⁹ The statutory requirements for public participation were much reduced in the planning regulations.⁴⁰ For example, according to Local Government, Planning and Land Act 1980,⁴¹ the

³⁵ Vigar (n 6) 510–511.

³⁶ Peter Pearson and Jim Watson, ‘UK Energy Policy 1980-2010: A History and Lessons to Be Learnt’ (2012) 7 <<http://pges.org.uk/wp-content/uploads/2015/01/uk-energy-policy.pdf>> accessed 3 February 2017.

³⁷ Hart, Vigar and Davoudi (n 9) 11; Andy Thornley, *Urban Planning under Thatcherism: The Challenge of the Market* (2nd edn, Routledge 1993) 143.

³⁸ Thornley (n 37) 143.

³⁹ Mark Tewdwr-Jones and Huw Thomas, ‘Collaborative Action in Local Plan-Making: Planners’ Perceptions of “Planning through Debate”’ (1998) 25 *Environment and Planning B: Planning and Design* 127, 129; Vigar (n 6) 510–511; Thornley (n 37) 144.

⁴⁰ Vigar (n 6) 511; Thornley (n 37) 127–128, 133–134.

⁴¹ Local Government, Planning and Land Act 1980, sch 14, para 3.

requirement of publicity of survey reports of planning areas was removed.⁴² Tewdwr-Jones and Thomas accuse the streamlined planning process of reinforcing the influence of powerful interests and causing the exclusion of local communities from the planning process.⁴³ Bedford et al. also report that participants who held power, interests, resources, and experience were the main players and influencers of planning decisions.⁴⁴ In this streamlined planning context, public participation was applied to display transparency and legitimacy in decision-making processes, to meet political requirements. It did not aim to address the core arguments raised from public consultation (substantive rationale) or empower participants (normative rationale).⁴⁵ Thus, during the 1980s, the true values underlying all three rationales for public participation, such as promoting democracy, improving the quality of decision-making, and achieving social goals, were neglected and undermined by the streamlined and centralised planning strategy.

At the end of the 1990s, EU legislation and international laws (such as the Aarhus Convention and Human Rights Act 1998) gradually became a driving force for the improvement of public participation in planning matters.⁴⁶ The introduction of Local Agenda 21 was another catalyst for the promotion of public participation in planning matters.⁴⁷ However, as investigated in chapter 4 above, the requirements for public participation set out in international law are too weak and vague, and cannot provide robust support for the development of public participation at the national level. Relevant international laws provide a low standard for public participation in decision-making processes, and are therefore unable to support and guide high-quality and effective public participation in practice.

⁴² According to s6 of Town and Country Planning Act 1971, local planning authority is required to prepare a survey to examine “matters which may be expected to affect the development of that area or the planning of its development and in any event to keep all such matters under review”.

⁴³ Tewdwr-Jones and Thomas (n 39) 129.

⁴⁴ Tracey Bedford, Judy Clark and Carolyn Harrison, ‘Limits to New Public Participation Practices in Local Land Use Planning’ (2002) 73 *Town Planning Review* 311; Gary Pattison, ‘The Role of Participants in Producing Regional Planning Guidance in England’ (2001) 16 *Planning Practice & Research* 349.

⁴⁵ Bedford, Clark and Harrison (n 44) 324–326.

⁴⁶ Julie Adshead, ‘Revisiting the Ideologies of Planning Law’ (2014) 6 *International Journal of Law in the Built Environment* 174, 180.

⁴⁷ See Andrew Wild and Robert Marshall, ‘Participatory Practice in the Context of Local Agenda 21: A Case Study Evaluation of Experience in Three English Local Authorities’ (1999) 7 *Sustainable Development* 151.

5.1.3. Public Participation in Land Planning in England after the 2000s

The Planning and Compulsory Purchase Act 2004 (PCPA 2004) introduced fundamental reform to the English planning system. The PCPA 2004 changed the complex planning system in England into a two-tier planning framework based on Regional Spatial Strategies (RSSs) and Local Development Frameworks (LDFs). Certain aspects of the planning framework were detailed in a set of Planning Policy Statements (PPSs). In the post-2004 planning system, achieving sustainable development has gradually become the main objective for planning. This objective is presented more explicitly in the National Planning Policy Framework (NPPF), which is the present planning policy, as 'the purpose of the planning system is to contribute to the achievement of sustainable development'.⁴⁸ Public participation is a commonly acknowledged principle for sustainable development.⁴⁹ Accordingly, public participation is emphasised as an inherent element of the post-2004 planning system.

Despite the good intentions of the central government to improve public participation in planning issues, the results of the implementation of public participation have been far from satisfactory. Flaws in the new participatory approaches, such as the Statement on Community Involvement (SCIs) established under the PCPA 2004,⁵⁰ are identified by researchers. SCIs are documents produced by local planning authorities to specify how and when the public will be involved in the production of local plans and the application of specific projects. This is the key approach for enhancing public participation in the 2004 planning reforms. Brownill and Carpenter point out that the function and expected results of SCIs would be diluted due to the wide local flexibility provided to local planning authorities.⁵¹ In addition, in the two-tier planning system, the requirements for participation in RSSs are very few.⁵² Therefore, under a hierarchical plan-led system,

⁴⁸ NPPF, 2.

⁴⁹ PPS1, 6; NPPF, 5

⁵⁰ PCPA 2004, s18

⁵¹ Sue Brownill and Juliet Carpenter, 'Increasing Participation in Planning: Emergent Experiences of the Reformed Planning System in England' (2007) 22 *Planning Practice and Research* 619, 627.

⁵² *ibid* 628.

consensus gained from participation and negotiation in LDFs can be undermined by higher level planning strategies produced in less participatory procedures.⁵³

Old barriers to participation, such as the insufficient skills and resource of local planning authorities and the insufficient participation of hard-to-reach groups, still exist.⁵⁴ Kitchen and Whitney's research reflects the challenge of altering the local circumstances and cultures regarding participation and the traditional participation approaches applied by local planning authorities in the short term to meet the government's ambition regarding the enhancement of participation.⁵⁵ Consequently, public participation was still problematic in planning matters following the 2004 planning reforms. As the NPPF points out, 'this [planning] should be a collective enterprise. Yet, in recent years, planning has tended to exclude, rather than to include, people and communities'.⁵⁶ Therefore, the English planning system experienced another dramatic reform in 2011. This had the purposes of increasing devolution and localism.

The introduction of the Localism Act 2011 is considered as a democratic revolution in the planning system. The Act transfers powers and responsibilities from central governments to local governments and local communities.⁵⁷ The government committed itself to 'put (local planning) power back in the hands of residents and relevant groups'.⁵⁸ The Localism Act 2011 abolished regional strategies (RSSs) and established a neighbourhood-planning regime⁵⁹ to meet the government's commitment to transferring planning powers to the local level. Neighbourhood planning regimes include Neighbourhood Development Plans (NDPs) and Neighbourhood Development

⁵³ Joe Doak and Gavin Parker, 'Networked Space? The Challenge of Meaningful Participation and the New Spatial Planning in England' (2005) 20 *Planning Practice & Research* 23, 33.

⁵⁴ Brownill and Carpenter (n 51) 630–631; Doak and Parker (n 53) 33–34.

⁵⁵ Ted Kitchen and David Whitney, 'Achieving More Effective Public Engagement with the English Planning System' (2004) 19 *Planning Practice and Research* 393.

⁵⁶ Department for Communities and Local Government, 'National Planning Policy Framework' (2012) i <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf> accessed 12 May 2017.

⁵⁷ Department for Communities and Local Government, 'A Plain English Guide to the Localism Act' (2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf> accessed 1 December 2016.

⁵⁸ Department for Communities and Local Government, 'Neighbourhood Planning' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229749/Neighbourhood_planning.pdf> accessed 1 December 2016.

⁵⁹ Localism Act 2011, ss 109 and 116.

Orders (NDOs).⁶⁰ NDPs are strategic plans for neighbourhood areas.⁶¹ NDOs grant planning permissions in neighbourhood areas.⁶² Neighbourhood planning allows local communities and individuals, through a local parish council or neighbourhood forum, to map and influence local planning issues. This measure backs up the localism agenda. Neighbourhood planning is not a statutory requirement, but a right that local English communities can choose to apply. A neighbourhood plan becomes part of the statutory development plan once it has been agreed via a referendum and accepted by the planning authority.⁶³ Accordingly, local communities and residents are granted new powers and rights to achieve their ambitions in neighbourhood areas.

Neighbourhood planning was much strengthened by the introduction of the Neighbourhood Planning Act 2017. This new Act provides procedural requirements for modifying existing Neighbourhood Plans;⁶⁴ requires local planning authorities to set out advice or assistance on proposals for making neighbourhood plans in their SCIs;⁶⁵ and requires local planning authorities to consider draft neighbourhood plans (referred to as “post-examination draft neighbourhood development plans” in the Act) when determining planning permission.⁶⁶ The current planning system reflects that devolution and localism are the main objectives of the post-2011 planning system. Sharing planning power is the main motivation for involving local communities in planning issues. As discussed in chapter 2, power sharing is a fundamental element of the normative rationale for participation. Therefore, the normative rationale is the dominant rationale for participation under the present planning system. The introduction of the Neighbourhood Planning Act 2017 also implies that the trend of the devolving planning power to local communities and local governments will continue. Therefore, the normative rationale for participation will remain the dominant position in the English land planning system in future years. Despite the goodwill of the central government in empowering local communities on land planning, the goal of

⁶⁰ Localism Act 2011, sch 9.

⁶¹ PCPA 2004, s 38A.

⁶² Town and Country Planning Act 1990, s 61E.

⁶³ PCPA 2004, s 38(2).

⁶⁴ Neighbourhood Planning Act 2017, s 4.

⁶⁵ Neighbourhood Planning Act 2017, s 6.

⁶⁶ Neighbourhood Planning Act 2017, s 1.

empowerment seems too ambitious to be achieved under the current land planning system. A review of the literature indicates two reasons for this: the *mismatched capacity and local circumstance* and the *wide discretion granted to land planning authorities*.

As discussed in chapter 2, the level of participation depends on the nature of the proposed decisions. However, by reviewing the literature, it was found that the capacity of local communities and the current governance pattern at the local level are not able to support fully the goal of public empowerment in neighbourhood planning. Local planning should rely on a vibrant local democracy. Gallent and others, however, found that a genuine and close relationship between residents and local planning authorities has not been established although the planning system has dramatically changed.⁶⁷ Gallent points out that

[R]eform of the planning system in itself will not alter the basic reality of limited dialogue between community groups and local government...for there to be harmonious compliance between future community-based plans and local plans...there will be need to be substantial investment in open dialogue between authorities and residents, and a consequent accumulation of trust.⁶⁸

In addition, Le-Las and Shirley warn that the localism strategy liberates local governments from the central government but also separates local government from local democracy due to the extensive flexibility provided to local governments.⁶⁹ They criticise the Local Government Act 2000, from the perspective of democracy, for adversely changing the structure of the local planning authorities. Some internal bodies of local government, such as Local Strategy Partnerships, which tend to serve commercial interests rather than the public interest and local communities' welfare, gain strong power or influence on decision-making.⁷⁰ Consequently, 'public interest has

⁶⁷Nick Gallent, Iqbal Hamiduddin and Manuela Madeddu, 'Localism, down-Scaling and the Strategic Dilemmas Confronting Planning in England' (2013) 84 *Town Planning Review* 563; Nick Gallent, 'Re-Connecting "people and Planning": Parish Plans and the English Localism Agenda' (2013) 84 *Town Planning Review* 371.

⁶⁸ Gallent (n 67) 393.

⁶⁹ Wendy Le-Las and Emily Shirley, 'Does the Planning System Need a "Tea Party"?' (2012) 3 *Journal of Planning and Environment Law* 239.

⁷⁰ *ibid.*

been subsumed into the private interest...the children [the local community] can spend their pocket money on neighbourhood plans and their 'prefects' can speak and vote on local issues, whilst the grown-ups [local government] concentrate on exploiting their new freedoms'.⁷¹ Furthermore, Baker points out that not all local planning authorities and local residents, particularly some underprivileged communities, have the capacity and resources to deliver local planning.⁷² This concern is confirmed by other empirical studies, which show that participation in neighbourhood planning is more difficult in deprived areas.⁷³ Thus, based on the above investigation, it seems that despite the willingness of central government to return planning powers to local populations, empowerment participation is difficult to be achieved based on the current circumstances at the local level.

In addition to the inadequate capacity of local communities, the increasing flexibility granted to local planning authorities on participation issues can also hinder public participation in planning issues. The original purpose of providing wide discretion to local planning authorities was to add flexibility to participation depending on different circumstances, but not to provide excuses for reducing participation or undermining the value of participation. Although the criticism of the discretion granted to local planning authorities on participation issues is not new,⁷⁴ it is still worth investigating whether this matter has been controlled to some extent in the current planning system. However, as will be illustrated below, an investigation on the Statement on Community Involvements (SCIs) for local planning shows that the extensive discretion granted to local planning authorities has not been well supervised under the current planning regime.

SCIs are core documents concerning the design and implementation of public involvement in planning matters at a local level. However, the quality and accountability of SCIs cannot be guaranteed for two reasons. First, under the current planning system,

⁷¹ *ibid* 242.

⁷² Francine Baker, 'Housing and Planning Regulation – England and Ireland' (2013) 5 *International Journal of Law in the Built Environment* 118, 131.

⁷³ See Katherine Brookfield, 'Getting Involved in Plan-Making: Participation in Neighbourhood Planning in England' (2016) *Environment and Planning C: Government and Policy* 1; John Geoghegan, 'Poorer Areas See Few Local Plan Applications' (2013) 25 *Planning* 4.

⁷⁴ See Bedford, Clark and Harrison (n 44).

there are no statutory requirements or formal guidance on how to create SCIs. Second, under section 180 of Planning Act 2008, the legal status of SCIs was changed; as a consequence, the quality of the SCI could not be inspected by the planning inspectorate.⁷⁵

Provisions about preparing for an SCI were set out in the Town and Country Planning (Local Development)(England)(Amendment) Regulations 2008.⁷⁶ This required local planning authorities to invite comments from statutory bodies or persons about what the contents of the statement might be.⁷⁷ The local planning authority also need to consider whether it was appropriate to invite comments from related local residents and business.⁷⁸ These comments were to be taken into account when preparing the SCI.⁷⁹ When an SCI was proposed to be submitted to the SoS, a document which explained the main concerns that raised by statutory consultees and the public, and how these issues had been resolved, had to be submitted with the SCI.⁸⁰ However, the statutory requirements regarding preparation of SCIs have been removed from the current planning regulations. Therefore, local planning authorities are granted broad discretion on how to produce this document.

As a consequence, the preparation of the SCI may not consider or involve public input as much as it should. Baker et al. investigated twenty-three SCIs and revealed several problems regarding their quality.⁸¹ Many SCIs fail to provide clear and specific approaches for participation.⁸² More attention was paid to certain stakeholders instead of the public, especially marginal groups.⁸³ There was little innovation or deliberate engagement approaches in these SCIs; consultation remains the main strategy for participation.⁸⁴ Baker and others' empirical research also revealed that the preparation

⁷⁵ According to PCPA 2004, only Development Plan Documents (DPD) require an independent examination. Before the PCPA 2004 was amended, in some cases, independent examinations were applied to SCIs as if they were DPDs.

⁷⁶ Town and Country Planning Regulation 2008, reg 26.

⁷⁷ Town and Country Planning Regulations 2008, reg 26(1)(b).

⁷⁸ Town and Country Planning Regulations 2008, reg 26(3).

⁷⁹ Town and Country Planning Regulations 2008, reg 26(5).

⁸⁰ Town and Country Planning Regulations 2008, reg, 24.

⁸¹ Baker, Hincks and Sherriff (n 18).

⁸² *ibid* 581-582.

⁸³ *ibid*.

⁸⁴ *ibid*.

processes of SCIs were not as inclusive and participatory as they were claimed since local stakeholders (such as Parish Councils) and key stakeholders in the performance of local planning (such as small developers) found the participation in plan making was difficult.⁸⁵ Therefore, the quality of both the content and the production processes of SCIs are open to debate.

The local planning authorities are asked only to act upon their own SCI,⁸⁶ rather than acting to guarantee the effectiveness of public participation. However, the quality of an SCI is not scrutinised by the planning inspectorate. Courts are reluctant to interfere with the discretion granted to local planning authorities and the content of SCIs. The judge in the *Kendall v Rochford District Council and another* case stated that

The duty imposed on a local planning authority by s 19(3) is, a duty to act in accordance with its own statement of community involvement. It is not a duty to do anything more...as a strategy for consultation it [the SCI] is framed in deliberately broad terms, it does not prescribe a uniform approach for every plan-making process. It recognizes the need for flexibility. It allows the council to decide how it should proceed when preparing a particular development plan document or when dealing with a particular application for planning permission.⁸⁷

Bedford and others warn that planning authorities' discretion on decision-making could undermine the effect of public participation.⁸⁸ Land planning authorities' wide discretion on the determination of the publicity method in granting planning permission is also identified in Adshead's research.⁸⁹ This could potentially bring risk to the occurrence of public participation in land planning issues.

Judicial review can limit discretion in participation matters, or at least remind plan-makers to apply it cautiously, since it has become a common practice for addressing the

⁸⁵ *ibid.*

⁸⁶ PCPA, s 19(3).

⁸⁷ *Kendall v Rochford District Council and another* [2014] EWHC 3866 (Admin), paras 56-57.

⁸⁸ Bedford, Clark and Harrison (n 44) 321.

⁸⁹ Adshead (n 46) 181–183.

lack of participation in plan making.⁹⁰ However, judicial review is not a good mechanism for ensuring effective participation. First, it is a remedial action rather than a routine channel for participation.⁹¹ As Barton writes,

Access to justice is a fundamental aspect of legal and human rights and is a major subject on its own, but in relation to public participation in environmental and resources matters, its role is mainly one of support... rather than as the routine channel for participation in decision-making.⁹²

Secondly, judicial review only concentrates on whether the right plan-making procedures have been followed in the planning process, rather than on the content of decisions. Although general procedures are embedded by legal obligations, local planning authorities have the discretion to determine the specific approaches for implementation: courts will not intervene. Finally, bringing a judicial review is expensive.⁹³ Therefore, judicial reviews are remedial approaches rather than effective methods for ensuring public participation in planning issues or limiting land planning authorities' discretion on public participation.

The findings in this section have been: first, since power sharing is the motivation and objective under the localism agenda, the normative rationale is the dominant rationale for participation in the current planning system. Second, although the level of participation in land planning issues has reached empowerment participation, the top rank of the participation ladder, potential barriers to implementation, such as inadequate resources and democratic bias at the neighbourhood level and the flexibility given to local planning authorities, should not be neglected.

5.1.4. Conclusion

⁹⁰ Phil Allmendinger and Graham Haughton, 'Post-Political Spatial Planning in England: A Crisis of Consensus?' (2012) 37 *Transactions of the Institute of British Geographers* 89, 98.

⁹¹ Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Donald M Zillman, Alistair Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 79.

⁹² *ibid.*

⁹³ Judiciary for England and Wales, 'The Administrative Court Judicial Review Guide 2017' (2017) 106 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635938/HMCTS_Admin_Court_JRG_2017_040817.pdf> accessed 23 August 2017.

The review of the development of public participation in English land planning from the 1940s to the 2000s reveals *the significance of recognising and identifying the rationales for participation in specific decision-making contexts*. Public participation was not an inherent element in English land planning in the 1940s. Land planning was exclusive to experts and local authorities at its initial stage of development. When public participation was introduced to planning regulations at the end of the 1960s, the function and rationales for participation in planning matters were not fully recognised and clarified at the theoretical and practical levels. Without detailed regulations and clear guidance, participation was conducted randomly and variously depending on the performers' own understandings of it. Without any robust motivation for it, the commitment to public participation in planning matters was fragile and easily replaced by stronger motivations such as the demands of social-economic development during the 1980s to the 1990s. A lack of a clear understanding of the rationales for participation undermines the values of public participation. As a result, public participation seems more like a decoration for a legitimate decision-making process rather than an influential factor in planning matters. If the rationales and values of public participation are underestimated, public participation will eventually become mere lip service and tokenism in planning issues. As Doak and Parker warn, 'If the 'tokenists' win out, the minimal levels of involvement required by the regulations will become standard practice'.⁹⁴ Therefore, when the requirements of public participation are introduced in a decision-making context, *the functions and purposes of participation should be clearly recognised and identified, and reflected at the legal level or the policy level*.

Section 5.1.3 found that localism is a theme of current English land planning strategy. Local planning aims to empower local communities on planning issues and give planning power to their populations. The current land planning system is based on the normative rationale for participation, which concentrates on democracy and power sharing. However, the goal of the empowerment of local communities on planning issues can be hindered by mismatched capacity and governance patterns at the local level. The wide

⁹⁴ Doak and Parker (n 53) 37.

discretion offered to local planning authorities is another potential obstacle for empowerment participation.

5.2. The System of Public Participation in Marine Planning

The sea around Britain is vitally important to the United Kingdom. Sea transport accounts for 95% of imports to and exports from the UK: this includes 40% of food goods and 25% of energy.⁹⁵ During 2011-2012, the marine and maritime sector contributed £35 billion to UK GDP, which covered 2.3% of the total output produced by the UK economy in that year.⁹⁶ About 700,000 people were employed by marine-related sectors in 2011.⁹⁷ The contribution of marine industries and the maritime services sector to the UK economy is expected to rise from £17 billion annually (in 2011) to £25 billion annually by 2020.⁹⁸ More than 10% of the population lives in coastal areas in the UK.⁹⁹ The sea around the UK is of great importance for the development of the whole society.

Compared to land planning, with its long history, marine planning is a new form of governance. In 2001, the introduction of *Safeguarding Our Seas* was the first measure to outline a new strategy of marine management for the UK to address challenges happening to the sea. It puts forward a new vision for “clean, healthy, safe, productive and biologically diverse seas” in UK marine areas.¹⁰⁰ In 2007, the *Marine Bill White Paper* (White Paper) mapped a new framework for marine management and a strategic system of marine planning for achieving the UK’s marine vision. Two years later, this

⁹⁵ Department for Transport, ‘Maritime Growth Study: Keeping the UK Competitive in a Global Market’ (2015) 12
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460861/maritime-growth-study-keeping-UK-competitive.pdf> accessed 6 December 2016.

⁹⁶ Oxford Economics, ‘The Economic Impact of the Marine and Maritime Sector on the UK in 2011/12’ (2013) <[https://connect.innovateuk.org/documents/2800720/3676337/Economic impact of the marine and maritime sector in 2011-12](https://connect.innovateuk.org/documents/2800720/3676337/Economic%20impact%20of%20the%20marine%20and%20maritime%20sector%20in%202011-12)> accessed 6 December 2016.

⁹⁷ *ibid.*

⁹⁸ UK Marine Industries Alliance, ‘A Strategy for Growth for the UK Marine Industries’ (2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31813/11-1310-strategy-for-growth-uk-marine-industries.pdf> accessed 6 December 2016.

⁹⁹ Department for Communities and Local Government, ‘Coastal Communities Fund Annual Progress Report 2014’ (2014) 5
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397907/20150123_CF_Annual_Report_Final.pdf> accessed 29 September 2017.

¹⁰⁰ DEFRA, *Safeguarding Our Seas*, 3.

new marine management and planning system was established by the introduction of the Marine and Coastal Access Act 2009 (MCAA 2009).¹⁰¹ Although it has been criticised for failing to simplify the complex governance of UK seawaters and for missing opportunities for better marine environmental protection,¹⁰² the MCAA 2009 is the first piece of legislation that contributes to the integration of marine management in the UK. It established the statutory basis for marine sustainable development. In line with section 44 of the MCAA 2009, the Marine Policy Statement (MPS) was issued in 2011 to set out the framework for preparing marine plans and decision making on specific marine projects to contribute to sustainable development in the UK marine area.¹⁰³

As found in chapter 4 above, the Aarhus Convention and the CBD have not established a comprehensive, effective and robust legal framework for public participation. Worse, existing marine related conventions and EU Directives fail to realise the importance of public participation in marine environmental protection and marine management since only few unclear and limited regulations for public participation are set out in these legal instruments. At the international level, the public participation system in marine-related decision-making has neither been established nor appreciated. Since there is no impetus for ensuring and facilitating public participation in marine decision-making from the international law level, this section aims to explore the issue of public participation in marine planning at the English domestic level. Three questions will be asked: first, what is the requirement for public participation in the marine planning regulatory regime in England? Second, what is the main rationale for public participation recognised by governmental documents and policies related to marine planning? Third, to what extent have the procedural criteria for collaborative participation been set out in the regulatory regime of marine planning in England? This section is divided into three parts. Sections 5.2.1 and 5.2.2 review the binding and non-binding requirements on public participation. These will outline the system of public participation in the marine

¹⁰¹ The requirements for public participation in MCAA will be investigated below in s 5.2.1.2, 165-168.

¹⁰² Gotthard Mark Gauci, 'The U.K. Marine and Coastal Access Bill—A Missed Opportunity to Enhance Protection from Marine Environmental Pollution?' (2010) 34 *Marine Policy* 498; Suzanne J Boyes and Michael Elliott, 'The Excessive Complexity of National Marine Governance Systems – Has This Decreased in England since the Introduction of the Marine and Coastal Access Act 2009?' (2015) 51 *Marine Policy* 57.

¹⁰³ MPS, 3.

planning process. Section 5.2.3 assesses the procedural criteria for collaborative participation in the system.

5.2.1. Statutory Requirements for Public Participation under the MCAA 2009

The MPS is a crucial piece of policy for marine planning, as it ‘provides a framework for [the] development of marine plans to ensure necessary consistency in policy goals, principles and considerations that must be taken into account, including in decision making’.¹⁰⁴ When specific marine plans have not been set in certain marine areas, the MPS functions as the marine plan. Thus, the MPS have a direct influence on the decision-making of marine licensing and other marine activities. Since they are a key component for making marine plans, the issue of public participation should be required in the MPS. This section will investigate the requirements for public participation in both the MPS and in the obligations of the MCAA 2009.

5.2.1.1. The Requirements for Public Participation under the MPS

The MPS contains three parts. The first explains the role of the MPS and its relationship with the terrestrial planning system.¹⁰⁵ The second outlines the UK vision and objectives for marine environment and states what vision and objectives (e.g. multiple dimensions for sustainable development) will be achieved through marine planning.¹⁰⁶ The MPS also provides a set of *high-level approaches to marine planning* and *high-level principles of marine decision-making* to support the fulfilment of the objectives of UK Marine Vision.¹⁰⁷ The second part also points out the social, economic, and environmental considerations that need to be considered in marine plans.¹⁰⁸ The third part of the MPS sets out the policy objectives for different marine sectors, such as energy, shipping, aggregates, and marine protected areas.¹⁰⁹

Although public participation has been recognised as an important approach for marine planning, the MPS contains very thin requirements concerning public participation. First,

¹⁰⁴ MPS, 7.

¹⁰⁵ MPS, 7-8.

¹⁰⁶ MPS, 10.

¹⁰⁷ MPS, 12-14.

¹⁰⁸ MPS, 16.

¹⁰⁹ MPS, 26.

the high-level principles of marine decision-making are silent on the issue of public participation. Second, there is only one statement concerning public participation set out in the high-level approaches to marine planning. This states that the development of marine plans should be ‘participative and informed by data provided by consultees, stakeholders, regulators and relevant experts’.¹¹⁰ Therefore, without mapping out the full potential benefits of participation and providing specific strategy for public participation, the MPS gives very limited consideration to participation issues.

However, the MPS does imply the motivation for public participation in marine planning. The MPS notes that the participation of stakeholders and local communities will ‘maximise adherence to plan-led proposals, identify opportunities for compatible uses and minimise potential conflicts’.¹¹¹ Accordingly, improving the quality of marine plans and managing conflicts are recognised as benefits of public participation in the MPS. Thus, according to the MPS, the substantive rationale and part of the instrumental rationale are recognised as motivations for public participation in the marine planning process.

The lack of a clear interpretation and illustration of both the general objectives of participation and specific approaches to participation in the MPS is a potential obstacle to the implementation of public participation in marine decision-making. As concluded in section 5.1.4, clarifying and identifying the motivations of public participation in a decision-making context is necessary. It will not only strengthen the theoretical basis of participation but also avoid misleading performance that might undermine the value of participation. On the other hand, MPS have a direct influence on marine-related decision-making when marine plans have not been set. As the fundamental policy for marine planning and specific decision-making, the MPS should, at least, map a general requirement for public information and participation or clearly clarify the rationales for participation in marine decision-making.

5.2.1.2. The Requirements for Public Participation in Marine Planning under the MCAA 2009

¹¹⁰ MPS, 12.

¹¹¹ MPS, 13.

This section reviews the obligations under the MCAA 2009 to map the statutory procedure for public participation in making marine plans. It focuses on two issues: first, outlining the main stages of making marine plans and the participation opportunities in these stages; second, clarifying the content and preparation procedure of Statement of Public Participation (SPP) which is the key document concerning public participation in the marine planning process.

The procedure of making marine plans is regulated under schedule 6 of the MCAA 2009. The production of English marine plans can be divided into four stages: Preparation, Scoping and Developing, Public Consultation and Independent Investigation, and Adoption. At the preparation stage, the MMO is required to inform the related planning authorities of its intention to produce a marine plan¹¹² and to prepare and publish an SPP for the proposed plan.¹¹³ The scoping stage is when all significant issues and concerns about the proposed marine area are identified.¹¹⁴ Information and data about the proposed marine areas will be collected; conflicts and demands of marine users and marine environmental protection will be identified; visions and possible alternatives will be determined; and the preferred option will be selected.¹¹⁵ The developing stage focuses on drawing up the draft marine plans.¹¹⁶ According to paragraph 8(1) of schedule 6 of the MCAA 2009, in the scoping and developing stage, ‘the marine plan authority may seek advice or assistance from any body or person in relation to any matter in which that body or person has particular expertise’. The method for this involvement is determined by the MMO.¹¹⁷ The MMO should consider the advice collected from this involvement.¹¹⁸ The MMO should also invite representations about matters to be included in the proposed marine plan.¹¹⁹ The MMO should take account of the advice and comments collected when preparing marine plans.¹²⁰

¹¹² MCAA 2009, sch 6, para 1(2).

¹¹³ MCAA 2009, sch 6, paras 5 and 6.

¹¹⁴ DEFRA, ‘A Description of the Marine Planning System for England’ (2011) 52–55.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.* 56.

¹¹⁷ MCAA 2009, sch 6, para 8(2).

¹¹⁸ MCAA 2009, sch 6, para 9.

¹¹⁹ MCAA 2009, sch 6, para 5(5).

¹²⁰ MCAA 2009, sch 6, paras 9(2)(f) and (g).

When it is completed, with the agreement of the SoS, the draft marine plan should be published to collect comments from the public.¹²¹ The MMO must ensure that ‘the proposals contained in the consultation draft are brought to the attention of interested persons’.¹²² Comments collected from the public consultation should be considered by the MMO when determining the final marine plan.¹²³ However, there are no statutory requirements concerning how long a public consultation should be. When the draft marine plan is published for consultation, the MMO will suggest to the SoS whether an Independent Investigation is needed but leave the decision to be made by the SoS.¹²⁴ If an Independent Investigation is required, the MMO should publish the recommendations and relevant reasons provided by the investigator and should regard the recommendations and reasons when determining the final marine plan.¹²⁵ When it is finalised, with the agreement of the SoS, the final marine plan will be published/adopted.¹²⁶ Modifications (if any), reasons for those modifications, and reasons for failing to apply any recommendations provided by the investigator (if relevant) should be published alongside the final marine plan.¹²⁷ A Sustainability Appraisal (SA) must be prepared alongside the marine plan.¹²⁸ The preparation of an SA is based on the legal obligations of SEA.¹²⁹ In addition to the opportunities for participation in the process of marine planning, the preparation of an SA also provides a participation opportunity for the public. Some participation activities in preparing an SA run in parallel with the opportunities offered when making a marine plan.¹³⁰

Statutory requirements concerning the SPP are regulated under paragraphs 5 to 7 of schedule 6 of the MCCA 2009. An SPP is ‘a statement of the policies settled by the marine plan authority for or in connection with the involvement of interested persons

¹²¹ MCAA 2009, sch 6, paras 11-12.

¹²² MCAA 2009, sch 6, para 11(4).

¹²³ MCAA 2009, sch 6, para 12 (3).

¹²⁴ MCAA 2009, sch 6, para 13(1).

¹²⁵ MCAA 2009, sch 6, paras 13 and 14.

¹²⁶ MCAA 2009, sch 6, paras 15(1) and 15(2).

¹²⁷ MCAA 2009, sch 6, para 15(7).

¹²⁸ MCAA 2009, sch 6, para 10.

¹²⁹ SEA Directive and the Environmental Assessment of Plans and Programmes Regulations 2004.

¹³⁰ Such as in the East Marine Plan case, the draft SA was open to public comments alongside the public consultation on draft East Marine Plan. Information is available at: <<https://www.gov.uk/government/consultations/draft-east-inshore-and-east-offshore-marine-plans>> accessed 6 August 2017.

in the preparation of the proposed marine plan'.¹³¹ An SPP should be prepared and published by marine planning authorities before the preparation of the marine plans.¹³² According to the MCAA 2009, an SPP should cover the following issues: identifying (by a map or otherwise) proposed marine areas;¹³³ providing a timetable for the preparation of the plan and the relevant participation opportunities;¹³⁴ and inviting comments on matters to be included in proposed plans and on the consultation draft.¹³⁵ An SPP should also state the time and manner of taking comments on the matters to be included in the plan and on the consultation draft.¹³⁶ An SPP "may" contain a provision for or concerning the holding of public meetings about the consultation draft.¹³⁷ After it is produced, an SPP should be published with the agreement of the SoS.¹³⁸ There is no statutory requirement for public consultation on a draft SPP. The MMO should ensure that an SPP is published 'in a way calculated to bring it to the attention of interested persons'.¹³⁹ The MMO is also responsible for keeping an SPP under review.¹⁴⁰

5.2.2. Non-statutory Instruments Concerning Public Participation in Marine Planning

The above investigation has established the statutory framework for public participation in the English marine planning process. In addition to these binding obligations, more detailed description of public participation related to marine planning is set in non-binding documents. This section concentrates on DEFRA's non-statutory guidance for English marine planning and Cabinet Office consultation guidance documents to investigate the supplementary requirements for public participation in marine planning. According to section 38 of the MCAA 2009, the SoS may provide statutory guidance to the MMO concerning the exercise of its function. Statutory guidance for marine planning is expected to detail and advance the framework planning process set out in

¹³¹ MCAA 2009, sch 6, para 5(2).

¹³² MCAA 2009, sch 6, para 5(1).

¹³³ MCAA 2009, sch 6, para 5(3).

¹³⁴ MCAA 2009, sch 6, para 6(2).

¹³⁵ MCAA 2009, sch 6, para 6(4).

¹³⁶ MCAA 2009, sch 6, para 6(5).

¹³⁷ MCAA 2009, sch 6, para 6(3).

¹³⁸ MCAA 2009, sch 6, paras 5(1) and 5(4).

¹³⁹ MCAA 2009, sch 6, para 5(6).

¹⁴⁰ MCAA 2009, sch 6, para 7(1).

the MCAA 2009.¹⁴¹ However, even after the East Marine Plans have been adopted and the rest of English marine plans are in progress, there is no statutory guidance for marine planning practice. DEFRA has only issued a non-statutory, but very important, document, *A Description of the Marine Planning System for England (Description)* to guide English marine planning. The *Description* explains the purposes and contexts of marine planning, illustrates the production process, implements approaches for marine plans, and identifies the responsibilities of different parties and stakeholders; it 'represents current Government understanding of best practice in marine planning'.¹⁴²

A key element of the marine planning process, the issue of public participation, is addressed in the *Description*. Motivations for public participation in marine planning are pointed out in the *Description*. Improving the quality and implementation of marine plans are mentioned as purposes for public participation. The *Description* states 'The involvement of stakeholders will increase the likelihood of adopted documents being based on robust local evidence and accepted by a wide group of people, thus being effectively implemented so as to achieve the objectives of marine planning.'¹⁴³ The *Description* adds that 'participation from the third sector (non-government, not-for-profit bodies) will enable access to alternative sources of data and broad support for plans'.¹⁴⁴ Therefore, the substantive rationale for participation is emphasised in the *Description*. Achieving democracy, which is the focus of the normative rationale for participation, is not directly mentioned in the *Description* as a motivation for public participation. However, it states that participation 'will give all parties a greater sense of ownership of the final Marine Plans'.¹⁴⁵ Allowing participants to have an influence on decision-making facilitates their feeling of ownership on the outcomes of decisions.¹⁴⁶ Therefore, the normative rationale for participation, to some extent, is implied in the *Description*. The *Description* also picks out some elements of the instrumental rationale for participation, such as conflict management and learning. It notes that '[participation] would also lead to greater certainty for developers submitting licence applications...a

¹⁴¹ DEFRA, 'A Sea Change: A Marine Bill White Paper' (2007), paras 4.100-4.101 (Marine Bill).

¹⁴² DEFRA, *Description*, 4.

¹⁴³ *ibid* 61.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid* 13.

¹⁴⁶ See s 2.1.1 in ch 2 above, 20.

participatory planning approach from an early stage will enable increased public understanding of and engagement with the marine area'.¹⁴⁷ Other elements identified under the instrumental rationale for participation, such as relationship building and trust building, are not recognised in the *Description*. As found in the first part of this chapter, to ensure land planning authorities' right understanding and consistent practice on participation issues, the central government and relevant policies should clarify the purpose of participation when introducing it into the land planning system. Despite the insufficient focus given to the normative and instrumental rationales for participation, the *Description* has taken an important step in clarifying the motivation and purpose of public participation in the English marine planning context.

The *Description* also provides some practical instructions for public participation, such as carrying out stakeholder analysis,¹⁴⁸ using existing mechanisms to facilitate participation,¹⁴⁹ establishing marine planning advisory groups,¹⁵⁰ and suggesting roles that stakeholders might play at every stage of marine plans.¹⁵¹ In terms of the preparation of an SPP, the *Description* provides four suggestions: first, stakeholders should be involved in the preparation of an SPP.¹⁵² Second, an SPP should not only identify the proposed marine plan areas as the MCAA 2009 requires, but also point out the potential scope of the reporting area of the plan.¹⁵³ Third, there should be a public consultation on the draft SPP. The *Description* states 'the drafting of the SPP should itself be informed by public participation, with plan area stakeholders invited to submit comments on a draft version'.¹⁵⁴ Fourth, according to the *Description*, an SPP should be able to manage participants' expectations for marine plans. It notes 'it is important that the MMO is as clear as it can be in the SPP on the realistic extent to which stakeholders will be able to influence a Plan, in order to manage expectations'.¹⁵⁵ Therefore, in addition to the statutory requirement concerning SPPs regulated under the MCAA 2009,

¹⁴⁷ DEFRA, *Description*, 61.

¹⁴⁸ *ibid* 51.

¹⁴⁹ *ibid* 63.

¹⁵⁰ *ibid* 64.

¹⁵¹ *ibid* 65.

¹⁵² *ibid* 50.

¹⁵³ *ibid*.

¹⁵⁴ *ibid* 52.

¹⁵⁵ *ibid* 63.

the requirements concerning SPPs set in the *Description* should be considered by the MMO as well, when an SPP is prepared. As mentioned in the previous section, although the MCAA 2009 established the framework of public participation in marine planning, the length of public consultation on draft marine plans is not regulated under it. The time span for formal consultation is also not explicated in the *Description*. The Cabinet Office's consultation guidance documents, namely, the Code of Practice on Consultation 2008,¹⁵⁶ the Consultation Principles (2012),¹⁵⁷ the Consultation Principles (2013),¹⁵⁸ and the Consultation Principles (2016),¹⁵⁹ can provide some clues. These four documents target formal, written public consultation activities on draft policies and legislation run by governmental departments and public bodies.¹⁶⁰ Since the MMO is an executive non-departmental public body and develops marine plans on behalf of the SoS for DEFRA, formal public consultation on draft marine plans should follow these consultation guidance documents.

The Code of Practice on Consultation (2008) (*Code*) and Consultation Principles (2012) were the guidelines regarding consultation issues available at the time the East Marine Plans were produced.¹⁶¹ The *Code* was issued in 2000 and revised in 2008. In 2012, the *Code* was replaced by the Consultation Principles (2012). However, due to the great flexibility granted to the consultation process under them,¹⁶² the Second Legislation Scrutiny Committee required an independent, external review of the Consultation

¹⁵⁶ HM Government, 'Code of Practice on Consultation' (2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf> accessed 6 February 2017.

¹⁵⁷ Cabinet Office, 'Consultation Principles (2012)' (2012) <http://webarchive.nationalarchives.gov.uk/20130506171816/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf> accessed 6 February 2017.

¹⁵⁸ Cabinet Office, 'Consultation Principles (2013)' (2013) <http://webarchive.nationalarchives.gov.uk/20150208011121/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf> accessed 6 February 2017.

¹⁵⁹ Cabinet Office, 'Consultation Principles (2016)' (2016) <<https://www.gov.uk/government/publications/consultation-principles-guidance>> accessed 6 February 2017.

¹⁶⁰ The Code, 5; Consultation Principles (2012). A comparison of the requirements of the four consultation guidances can be found in Annex 1.

¹⁶¹ The Consultation Principle 2013 was published in Nov. 2013 when the formal public consultation on the draft East Marine Plans was completed.

¹⁶² Secondary Legislation Scrutiny Committee, 'The Government's New Approach to Consultation - Work in Progress' (2013) 3 <<https://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/100/10002.htm>> accessed 6 February 2017.

Principles.¹⁶³ The Committee's requirement was accepted; the Consultation Principles (2012) were revised and replaced by Consultation Principles (2013). The general contents of the Consultation Principles of 2012 and 2013 are generally the same but the revised version contains more detailed requirements for public consultation. The present guidance on public consultation is the Consultation Principles (2016) which is a revised version of the version of 2013.

All of these guidance documents on public consultation, more or less, have statements concerning the procedural criteria for collaborative participation described in chapter 3 above. Since these guidance documents concentrate on the formal public consultation that occurs at a relatively late stage of policy-making and mainly depends on written consultation, criteria concerning early participation and interactive participation, although stated in these documents, are somewhat weak. Easy access to information and participation in public consultation and transparency of public consultation are also regulated in these documents. The quality of the information provided is covered in all of the consultation documents. The information provided for public consultation should be sufficient, easy to understand, and written in plain language.¹⁶⁴ Hard to reach and vulnerable groups' access to participation should be considered.¹⁶⁵

However, the duration of public consultation is regulated differently under most of the consultation documents. The consultation period required under the *Code* is at least twelve weeks and can be extended under certain circumstances, such as when the consultation spans a holiday period.¹⁶⁶ The Consultation Principles of 2012 suggests that the consultation spans should range two to twelve weeks but offers no suggestions on extension.¹⁶⁷ The standard consultation period set out in the Consultation Principles of 2013 is two to twelve weeks and can be extended if the proposal is new and contentious.¹⁶⁸ The Consultation Principles of 2013 also states that appropriate

¹⁶³ *ibid* 1–4.

¹⁶⁴ The Code, criterion 4.2; Consultation Principles (2016), Principle C; Consultation Principles (2012); Consultation Principles (2013).

¹⁶⁵ Consultation Principles (2016), Principle F; Consultation Principles (2013).

¹⁶⁶ The Code, criteria 2.1 and 2.2.

¹⁶⁷ Consultation Principles (2012).

¹⁶⁸ Consultation Principles (2013).

mitigating actions should be taken if the consultation span covers a holiday period.¹⁶⁹ The Consultation Principles of 2016 does not give a specific time limitation as the earlier versions did. It states that the length of consultation should be based on legal advice and the nature and potential impact of the proposal;¹⁷⁰ but also points out that appropriate mitigating actions should be taken if the consultation span covers holiday period.¹⁷¹ The issue concerning extension of consultation spans is important here, since the completed public consultation on the drafts of the East Marine Plans and South Marine Plans was carried out during holiday periods.¹⁷² The proposed public consultation on the rest of marine plans in England will be carried out in summer 2019. This is likely to cover summer holiday dates.¹⁷³

In terms of ensuring the transparency of consultation, all four documents state that policy makers should explain what comments have been collected from public consultation and provide feedback to participants on how their comments have been used.¹⁷⁴ Furthermore, the necessity of managing the public's expectations on consultation is emphasised. Policy makers should state clearly the purpose of the consultation, and what issues of the draft policy are open to change and what aspects are not open to change.¹⁷⁵ The *Description* also requires the MMO to be explicit about the extent to which stakeholders can influence marine plans in an SPP.

Based on the investigation above, the binding and non-binding requirements for public participation in English marine planning can be illustrated in Table 3 below.

¹⁶⁹ *ibid.* Holiday period assumptions are suggested in the Consultation Principles (2013) as follows: Easter=5 Working Days (1 week); Summer(August)= 22 Working Days (4.2 weeks); Christmas= 6 Working Days (1.1 week)

¹⁷⁰ Consultation Principles (2016), Principle E.

¹⁷¹ Consultation Principles (2016), Principle G.

¹⁷² The public consultation on the draft East Marine Plans was conducted between 16 July 2013 to 8 October 2013 which included a summer holiday. The draft South Marine Plans were opened for consultation between 7 November 2016 and 27 January 2017. This included the Christmas and New Year holidays.

¹⁷³ Timetables for developing North East Marine Plan, North West Marine Plan, South East Marine Plan, and South West Marine Plan are available at MMO's website: < <https://www.gov.uk/topic/planning-development/marine-planning> > accessed 16 September 2017.

¹⁷⁴ The Code, criterion 6.4; Consultation Principles (2016), Principle I; Consultation Principles (2012); Consultation Principles (2013).

¹⁷⁵ The Code, criterion 3.2; Consultation Principles (2016), Principle B; Consultation Principles (2012); Consultation Principles (2013).

		Binding requirements (schedule 6 of the MCAA 2009)	Non-binding requirements
Preparation Stage (SPP preparation)	Content of an SPP:	<ul style="list-style-type: none"> •Maps of proposed plan area (para 5(3)) •A timetable for participation activities (para 6(1)) •Invitation for comments on proposed marine plans and consultation on draft marine plans (paras 6(4)) •The time and manner of inviting comments should be clarified. (paras 6(5)) • SPP may include provision for or in connection with the holding of public meetings about the consultation draft. (paras 6(3)) 	<ul style="list-style-type: none"> • A map of potential scope of report area of marine plans (suggested in the <i>Description</i>) • Management of stakeholders' expectations (suggested in the <i>Description</i>)
	Procedure of preparing an SPP:	<ul style="list-style-type: none"> • SPP should be published in a way to attract attention from the public (para 5(6)) 	<ul style="list-style-type: none"> •Stakeholders should be involved in the preparation of an SPP (suggested in the <i>Description</i>) •A draft SPP should be carried out for public consultation (suggested in the <i>Description</i>)
Scoping Stage and Developing Stage		<ul style="list-style-type: none"> •MMO should invite comments on matters to be included in the proposed marine plan (para 5(5)) •MMO may seek advice from anybody has particular expertise (para 8) • MMO should regard advice and comments (paras 9(2)(f) and (g)) 	
Public Consultation Stage		<ul style="list-style-type: none"> • MMO should invite comments on draft marine plans. (para 12) •The consultation draft marine plans should published in a way to attract public attention (para 11(4)) • MMO may hold public meetings about the consultation draft (para 6(3)) 	<ul style="list-style-type: none"> • Consultation span ranges from 2-12 weeks or more depends on the nature of proposed issues. (suggested in Cabinet Office's consultation documents) •Information should be sufficient, easy to understand, and written in plain language. (suggested in Cabinet Office's consultation documents)

		<ul style="list-style-type: none"> • Participants' expectation on consultation should be managed (suggested in Cabinet Office consultation documents)
Independent Investigation and Adaptation Stage	<ul style="list-style-type: none"> • Modifications that have been made to the draft marine plans and reasons for those modifications should be published alongside the final marine plan (para 15(7)) 	

Table 3. Binding and non-binding requirements on public participation in producing English marine plans

Now that the system of public participation in creating marine plans has been mapped, the following section moves to the examination on whether and how the procedural criteria for collaborative participation can be ensured in the English marine planning process. The procedural criteria for collaborative participation include easy and broad participation, easy access to information and participation, interaction, and transparency.

5.2.3. Procedural Criteria for Collaborative Participation in Binding and Non-binding Requirements for Public Participation

5.2.3.1. Early and Broad Participation

The MCAA 2009 grants marine plan authorities discretion in determining specific methods and approaches of participation, but clearly requires a wide scope of participation. According to paragraph 5 of schedule 6, "interested persons" should be notified about the publication of SPPs and invited to make representations about the issues to be included in the proposed marine plan.¹⁷⁶ The term "interested persons" refers to 'any persons appearing to the marine plan authority to be likely to be

¹⁷⁶ MCAA 2009, sch 6, paras 5(2), 5(5), and 5(6).

interested in, or affected by, policies proposed to be included in the marine plans, and members of the general public'.¹⁷⁷ Paragraph 8 of schedule 6 requires the marine planning authority to seek advice and assistance from anybody with particular expertise when preparing the plan. Seeking advice is not exclusive to experts or traditional statutory consultees; it also includes the public and other stakeholders.¹⁷⁸ In this way, everyone is entitled to engage in the marine planning process.

According to the MCAA 2009, marine plan authorities must make an SPP available to the public after the SPP has been agreed by Secretary of State.¹⁷⁹ The publication of the SPP is the earliest statutory opportunity for public notification in the marine planning process. Paragraph 5(5) of Schedule 6 entitles the public and other stakeholders to make representations about the issues that should be covered by the proposed marine plans. The scoping stage of marine planning addresses data collection and the identification of the issues, visions, and preferred options of proposed marine plans. Thus, the public and other stakeholders can engage in the marine planning from as early as the scoping stage. The importance of *early participation* in marine planning has been repeatedly emphasised in the *Description*.¹⁸⁰ However, there is no statutory requirement for public consultation on the draft SPP. Although the *Description* suggests public consultation on a draft SPP, given the important role that an SPP plays in marine plan making, having a statutory requirement for public consultation on a draft SPP is necessary. The English marine planning system is place-based and is divided into eleven areas. Every marine plan area has unique features and issues that need to be considered when marine planning. Formal consultations on draft SPP ensure that the broad public has an opportunity for expressing how it would like to be involved in marine planning.

5.2.3.2. Easy Access to Information and Participation

The MCAA 2009 does provide some requirements for ensuring easy access to information and participation. The requirement for broad participation in the marine planning process discussed above is actually a useful way to ensure easy access to

¹⁷⁷ MCAA 2009, sch 6, para 5(8).

¹⁷⁸ MCAA 2009, sch 6, para 8(1).

¹⁷⁹ MCAA 2009, sch 6, para 5(6).

¹⁸⁰ DEFRA, *Description*, 61 and 65.

participation. In addition, the MCAA 2009 requires marine plan authorities to publish an SPP and draft marine plan 'in a way calculated to bring it to the attention of interested persons',¹⁸¹ which to some extent can ensure the public and stakeholders have easy access to information.

However, there is a concern regarding easy access to information and participation in marine planning. As mentioned in chapter 3, the lack of requirements regarding the quality of information provided by relevant environmental authorities is one of the weaknesses of the information disclosure system under the Aarhus Convention. The same concern arises here; there are no requirements for the quality of published information and consultation documents under the MCAA 2009. The consideration of the quality of information is mainly due to *the low awareness and knowledge level of marine issues among the public*, which was identified in chapter 3 as a barrier to marine planning. Since the UK marine planning system has been newly established since 2009 and the public is unfamiliar with marine matters, ensuring understandable information regarding marine plans is important. The absence of obligations on the quality of information under the MCAA can be remedied, to some extent, by relevant requirements set in Cabinet Office's consultation guidance documents. However, these guidance documents are only limited to formal public consultations at the final stages rather than the whole policy making process. Requirements such as providing plain language or non-technical information/consultation documents should set in the MCAA 2009.

5.2.3.3. Transparency

Two measures required under the MCAA 2009 can ensure transparency regarding public participation in the marine planning process. The first is the production of the SPP. The SPP is a statement produced by marine plan authority to explain how and when participants will be involved in the creation of marine plans. SPPs play the same role as SCIs in land planning contexts. However, different from the unregulated production of SCIs in land-use plans, the MCAA 2009 places a number of obligations on the procedure

¹⁸¹ MCAA 2009, sch 6, paras 5(6) and 11(4).

of producing SPPs, their content, and their review,¹⁸² which makes the producing process more transparent.

Second, when the MMO publishes final marine plans, the MCAA 2009 requires that any modifications to draft marine plans and the reasons for those modifications should be published alongside with the final marine plans.¹⁸³ The public and stakeholders who have made comments on draft marine plans should have clear feedback on how their comments have been considered by the marine plan authorities. In this way, the transparency of marine plan making can be ensured. The public and other stakeholders should also make comments and suggestions on the proposed marine plans at the scoping stage. However, the feedback on public comments is only required at the public consultation stage. Ensuring transparency in marine planning at the scoping stage remains unclear. Clearly explaining what issues the public can influence and the extent of this influence is another way to ensure transparency in decision-making. The requirement of managing the public's expectations on their participation has been set out in the *Description* and the Cabinet Office's consultation documents.

The major weakness concerning transparency under the MCAA 2009 is the obligations regarding Independent Investigation.¹⁸⁴ According to the MCAA 2009, a marine planning authority needs to consider appointing an independent investigator to scrutinise a draft marine plan after the authority has published it for consultation.¹⁸⁵ A marine planning authority must decide whether an Independent Investigation is necessary based on three considerations: if any representations received about the matters are to be included in the plans; if any unresolved issues are raised during the public consultation on the plans; and other matters as the marine plan authority considers relevant.¹⁸⁶ Based on the MMO's suggestion, the SoS will make the final

¹⁸² MCAA 2009, sch 6, para 7.

¹⁸³ MCAA 2009, sch 6, para 15(7).

¹⁸⁴ In addition to the requirements concerning Independent Investigation in para 13 of sch 6 under the MCAA, guidance on independent investigation in marine planning is produced by Planning Inspectorate and available at the government's website:< <https://www.gov.uk/guidance/marine-plans-independent-investigations>> accessed 12 February 2017.

¹⁸⁵ MCAA 2009, sch 6, para 13(1).

¹⁸⁶ MCAA 2009, sch 6, para 13(2).

decision on whether an Independent Investigation for marine plans is required.¹⁸⁷ An Independent Investigation can be conducted through hearings and/or written responses.¹⁸⁸ The independent investigator decides the form and participants of the investigation. When complete, the investigator's recommendations and the reasons for them should be published.¹⁸⁹ These recommendations are not legally binding.¹⁹⁰ The decision to change marine plans is determined by the SoS.¹⁹¹ The shortcoming of the Independent Investigation procedure is that neither the MCAA 2009 nor the Planning Inspectorate's Guidance provides explicit procedures and instructions on determining whether an Independent Investigation will be carried out and why. There are no statutory requirements for a marine planning authority to publish the reasons or considerations behind these decisions. As a consequence, the public and stakeholders cannot know whether there are unresolved issues concerning a marine plan. The decision-making process of Independent Investigation is opaque.

The *White Paper* notes that the process of an Independent Investigation could draw on the Independent Examination used in land planning issues.¹⁹² However, some good practice elements of Independent Examinations have not been fully adopted in Independent Investigation. In the land planning context, every development plan document must be submitted to the SoS for Independent Examination.¹⁹³ The procedure of Independent Examination is clearly set out.¹⁹⁴ However, in the marine planning context, Independent Investigation is optional. In the land planning context, the Independent Examination scrutinises the legal compliance and soundness of the plans.¹⁹⁵ Therefore, both the content and the process of producing local plans are

¹⁸⁷ Planning Inspectorate, 'Marine Plans: Independent Investigations' (2014) <<https://www.gov.uk/guidance/marine-plans-independent-investigations>> accessed 12 February 2017.

¹⁸⁸ *ibid.*

¹⁸⁹ MCAA 2009, sch 6, para 13.

¹⁹⁰ Planning Inspectorate (n 187).

¹⁹¹ *ibid.*

¹⁹² Marine Bill, para 4.66.

¹⁹³ PCPA 2004, s 20.

¹⁹⁴ Planning Inspectorate, 'Procedural Practice in the Examination of Local Plans' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/531005/Procedural_Practice_in_the_Examination_of_Local_Plans_-_final.pdf> accessed 21 February 2017.

¹⁹⁵ PCPA 2004, s 20(5).

examined. However, in the marine planning context, the Independent Investigation only concentrates on the unresolved issues of marine plans.

In addition, English land planning authorities have duties to co-operate with other bodies in the preparation of strategic matters in local plans.¹⁹⁶ The MMO is included in the list of prescribed public bodies that are subject to the duty to cooperate. The MMO is subject to the same duty to cooperate with land planning authorities and other public bodies in the preparation of marine plans.¹⁹⁷ The major difference between the duty to cooperate subject to land planning authorities and the MMO is that the requirements for cooperation in land planning are overseen by the SoS through Independent Examination. The cooperation between land planning authorities and other public bodies is a crucial consideration when testing the soundness of the plans.¹⁹⁸ However, in the marine planning context, an Independent Investigation is not compulsory. In addition, an Independent Investigation does not examine the issue of cooperation between the MMO and other bodies.

5.2.3.4. Interaction

According to the MCAA 2009, the main approach for participation in marine planning is consultation. The public and other stakeholders are invited to make representations on proposed marine plans and draft marine plans.¹⁹⁹ Although the MCAA 2009 requires the marine plan authorities to seek advice and assistance from experts, whether this advice will be collected from a one-way flow of information, such as providing written comments, or through interactive communication, such as workshops or stakeholder meetings, is determined by the MMO.²⁰⁰ Although paragraph 6(3) requires an interactive participation opportunity by holding public meetings about the consultation

¹⁹⁶ Localism Act 2011, s 110; Planning and Compulsory Purchase Act 2004, s 33A; Town and Country Planning (Local Planning) (England) Regulations 2012, reg 4.

¹⁹⁷ PCPA 2004, s33; Town and Country Planning (Local Planning) (England) Regulations 2012, reg 4; the definition of local planning authorities can be found in the National Planning Policy Framework Annex 2: Glossary

¹⁹⁸ Department for Communities and Local Government, 'Guidance: Duty to Cooperate' (2014) para 2 < <https://www.gov.uk/guidance/duty-to-cooperate> > accessed 21 February 2017.

¹⁹⁹ MCAA 2009, sch 6, paras 5(5) and 12.

²⁰⁰ MCAA 2009, sch 6, para 8(1).

draft, it is optional rather than obligatory.²⁰¹ Consultation remains the main participation approach under the MCAA 2009. Whether interactive participation is performed in marine planning practice largely depends on the MMO.

5.2.4. Conclusion

This section addressed two issues: identifying the rationale for public participation in marine planning related policy and governmental documents and assessing to what extent procedural criteria for collaborative participation have been set out in the system of public participation in the production of marine plans. According to the MPS and the *Description*, it was found that the substantive rationale for participation is the primary motivation for participation in marine planning. The normative rationale and the instrumental rationale are mentioned less in MPS and *the Description*.

The findings of the investigation into the procedural criteria for collaborative participation set out in the MCAA 2009 are rather mixed. Early and broad participation is required under the MCAA 2009. Placing a statutory requirement for public consultation on draft SPPs is suggested. Obligations regarding easy access to information and participation are set out, to some extent, in the MCAA 2009. Considering the lack of familiarity about marine planning and issues among the public, adding requirements for marine authorities to provide plain information or non-technical versions of consultation documents would promote easy access to information and participation in the marine planning process. In terms of the issue of transparency, obligations regarding Independent Investigation are not clear and this is a potential threat to a transparent marine planning process. The main participatory approaches required under the MCAA 2009 are consultation and information collection. Therefore, before examining specific SPPs for marine plans or investigating the practice of marine planning, it is difficult to conclude whether interactive participation would be applied in the marine planning process.

5.3. Conclusion

²⁰¹ Para 6(3) of sch 6 of the MCAA 2009 requires that 'An SPP may include provision for or in connection with the holding of public meetings about the consultation draft'.

Three issues were addressed in this chapter. First, a review of the history of development of public participation in land planning found that, in the initial period of introducing public participation into planning issues, establishing a robust theoretical basis for public participation was of great importance. The government and the planning authorities should have a clear understanding of the rationales for participation to avoid misleading practices or “token” participation. Second, the investigation on the land planning system found that the main motivation for public participation in current English land planning is to fulfil a commitment to democracy and to empower local communities (the normative rationale). Accordingly, participants in land planning, such as local communities or those who have property rights in proposed areas, are relatively easy to be identified and targeted compared with the marine planning context. In addition, given the motivation of protecting private interests, participants in land planning might be more self-motivated to get involved in the land planning process. In the marine planning context, according to the MPS and the *Description*, the substantive rationale (improving the quality of marine plans) and some elements of instrumental rationale (conflict management and learning) are explicitly expressed as the motivations for bringing the public and stakeholders into the marine planning process. Thus, wide participation is crucial in order to broaden data and evidence sources concerning marine planning and achieve social benefits. Given the public interest and remote nature of the marine environment, more publicity concerning the value and opportunities of participation in marine planning and more encouragement of participation should be given to the general public and stakeholders compared with the land planning context. In addition, as found in this chapter, the rationale for participation in the land planning context has been changing. This change largely depends on the purpose of land planning but also relates to an increase in the public’s familiarity with/ knowledge of planning issues in the past decades. Thus, it is very likely that the rationale for public participation in English marine planning will alter as well depending on the change of the purpose of marine planning and new issues that need to be addressed through marine plans. Thus, it is worth restating that the rationales and strategy for public participation suggested in this thesis are applicable to the present circumstances of marine planning in England.

Third, the MCAA 2009 and other non-binding instruments do provide some support for ensuring collaborative participation in the marine planning process. However, not all procedural criteria for collaborative participation are set out in these instruments. Since no empirical data on the practice of public participation in English marine planning is available in existing studies, whether these unregulated procedural criteria will impact the marine planning practice is unclear. In order to fill this knowledge gap, this thesis will move to empirical research on the first English marine plans, the East Inshore and Offshore Marine Plans (East Marine Plans). The next chapter will explain the research method applied in the empirical research and provide background information about the East Marine Plans.

Chapter 6. The Background of the English East Inshore and Offshore Marine Plans and the Research Method

Introduction:

Chapter 5 reviewed the statutory and non-statutory requirements for public participation in the English marine planning context and mapped the system of public participation for making marine plans. It also evaluated this system based on the four procedural criteria for collaborative participation and identified potential gaps in the legal obligations concerning the fulfilment of all procedural criteria, such as the lack of obligations on quality of information and insufficient requirements for interactive participation. However, whether these identified gaps hinder public participation in marine planning practice is unknown. This and the following two chapters aim to fill this knowledge gap.

This chapter addresses two issues: first, it presents background information on the English East Inshore and Offshore Marine Plans (the East Marine Plans) and outlines the process of public participation when the plans were made. Second, it explains the research method and data collection process. Section 6.1 will provide background information about the East Marine Plan area. Section 6.2 will focus on the content and the producing process of the Statement of Public Participation (SPP) for the East Marine Plans. Section 6.2 will also analyse the general strategy, purpose, and specific methods of participation presented in the SPP to investigate whether procedural criteria were implied or promised by it. Section 6.3 will present the entire process of public participation used in creating the East Marine Plans. Following this basic information on the production of the East Marine Plans, section 6.4 will explain the research design and data collection method employed for the empirical research into the East Marine Plans.

6.1. Background Information on the East Marine Plans

By 2034, sustainable, effective and efficient use of the East Inshore and East Offshore Marine Plan Areas has been achieved, leading to economic development while protecting and enhancing the marine and coastal

environment, offering local communities new jobs, improved health and well-being. As a result of an integrated approach that respects other sectors and interests, the East marine plan areas are providing a significant contribution, particularly through offshore wind energy projects, to the energy generated in the United Kingdom and to targets on climate change.

—Vision for the East Marine Plans¹

The East Marine Plans cover about 55,000 square kilometres of the sea.² The East inshore area stretches from mean high water springs to the boundary of the territorial sea between Flamborough Head and Felixstowe; the East offshore region extends from the boundary of the territorial sea to the UK Exclusive Economic Zone.³ These marine areas are environmentally and economically important to England: the coastal zones are crowded with tourism and recreational activities which have made a great contribution to the coastal economy. Many marine sectors, including fishing, aggregates, shipping, oil and gas, and offshore wind are working on or expected to join the busiest marine area in England.⁴ Around 90% of Round 3 wind farms, and 77% licensed aggregate extraction activities are located in the East Marine-planning area. The East marine area is also the busiest fishery area along England's coast.⁵ The East Marine areas are also of great importance for marine environmental protection and climate change. Around 80% of English Special Areas of Conservation (SACs) and 40% of English Special Protection Areas (SPAs) fall into the East Marine areas.⁶ Furthermore, the North Sea has an enormous potential for storing carbon dioxide.⁷ Based on the importance mentioned

¹ HM Government, 'East Inshore and East Offshore Marine Plans' (2014) 23 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312496/east-plan.pdf>.

² *ibid* 13–17.

³ *ibid*.

⁴ *ibid*.

⁵ MMO, 'Strategic Scoping Report for Marine Planning in England' (2013) 164–165 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312327/ssr-august2013.pdf>.

⁶ *ibid*.

⁷ *ibid*.

above, the East Marine areas were selected to be developed as the first marine plans in England.⁸

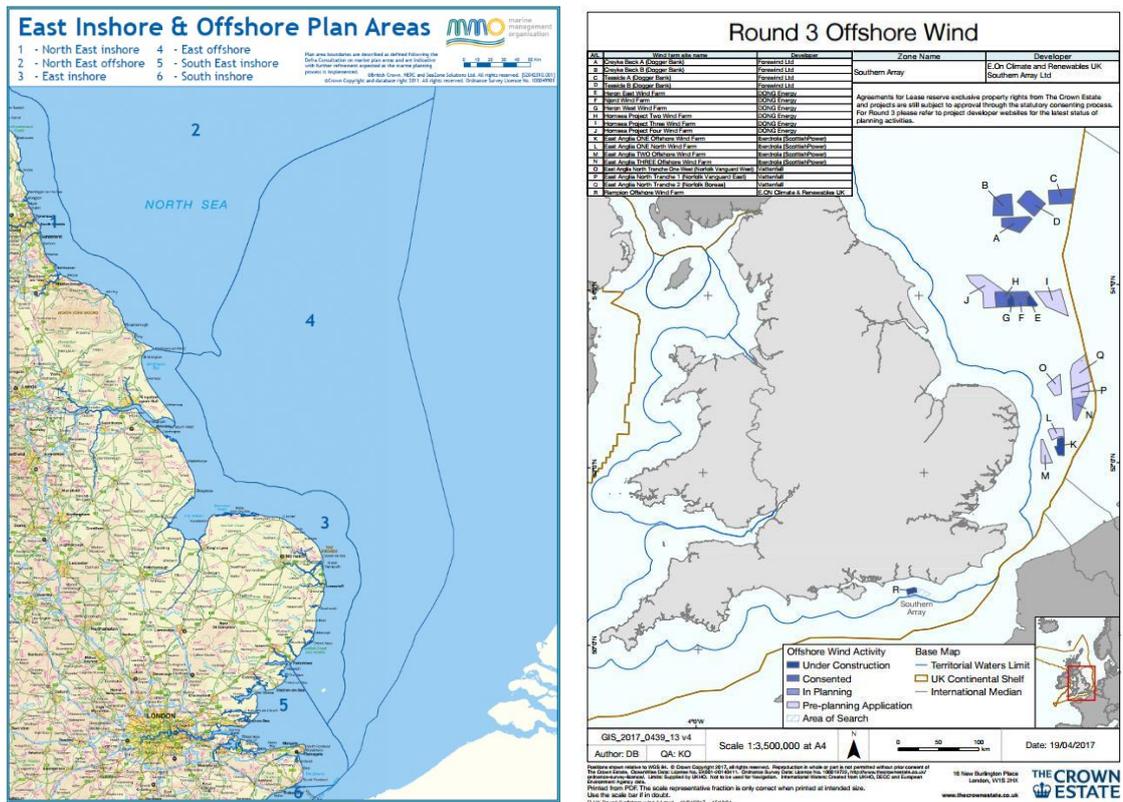


Figure 6. Maps of the East Marine Plans and Round 3 offshore wind Zones⁹

6.2. The SPP of the East Marine Plans

As the key document for public participation, an SPP provided a general strategy as well as a detailed explanation of how the general public and stakeholders would be involved throughout the East Marine Plan-making process. The process started formally in April 2011. The East Marine Plan’s SPP was first introduced in April 2011 (hereafter the SPP 2011) and has been revised twice in the production process of the East Marine Plans in 2012 and 2013.¹⁰ The latest SPP for the East Marine Plans was revised and published in

⁸ MMO, ‘Decision on First Marine Plan Areas’ (2010) 8 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312364/east_selecti_on.pdf>.

⁹ The Map of the East Marine Plans is available on MMO’s website: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312357/east_marine_plan_areas.pdf> accessed 26 February 2017; The Map of Round 3 Offshore Wind Zones is available on the Crown Estate’s website: <<https://www.thecrownestate.co.uk/media/252256/ei-uk-round-3-offshore-wind-a4.pdf>> accessed 26 February 2017.

¹⁰ MMO, ‘East Inshore and East Offshore Marine Plan Areas Statement of Public Participation: Revised May 2012 Revised Statement of Public Participation: May 2012’ (2012)

2015 after the adoption of the East Marine Plans in 2014. This updated the content on the implementation and monitoring of the plans.

6.2.1. Examination of the Content and Creation Procedure of the SPP for the East Marine Plans

The relevant requirements for producing the content of the SPP are presented in Table 4 below.¹¹

Table 4. Binding and Non-binding requirements on the content and procedures of an SPP

	Binding requirements (regulated under the MCAA 2009)	Non-binding requirements (suggested in the <i>Description</i>)
Procedure of making an SPP	<ul style="list-style-type: none"> • SPP should be published in a way to attract public attention. 	<ul style="list-style-type: none"> • Stakeholders should be involved in the preparation of an SPP. • Public consultation on draft SPP.
Content of an SPP	<ul style="list-style-type: none"> • Maps of proposed plan area. • Timetable for participation activities. • Invitation for comments on proposed marine plans and on draft marine plans. • Time and manner of inviting comments should be clear. • Public meetings about the consultation draft (optional). 	<ul style="list-style-type: none"> • Map of potential scope of report area of marine plans. • Management of stakeholders' expectations.

The SPP 2011 for the East Marine Plans was produced in a participatory manner. Before drawing up the SPP, the MMO conducted a survey and three workshops at Hull, Norwich, and Peterborough between November 2010 and January 2011 to collect stakeholders' input on the participatory strategy for the plans.¹² Stakeholders were involved in

<http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_final_spp_revised.pdf> accessed 6 February 2017; MMO, 'East Inshore and East Offshore Marine Plan Areas Statement of Public Participation: Revised August 2013' (2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312377/east_final_spp_august2013.pdf>

¹¹ Table 4 is a simplified version of Table 3 in ch 5 174-175. More detailed discussion about SPP requirements can be found in ss 5.2.1 and 5.2.2 in ch 5, 167-170.

¹² MMO, 'East Inshore and East Offshore Draft Statement of Public Participation – Survey Results' <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_draft_spp_survey.pdf> accessed 12 February 2017; MMO, 'East Inshore and East Offshore Marine Plan Areas Statement of Public Participation Stakeholder Workshops Report (January 2011)' (2011)

creating the SPP for the East Marine Plans. This followed the suggestion of the *Description*. As noted in chapter 5, a public consultation on a draft SPP is not required under the MCAA 2009 but is suggested in the *Description* by DEFRA. In the East Marine Plans case, a month-long public consultation on the draft SPP was conducted, which went far beyond the statutory requirements for stakeholders' participation in the preparation of SPPs.¹³ Several concerns, such as boundary issues, a more detailed engagement strategy, and the inclusion of additional stakeholders, were raised during consultations.¹⁴ In April 2011, the SPP 2011 was published alongside an announcement for the beginning of work on the East Marine Plans on the MMO's website.¹⁵ From a procedural perspective, the production of the SPP for the East Marine Plans followed all of the statutory and non-statutory requirements set in Table 4.

However, it is worth noting that the practice of public consultation on draft SPPs is inconsistent. In the South Marine Plans case, only three stakeholders' workshops were held before drawing up the draft SPP for the South Marine Plans.¹⁶ The SPP of the South Marine Plans was then published without public consultation. However, in the production of North West Marine Plan, South East Marine Plans, South West Marine Plan, and North East Marine Plan, one-month public consultations were carried out on draft SPPs.¹⁷ Although workshops are an important participatory approach, since their time and locations are fixed, a broad consultation on the draft SPP should be performed.

As mentioned above, the SPP 2011 was revised twice in 2012 and 2013. This was mainly because the East Marine Plans were not developed as quickly as expected. The revised

<http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_spp_workshops_summary.pdf> accessed 27 February 2017.

¹³ MMO, 'East Inshore and East Offshore Statement of Public Participation – Consultation Summary' <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_draft_spp_consultation.pdf> accessed 12 February 2017.

¹⁴ *ibid.*

¹⁵ Information is available at: <<http://webarchive.nationalarchives.gov.uk/20140305093536/http://www.marinemanagement.org.uk/news/press/110412.htm>> accessed 26 February 2017.

¹⁶ MMO, 'South Inshore and South Offshore Marine Plan Areas Statement of Public Participation: April 2013' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312566/south_spp.pdf> accessed 12 February 2017.

¹⁷ MMO, 'Statement of Public Participation - North East, North West, South East and South West' (2016) <<https://www.gov.uk/government/publications/statement-of-public-participation-north-east-north-west-south-east-and-south-west>> accessed 12 September 2017.

SPPs mainly had the purposes of updating the estimated time frames for the later stages of making marine plans or renewing other related information, such as informing the public about newly released guidance on the Independent Investigation or changing the wording from the “Localism Bill” to the “Localism Act 2011”.¹⁸ No substantive changes were made in these three SPPs on the general strategy or the specific methods of public participation in the East Marine Plans. The SPP 2013 contains the most accurate period and status of the East Marine Plans so it will be used to analyse the content that an SPP should contain.

The SPP 2013 meets almost all of the requirements listed in Table 4. First, the marine plan areas and reporting area of the marine plans are described.¹⁹ Second, a timetable which details public participation events and activities in different marine planning stages is provided.²⁰ Relevant participation methods, such as email notification, workshops, stakeholder meetings, and timings are presented.²¹ Invitations for representation on the draft documents are clarified in the timetable and other statements in the SPP 2013.²² Although there is no commitment to holding public meetings on the draft marine plans, as will be illustrated later, twelve drop-in sessions were held during the formal public consultation period.²³ However, the SPP 2013 did not address the issue of managing participants’ expectations. The SPP 2013 did not provide clear statements about the extent to which stakeholders and the public could influence the production of marine plans. The wording applied in the SPP 2013 regarding the degree of the impact of public participation is unclear and too general. It states ‘... those with an interest can **have their say** in the marine planning process’.²⁴ The SPP 2013 contains a timetable listing the key stages for producing East Marine Plans and the relevant participation events for each stage but the phrasing used in this timetable is too vague to imply the extent to which interested parties will be able to

¹⁸ SPP 2011, 2012 and 2013 are available at: <http://webarchive.nationalarchives.gov.uk/20140305092259/http://www.marinemanagement.org.uk/marineplanning/areas/east_spp.htm> accessed 12 September 2017. All changes made to the revisions are highlighted in yellow. Therefore, it is easy to track the changes made in the revisions of SPPs.

¹⁹ MMO, SPP 2013 (n 10) 4–6.

²⁰ *ibid* 11–13.

²¹ *ibid*.

²² *ibid* 14.

²³ See table 5.

²⁴ MMO, SPP 2013 (n 10) 1 (emphasis added).

influence any of the proposals. For example: ‘stakeholders **to input** to development of plan area vision and objectives’ or ‘continued engagement through events and updates to **seek the views and input** from stakeholders and interested parties’.²⁵ Thus, the extent to which the input and views will be considered and used in producing the East Marine Plans is unclear. The effect of the lack of managing stakeholders’ expectations emerged in the data collected from stakeholders. This will be discussed further in chapter 7 below.

In summary, the investigation of the SPPs found that except for the management of stakeholders’ expectations, most of the statutory and non-statutory requirements for the content and creation of procedures in the SPP were met in the case of the East Marine Plans. However, there is inconsistent practice on public consultations on draft SPPs in other marine plans.

6.2.2. Examination of the Purposes and Strategy of Public Participation in the SPP 2013

The SPP 2013 does not offer specific purposes, for example, filling evidence gaps, improving the legitimacy of decision-making, or addressing conflicts, for bringing the public and stakeholders into marine planning. Instead, it provides a very general reason for public participation that, ‘The future development of our marine area affects many people. In order to create places and spaces where people can work, live and enjoy, those with an interest can have their say in the marine planning process.’²⁶ Because of the failure of managing participants’ expectations on participation, the level of participation in producing the East Marine Plans is unclear. The wording used in the SPP, such as, “stakeholders to input on...”, “seek views and input from stakeholders”, or “keep stakeholders informed of development”²⁷ seems to imply that participants were to act as “information providers and receivers” in marine planning rather than “collaborators” in the marine plans.

²⁵ *ibid* 11 (emphasis added).

²⁶ *ibid* 1.

²⁷ *ibid* 11–12.

To ensure the quality of public participation, the SPP 2013 lists seven principles that the MMO is committed to following. These indicate the procedural requirements for collaborative participation for the East Marine Plans. These are:

1. Involve people early on in the decision-making process and in developing locally specific policy within the framework provided by the Marine Policy Statement
2. Engage with interested people and organisations at the appropriate time using effective engagement methods and allowing sufficient time for meaningful consultation
3. Be adaptable, recognising that some consultation methods work better for some people and some issues and that a one size fits all approach will not work
4. Respect the diversity of people and their lifestyles and give people a fair chance to have their voice heard regardless of gender, age, race, abilities, sexual orientation, circumstances or wherever they live
5. Be clear on the purpose of any engagement and how you may contribute and let people know how their views have been taken into account within agreed timescales
6. Make documents publicly available on our website and across our network of coastal offices and be consistent in our approach
7. Communicate clearly with people using plain English and avoiding jargon.²⁸

Principles 1 and 4 require *early and broad participation*. Principle 5 addresses the *transparency* of participation. Principles 2, 3, and 4 target *easy access to participation* during the plan making process. Principles 6 and 7 promise easy access to information. Some principles are related to each other. For example, principle 2 points out that participation should be carried out at an “appropriate time” and using “effective engagement methods”. Since principle 1 notes that people should be involved early in decision-making, early participation should be considered in the determination of an “appropriate time” for participation. Similarly, principle 3 indicates consultation methods should be flexible for different circumstances, which further explains the term

²⁸ *ibid* 1.

“effective engagement methods” applied in principle 2. Principles 3 and 4 are related because the participation of a diverse range of people can be achieved by employing different consultation methods to meet the needs and circumstances of different people. Principle 4 is crucial for both the criteria for broad participation and easy access to participation.

Although there is no relevant principle that particularly addresses the criterion for interactive participation, a range of interactive participatory methods were provided in the SPP 2013. The participatory methods under the SPP include one-way information methods such as email newsletters, social media, the press, questionnaires, and web updates, and two-way communication methods such as workshops, drop-ins, one-to-one meetings, stakeholder meetings, and exhibitions.²⁹ It is worth noting that, before the official start of the East Marine Plans, the MMO surveyed stakeholders to see how they would like to be involved. According to the survey, most of the stakeholders wanted to be actively involved in marine planning by inputting views and opinions on proposed issues, rather than just being updated and informed.³⁰ Apart from emails and a web portal, workshops and working groups were preferred to less interactive methods such as one-to-one meetings or questionnaires.³¹ The survey result demonstrates that stakeholders expected active and interactive participation in the production of the East Marine Plan. This is in line with Maguire and others’ research findings. Maguire and others carried out a case study of the Solent marine planning project on how stakeholders would like to be involved in English marine planning.³² They found that the majority of marine stakeholders in the Solent expected direct two-way communication and extensive interaction with other participants.³³

In summary, except the management of stakeholders’ expectations, almost all of the binding and non-binding requirements of the content and the creating process of the SPP for the East Marine Plans were met. The purpose and levels of public participation

²⁹ *ibid* 12-15.

³⁰ MMO, ‘East Inshore and East Offshore Draft Statement of Public Participation – Survey Results’ (n 12).

³¹ *ibid*.

³² Bernadine Maguire, Jonathan Potts and Stephen Fletcher, ‘Who, When, and How? Marine Planning Stakeholder Involvement Preferences – A Case Study of the Solent, United Kingdom’ (2011) 62 *Marine Pollution Bulletin* 2288, 2291.

³³ *ibid*.

were not clearly explicated in the SPP 2013. In terms of the specific methods for participation, the procedural criteria such as easy and broad participation, easy access to information and participation, and transparency were guaranteed as principles of participation in the SPP 2013. Although interactive participation is not a principle of participation in the SPP, interactive participation activities, such as workshops and stakeholder meetings, were promised in the production of the East Marine Plans.

6.3. The Practice of Public Participation in the Production of the East Marine Plans

This section presents the practice of public participation in the main stages of marine planning. The production of the East Marine Plans can be divided into four stages: preparation (including preparing of SPP), scoping and developing, public consultation, and Independent Investigation (optional) and adoption. This section will begin with the scoping and developing stage of the East Marine Plans. Before mapping the participation activities in every stage, a table (Table 5) which contains information about the main participation activities conducted in the production of East Marine Plans can be found below.

Table 5. Main participation events during the production of East Marine Plans

Activities	Time	Location	Purpose
Survey of the Statement of Public Participation (<i>Informal</i>)	Nov. and Dec. 2010	n/a	Collect opinions from stakeholders on how they were to be involved. ³⁴
Three stakeholder workshops on the draft SPP (<i>Informal</i>)	11-13 Jan. 2011	Norwich, Hull, and Peterborough	Collect input on the draft SPP. ³⁵
Public Consultation (<i>Informal</i>)	Jan. to Feb. 2011 (4 weeks)	n/a	Public Consultation on the draft Statement of Public Participation. ³⁶
1 April 2011: Official start of the East Marine Planning Process			

³⁴ MMO, 'East Inshore and East Offshore Draft Statement of Public Participation – Survey Results' (n 12).

³⁵ MMO, 'East Inshore and East Offshore Marine Plan Areas Statement of Public Participation Stakeholder Workshops Report (January 2011)' (n 12).

³⁶ MMO, 'East Inshore and East Offshore Statement of Public Participation – Consultation Summary' <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_draft_spp_consultation.pdf> accessed 12 February 2017.

Three Evidence and Issues Report workshops (<i>Informal</i>)	5-7 Dec. 2011	Norwich, Hull, and Peterborough	Review <i>Evidence and Issues Report</i> ; identify emerging issues. ³⁷
Public Consultation (<i>Informal</i>)	24 Nov. 2011-10 Jan. 2012 (nearly 7 weeks)	n/a	Consult on the draft <i>Evidence and Emerging Issues Report</i> . ³⁸
Twelve Public Drop-in Sessions (<i>Informal</i>)	13-23 Feb. 2012	Aldeburgh, King's Lynn, Great Yarmouth, Skegness, Hull, Bridlington, Grimsby, Hornsea, Mablethorpe, Ipswich, Boston, Wells-Next-The-Sea	Approach coastal communities and publicise marine planning. ³⁹
Public Consultation (<i>Informal</i>)	23 Mar.- 20 Apr. 2012 (4 weeks)	n/a	Consultation on <i>Draft Vision and Objectives</i> for East Marine Plans ⁴⁰
Two Options workshops (<i>Informal</i>)	3-4 July 2012	Norwich and Hull	Collect feedback from stakeholders on the draft options. ⁴¹
Statutory Public Consultation (<i>Formal</i>)	16 July 2013 to 8 Oct. 2013 (12 weeks)	n/a	Consultation on the Draft East Marine Plans
Twelve Public drop-in sessions for consultation on the draft East Marine Plans (<i>Informal</i>)	23 July-8 Aug. 2013; 4 and 6 Sept. 2013	Felixstowe, Aldeburgh, Lowestoft, Wells-next-the-Sea, King's Lynn, Boston, Skegness, Grimsby, Hull, Scarborough, and London	Publicise marine planning and obtain comments from stakeholders and the public on the draft East Marine Plans

³⁷ MMO, 'Marine Planning Workshops: Evidence and Emerging Issues Report' (2012) <<https://www.gov.uk/government/publications/east-marine-plan-areas-evidence-and-issues-report>> accessed 27 February 2017.

³⁸ MMO, 'East Inshore and East Offshore Marine Plan Areas Evidence and Issues Report 2012 : Chapter 1: Introduction and Background' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312395/east_evidence_issues_chapter1.pdf> accessed 24 February 2017.

³⁹ MMO, 'Marine Planning Public Drop-in Events Summary' (2012) <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_drop-in_sessions.pdf> accessed 27 February 2017.

⁴⁰ MMO, 'Draft Vision and Objectives for East Marine Plans: Consultation Summary (Update)' <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_vision_objectives_update.pdf> accessed 24 February 2017.

⁴¹ MMO, 'Marine Planning Workshops: Options' <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_options_workshops.pdf> accessed 12 February 2017.

Three Planning Makers' Workshops (<i>Informal</i>)	Marine Decision Workshops	Sept. 2013	Hull, Peterborough, and London	Identify influence of marine plans on public authorities and their decisions. ⁴²
April 2014: East Marine Plans adopted and published				

Table 5 shows that, in addition to attending a range of informal engagement events, the public and stakeholders also contributed to the East Marine Plans through providing comments in four consultations. The MMO conducted three informal consultations on the draft SPP, the draft *Evidence and Issues Report* and the draft vision and objectives of East Marine Plans,⁴³ and one formal consultation on the draft plans and the SA Report.⁴⁴ The formal public consultation on the draft East Marine Plans was the only statutory participation activity according to the MCAA 2009.⁴⁵ The most notable difference between informal consultations and statutory consultations is that the MMO responds to and publishes all comments collected from formal consultations.⁴⁶ As Table 5 shows, from a procedural perspective, the participatory opportunities provided during the production of the East Marine Plans went far beyond the statutory requirement for participation under the MCAA 2009.

6.3.1. Scoping and Developing Stage

The participatory activities in the scoping stage included the collection of data and the identification of visions and objectives for the East Marine Plans. The evidence used to inform the East Marine plans came from a broad range of sources, including national policies, sub-national policies, existing plans and databases, and stakeholders' input.⁴⁷

⁴² MMO, 'Marine Planning Decision Makers' Workshops: Summary Report (December 2013)' (2013) <<http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east-decision-makers.pdf>> accessed 27 February 2017.

⁴³ See table 5 above.

⁴⁴ See table 5 above.

⁴⁵ MCAA 2009, sch 6, para 12.

⁴⁶ MMO, SPP 2013 (n 10) 14.

⁴⁷ National policies refer to the MPS's key reference documents, NPSs and critical strategy policies. Sub-national policies considered at the evidence gathering stage include Local Development Frameworks (LDFs), National Park Plans (NP), Areas of Outstanding Natural Beauty plans (AONB), River Basin Management Plans (RBMPs) and Shoreline Management Plans (SMPs). Other sub-national policies such as Sites of Special Scientific Interest (SSSIs), National Nature Reserves (NNRs), Special Areas of conservation (SACs), and Special Protection Areas (SPAs) were covered under the SA process or marine planning portal. See, MMO, 'East Inshore and East Offshore Marine Plan Areas Evidence and Issues Overview Report 2012: Chapter 2: Evidence Gathering' (2012) 25

The MMO also conducted social-economic studies to back up the evidence base of the East Marine Plans.⁴⁸ Studies carried out by third parties were absorbed into the database for the East Marine Plans.⁴⁹ A Sustainability Appraisal Scoping Report (SA Report) also supplemented the database for the East Marine Plans.⁵⁰ Sustainability Appraisal and Habitats Regulations Assessments⁵¹ were conducted alongside the production of the Marine Plans. An informal public consultation on the evidence used for the East Marine Plans was conducted from November 2011 to January 2012.⁵² Although the MMO endeavoured to provide a complete evidence base, data gaps limited the East Marine Plans.⁵³

Identifying the *vision, objectives, and options* of the East Marine Plans offered participatory opportunities for the public and stakeholders in the scoping stage.⁵⁴ The informal public consultation on the draft vision and objectives for the East Marine Plans ran from March 2012 to April 2012. The general summary comments and responses on specific objectives and visions are available at the MMO's website.⁵⁵ The "options" of the East Marine Plans are strategies that had different priorities for implementing the marine plans. Thirteen issues, which could become potential options, were identified by the MMO based on the *Evidence and Issues Report*.⁵⁶ Issues concerning offshore wind and aggregates were selected to generate options for the East Marine Plans, since

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312396/east_evidence_issues_chapter2-2.pdf> accessed 12 February 2017.

⁴⁸ MMO, 'East Inshore and East Offshore Marine Plan Areas Evidence and Issues Report 2012 : Chapter 1: Introduction and Background' (n 38) 4.

⁴⁹ MMO, 'Seascape Character Area Assessment East Inshore and East Offshore Marine Plan Areas' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312481/east_seascape.pdf> accessed 12 February 2017.

⁵⁰ Information is available at: < <https://www.gov.uk/government/publications/east-marine-plans-sustainability-appraisal>> accessed 20 August 2017.

⁵¹ Information is available at: < <https://www.gov.uk/government/publications/east-marine-plan-habitats-regulations-assessment> > accessed 20 August 2017.

⁵² MMO, 'East Inshore and East Offshore Marine Plan Areas Evidence and Issues Report 2012: Chapter 1: Introduction and Background' (n 38) 1.

⁵³ East Marine Plans (n 1) 11.

⁵⁴ Investigations on different versions of visions of the East Marine Plans can be found in s 8.1.2.1 in ch 8, 288-232.

⁵⁵ MMO, 'Draft Vision and Objectives for East Marine Plans: Update (May 2012)' (2012) <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_vision_objectives_update.pdf> accessed 1 June 2016.

⁵⁶ The 13 issues, including co-location, displacement, economic growth, renewable growth (particularly wind energy), aggregates, cabling, oil and gas, seascape, environmental concerns/MSFD, MPAs, focus on local issues, and planning approaches need more research.

these two sectors could be defined “spatially” and possessed robust evidence for “an aspect that looked to the future”.⁵⁷ Finally, four options were selected:

Option A) Emphasise support for wind energy (leading to less support for co-location in Round 3 Zones – i.e. the areas most recently licensed for offshore wind development - than is the case currently)

Option B) Emphasise support for co-location of wind with other activities in Round 3 Zones (i.e. more so than is the case currently / would be the case under a business as usual scenario)

Option C) Emphasise strong support for aggregates (i.e. maximum safeguarding for aggregates extraction across the marine plan area, including within Round 3 Zones)

Option D) Emphasise support for aggregates (i.e. maximum safeguarding for aggregates extraction across the marine plans, other than within Round 3 Zones).⁵⁸

The identification of these options implies that, at an early stage of making the East Marine Plans, offshore wind and aggregates were considered priorities in the east marine areas. Stakeholders were involved in the selection of the appropriate options for the East Marine Plans. Two workshops were held in July 2012 in Hull and Norwich to introduce the options to stakeholders.⁵⁹ Most of the participants engaged in these workshops preferred Option B, a balanced and integrative development in the East Marine area.⁶⁰ These options were put through to the SA process. Finally, a combination of Options B and C was selected by the MMO as the option for the East

⁵⁷ MMO, ‘Sustainability Appraisal of the East Inshore and East Offshore Marine Plans- Sustainability Appraisal Report (Volume 2: SA Report)’ (2014) 32 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312502/east-plan-sa.pdf> accessed 6 August 2016.

⁵⁸ MMO, ‘Sustainability Appraisal of the East Inshore and East Offshore Marine Plans - Sustainability Appraisal Report (Volume 1: Non-Technical Summary)’ (2014) 11 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/549920/Sustainability_Appraisal_Report__Non-technical_summary.pdf> accessed 6 August 2016.

⁵⁹ MMO, ‘Marine Planning Workshops: Options’ (n 41).

⁶⁰ *ibid.*

Marine Plans,⁶¹ which means both wind energy and aggregate industry will be prioritised in East Marine Areas. Having identified the visions, objectives, and option of the East Marine Plans, the plans moved to the drafting period.

6.3.2. Public Consultations on the Draft Marine Plans

The draft East Marine Plans were opened to public consultation in summer 2013. The formal public consultation lasted for twelve weeks from 16 July 2013 to 8 October 2013. An online consultation tool was the primary method for public consultation on the draft marine plans.⁶² Responses to the consultation could also be posted or emailed to the MMO.⁶³ The MMO organised a range of drop-in sessions, workshops, and meetings with the public and stakeholders during the consultation period.⁶⁴ More than one hundred organisations, groups, and individuals responded to the consultation and more than 2000 comments were collected from a variety of consultation channels.⁶⁵ The MMO responded to all of the comments made by stakeholders. Stakeholders' comments and the MMO's responses were published on the MMO's website along with the publication of the final East Marine Plans, as required in paragraph 15(7), schedule 6 of the MCAA 2009.⁶⁶

⁶¹ MMO, 'Sustainability Appraisal of the East Inshore and East Offshore Marine Plans- Sustainability Appraisal Report (Volume 2: SA Report)' (n 57) 34-35.

⁶² Information is available at: <http://webarchive.nationalarchives.gov.uk/20140305170202/http://www.marinemangement.org.uk//marineplanning//about/questions_east-consultation.htm#25> accessed 10 September 2017.

⁶³ *ibid.*

⁶⁴ MMO, 'Marine Planning Decision Makers' Workshops: Summary Report December 2013' (n 42). Information regarding public participation is available on MMO's website: <<https://www.gov.uk/guidance/east-inshore-and-east-offshore-marine-plan-areas>> accessed 12 February 2017.

⁶⁵ MMO, 'East Inshore and East Offshore Marine Plans Modifications- Overview and Summary of Consultation April 2014' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312518/east-plan-mod-summary.pdf>.

⁶⁶ Information is available at: <<http://webarchive.nationalarchives.gov.uk/20140618025451/https://www.gov.uk/government/publications/east-inshore-and-east-offshore-marine-plans>> accessed 12 September 2017. Along with the publication of the East Marine Plans in April 2014, a range of documents related to the East Marine Plans was published at the MMO's website. These included an executive summary and an analysis of the East Marine Plans; support information on the production of maps; a summary of the sustainability appraisal and the formal sustainability appraisal; four documents related to the habitats regulations assessment; an outline of the East Marine Plans implementation and monitoring approach; a modification pack which includes an overview and summary of consultation, and a version of the East Marine Plans showing tracked changes, and consultation responses.

However, the consultation span for the draft East Marine Plans needs investigation. As described in chapter 5,⁶⁷ the *Code* and the *Consultation Principles (2013)* suggest that if consultation proposals are new and complex, at least twelve weeks' consultation is appropriate.⁶⁸ With the exception of the *Consultation Principles (2012)*, all the consultation documents suggest that mitigating actions, such as an extension, should be taken if consultation spans a holiday period. The assumption for the summer holiday period is twenty-two working Days (4.2 weeks).⁶⁹ However, during the East Marine Plans consultation, no extension was provided, despite the period of public consultation offered for the draft East Marine Plans covering summer dates. It can be argued that the *Consultation Principles (2012)* was applied at the time of public consultation on the draft East Marine Plans: it provides no suggestions on the extension matter. However, the *Code* contains a suggestion about the extension issue, and this had been applied more than ten years before the adoption of *Consultation Principles (2012)*. The extension suggestion is also applied in the *Consultation Principles 2013* and the *Consultation Principles 2016*. An extension period should have been applied to the public consultation on draft East Marine Plans.

6.3.3. Independent Investigation (optional) and Adaptation of Marine Plans.

Independent Investigations are optional in the marine plan-making process. The MMO is required to make a recommendation to the SoS, but it is the SoS's decision whether or not an Independent Investigation is needed. In the case of the East Marine Plans, the MMO considered that an Independent Investigation was not necessary; this recommendation was accepted by the SoS. However, as pointed out in chapter 5,⁷⁰ there are no obligations set out in the MCAA 2009 for regulating the decision-making process for Independent Investigation. The reasons or the process of determining whether an Independent Investigation will be carried out or not are opaque. As a result, in the East Marine Plans case, there was no formal explanation or report issued by the MMO or the SoS to explain why the investigation was omitted, despite many

⁶⁷ See s 5.2.2 in ch 5, 171-173.

⁶⁸ See Annex 1

⁶⁹ This is suggested under the *Consultation Principles (2013)*

⁷⁰ See discussion in s 5.2.3.3 in ch 5, 178-179.

stakeholders commenting that an investigation on East Marine Plans was necessary.⁷¹ Only a brief statement on this issue can be found on the MMO's website:

Although a small number of stakeholders still have concerns about very specific issues, MMO is confident that it has made as much effort as can reasonably be expected to resolve outstanding matters, and that those issues remaining were not significant enough to prevent adoption of the plans.⁷²

The final East marine plans were published in April 2014 without an Independent Investigation. However, the opaque decision-making process on the necessity of an independent investigation in the marine planning context may call into question the transparency of marine planning.

This section has reviewed the process of public participation in producing the East Marine Plans. Some potential barriers to public participation were identified in this section, including the time allowed for public consultation and the unclear process of determining if an Independent Investigation was needed. It is not proper to rush to any conclusions before collecting and analysing empirical data about these issues. The following section will explain the research design and data collection methods used for an empirical study of the East Marine Plans.

6.4. Research Method and Research Design

The aim of this empirical study is to explore the participants' experiences and the outcomes of their participation in the production of the East Marine Plans. This focuses on how participants were involved in the process and whether the procedural criteria for collaborative participation were applied in practice as the SPP 2013 promised. The exploration of the outcomes of participation seeks to evaluate whether and to what extent the pluralist rationale for participation was achieved and why.

6.4.1. Research Method (qualitative research)

⁷¹ See discussion in s 7.4 in ch 7, 229.

⁷² Information is available at < <https://www.gov.uk/guidance/east-inshore-and-east-offshore-marine-plan-areas> > accessed 6 February 2017.

Although it has been widely used in social science studies, there is no fixed definition of the qualitative research method.⁷³ Qualitative research is an approach to developing understanding or exploring issues or problems with a series of “how” and “why” questions through analysing words rather than numbers.⁷⁴ Qualitative research has two aims. Generating theories is the most commonly cited purpose of qualitative research. Qualitative research is also applied in evaluative case studies to improve people’s understanding of the real world.⁷⁵ The evaluation model employed in this thesis is “Espoused Theories” and “Theories-in-Use”.⁷⁶ As Patton explains, ‘The espoused theory is what people say they do; it is the official version of how the programme or organisation operates. The theory-in-use (or theory in action) is what happens.’⁷⁷ This empirical study aims to evaluate whether and how the commitments of public participation in marine planning, set in obligations and governmental documents, were met in the East Marine Plans. The qualitative research method is suitable for the purpose of this empirical study.

The justification for the application of the qualitative method for this study is reinforced because the quantitative method is inapplicable to this research context. First, quantitative research methods, such as surveys and structured-interviews, commonly use fixed, strict, and limited questions to quantify research findings. However, participants’ experiences and feelings are differently expressed and difficult to quantify. It is challenging to obtain meaningful quantitative research data in this research context. Second, the issues evaluated in this research are not measurable using numbers. The influence of the participatory process on the outcome of participation, social learning, and conflict management is not quantifiable. Thus, quantitative methods are not appropriate for the objectives of this empirical research. Qualitative methods are more appropriate for this empirical study.

6.4.2. Research Design

⁷³ John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (7th edn, SAGE 2013) 43.

⁷⁴ Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 35–37; Monique M Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (SAGE 2011) 7–10; Creswell (n 73) 48.

⁷⁵ Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3rd edn, SAGE 2002) 170.

⁷⁶ *ibid* 200.

⁷⁷ *ibid*.

This empirical study applied a case study method. Compared with other research methods, case studies were not highly valued by researchers until the 1980s.⁷⁸ The case study method is good for answering “how” and “why” questions.⁷⁹ It is a qualitative research method. Qualitative case studies are defined as in-depth descriptions and analysis of “bounded” issues within a real-life context.⁸⁰ “Bounded” means a programme or an issue was run over a finite period with a limited number of participants.⁸¹ In empirical legal research, case studies can be employed either as an umbrella strategy that includes several data collection methods, or as a single method based on various resources.⁸² The qualitative case study method was applied in the empirical research on the East Marine Plans.

Qualitative interviewing and documentary analysis are the main approaches for data collection in this research. The motivation for using multiple data collection methods in this thesis is to maximise the strengths of each type of data collection approach while minimising the limitations of using any one of them.⁸³ By triangulating and crosschecking data, the credibility of data and findings can be ensured.⁸⁴ In this East Marine Plans case study, qualitative interviewing is the main approach for collecting

⁷⁸ Robert K Yin, *Case Study Research: Design and Methods* (5th edn, SAGE 2014) 17; Sharan B Merriam and Elizabeth J Tisdell, *Qualitative Research: A Guide to Design and Implementation* (4th edn, Jossey-Bass 2016) 37.

⁷⁹ Yin (n 78) 14.

⁸⁰ Merriam and Tisdell (n 78) 37; Johnny Saldaña Matthew B. Miles, A. Michael Huberman, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, SAGE 2014) 28.

⁸¹ Merriam and Tisdell (n 78) 39.

⁸² Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M Kritzer (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 939.

⁸³ Patton (n 75) 306-307; Yin (n 78) 114; Laura Beth Nielsen, ‘The Need for Multi-Method Approaches in Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 953.

⁸⁴ For example, data collected from documentary analysis in cha 6 (see pp193-195) shows that interactive participation opportunities were provided during the production of the East Marine Plans. However, the details of how these interactive participation opportunities were performed were unknown. According to data collected from interviews (see p230-231), it shows that these participation opportunities were conducted in an “interactive format” but with insufficient opportunities for discussion and negotiation which undermines the intention and value of interactive participation. Therefore, in this context, interview data provides more detailed information compared with data got from documentary analysis. Another example can be found in chap 8 (see p235), interview data shows that interviewees believed they did not make substantive impacts on the final East Marine Plan. This data might include possibly distorted responses due to bias of interviewees. In order to compensate this limitation of interview approach, documents issued by the MMO, namely *Track Change Plans* and the *Comments and Responses*, were analysed (see p246-249), which found that participants’ comments were not accepted on substantive issues of the final East Marine Plans. In this way, the credibility of interview data can be justified.

data, while documentary analysis is used to supplement the data collected from the interviews. Qualitative interviews were conducted in a face-to-face and semi-structured way. Semi-structured interview (which also refers to the interview guide approach) is defined as an approach in which the researcher has a list of predetermined questions or relatively specific topics to be investigated during the interview.⁸⁵ The process of semi-structured interview is more flexible compared with structured interview, and therefore researchers do not need to follow the exact wording and sequence of questions.⁸⁶ The strength of semi-structured interview is that it can increase the comprehensiveness of data and enable exploration of overlooked issues. However, due to its flexibility, data analysis of semi-structured interview is complicated, due to the lack of comparability of responses.⁸⁷ However, comparing responses is not a primary purpose of this empirical research. Also, given the fact that extensive participation opportunities were offered to a wide range of participants during the creation of the East Marine Plans, participants' motivations, capacities, and experiences of participation were different. Hence, a comparison of experiences of public participation among different participants would be impractical. Therefore, this weakness of the semi-structured interview approach, the difficulty of comparing answers, is not considered a significant issue in the East Marine Plans case study. A range of questions were used to lead the interviews.⁸⁸ Follow-up questions were asked, based on the interviewees' responses.

In addition to interview and documentary analysis, participant observation and focus groups are the other two main approaches to collect data in qualitative studies. This PhD research started in October 2013; at that time, all participation opportunities for the production of the East Marine Plans were closed. Therefore, it was not possible to collect data through a participant observation approach for this thesis. In addition, participants of the East Marine Plans are widely located in England, given the wide geographical area that the East Marine Plans cover. Thus, organising different participants to participate in a group interview would have been impossible in the

⁸⁵ Bryman (n 74) 471; Patton (n 75) 349.

⁸⁶ *ibid.*

⁸⁷ Patton (n 75) 349.

⁸⁸ Main interview questions are attached in Annex 2.

context of this PhD research. Therefore, the participant observation and focus groups approaches were not feasible for this empirical study.

This research investigates the experiences of participants who participated in the process of making the East Marine Plans. Purposive sampling (purposeful sampling) was applied to select candidates deliberately rather than randomly.⁸⁹ Before selecting the sample, identifying the potential interviewees for this case study was necessary. According to the SPP for the East Marine Plans, key participants included coastal partnerships, marine conservation zone (MCZ) projects, local authorities and other regulators, bordering nations, NGOs, industry representative groups, the public, local communities and local interest groups, sustainability appraisal consultees, statutory partners, and other government bodies.⁹⁰ The following content presents a brief introduction to some of the stakeholder groups, since this is closely related to the design and the determination of the research sample used in the subsequent empirical study.

National/ local industry and business representative groups

The East Marine planning areas have both intensive human activities and a high level of poverty concerning the coastal population.⁹¹ Marine industries include fisheries and aquaculture, national defence and security, marine aggregates, marine dredging and disposal, ports and shipping, telecommunications and cabling, marine energy production, carbon capture and storage sectors, and recreation sectors.⁹² Marine energy sectors include both traditional energy sectors such as oil and gas, and renewable energy sectors such as wind and tide energy.

Environmental NGOs

The environmental NGOs' contribution to the marine management and planning has been widely documented.⁹³ NGOs contribute to marine planning by representing a wide

⁸⁹ Bryman (n 74) 418.

⁹⁰ MMO, SPP 2013 (n 10) 7-10.

⁹¹ MMO, 'Decision on First Marine Plan Areas' (n 8).

⁹² MMO, SPP 2013 (n 10) 7-8.

⁹³ See Elizabeth M De Santo, 'Environmental Justice Implications of Maritime Spatial Planning in the European Union' (2011) 35 *Marine Policy* 34; Heather M Leslie, 'A Synthesis of Marine Conservation Planning Approaches' (2005) 19 *Conservation Biology* 1701; Alan T White, Catherine A Courtney and Albert Salamanca, 'Experience with Marine Protected Area Planning and Management in the Philippines' (2002) 30 *Coastal Management* 1.

range of individuals and groups. They provide knowledge and expertise and performing educational functions.⁹⁴ NGOs can act as a bridge between governmental agencies and communities, and between different governmental sectors.⁹⁵ In the UK, environmental NGOs have played a crucial role in supporting the improvement of marine management.⁹⁶ As important stakeholders in marine planning, NGOs were invited to participate in this empirical research.

Coastal Partnerships

The original purpose of establishing Coastal Partnerships (CPs) was to deliver Integrated Coastal Zone Management (ICZM) in the UK. Therefore, CP's functions and main services are closely related to coastal and marine issues. Owing to the close link between CPs and local communities, marine authorities use CPs as their main channels for approaching local stakeholders. Delivering public participation is a primary function of CPs regarding marine related issues.⁹⁷ The MMO has high expectations regarding the assistance that CPs can provide when engaging local stakeholders as in the East Marine Plans.⁹⁸

The MMO selected thirty CPs for engaging with marine planning based on a set of criteria.⁹⁹ However, none of these criteria considers the functions or the abilities of a CP to deliver public and stakeholder participation. Although facilitating stakeholder engagement is reported as a common function of CPs in England,¹⁰⁰ the representativeness of CPs and the quality of public and stakeholder participation run by CPs are questioned by Fletcher.¹⁰¹ CPs in the East coastal areas have common

⁹⁴ Helena Calado and others, 'NGO Involvement in Marine Spatial Planning: A Way Forward?' (2012) 36 Marine Policy 382.

⁹⁵ *ibid.*

⁹⁶ See WWF and others, 'Mobilising the Marine Act- Implementing Marine Spatial Planning in the UK' (2010) <http://assets.wwf.org.uk/downloads/mobilising_the_marine_act.pdf>; David Tyldesley, 'Making the Case for Marine Spatial Planning in Scotland' (2004) <https://www.rspb.org.uk/Images/marineplanning_tcm9-132919.pdf> accessed 12 August 2016;

⁹⁷ Coastal Partnerships Network, 'Baseline Report for Developing Partnership Working at the Coast' (2012) 27 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312716/cpn_baselinereport.pdf>.

⁹⁸ MMO, SPP 2013 (n 10) 8.

⁹⁹ MMO, 'Decision on First Marine Plan Areas' (n 8) 7–8.

¹⁰⁰ Coastal Partnerships Network (n 97) 27.

¹⁰¹ See Stephen Fletcher, 'Stakeholder Representation and the Democratic Basis of Coastal Partnerships in the UK' (2003) 27 Marine Policy 229; Stephen Fletcher, 'Representing Stakeholder Interests in

shortcomings such as failing to release up-to-date information to the public and a lack of cross-sectoral cooperation with different stakeholder groups.¹⁰² A lack of funding is a major threat to their existence and development.¹⁰³ Some CPs are experiencing a reduction in both services and staff.¹⁰⁴ The functions and abilities of CPs regarding public participation should have been considered by the MMO when they selected certain CPs to support marine planning. Based on defective criteria, the MMO selected a few CPs for the East Marine Plans.¹⁰⁵ However, one of the selected CPs closed for financial reasons at the beginning of producing the East Marine plans.¹⁰⁶ Despite the high expectations that the MMO had for CPs regarding the promotion of public participation in the production of the East Marine Plans, whether CPs should play such a crucial role, as stated in the 2013 SPP, is open to question. Therefore, CPs were invited to participate in this empirical study.

Local authorities and local interest groups

In addition to CPs, local authorities and interest groups are crucial participants at the local level. All three layers of local authorities (county councils, city/district councils, and parish councils) were invited to engage with the East Marine planning process. Local authorities could contribute to East Marine Plan in three ways. First, involving local authorities is a useful approach for achieving the integration of marine and terrestrial planning.¹⁰⁷ Second, local authorities can facilitate public participation and represent local communities and interests in the marine planning process.¹⁰⁸ Third, local authorities hold a large amount of local information and data, such as Historic Environment Records.¹⁰⁹ Therefore, involving them increases the evidence available for marine planning. Local interest groups are stakeholders who can represent local

Partnership Approaches to Coastal Management: Experiences from the United Kingdom' (2007) 50 *Ocean & Coastal Management* 606.

¹⁰² Coastal Partnerships Network (n 97) 46–52.

¹⁰³ *ibid* 98.

¹⁰⁴ *ibid*.

¹⁰⁵ MMO, 'Decision on First Marine Plan Areas' (n 8) 9.

¹⁰⁶ The Wash Estuary Strategy Group closed in March 2012 for financial reasons. More information is available at its website < <http://www.washestuary-info.org.uk/>> accessed 12 August 2016.

¹⁰⁷ The discussion of integration of marine and land planning systems can be found in s 3.2.1.1 in ch 3, 67–68.

¹⁰⁸ MMO, SPP 2013 (n 10) 9.

¹⁰⁹ More information see <<http://www.heritagegateway.org.uk/Gateway/CHR/>>.

interests and needs.¹¹⁰ Engagement with residents' associations and Local Enterprise Partnerships also strengthened public participation in the East Marine Plans at the local level. Both local authorities and local interest groups are important to this empirical research.

Sustainability appraisal consultees, statutory partners, and other government bodies

In England, the three statutory consultees for sustainability appraisal are Historic England, Natural England and the Environment Agency.¹¹¹ Other government partners and bodies listed in the 2013 SPP include government departments, the Joint Nature Conservation Committee (JNCC), the Centre for Environment, Fisheries and Aquaculture Science (Cefas), the National Infrastructure Directorate of the Planning Inspectorate, the IFCA, the Maritime and Coastguard Agency, the Crown Estate, the Planning Inspectorate, and harbour authorities.¹¹² It was assumed that these organisations could more easily gain the MMO's attention and have an influence on the production of the East Marine Plans since they all have a strong statutory status for marine issues. Thus, this group of stakeholders only accounts for a small percentage of the research sample.

The sample frame of this study was based on existing sources.¹¹³ The published list of "current MMO stakeholder organisations and groups" is an ideal source.¹¹⁴ This list includes about 300 stakeholders and covers almost all of the types of stakeholders identified in the SPP 2013. However, in the process of contacting potential interviewees, it was found that many stakeholders in this list had only very limited interest and involvement in the East Marine Plans and therefore could not bring rich information to this empirical research. The sample was narrowed and more focus was placed on the stakeholders who submitted comments to the draft marine plans during the public consultation. 106 responses were received during the formal public consultation on the

¹¹⁰ MMO, SPP 2013 (n 10) 9.

¹¹¹ Environmental Assessment of Plans and Programmes Regulations 2004, reg 4.

¹¹² MMO, SPP 2013 (n 10) 9-10.

¹¹³ More issues of sample selection are discussed in Jane Ritchie, Jane Lewis and Gillian Elam, 'Designing and Selecting Samples' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE 2003) 89.

¹¹⁴ These lists were attached in Appendix 1 of the SPP documents. These lists are regularly reviewed and updated by the MMO, therefore, they are not exclusion lists. The most recent list was requested from the MMO in Sept. 2015.

draft East Marine Plans.¹¹⁵ Among these responses, seven respondents represented SA consultees, border authorities and government departments were excluded from the sample frame.¹¹⁶ This is because these respondents are considered more powerful and influential than ordinary or smaller stakeholders in the marine decision-making process;¹¹⁷ therefore, they might have more access to and influence on marine planning than other participants. As a result of this exclusion, the sample frame of this empirical research was reduced to 99.

These respondents were generally divided into seven groups based on the categories of participants mentioned above, *including national industry representatives, ENGOs, local planning authorities, local industry representatives and interest groups, local communities, coastal partnerships, and others.*¹¹⁸ It is worth noting that, although a few members of the general public commented on the draft East Marine Plans, they were not included in the sample frame due to the difficulty of getting access to their contact information from either published information or the MMO.¹¹⁹ However, some categories covered in the sample frame mentioned above, such as local planning authorities, local industry and interest groups, and local communities, are representatives of the general public and individual local residents and therefore, more or less, can represent the general public and individuals' needs, interest and opinions related to marine planning. Although there is a concern that these representatives might pursue certain or their own interests rather than the public interest through their participation, due to the difficulty of approaching individual members of the general public and local residents, involving these representatives in the sample frame was the most practical way to conduct this empirical research.

¹¹⁵ MMO, 'East Inshore and East Offshore Marine Plans: Modifications-overview and summary of consultation (April 2014)' (2014) 2 <
http://webarchive.nationalarchives.gov.uk/20140619195215/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312518/east-plan-mod-summary.pdf > accessed 1 June 2016.

¹¹⁶ Such as Department for Work and Pensions, Environment Agency, Crown Estate, and Ministry of Infrastructure and Environment (Netherlands).

¹¹⁷ Arild Buanes and others, 'In Whose Interest? An Exploratory Analysis of Stakeholders in Norwegian Coastal Zone Planning' (2004) 47 *Ocean & Coastal Management* 207.

¹¹⁸ "Others" include academic institutions, independent consultees, and local regulatory bodies.

¹¹⁹ At the preparation stage of this empirical research, an email was sent to the MMO to request specific contact information of participants who participated the creation of East Marine Plans. Due to the concern of information protection, the MMO declined this request.

To investigate a wide variety of experiences and views of participants of the East Marine Plans, maximum variation sampling was applied.¹²⁰ As a result, the sample frame of potential interviewees who belong to the same category was restricted (no more than three).¹²¹ For example, 21 local planning authorities commented on the draft East Marine Plans.¹²² In the process of approaching potential interviewees, the recruitment of local planning authorities was ceased when two or three local planning authorities confirmed their participation in this research project. Similarly, when determining the sample frame for the national and local industry representatives,¹²³ the number of potential interviewees who belong to the same industry/sector was restricted to maximise the different types of industry/sector representatives in this research. For example, nine respondents represented port and shipping industry. The recruitment of port and shipping representatives was ceased when one of them confirmed his/her participation in this research. Thus, the actual sample frame of this empirical research was reduced to around 55.

A final issue that needs to be addressed about sampling is the determination of an appropriate sample size. The sample size in qualitative research varies. There are no set rules or a minimum requirement for a sample.¹²⁴ Many previous studies have been based on a relevant small sample.¹²⁵ Reaching “saturation” is a popular method for identifying the sample size.¹²⁶ This means data collection can be complete when no new data seem to be emerging. The concept of “saturation” actually means “theoretical saturation”. This is applied in the theoretical sampling method, which aims to generate theory from qualitative research. Theoretical sampling was not applied in this research.

¹²⁰ Bryman (n 74) 419.

¹²¹ There are five criteria for good regulation: legislative mandate, accountability, due process, expertise, and efficiency. More discussion about these regulatory criteria see Robert Baldwin, Martin Cave, and Martin Lodge, *Understand Regulation: Theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 27-33.

¹²² A detailed category of responses who commented on the draft East Marine Plans and the number of the responses under each category can be found at : < http://webarchive.nationalarchives.gov.uk/20140619195215/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312518/east-plan-mod-summary.pdf > .

¹²³ These industries including tourism and recreation, aggregate, ports and shipping, fisheries, renewable energy, oil and gas, and carbon capture and storage.

¹²⁴ Patton (n 75) 311; Bryman (n 74) 425–426.

¹²⁵ Patton (n 75) 311.

¹²⁶ Mark Mason, ‘Sample Size and Saturation in PhD Studies Using Qualitative Interviews’, *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research* (2010)

Based on the sample frame of this empirical research and the intention of involving all seven categories of participants into this empirical research, the sample size identified as appropriate for this research was 10-15.

6.4.3. The Process of Gathering Empirical Data

Between 21 September and 9 December 2015, fifty-three invitation letters were sent to potential candidates.¹²⁷ Twenty-nine candidates responded to the research invitation. Many candidates declined the research invitation for two reasons: first, they did not engage much in the East Marine Plans because of limited interest in and or attention to the East Marine areas; second, staff who were responsible for the East Marine Plans had left or retired. Thirteen candidates agreed to participate in this study (twelve interviews and one written response). It is worth noting that several interviewees were representatives of an association or an umbrella organisation that represented a number of individual companies or smaller organisations in the production of the East Marine Plans. Some interviewees represented different organisations during the creation of the East Marine Plans due to secondment reasons. Therefore, the participants of this empirical study brought wider perspectives on stakeholder participation in the East Marine Plans than expected.

Between October 2015 and February 2016, twelve face-to-face interviews were conducted. Most of the interviews were conducted in interviewees' offices; only a few of them were conducted in public places, such as local libraries, or at the interviewees' homes. The average length of the interviews was about 30-50 minutes. All of the interviews were recorded by two voice recorders with the permission of the interviewee. After the interviews, every interviewee was provided with an information sheet about the more specific purposes of the research. The collected data were subjected to a qualitative examination. This involved a rigorous analysis of the transcripts using Word and Nvivo qualitative analysis software for coding. Interviewees' identities were coded. All codes, records, and transcriptions of interviews were anonymous and stored securely.

6.4.4. Ethical Considerations

¹²⁷ A sample of invitation letter is attached in Annex 3.

Although it did not involve sensitive questions or risk, ethical issues were seriously considered during the empirical research.¹²⁸ This empirical study underwent full ethical scrutiny and its procedures were approved by the Faculty of Arts and Social Sciences Ethics Committee at the University of Hull. Before participating in this research, potential interviewees were sent an information sheet and consent form that provided further information regarding this PhD research and interview.¹²⁹ Before conducting interviews, all interviewees were required to confirm their understanding of issues clarified in the information sheet and to sign the consent form. All information about participating organisations and individuals has been kept confidentially.

6.5. Conclusion

This chapter addressed three issues: the examination of the SPP for the East Marine Plans, the introduction of the practice of public participation in the production of East Marine Plans, and the explanation of research methods applied in the East Marine Plans empirical research.

The investigation on the SPP found that except for the management of stakeholders' expectations, almost all of the statutory and non-statutory requirements on the content and the producing procedure of the SPP were met in the East Marine Plans case and all procedural criteria for collaborative participation are required or implied in the SPP. However, the purpose and levels of public participation were not explicated in the SPP. The practice of public participation in the East Marine Plans went far beyond the statutory obligations on public participation regulated under the MCAA. However, the unclear decision-making process and reasons for the omission of an Independent Investigation, and the insufficient time allowed for public consultation on the draft plans, might have weakened the transparency and easy access to participation requirements in the production of the East Marine Plans.

A qualitative case study method was applied for the empirical research on the East Marine Plans. Methods of data collection included qualitative interviews and documentary analysis. Qualitative interviews were carried out with interviewees face-

¹²⁸ Patton (n 75) 496–502; Anne Ryen, 'Ethical Issues' in Clive Seale (ed), *Qualitative research practice* (SAGE 2004) 230.

¹²⁹ These documents are attached in the Annex 4 to this thesis.

to-face and in a semi-structured manner. The research sample included stakeholders who participated in the production of the East Marine Plans and provided comments on the draft marine plans. Potential interviewees were purposefully selected from the sample, to reach different types of stakeholder. Finally, data collection came via twelve face-to-face interviews and one written interview. All of the interviews were recorded and transcribed. Records of interviews, transcriptions, and interviews' identities were coded and stored separately. The next chapter presents the findings of the data analysis.

Chapter 7. Data Analysis- Part I: an Evaluation of the Procedural Criteria for Public Participation in the East Marine Plans

Introduction:

This chapter concentrates on evaluating the implementation of the procedural criteria for collaborative participation when producing the East Marine Plans. Before analysing the data collected from interviews and other relevant documents, a review of the theoretical and legal issues concerning the procedural criteria for collaborative participation discussed in previous chapters is needed.

Chapter 3 found that public participation in English marine planning, ideally, should contribute to conflict management, improve trust in the MMO, enhance knowledge and understanding among stakeholders and the public on marine planning issues, and increase data sources used for making marine plans. Marine planning is an integrated process, which means all sectors related to marine planning should be gathered and work collaboratively to achieve integration and sustainability in marine planning. To achieve these purposes of public participation and meet the nature of marine planning, four procedural criteria were selected: early and broad participation, easy access to information and participation opportunities, interaction, and transparency.

However, the review of international law in chapter 4 found that the binding obligations for public participation in these international legal instruments, particularly in marine conventions and EU marine Directives, are general and insufficient. They are therefore unable to establish a clear and robust legal basis for implementing the procedural criteria for public participation in marine planning. Thus, this burden was transferred to the national level.

Chapter 5 found that under the English marine planning regulatory regime, with the exception of interactive participation, the other procedural criteria, more or less, are required. Potential barriers, however, such as a lack of requirements on the quality of information and opaque decision-making on Independent Investigations, were identified. The research findings in chapter 6 on the investigation on the SPP for the East Marine Plans are encouraging. These found that all the procedural criteria were

required or implied under the SPP. Offering a guarantee on procedural criteria for collaborative participation is one question; whether they will be implemented is another. This chapter focuses on assessing the implementation of the four procedural criteria for collaborative participation when producing the East Marine Plans.

The material used for data analysis was collected via interviews with stakeholders. The *Modification Pack: Consultation Responses* (hereafter *Comments and Responses*) was also used.¹ This document contains all of the comments collected during the formal public consultation on the draft East Marine Plans in 2013 and the MMO’s responses to these comments. Since many participants provided comments on not only the content of the draft East Marine Plans but also participation issues, *Comments and Responses* offers useful data for empirical research. The data obtained from the interviews was the main material for data analysis while the data collected from *Comments and Responses* was applied to supplement the findings of the interviews.

To better understand their comments, general information about the interviewees’ identities is shown in Table 6.

Interviewee 1: Local industry stakeholder	Interviewee 8: NGO
Interviewee 2: National industry stakeholder	Interviewee 9: Local authority
Interviewee 3: Local regulatory body	Interviewee 10: Local interest stakeholder
Interviewee 4: Local planning authority	Interviewee 11: National industry stakeholder
Interviewee 5: NGO	Interviewee 12: Coastal stakeholder partnership
Interviewee 6: Independent consultant	Interviewee 13: Local planning authority (written responses)
Interviewee 7: National industry stakeholder	

Table 6. General information on the identities of the interviewees

7.1. General Comments on the Procedural of Public Participation in the East Marine Planning Process

¹ *Comments and Responses* is available at: < <http://webarchive.nationalarchives.gov.uk/20140618025451/https://www.gov.uk/government/publications/east-inshore-and-east-offshore-marine-plans> > accessed 2 October 2017.

As described in chapter 6, the MMO offered a range of participation activities and three informal consultations in the East Marine Plans.² This went beyond the statutory requirements for participation under the MCAA 2009. Interviewees confirmed this finding. According to interviewees, a general impression was that the *production of East Marine Plans was a participatory planning process* since there were *plenty and various opportunities for participation and direct communication*. As interviewees noted:

Generally, it was quite a well-engaged process. I felt that they [the MMO] were very much keen on getting as much contributions from us as possible. (Interviewee 2 - National industry stakeholder)

Generally, I think on the whole, the stakeholder process has been quite good **we've had more public consultations** [than] **legally required**, so we had [an] informal chance to comment. We had one-to-one meetings. And we have a good relationship ... with the MMO. So, on the whole, I would probably give 6 or 7 out of 10 [for the participation process]. (Interviewee 8 - NGO)

This impression is also supported by a survey conducted by the MMO regarding stakeholders' opinions on compliance with the SPP. Around 60% of the responses agreed that the MMO complied with the SPP.³ According to *Comments and Responses*, general positive feedback regarding participation in the East Marine Plans was provided by participants.⁴ Thus, it is found that the *production of the East Marine Plans was a participatory process*.

However, the above conclusion does not imply that the participatory process of the East Marine Plans was perfect or performed effectively, since many deficiencies and challenges, as will be presented in the following sections, were raised by interviewees

² See Table 5 in s 6.3 in ch 6, 193-195.

³ MMO, 'East Inshore and East Offshore Marine Plans: Modifications-overview and summary of consultation April' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312518/east-plan-mod-summary.pdf> accessed 2 December 2016.

⁴ Positive feedback can be found in *Comments and Responses* (n 1), see comments 577, 388, 106, 1928, 581, 2049, 1987, 1786, 1117, 1140, 294, 1831, 766, 426, 673, 1360, 1102, 1450e, and 523. There is also some, but not much, negative feedback on participation. See comments 123, 2010, 1511, 328 and 1473 which will be discussed further below.

and in *Comments and Responses*. It is also interesting to note that, although most of the interviewees confirmed that they were given opportunities to participate in the production of the East Marine Plans, they did not think *their participation had much impact on the result of the East Marine Plans*.⁵ Since the influence of participation, as an outcome of public participation, will be further analysed in chapter 8, this chapter will only focus on evaluating the procedural criteria for participation of the process.

7.2. Early and Broad Participation

As found in chapter 5, the requirements for early participation and notification when making marine plans are regulated under the MCAA 2009 and DEFRA's *Description*.⁶ *Early participation* refers to participation at the stage when all of the options are open and participants therefore can shape and form proposals for decisions and provide data and information. Involving participants at the initial stage of decision-making can trigger benefits under the instrumental rationale, such as social learning and trust building. This can benefit the subsequent participatory process. In a marine planning process, participation that begins at the scoping stage is considered as early participation, since this stage involves data collection and a decision about which proposed issues will be addressed. In the English marine planning context, the earliest statutory participation (notification) opportunity occurs at the preparation stage when the SPP is published.⁷ The *Description* goes further and suggests public participation in the preparation and consultation for the draft SPP.⁸ The public and relevant stakeholders may have opportunities for involvement even before the marine planning process starts.

For those who could recall their first awareness of and participation in the East Marine Plans, most interviewees began to participate in 2011, around the official start of the East Marine Plans. Interviewees 1, 9, 12, and 13 started their participation in 2011 through local events; Interviewees 2 and 3 began their participation at the informal consultation on the draft SPP in January 2011; Interviewees 5, 6, 8 and 11 engaged in the selection of the first marine plans in England in 2010, which was before the official

⁵ See section 8.1 in ch 8, 235-238.

⁶ See discussion in s 5.2.3.1 in ch 5, 175-176.

⁷ MCAA 2009, sch 6, para 5(6).

⁸ See Table 3 in s 5.2.2 in ch 5, 174-175.

start of the East Marine Plans. Interviewees were impressed and spoke highly of the practice of early participation. Interviewees 2 and 3 stated:

This is quite unusual actually, I think. **They [the MMO] had at least three pre-consultations before they came out with the actual consultation on the East Marine Plan...**which I think is quite helpful because it meant that **we were able to input and contribute on our perspectives before the actual East Marine Plan consultation came out.** (Interviewee 2 - National industry stakeholder)

I felt my initial impression was 'Wow! They [the MMO] are doing this very thoroughly'. The Statement of Public Participation, I hadn't come across one of those before. I thought, 'Oh gosh that is very thorough' you know, **before they consult us on the plan, they are giving us an opportunity to comment on how we are involved.** I hadn't seen that before. I got the impression that it was very thorough. (Interviewee 3 - Local regulatory body)

Due to the early participation, interviewees began to *become aware of the inadequate evidence base of making the East Marine Plans and approached other stakeholders and the MMO*. Early participation enabled stakeholders to establish relationships with the MMO and other participants, and to fill the evidence gap from an initial stage of the plan making. As two interviewees noted:

In that first meeting, we started to build relationships with people. And then [we had] a whole series of telephone conversations and other meetings with individuals over the next few months... so that [the] initial meeting got [us] a chance to make contact with people involved in this plan. I think which was crucial to the benefits that we got from [the early participation]. (Interviewee 1 - Local industry stakeholder)

We realised that because the MMO was a very new organisation, and a lot of their staff did not have marine expertise or they did not have ecological environmental expertise, so we recognised quite early that

we had to start [to provide] **quite a basic level** [of information] **for them.**

So we gave them information and data, we also provided guidance on how to use that data. (Interviewee 8 - NGO)

Based on the information provided in Table 5 and the interview data it is reasonable to conclude that the criterion for early participation was applied for the East Marine Plans. It seems that the early participation also had implications for the fulfilment of increasing the data available for marine planning and establishing relationships among participants. These elements fall under the substantive and instrumental rationales for participation. Ensuring broad participation is another basic criterion for public participation in the marine planning context due to the wide influence that marine plans have on both land-based, such as coastal communities, and marine stakeholders. According to the MCAA 2009, every individual or group is allowed to participate in marine planning.⁹ Therefore, there is a very robust legal basis for broad participation in the marine planning process. Data collected from interviews shows that a wide arrange of stakeholders engaged in the case of the East Marine Plans. Some interviewees commented that:

They [The MMO] had **a large** [group of] **representatives of the different organisations** in the whole areas. That was really positive. It seems the right people were involved. (Interviewee 12 - Coastal stakeholder partnership)

I am pretty sure the local authorities were represented [in a participation event] as well. There were many marine sectors, fisheries representatives, natural environment representatives, environmental regulators, the RSPB, NGOs, aggregates, offshore wind, tidal wave and power, yes, many marine sectors and a couple of local authorities. (Interviewee 7 - National industry stakeholder)

[In] the drop-in sessions, **a lot of people representing different bodies came.** I did not know them all, obviously. I do remember the one that stood on the beach, I remembered the district councillor was there, the

⁹ MCAA 2009, sch 6, para 5(8).

county councillor was there I am sure, and there would be people I am sure involved with fishing and [that] sort of thing. (Interviewee 9 - Local authority)

A similar comment is found in *Comments and Responses*:

The Council note that in addition to local authorities and Government organisations, interest groups and the general public have had the opportunities to be involved and to make representations at all stages.¹⁰

However, it is worth noting that, although there were no negative comments on the matter of broad participation revealed from interviews, some negative feedback is found in *Comments and Responses*.¹¹ These criticisms largely come from land-based stakeholders or individuals, such as landowners, tenants, and sea anglers, who argued that they were not well engaged in the marine planning process or that the notification/participation events at their local level were not effective.¹² Despite these criticisms, data collected from interviews and *Comments and Responses* shows that, generally, broad participation was applied in the East Marine Plans case.

7.3. Easy Access to Information and Participation

7.3.1. Easy Access to Information

There are two issues under the requirement of easy access to information: the availability and quality of information. According to the MCAA 2009, the MMO is required to publish an SPP and consultation draft on marine plans to bring them to the attention of interested persons so that the public has easy access to important information about marine plans.¹³ Using easy and understandable information was listed as a principle for participation in the SPP 2013.¹⁴ In the East Marine Plans practice, the official website of the MMO was the main resource for information delivery. From November 2010 to December 2013, seventeen newsletters were issued to keep the

¹⁰ *Comments and Responses* (n 1) comment 106.

¹¹ *ibid*, comments 2010, 1511, 328 and 1473.

¹² *ibid*.

¹³ MCAA 2009, sch 6, paras 5(5) and 11(4).

¹⁴ See s 6.2.2 in ch 6, 191.

public informed about the progress of the East Marine Plans and upcoming participation opportunities.¹⁵ Press releases concerning East Marine Plans were available on the MMO's website.¹⁶ Information about the East Marine Plans was also released through participation in local and national events. Data collected from interviews and *Comments and Responses* presents a rather mixed picture about the success of this publicity. Interviewees made some positive comments concerning the availability of information:

I would say probably the best thing [about participation] was the communication from the MMO. In my mind [the communication] was very good, **it was regular** ... [we] had their newsletters as well, individual emails and **there were a lot of engagement opportunities and events.**
(Interviewee 3 - Local regulatory body)

Neither of [the] documents were hard to find from what I recall.
(Interviewee 6 - Independent consultant)

However, statements about limited communication received from the MMO are revealed in the data.¹⁷ Interviewee 10 stated that:

If you looked at the DEFRA camp, you know the MMO, Environmental Agency, and Natural England, they vary in their communications ... I think probably the MMO is the one we received the least communication from, for whatever reason. (Interviewee 10 - Local interest stakeholder)

A general impression on this issue is that locally-based stakeholders, particularly small local stakeholders were more likely to have problems in receiving information from the MMO if they were not on its communication list. In terms of the quality of information, data collected from interviews and *Comments and Responses* implies some obstacles

¹⁵ The newsletters are available at: <
<http://webarchive.nationalarchives.gov.uk/20140305092248/http://www.marinemanagement.org.uk/marineplanning/news/newsletters.htm> > accessed 26 February 2017.

¹⁶ Information can be found at: <
<http://webarchive.nationalarchives.gov.uk/20140402143557/http://www.marinemanagement.org.uk/news/archive2013.htm>> accessed 26 February 2017.

¹⁷ *Comments and Responses* (n 1) comment 2010, 1473.

concerning the intelligibility of information and consultation documents provided about the East Marine Plans.

Making information and consultation documents understandable is closely related to the effectiveness of public participation. In the East Marine Plans case, however, data collected from interviews and *Comments and Responses* shows that some participants thought the marine planning documents were too lengthy and difficult to understand. This may have hindered stakeholders, especially lay people, from engaging with the plans. Some interviewees commented that:

I think the **plans are generally too long and too wordy**. I think it turns people off and turns the public off from the process if you have a 200-page long document to read every time. (Interviewee 8 - NGO)

Plan documents and summaries **could be made more readable, could be made easier to digest and engage with** for people who do not exist in [that] kind of slightly bureaucratic environment. (Interviewee 1 - Local industry stakeholder)

This issue is also raised in *Comments and Responses*:

Many people felt that the plan documents were incredibly long and difficult to decipher. To the lay person the volume of information being provided resulted in confusion and technical problems in terms of viewing the plan itself once it became available.¹⁸

The argument of the quality of information is not novel in environmental related decision-making. The lack of requirements for the quality of information can undermine easy access to information and participation.¹⁹ Ensuring the intelligibility of information and consultation documents used in marine planning should be highlighted, particularly in a context of low awareness and knowledge levels among the public, which is one of the barriers to English marine management as described in chapter 3 above.

¹⁸ *ibid* comment 52. Similar comments see 104 and 1671.

¹⁹ See discussion in s 4.1.1.2 in ch 4, 89-90.

7.3.2. Easy Access to Participation

In terms of easy access to participation, broad participation is significant. In addition, participants should be offered enough time and, ideally, the necessary support to enable participation. As shown below, the time allowed for consultation and participation and the capacity of some stakeholders are practical barriers for easy access to participation. Engaging stakeholders and the public at the appropriate time and providing adequate time for consultation is a principle of participation according to the SPP 2013 for the East Marine Plans.²⁰ However, some interviewees believed that timeframe was one of the difficulties they met during the engagement process.

Although the MMO was quite open with their engagement, they often gave us very tight deadlines to respond. They often gave us less than a week in the period between the formal public consultations. They often sent us something to comment on and gave us maybe four or five days. And sometimes the documents could be quite long, such as the sustainability appraisal. **I mean the draft of those documents were quite [long], over hundred pages sometimes. We had to respond quite quickly and looked at quite a lot of information in a short piece of time. That was not always possible to do that.** (Interviewee 8 - NGO)

The timescale was a challenging point. (Interviewee 4 - Local planning authority)

Comments concerning the time span for participation can also be found in *Comments and Responses*:

Consideration should be given to the limited resources of local organisations, local communities, and individuals to respond to major consultations in such short time periods which can affect the quality of the response.²¹

Two possible reasons were found during the interviews that might have caused

²⁰ See s 6.2.2 in ch 6, 191.

²¹ *Comments and Responses* (n 1) comment 286. Similar comments can be found in comment 673 and 470.

insufficient time for consultation. First, for some stakeholders, particularly those from large organisations, there was more than one team or member of staff tasked with responding to marine planning consultations. Interviewee 13 stated that there were two teams in the organisation that were separately responsible for strategic planning and sustainable development issues concerning the East Marine Plans. Therefore, it took time to organise different working groups, to negotiate, and to reach a consensus for the consultation responses. Interviewee 4 further explained that the timescale for the consultation for the draft plans was too tight because their consultation response required their Council Cabinet to make a decision. Their cabinet meetings usually take place once a month. Therefore, very little time for preparing the consultation response remained after the cabinet meeting, especially since significant changes were required.

Second, the time of consultation caused problems for some participants. The formal public consultation on the draft East Marine Plans was conducted from July to October 2013. This covered a summer holiday period but no extension was granted. This argument can be supported by *Comments and Responses*:

... we ask that future consultation exhibitions should be publicised well in advance and should either stagger or avoid busy periods such as the summer season. As can be expected in such periods many stakeholders are either away, or, extremely busy due to the peak tourist season.²²

As shown above, the inadequate time period allowed for consultation was a barrier to participation for some participants during the production of the East Marine Plans.

The interview data also shows that some participants' engagement in producing the East Marine Plans was hindered due to their own capacity, including *the nature and cohesion within stakeholder groups, staff resources, and the available data on planned marine areas*. Interviewees commented that national stakeholders or well-organised stakeholders could more easily be involved, and therefore be more likely to influence the production of the East Marine Plans. The fishing industry is the most common

²² *ibid* comment 470. A similar comment can be found in comment 1670.

example mentioned by interviewees to illustrate the difficulty of engaging less organised stakeholders in marine planning. They commented as follows:

I think the fishery sector is always difficult to engage with. From our experiences **it is quite difficult to get a single voice from them. They do not really talk as an industry and as a whole.** So it is quite difficult to ensure that you've satisfied them. Because one agreement you get from one fishery sector, the rest of fisheries won't get agreement with them. So I can imagine, there are particular difficulties. (Interviewee 7 - National industry stakeholder)

I think national stakeholders are a lot easier to get hold of. They're more organised. Fishermen are not easy to get hold of. [If] there are seventy fishing boats, [then there are] seventy separate independent small businesses, who are all very busy going out on the sea and catching fish, who do not spend a lot of time on paperwork and reading consultation documents. (Interviewee 1 - Local industry stakeholder)

The reality of the fisheries sector is, the largest gear fleets tend to be more organised and [they] produce organisations that have a staffing capacity. Outside of that is a mixed picture. [Small fleets] depended much on volunteerism of individuals in associations. Therefore, as a consequence of this, it is more difficult for local organisations to get involved. (Interviewee 11 - National industry stakeholder)

These comments are also confirmed by the MMO's evidence report, which states 'fishermen are often unable to substantiate their case due to availability of quality data or lack of internal agreement and cooperation'.²³ Apart from this, the lack of resources, specifically staff resources and available data, were also commonly mentioned by interviewees, as barriers to participation in the East Marine Plans. Interviewees noted:

²³ MMO, 'East Marine Plan Areas: Evidence and Issues Report Annex 2: Stakeholder groups and engagement' (2014) <
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312404/east_evidence_issues_annexes.pdf > accessed 12 February 2017.

The agencies involved in the marine historical environment are very much less. There are three people in Historical England covering the whole of the marine historical environment UK. Compared to the number of people, for example in Natural England or the JNCC who have a remit in marine environment and on the planning side [in marine historical agencies] it is **severely under resourced**. So consequently, they cannot get around everything, and they are handling both planning and licensing, these three people, this is ridiculous, disproportionate provision. (Interviewee 6 - Independent consultant)

Over the last few years, there has been an awful a lot of a much smaller public sector across in this country. **There is a lot of people out there trying to do an awful lot of more work than they used to do. And you just do not have that capacity, you have to prioritise.** (Interviewee 10 - Local interest stakeholder)

Coastal Partnerships were involved because they are very useful network for the MMO to use. But like I said, the problem is that they don't have any resources, people do [it] voluntarily. (Interviewee 12 - Coastal stakeholder partnership)

Some interviewees mentioned that they failed to achieve their expectations or missed opportunities to enhance the importance of their interests in the East Marine Plan-making process due to insufficient data in their sectors.

One of the difficulties I think, particularly on the marine plan level, is that we don't have [a] spatial policy for [our industry]. **Perhaps because [our] spatial evidence basis is only partial, particularly for inshore areas where there is no [relevant] data.** (Interviewee 11 - National industry stakeholder)

... same goes for marine data, **we just do not have the quality of data**, of course we have some good data but **we do not have the same coverage [that] has been achieved for other sectors.** So again, that contributes to

the invisibility of [our sector and interests]. (Interviewee 6 - Independent consultant)

In chapter 6, the MMO's selection criteria for CPs was criticised for lacking any consideration about the functions and abilities of CPs to deliver public and stakeholder participation.²⁴ Previous studies show that some CPs have problems when facilitating local engagement. The CPs' capacity for enhancing public and stakeholder engagement in the East Marine Plans is questionable.

Some interviewees confirmed this concern. Interviewee 12, who represents a coastal partnership, reports the issue of under resourcing among coastal partnerships. Interviewee 12 also states that providing information to the MMO and sharing the MMO's information to partnerships were the only two functions of their organisation at the time of the East Marine Plans. They only had a limited focus on ecology and environmental interests and did not concentrate much on social economic concerns at the time of producing East Marine Plans. These comments imply that, based on different focuses and services, not all coastal partnerships have broad functions in terms of facilitating a wide range of public and stakeholder engagement. The limited performance of the coastal partnerships on the east coast is also verified by interviewee 8, who commented:

I think there are coastal partnerships around the UK and some of them are busier than others and better engaged in the process. **So in [the] east [of] England, I do not think that coastal partnerships really existed to provide that level of engagement.** Whereas in the south [of] England, in the south coast you have at least two coastal partnerships and they are very active and very engaged in the process, while in the East, the MMO had to coordinate everything. There [are] not many formal coastal partnerships in the East Marine Plan areas, which is quite difficult. [In the east], they do not really exist. If they really exist, they are very small and

²⁴ See discussion in s 6.4.2 in ch 6, 205-206.

they did not have the ability to organise workshops or organise themselves. (Interviewee 8 - NGO)

Therefore, it seems that CPs played a less effective role than expected in the SPP. This also raises doubt about the credibility of the stakeholder analysis for the East Marine Plans. However, an investigation of stakeholder analysis goes beyond the focus of this thesis. More research is needed to examine and evaluate the effectiveness of stakeholder analysis in marine planning practice.

7.4. Transparency

The transparency criterion requires decision-makers to ensure that the public and participants know how a decision is made and what evidence or reasons have been used to make it. In the East Marine Plans case, transparency means that stakeholders should be informed about and have an understanding of how their input, including both data and concerns, were considered and used in planning process. Second, stakeholders should understand how decisions, such the determination of having an Independent Investigation, were made and based on what considerations. Data collected from interviews and *Comments and Responses* shows that there was insufficient transparency during the creation of the East Marine Plans.

Interviewees reported that the *link between their input and the creation of marine plans* was unclear. They commented:

It was not quite clear how the MMO would use comments although I said that the data was used and we could see that through planning process. The comments that we provided on the wider process, we fed them into the MMO. But **it was not quite clear how they used these comments and what changed as a result.** (Interviewee 8 - NGO)

I would just have the question how much effort has gone into that consensus building process. Once they've received a lot of consultation responses, how much effort went into the consensus building and how this information ... has been recirculated into [the] marine plan. (Interviewee 10 - Local interest stakeholder)

I wouldn't say it was an opaque decision-making, I would say the lack of clarity on the decision was the main issue that we faced. (Interviewee 4 - Local planning authority)

A similar comment is found in *Comments and Responses*:

The Vision in the draft plan doesn't appear to properly reflect the discussions and input on the Vision during public engagement in 2011-12, and appears to have been significantly influenced since summer 2012, when public engagement ceased before the draft plan was published around a year later.²⁵

The feeling of a lack of transparency in producing East Marine Plans reported by interviewees, to some extent, came from the fact that the priority of the East Marine Plans was unexpectedly changed at the later stage of plan-making. At the scoping stage of producing the East Marine Plans, priority was granted to the offshore wind sectors. This argument can be supported by the emphasis paid to offshore wind sectors in the vision of the East Marine Plans²⁶ and in the identification of the options for the East Marine Plans areas.²⁷ However, when the draft Marine Plans came out, the absolute priority of development in the East Marine Plans was granted to the oil and gas sector,²⁸ although it is clearly stated in the SA reports that 'oil and gas extraction **were not able to** be expressed in terms of their future development, as there was insufficient evidence available to project the location of suitable commercial gas resources and the potential nature of any related developments'.²⁹ This unexpected change in the priority of the East Marine Plans is also raised by interviewee 8:

[The] Initial draft of the East Marine Plans was quite strong on renewable energy and other activities. Then the plan was passed to government

²⁵ *Comments and Responses* (n 1) comments 1491. Similar comments can be found in comments 1727 and 882.

²⁶ A discussion about the visions of the East Marine Plans can be found in s 8.1.2.1 in ch 8, 239-243.

²⁷ See the discussion about the selection of options for the East Marine Plans in s 6.3.1, 196-198.

²⁸ See discussion in s 8.1.2.2 in ch 8, 246-247.

²⁹ MMO, 'Sustainability Appraisal of the East Inshore and East Offshore Marine Plans- Sustainability Appraisal Report (Volume 2: SA Report)' (2014) 33 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312502/east-plan-sa.pdf> accessed 6 August 2016.

departments and suddenly the final plans for public consultation had a priority, like oil extraction will be allowed anywhere. (Interviewee 8 - NGO)

This shift, to some extent, might explain the participants' feelings that the link between their input and the result of the East Marine Plans consultations was not clear. Interviewee 11 commented that:

Although the stage process has been set out, it was quite tricky to follow up, particular[ly] for the latest stages of exactly what was happening and why. **It seemed to shift around a bit wildly towards the end stages.** (Interviewee 11 - National industry stakeholder)

In addition to the unclear link between the participants' input and the creation of the East Marine Plans, the determination of running an Independent Investigation on the East Marine Plans is another issue raised in data regarding the lack of transparency about them. The data collected from *Comments and Responses* shows that an Independent Investigation was strongly recommended by stakeholders for three reasons. First, some stakeholders believed that their concerns, especially local issues raised during formal public consultation, could not be resolved without an Independent Investigation.³⁰ Second, as the pioneer marine planning in England, the evidence base, procedures, and content of the East Marine Plans should be reviewed to justify the legitimacy and lead the future of the marine planning processes.³¹ Third, an Independent Investigation was also suggested to assess the effective implementation of public participation in the process.³² However, there was no Independent Investigation into the East Marine Plans and no detailed explanation on this decision was given.³³ Therefore, the decision about the Independent Investigation was not transparent. Interviewee 4 commented that:

³⁰ *Comments and Responses* (n 1) comments 178, 1926 and 240.

³¹ *ibid* comments 468, 1663, 1254, 505 and 241.

³² *ibid* comments 578 and 1683.

³³ See discussion in s 6.3.3 in ch 6, 199-200.

The criteria for whether or not an investigation takes place are vague.
(Interviewee 4 - Local planning authority).

As shown above, the data implies that there might have been inadequate transparency when producing the East Marine Plans, due to the unclear link between stakeholders' input and the outcomes of their participation. The lack of clarity about the decision not to perform an Independent Investigation might also have impaired the transparency during the production of the East Marine Plans.

7.5. Interaction

As explained in chapter 3 above, interactive participation means the opportunities for communication and discussion among participants and decision-makers that should be provided during the planning process. Outcomes from this interaction can be used to form and develop decisions. The data collected from the interviews show that the MMO carried out a range of participation opportunities, such as drop-ins, workshops, and stakeholder meetings. These facilitated interactive communication among stakeholders and marine planners.³⁴ However, according to the data collected from the interviews, it seems that stakeholders were brought together but provided with insufficient opportunities to identify or debate the issues that needed to be addressed in the marine plans. In other words, some participation events did take an interactive format but they failed to achieve fully the substance and expected outcomes of interactive participation. As interviewees noted:

It [the stakeholder meeting] always has dreadful agendas ... it feels like the MMO does a box-ticking exercise ... They kind of **quickly run through that and we do not have a chance to debate issues** and then the meeting is over and rather than focusing [on certain issues]. (Interviewee 5 - NGO)

[The MMO] had workshops, drop-in meetings. We had one or two meetings with them with our sector leads. [The MMO had] formal consultation[s] as well. They engaged a hell of a lot over the whole

³⁴ See the interviewees' comments on broad participation, which demonstrate that different stakeholders were involved in the same participation events.

process, they cannot be criticised for not engaging. I think we are all sick of engaging. One thing we've sort of commented on several times is that **they should have engaged more about identifying the issues that the marine plan could address, what do the stakeholders really feel the plan could do for them, rather than just engaging over decisions that stakeholders can't actually put input into.** The stakeholders can help and identify what issues they are having that could be addressed at the plan level ... to me, the engagement were not very targeted and meaningful. (Interviewee 7 - National industry stakeholder)

I think [participation] worked best when it was quite interactive, worked best when it had opportunities to discuss options and things like that rather than just updating us on other things, so the more opportunities for interactive discussion the better. (Interviewee 8 - NGO)

It is also worth pointing out that the above comments reflect that some of the interviewees found their engagement was more limited than they expected. These comments imply that the participants' expectations concerning participation were not well managed in the East Marine Plans case. The differences between "participation in expectation" and "participation in reality" are also indicated by interviewees:

The MMO reviewed what evidence they knew about, came out with the plan and consulted upon it, which is a much more different approach than working out who are your interested stakeholders, dividing up some of the work programme that goes into the publication of the plan and then undertaking a consultation process. Because [a stakeholder] organisation can be involved in the production of the plan, the production of the evidence, and still have a different role when it comes to responding to the consultation. And that might have been a more effective mechanism. (Interviewee 4 - Local planning authority)

Marine planning is about [that] you can't override big departments' policies, so it was about pulling [existing policies] together and coordinating to show ... integration. So it is frustrating, because we

would like to be able to use this process to actually have a review of these policies, [and ask] shall we change these policies? (Interviewee 5 - NGO)

As determined in chapter 6 above, the SPP 2013 fails to provide a clear image on the extent to which participants would have been able to influence the production of the East Marine Plans. No evidence had been found in the data concerning a causal link between the failure of the SPP 2013 in managing stakeholders' expectations and the mismatched expectations held by the interviewees. However, it is still strongly suggested in this thesis that the expectations of stakeholders should be addressed in SPPs.

Therefore, as shown above, interactive participation opportunities were provided in producing East Marine Plans but the outcome from these interactive events seemed limited. Data collected from the interviewees also implies a gap between the stakeholders' expectations for their involvement and the actual level of participation that the MMO provided.

7.6. Discussion and Conclusion

This chapter has evaluated the implementation of the procedural criteria for collaborative participation, namely early participation, easy access to information and participation, transparency, and interaction, in creating the East Marine Plans. Although some barriers to participation were raised in the data collected from interviews and *Comments and Responses*, from a procedural perspective, the production of the East Marine Plans was generally a participatory process.

The data shows that the criteria for early and broad participation were implemented in the East Marine Plans case, although a very few of the local stakeholders arguing that they were not well involved in the process. Some barriers to easy access to information and participation emerged in the data analysis. First, the consultation documents and information provided were considered lengthy and difficult to understand by some interviewees. The inadequate timescale for the consultation and the insufficient capacity for participation were challenges to participation. The data collected from interviews and documentary analysis also shows that some participants considered the production of the East Marine Plans lacked transparency. Strengthening the link

between stakeholder input and marine plans and clarifying the criteria and the decision-making process concerning the Independent Investigation would promote transparency in marine planning. The last procedural criterion is interaction. Interviewees were provided with many opportunities to interact with other stakeholders and the MMO. However, some interactive participation events were limited to information updates rather than facilitating real communication and discussion among stakeholders and marine planners. A gap between stakeholders' expectations for involvement and actual participation was revealed in the interviewees' comments.

As explained in chapters 2 and 3, the performance of these procedural criteria has a crucial impact on the achievement of the pluralist rationale for participation. The next chapter will analyse the fulfilment of the normative, instrumental, and substantive rationales for participation in the East Marine Plans.

Chapter 8. Data Analysis- Part II: an Evaluation of the Achievement of the Pluralist Rationale for Public Participation in the East Marine Plans

Introduction:

Chapter 7 evaluated the implementation of the four procedural criteria for collaborative participation in the East Marine Plan case. As explained in chapter 3, this thesis considers these criteria as components of an appropriate participation process for achieving the pluralist rationale for participation for English marine planning. Chapter 2 explained that the pluralist rationale for participation includes the *normative, substantive and instrumental* rationales. The normative rationale is based on democratic theory and concentrates on *the procedures and influence* of public participation. The substantive rationale focuses on the improvement of *the quality* of the decision as a result of participation. The instrumental rationale aims at broad and long-term benefits of participation, such as promoting *social learning*, facilitating *conflict management*, and improving *institutional trust and relationship among participants and decision-makers*.

A good participation process not only has a value in the normative rationale but also contributes to achieving the instrumental and substantive rationales for participation. Therefore, the data analysis of the procedural criteria offered in the previous chapter is closely linked to the discussion in this chapter. This chapter evaluates the fulfilment of the three rationales for participation in the production of the East Marine Plans.

This chapter answers two questions: first, whether and to what extent the three main rationales for participation were achieved; second, whether and how the participation process affected the fulfilment of the pluralist rationale for participation. This chapter is divided into four sections. Sections 8.1 to 8.3 assess the achievement of the three rationales separately. Section 8.4 addresses the possible connections between the participation process and the realisation of the plural rationales for participation and presents the conclusion of this chapter.

8.1. Normative Rationale

As discussed in chapter 2 above, the normative rationale for participation is based on democratic theory. In addition to providing a *good participation process, having an influence on the proposed decision* is another core element under the normative rationale. Chapter 7 assessed the participation process of the East Marine Plans. This section focuses on *the influence that participants had on the creation of the East Marine Plans*. This section will investigate this issue through two approaches. The first approach is analysing data collected from interviews to explore the participants' opinions on this issue. The second approach uses document analysis to investigate how stakeholders' comments on the draft visions of the East Marine Plans and on the draft East Marine Plans influenced the production of the final East Marine Plans. Materials used for documentary analysis include the *Comments and Responses* and the tracked change version of the East Marine Plans (hereafter '*the Track Change Plans*').¹ The *Track Change Plans* documented all changes to the final East Marine Plans and gave the reasons for these changes.² It provides valuable material for showing how stakeholders' comments on the draft East Marine Plans were considered and addressed in the final East Marine Plans.

8.1.1. Interview Data

Participants contributed to the production of the East Marine Plans by providing data and information, and responding to consultations. Section 8.2 investigates the issue of accepting and using stakeholders' data to determine if the substantive rationale for participation was fulfilled. This section investigates whether stakeholders' comments to

¹ Along with the publication of the East Marine Plans in April 2014, a range of documents related to the East Marine Plans was published at the MMO's website. These included an executive summary and an analysis of the East Marine Plans; support information on the production of maps; a summary of the sustainability appraisal and the formal sustainability appraisal; four documents related to the habitats regulations assessment; an outline of the East Marine Plans implementation and monitoring approach; a modification pack which includes an overview and summary of consultation, and a version of the East Marine Plans showing tracked changes, and consultation responses.

² *Track Change Plans* is available at :< <http://webarchive.nationalarchives.gov.uk/20140618025451/https://www.gov.uk/government/publications/east-inshore-and-east-offshore-marine-plans>>; *Comments and Responses* is available at: < <http://webarchive.nationalarchives.gov.uk/20140618025451/https://www.gov.uk/government/publications/east-inshore-and-east-offshore-marine-plans> > accessed 2 October 2017.

consultations and their concerns presented to the MMO influenced the creation of the East Marine Plans, particularly in the final version.

As the following data indicates, the main driving force for interviewees to participate in the production of the East Marine Plans was to make marine planners aware of their interests and concerns in the East marine areas and to reflect these concerns in the East Marine Plans. However, many interviewees commented that they had no substantive influence on the result of the final East Marine Plans. They stated:

My job is to advocate on behalf of [our] industry. I was disappointed that **when the plans finally came out, it did not give any sort of protection to the existing use of the sea. I do not really feel that I had any impact on the outcome of it.** (Interviewee 1 - Local industry stakeholder)

It was the first plan and we were really hoping they [the East Marine Plans] would do what we wanted, which is **look at the UK ecosystem and what can this area really provide sustainably without going over the environmental limits. They did not do that.** (Interviewee 5 - NGO)

We've faced difficulties, **particularly with the issues with local concern that we raised, which were not taken up by the MMO when the plan was finalised.** We've found that perhaps the most problematic side. Our concerns haven't been taken up fully. (Interviewee 4 - Local planning authority)

We want clear prioritisation; we want consistency; we want spatial detail; and we want an ambitious plan system. **I think with those criteria the east plans did not match the expectations that the sectors wanted.** (Interviewee 8 - NGO)

Data analysis revealed three possible reasons for these comments. First, as shown in chapter 7, the lack of clear connections between the stakeholders' input and the creation of the East Marine Plans was identified as a barrier to the fulfilment of the

transparency criterion for participation.³ This possibly made some interviewees feel that they had not had a substantive impact on the creation of the East Marine Plans. Second, as found in chapter 7, some interviewees argued that they had limited chances to debate and negotiate issues during the participation process.⁴ It seems that the general level of participation applied in producing the East Marine Plans was consultation rather than collaboration. As interviewee 4 commented:

Even though the marine plan would be affecting our residents, **we weren't producing it, so we can only respond to it rather than shaping its production in a much more cooperative manner.** (Interviewee 4 - Local planning authority)

A third reason is related to the power and influence within the MMO and other governmental departments. According to interviewees, governmental departments who had strong political backing and support from national policies dominated the production of the East Marine Plans at its later stages. It was difficult for the MMO to resist the influence of governmental departments.

On the governmental level, you've got these big departments [that] make the actual policies. Then you've got DEFRA which is kind of a small and weaker department. Then underneath DEFRA you've got the MMO. So really the marine planning is about, you can't override these big departments' policies. I think they (the MMO) were very nervous [about] saying anything that would annoy any of the big departments. I think they were getting a bit more confident as to they can or can't say now, what kind of their position and role is. (Interviewee 5 - NGO)

One thing we saw in the East was that the **marine plans went to other governmental departments for clearance and the government departments basically said you can't do this, you can't do that, they were more critical of the plans than we were.** (Interviewee 8 - NGO)

³ See s 7.4 in ch7, 227-228.

⁴ See s 7.5 in ch 7, 230-231.

The hierarchy [of different policies for different sectors] **is always pre-treated early in the process.** We were not pitching one sector above another or whatever, but they [the MMO] never explain that. That just happens because **it** [the hierarchy in marine plans] **comes out [in] the different strength of the policies in the end,** but that may have come out at very late stages. (Interviewee 11 - National industry stakeholder)

We all recognised that it is the first plan, and **the MMO just doesn't seem to have the political backing behind them to make marine planning,** [the MMO is not] a real game changer. (Interviewee 7 - National industry stakeholder)

According to these interviewees, the late stage of producing marine plans became a top-down decision-making process. Therefore, it was difficult for them to have a substantive influence on the final East Marine Plans. This research finding about the limited power and influence that the MMO has is in accord with Rodwell and others' study indicating that the IFCA has limited power to make decisions.⁵ It seems that insufficient power in decision-making has become a common obstacle met by marine authorities in England. However, the solution for this obstacle will not be addressed here, since it is based on a complicated political context that goes beyond the concerns of this thesis.

The data collected from interviews show that interviewees considered that they had very limited influence on the East Marine Plans. The marine planning processes were participatory at an early stage but turned into a top-down decision-making process at the final stage. Although interviewees reported their limited influence on the East Marine Plans, it is not safe to jump to the conclusion that stakeholders' concerns and values had not significantly affected the East Marine Plans, merely based on the subjective feeling of stakeholders. To provide a more objective perspective on this issue, the following section will investigate whether stakeholders' comments had any substantive effects on the East Marine Plans through a documentary analysis approach.

8.1.2. Documentary Analysis

⁵ Lynda D Rodwell and others, 'Fisheries Co-Management in a New Era of Marine Policy in the UK: A Preliminary Assessment of Stakeholder Perceptions' (2014) 45 *Marine Policy* 279, 285.

This section is based on the analysis of two documents related to the East Marine Plans - the *Track Change Plans* and the *Comments and Responses*, to identify whether stakeholders influenced the production of the East Marine Plans. The different versions of the vision of the East Marine Plans will be examined first. Particular attention will be given to the visions for the draft and final versions of the East Marine Plans. An analysis of the general changes made to the final East Marine Plans will then be presented.

8.1.2.1. A Review of the Vision of the East Marine Plans

The East Marine Plans consist of three parts, from general to specific, including the background of the plan areas, the vision and objectives in the East Marine Areas, and the specific plan policies for different sectors in the east marine areas. The vision plays a leading role in both the production and the implementation of the East Marine Plans. It sets out the overall prospect for the east marine areas and shows the development and management strategy for the east marine areas for the next twenty years. Based on the vision, a number of specific objectives were determined. More detailed plan policies were identified according to these objectives. Thus, the vision statement directed the creation of the East Marine Plans.

The vision of the East Marine Plans was revised three times between 2012 and 2014. The first draft vision made by the MMO depended on a range of stakeholders' input.⁶ It stated that

As a result of increased knowledge and understanding of the opportunities for sustainable use of the East Inshore and East Offshore plan areas, high confidence among businesses and decision makers has led to effective and efficient resource use. This sustainable use has been in keeping with the character of the marine areas, and has offered local communities new jobs and wealth, integrated with the protection and appreciation of the environment.⁷

The first draft vision of the East Marine Plans emphasised the sustainable use of marine resources and the development of social and environmental sustainability. It was

⁶ MMO, 'Draft Vision and Objectives for East Marine Plans (March 2012)' (2012) 5 <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_vision_objectives.pdf> accessed 1 June 2016.

⁷ *ibid.*

published in March 2012 for a one-month informal consultation period.⁸ More than eighty comments were collected during this informal consultation.⁹ Respondents to this information consultation suggested the vision should reflect more plan area-specific characteristics.¹⁰ According to these comments, several issues were taken into account during the revision of the first draft vision.¹¹ These included increasing emphasis on the marine environment and social well-being, granting more attention to specific sectors, and highlighting offshore wind production.¹² The first draft vision was revised as follows:

The East marine areas are providing a substantial part of the UK's wind energy as a result of collaboration and integration between sectors. Sustainable, effective and efficient use of our marine area has been achieved, taking the ecosystem as a whole into account. This will all support considerable economic growth while living within environmental limits, offering local communities new jobs, wealth, and improved health and well-being.¹³

The second draft vision highlighted the collaboration and integration of different marine sectors, especially in two areas: the importance of ecosystem-based management and the significance of wind energy.

The draft East Marine Plans were published for formal consultation from July 2013 to October 2013. As a component of the draft East Marine plans, the third draft vision was brought to consultation. The third draft vision was significantly changed compared with the second draft vision, as shown below:

By 2033 the East Inshore and Offshore marine areas are providing a substantial part of the electricity generated from offshore wind in the UK as a result of collaboration and integration between sectors. Sustainable, effective and efficient use of our marine area has been achieved, resulting in economic

⁸ MMO, 'Draft Vision and Objectives for East Marine Plans: Update (May 2012)' (2012) 1 <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_vision_objectives_update.pdf> accessed 1 June 2016.

⁹ *ibid* 10.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² *ibid*.

¹³ *ibid* 11.

development whilst protecting the marine ecosystem, and offering local communities new jobs, wealth, improved health and well-being.¹⁴

The statement concerning ecosystem-based marine planning, a central theme in the second draft vision, was removed from the third draft vision. Data collected from the *Comments and Responses* show that some stakeholders had realised that their contributions to public consultation had not been used in the third draft vision of the East Marine Plans.¹⁵ One stakeholder commented:

The vision in the draft plan doesn't appear to properly reflect the discussions and input on the vision during public engagement in 2011-2012, and appears to have been significantly influenced since summer 2012, when public engagement ceased before the draft plan was published around a year later.¹⁶

Having reviewed all the comments made on the third draft visions documented in the *Comments and Responses*, three main concerns or objections regarding the third draft vision can be identified. First, stakeholders commented that the vision should offering a visionary strategy for the East Marine Plan areas first rather than putting priority on the development of only one sector - offshore wind energy.¹⁷ The vision of East Marine Plans should have given more balanced consideration to all marine industries instead of only prioritising the offshore wind industry.¹⁸ Second, the vision for the East Marine Plans should show concerns about key activities and industries for local economies and local communities, such as tourism and fishing, rather than merely focusing on industries that mainly contribute to the national interest, such as offshore wind.¹⁹ Third, the draft vision concentrates on economic development; therefore, more attention should have been paid to the environment. The priority of economic sustainability in draft East Marine Plans was not only against the multi-objectives of sustainability, but

¹⁴ MMO, 'Draft East Inshore and East Offshore Marine Plans (July 2013)' (2013) <http://webarchive.nationalarchives.gov.uk/20140305091040/http://www.marinemanagement.org.uk/marineplanning/areas/documents/east_draftplans.pdf> accessed 1 June 2016.

¹⁵ *Comments and Responses* (n 2) comments 1727,882 and 1491.

¹⁶ *ibid* comment 1491.

¹⁷ *ibid* comments 728, 297, 1727, 1107, 883 and 348.

¹⁸ *ibid* comments 1491, 66, 1243, 1453, 368, 617, 253, 568, 1439, 2013, 348, 297 and 526.

¹⁹ *ibid* comments 437, 260, 1536, 1886, 253, 391, 2013, 1793.

also divorced from the ecosystem-based approach for marine planning required in the MPS.²⁰ Stakeholders suggested that the final vision should have placed more emphasis upon social and environmental concerns to achieve multi-objectives for sustainability in the east marine areas.²¹

These three comments are quite reasonable. First, as investigated in chapter 4, the main feature of marine planning is integration. Overemphasising one sector in the vision of marine plans can lead to the misunderstanding that marine plans are about displacement and a sector-oriented strategy, which would undermine the original purpose of the marine plans. Second, since dealing with deprivation along the English East coast is one of the objectives of the East Marine Plans,²² enhancing the economic and social well-being of local areas should have been highlighted in the vision for the East Marine Plans. Third, environmental considerations are particularly important to marine plans since English marine planning is ecosystem based. This means that the economic development of marine areas should not go beyond the marine environment's carrying capacity. Therefore, environmental sustainability should have been stressed in the vision for the East Marine Plans.

As part of the final East Marine Plans, the final vision for the East Marine Plans was published in April 2014, as shown below:

By 2034, sustainable, effective and efficient use of the East Inshore and East Offshore Marine Plan Areas has been achieved, leading to economic development while protecting and enhancing the marine and coastal environment, offering local communities new jobs, improved health and well-being. As a result of an integrated approach that respects other sectors and interests, the East marine plan areas are providing a significant contribution,

²⁰ MPS, 11–12.

²¹ *Comments and Responses* (n 2) comments 1598, 260, 1571, 622, 1727, 1149, 1990 and 659.

²² MMO, 'Decision on First Marine Plan Areas' (2010) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312364/east_selecti on.pdf>.

particularly through offshore wind energy projects, to the energy generated in the United Kingdom and to targets on climate change.²³ (Changes underlined)

As the changes show, many of the modifications made to the final vision are wording changes, such as replacing “resulting in” with “leading to”, “whilst” with “while”, “substantial” with “significant”. The final vision addressed the stakeholders’ first concern by replacing the particular emphasis on the offshore wind sector with a general objective of the East Marine Plans in the opening sentence of the vision. However, the other two issues raised by stakeholders were not well addressed in the final vision for the East Marine Plans. Offshore wind farms were still the only industry emphasised in the final vision. No extra attention was paid to locally important industry and other marine sectors as stakeholders expected. Other sectors and their “interests” will only gain “respect” in the development of offshore wind energy. The “interests” mentioned in the final vision also refer to “non-economic interests”.²⁴ Although the first sentence of the vision seems show more concern for environmental issues by adding the content “enhancing the marine and coastal environment”, the priority granted to offshore wind industries implies social and environmental concerns are still in second place when considering developing the east marine areas. The concerns raised by stakeholders, including balancing local and national interests, balancing economic, social and, environmental sustainability, and balancing offshore wind sectors and other marine sectors, were not fully addressed in the final vision for the East Marine Plans.

8.1.2.2. A General Review of the Changes to the Final East Marine Plans

A review of the *Track Change Plans* found that around 600 modifications were made on the draft to reach the final East Marine Plans. Of them, around 150 modifications were based on the MMO’s internal discussions alone or based on consultation responses and MMO’s internal discussions. About sixty modifications were made to restructure the East Marine Plans slightly,²⁵ to update information concerning the plans,²⁶ or to make

²³ HM Government, ‘East Inshore and East Offshore Marine Plans’ (2014) 23 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312496/east-plan.pdf>.

²⁴ *Track Change Plans* (n 2)comment A55.

²⁵ See *ibid* comments such as A583, A243, A106, and A251.

²⁶ See *ibid* comments such as A176, A192, and A240.

some terms applied in the plans consistent.²⁷ The rest of the modifications were responses to stakeholders' comments on the draft plans. The modifications made based on stakeholders' comments on the draft East Marine Plans can be roughly divided into five types.

The first type of change to the final East Marine Plans was adding more references to the importance of certain sectors, issues and concerns for the accuracy and completeness of the East Marine Plans. These types of changes account for the majority of the modifications made to the draft East Marine Plans. For example, the socio-economic importance of recreation and tourism to coastal communities was highlighted.²⁸ The importance of fishery to food security, health, and coastal tourism was pointed out.²⁹ In addition to telecoms cables, the importance of energy cables was also recognised.³⁰ The concern of costal erosion and flood risk to coastal areas was added.³¹ The roles of local authorities and local interests groups in facilitating economic development relate to the sea was emphasised.³² Significant constructions projects in the east marine areas, such as proposed nuclear facilities and gas terminals, were added into the final East Marine Plans.³³

The second type of change furthered or clarified the requirements or terms under the East Marine Plans. For example, the conservation of nationally protected landscapes was added into objective five of the East Marine Plans.³⁴ Carbon Capture and Storage (CCS) proposals were required to consider using existing oil and gas infrastructures first, rather than installing new infrastructures.³⁵ The consideration of proportionality was added in the assessment concerning climate change.³⁶ The potential for future aggregate extraction should be demonstrated in the decommissioning plan for proposed applications, such as oil and gas infrastructures.³⁷ Furthermore, terms such as

²⁷ See *ibid* comments such as A 201, A209, and A337.

²⁸ *ibid* comment A555.

²⁹ *ibid* comment A151.

³⁰ *ibid* comments A492, A494, and A495.

³¹ *ibid* comment A27.

³² *ibid* comment A129.

³³ *ibid* comments A27-29.

³⁴ *ibid* comment A155.

³⁵ *ibid* comments A375-377.

³⁶ *ibid* comment A265.

³⁷ *ibid* comment A489.

“proposals”,³⁸ “cumulative effects”,³⁹ and “fishery activities”⁴⁰ were clarified in the East Marine Plans.

The third type of change strengthened the links between existing goals, management approaches, and legal instruments related to marine plans. For example, the relationships between the UK vision for the marine area and the vision for the East Marine Plans were explained.⁴¹ MSFD, OSPAR, and other international legal instruments on regulating the release of hazardous substances were emphasised.⁴² The link between the management of water quality with the EU Water Framework Directive was added.⁴³ The links between the East Marine Plans and the current regulatory regimes and approaches including, Shoreline Management Plans,⁴⁴ navigation risk assessments,⁴⁵ and Local Flood Risk Management Strategies⁴⁶ were strengthened.

The fourth type of change clarified, supplemented, corrected or updated data set out in the draft East Marine Plans. Examples include clarifying the inadequacy of historic wreck data in the policy maps,⁴⁷ correcting information on seabird species,⁴⁸ adding information about conserving some important migratory fish species in estuaries of the inshore marine areas,⁴⁹ adding new information about CCS storage sites,⁵⁰ and clarifying the lack of data on fishing vessels under ten metres.⁵¹

The last type of change added statements that help in understanding and using the East Marine Plans.⁵² These changes provided clarifications about the hierarchical formats in

³⁸ *ibid* comment A95.

³⁹ *ibid* comment A200.

⁴⁰ *ibid* comment A508.

⁴¹ *ibid* comment A47.

⁴² *ibid* comment A191.

⁴³ *ibid* comment A189.

⁴⁴ *ibid* comments A279-300.

⁴⁵ *ibid* comment A210.

⁴⁶ *ibid* comment A280.

⁴⁷ *ibid* comment A160.

⁴⁸ *ibid* comment A251.

⁴⁹ *ibid* comment A219.

⁵⁰ *ibid* comment A371.

⁵¹ *ibid* comment A519.

⁵² *ibid* comment A110.

plan policies;⁵³ added a framework for the East Marine Plans,⁵⁴ and provided instructions for using the East Marine Plans.⁵⁵

Therefore, to some extent, stakeholders' comments made on the draft plans did have some influence on the final East Marine Plans. However, a closer look at the modifications reveals that key issues raised by stakeholders during the public consultations, such as the exclusive rights granted to the oil and gas sectors and the insufficient concern given to the environment-related issues, were not fully addressed in the final East Marine Plans.

Almost all the content about plan policies in the draft East Marine Plans was changed in response to stakeholders' comments. However, only two plan policies in the final East Marine Plans - OG1 and OG2 which regulated proposals regarding oil and gas exploration - were modified without any input from stakeholders.⁵⁶ As described in chapter 7, during the production of the East Marine Plans, their priority suddenly shifted at a late stage. The priority shifted from the offshore wind sectors to the oil and gas sectors.⁵⁷ Many stakeholders questioned the inconsistency between the vision and the plan policies of the draft East Marine Plans at the formal consultation on the draft plans.⁵⁸ The MMO responded to stakeholders that the absolute priority granted to oil and gas sector in the final East Marine Plans was required by national planning policies, such as the National Policy Statement for Energy (EN-1).⁵⁹ The MMO also explained that prioritising the oil and gas sectors in the East Marine areas was also in line with the

⁵³ *ibid* comment A108.

⁵⁴ *ibid* comment A46.

⁵⁵ *ibid* comment A90.

⁵⁶ No modifications were made to the OG1 and OG2 plan policies when the final East Marine Plans were published. Therefore, OG1 and OG2 plan policies in the draft and final East Marine Plans are same. Only a few modifications were made to explain these policies in the final East Marine Plans. OG1 notes, "proposals within areas with existing oil and gas production should not be authorised except where compatibility with oil and gas production and infrastructure can be satisfactorily demonstrated". OG2 states, "proposals for new oil and gas activities should be supported over proposals for other development".

⁵⁷ See s 7.4 in ch 7, 227-229.

⁵⁸ The vision emphasises the offshore wind sector in the east marine area, however, the oil and gas sector were given overwhelming priorities in plan policies. See *Comments and Responses* (n 2) comments 1560, 128, 1912, 437,1816, 1600, 955, and 189.

⁵⁹ *Comments and Responses* (n 2) comment 1057. The priority granted to oil and gas development can be found in DECC, 'Overarching National Policy Statement for Energy (EN-1)' para 2.2.5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47854/1938-overarching-nps-for-energy-en1.pdf> accessed 26 May 2017.

statements set in the MPS.⁶⁰ The MMO stated, ‘the primacy of Oil and Gas over other activities is well established and clear’.⁶¹ However, although the important role that the oil and gas sector plays in securing the energy supply for the UK is set in it, it seems that the MPS does not set a clearly determined hierarchy among different sectors. The MPS states that it

... identifies those activities to which a degree of priority is expected to be given in marine planning, but does not state, and is not intended to imply, which activities should be prioritised over any others. Relative priorities will be most appropriately determined through the marine planning process, taking into account a wide range of factors alongside UK policy objectives, including the specific characteristics of the individual Marine Plan area.⁶²

As some comments in section 8.1.1 above show, some interviewees considered the shift in priority in the East Marine Plans that mirrors the weak influence and political power held by the MMO on decision-making. Therefore, under the circumstance that the priority of oil and gas was strongly supported in national policies and by other governmental departments, it is unlikely that stakeholders’ comments could make any substantive changes to the oil and gas plan policies in the East Marine Plans.

The contents regarding biodiversity conservation provide another example of the little impact that stakeholders had on influencing substantive issues in the East Marine Plans. According to objective 7 set out in the draft plans, the East Marine Plans are ‘to protect, conserve and, where appropriate, recover biodiversity that is in or dependent upon the East marine plan areas’.⁶³ This objective is specified in plan policies BIO1 and BIO2.⁶⁴ BIO1 states, ‘Appropriate weight should be attached to biodiversity, taking account of the best available evidence including on habitats and species that are protected or of conservation concern in the East marine plans areas’. BIO2 notes, ‘Where appropriate,

⁶⁰ *Comments and Responses* (n 2) comment 684.

⁶¹ *ibid.*

⁶² MPS, 7.

⁶³ MMO, ‘Draft East Inshore and East Offshore Marine Plans (July 2013)’ (n 14) 15.

⁶⁴ *ibid* 49-50.

proposals for development should incorporate features that enhance biodiversity and geological interests.’

During the public consultations, stakeholders raised the issue that the wording applied in the objective and plan policies, such as “appropriate weight should be given” and “where appropriate”, is too weak and vague for maintaining and protecting biodiversity, and will bring inconsistent interpretation and implementation of biodiversity conservation.⁶⁵ The MMO did not adopt these comments and explained that the wording “best reflect” paras 2.6.1.3 and 2.6.1.4 of the MPS.⁶⁶ However, the MPS is a framework document. Given that the MPS does not provide necessary guidance or a definition of “appropriate”, this term could be detailed and specified at the marine plans level.⁶⁷ However, the MMO did not change this wording but added an explanation of the term “appropriate” in the final East Marine Plans in response to stakeholders’ comments.⁶⁸ It stated that the term “appropriate” ‘should be judged by reference to the MPS, existing requirements and information provided in the East Marine Plans’.⁶⁹ The existing requirements mentioned in this explanation refer to instruments concerning biodiversity issues, such as requirements under the MSFD or the WFD and species and habitats with statutory protection at the EU or at the UK level.⁷⁰ This explanation adds little practical value to addressing the issue. As discussed in chapter 4 above, as the environmental pillar of the EU Maritime Strategy, the MSFD prioritises marine conservation. However, in the East Marine Plans, more priority was given to economic than to environmental aspects. The explanation of “appropriate” is still vague and can be interpreted differently in implementation. As a result, the plan policy on biodiversity in the East Marine Plans remains quite weak compared with other plan policies. Although stakeholders raised disagreements on the weak statements of the

⁶⁵ *Comments and Responses* (n 2) comments 700, 936, 1209, 217, 275, 661, 1369, 836, 1904, 1980, 448, 1798, 1629 and 1752.

⁶⁶ See MMO’s responses to comments A222 and A229 in *Track Change Plans*. Para 2.6.1.3 of the MPS states “... as a general principle, development should aim to avoid harm to marine ecology, biodiversity and geological conservation interests...where significant harm cannot be avoided, then appropriate compensatory measures should be sought.” Para 2.6.1.4 of MPS states “...development proposals may provide, where appropriate, opportunities for building-in beneficial features for marine ecology, biodiversity and geodiversity as part of good design...”

⁶⁷ *Comments and Responses* (n 1) comments 1629, 1752, 936, 1209, 661.

⁶⁸ East Marine Plans (n 23) 73.

⁶⁹ *ibid.*

⁷⁰ *ibid* 71–72.

biodiversity plan policies, no substantive changes were made on this issue in the final East Marine Plans.

Data collected from the interviews and documentary analysis shows that it is not fair to say that participants had no impact on the East Marine Plans. However, they did not influence some key issues of the East Marine Plans, such as the hierarchy of marine sectors and the priority put on economic development in the East Marine Plans areas. This research finding is consistent with findings from other researchers.⁷¹ They argue that the marine plans in the EU were not directed by the comprehensive consideration of economic, social and ecological perspectives, but dominated by powerful sectors, to serve sectoral goals.⁷² The findings in this section are also in line with Jones and other researchers' findings, which identify a gap between public participation and the decision-making.⁷³ Data collected in the East Marine Plans show that the public and stakeholders were provided with a wide range of participation opportunities in producing the East Marine Plans; however, the link between the participants' contributions and the final East Marine Plans is unclear. Participants had very little impact on the substantive issues concerning the East Marine Plans. As Jones and other found in their research, 'There are platforms for deliberations amongst stakeholders as part of the MPA processes ... but that these are disconnected from the actual decision-making platforms'.⁷⁴ The research findings about the East Marine Plans also confirm the argument raised by Ellis and Flannery that power is a crucial, but an overlooked, issue in marine planning.⁷⁵ They state, 'we can assume that the process will simply reflect existing power structures'.⁷⁶ One interesting issue, not raised in the above studies, but which emerges in the East Marine Plans case is the importance of the independence and the power of the marine planning authorities.⁷⁷ A key component of marine planning is reallocating marine spaces and resources based on ecosystem-based principles. Ideally,

⁷¹ Peter JS Jones, LM Lieberknecht and W Qiu, 'Marine Spatial Planning in Reality: Introduction to Case Studies and Discussion of Findings' (2016) 71 *Marine Policy* 256; Geraint Ellis and Wesley Flannery, 'Marine Spatial Planning: Cui Bono?' (2016) 17 *Planning Theory & Practice* 122.

⁷² Jones, Lieberknecht and Qiu (n 71).

⁷³ *ibid* 261.

⁷⁴ *ibid*.

⁷⁵ Ellis and Flannery (n 71) 125.

⁷⁶ *ibid*.

⁷⁷ A discussion on the independence of the MMO in marine planning can be found in s 3.1.2.2 in ch 3, 59-60.

marine planning authorities should be able to provide neutral perspectives to balance the goals of sustainable development and interests of different sectors in marine planning. They also need sufficient remits and power to make marine plans. The data collected from the East Marine Plans seems to imply that the MMO does not have such independence and power to decide the direction of the East Marine Plans. One possible result of the lack of independence and power of the MMO is that the consensus that participants and the MMO have reached and the effort that participants have put into marine plans at the early stage of marine planning might not be reflected in the final plans. As Interviewee 11 states,

[we] began moving from the various stages [of the East Marine Planss], particularly towards to the end, it seemed to swing widely between what we were doing in different workshops and what the end result was in terms of the draft plan.

8.2. Substantive Rationale

As discussed in chapter 2, according to the substantive rationale for participation, public participation can improve the quality of decisions through bringing data, information, and knowledge into decision-making, therefore, reinforcing the evidence base for it. Fragmental and insufficient data were identified as challenges for English marine management in chapter 3. Therefore, public and stakeholder participation is expected, to some extent, to fill the evidence gaps in marine planning.

According to the data collected from interviewees, the evidence used to create the East Marine Plans *was considerably improved because of stakeholder participation*. Some interviewees confirmed that providing data to the MMO was one of their main contributions to the East Marine Plans. Interviewees 12 and 7 commented:

We've done quite a lot of studies on recreation, so we've provided that [data to the MMO]. I think some of that [data] ... were used in the mapping to show where different recreation activities occur around the estuary. (Interviewee 12 - Coastal stakeholder partnership)

We submitted quite a lot of data as well for the east plan process. Certainly **the data was used**. (Interviewee 7 - National industry stakeholder)

Interviewees also contributed by correcting inaccurate or outdated information, or pointing out misinterpretations of marine data. Some interviewees noted:

The reason you [the MMO] have not got any information is because you are looking for the wrong information. **We spend quite a lot of time talking to people at the MMO about the sort of the data that were available, and [what] we can do about it**. (Interviewee 1 - Local industry stakeholder)

One of the issues that I think I **probably flagged up is that the data layer mapped in the draft plan hadn't acknowledged that the source of data was limited for twelve [nautical] miles. So there was a big problem in their data**. (Interviewee 6 - Independent consultant)

Documentary analysis of the *Track Change Plans* also demonstrated the contribution that stakeholders had made regarding providing and correcting data used in the East Marine Plans.⁷⁸ Additionally, the *Evidence Report of the East Marine Plans* confirms that the information collected through direct contact with stakeholders and comments of consultation was an important source of evidence for generating the East Marine Plans.⁷⁹ The data collected from interviews and documentary analysis imply that the information provided by participants filled, to some extent, data gaps when producing the East Marine Plans. This improved the quality of the data presented in the final East Marine Plans. It seems that the substantive purpose of participation was achieved in the East Marine Plans.

⁷⁸ See the discussion about the fourth type of changes made to the final East Marine Plans in s 8.1.2 above, 243-245.

⁷⁹ MMO, 'East Inshore and East Offshore Marine Plan Areas Evidence and Issues Overview Report 2012' (2012) 4
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312393/east_evidence_issues_overview.pdf>.

As explained in chapter 2, some existing studies imply that demonstrating how public participation has improved a decision is very difficult since the outcome and implementation of a decision can be influenced by other external factors.⁸⁰ However, in the case of the East Marine Plans, some interviewees reported that their understanding of the East Marine Plans and their familiarity with the MMO were improved as a result of their participation. This has possible long-term benefits for the implementation of the East Marine Plans and also for marine licensing in the East Marine Plans area. Interviewees 13 and 3 noted:

The team [responsible for responding the production of East Marine Plans in our organisation] **have gained a greater understanding of the issues involved and the use of the Marine Plan in planning decisions ...** the involvement with the marine plans furthered officers' knowledge of the MMO as the marine planning authority in the inshore and offshore zones, thus providing the long-term benefit of knowing who to contact for licences for foreshore works. (Interviewee 13 - Local planning authority (written responses))

If we had not been involved, **if we had not participated in the development of marine plans we would be probably less familiar with them** [the East Marine Plans] **and less confident in quoting them.** (Interviewee 3 - Local regulatory body)

Although the data collected from interviews show no evidence about any improvements in the implementation of the East Marine Plans resulting from it, these comments imply other possible ways in which public participation can benefit the outcomes or implementation of a decision.

8.3. Instrumental Rationale

The previous section assessed the fulfilment of the substantive rationale for participation in the participatory process of the East Marine Plans. This section will continue the evaluation of the fulfilment of the instrumental rationale for participation

⁸⁰ See s 2.1.2 in ch 2, 22-23.

in the East Marine Plans case. Instrumental benefits of public participation have been widely investigated in the literature and are referred to as “social goals” or “social preparation”.⁸¹ The instrumental benefits assessed in this thesis include *social learning, relationship building, trust building, and conflict resolution*.

8.3.1. Social Learning

As discussed in chapter 2 above, social learning is an interactive learning process.⁸² As competition for marine spaces and resources and the natural of multifunctional uses of marine area increases, seeking and encouraging opportunities for the co-existence of different marine activities has become a trend in modern marine management.⁸³ In addition to scientific and technical support, the co-existence of activities requires marine users to acquire broader notions and better understandings of marine issues that go beyond their own interests and values. Therefore, facilitating social learning in marine management is of great importance. There is debate over whether social learning is a process or an outcome.⁸⁴ In this thesis, social learning refers to both the learning process and its results.

Some interviewees reported that they had *learned about other stakeholders’ interests and values*. The improved awareness of other participants’ views and demands through an interactive participation process is a significant factor in the primary stage of the social learning process.⁸⁵ Interviewees reported that they were now more aware of other stakeholders’ interests, particularly those they were not familiar with previously. The understanding and awareness between land-based and marine-based stakeholders,

⁸¹ Thomas C Beierle and David M Konisky, ‘Values, Conflict, and Trust in Participatory Environmental Planning’ (2000) 19 *Journal of Policy Analysis and Management* 587, 588 ; Robert Pomeroy and Fanny Douvere, ‘The Engagement of Stakeholders in the Marine Spatial Planning Process’ (2008) 32 *Marine Policy* 816, 820.

⁸² See s 2.1.3.1 in ch 2, 24-25.

⁸³ MMO, ‘Scoping of a Robust Approach to the Assessment of Co- Existence of Activities in Marine Plan Areas’ (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317791/1049.pdf> accessed 6 March 2017.

⁸⁴ See s 2.1.3.1 in ch 2, 24-25.

⁸⁵ Erik Mostert and others, ‘Social Learning in European River-Basin Management: Barriers and Fostering Mechanisms from 10 River Basins’ (2007) 12 *Ecology and Society* 19, 24; Claudia Pahl-Wostl and Matt Hare, ‘Process of Social Learning in Integrated Resources Management’ (2004) 14 *Journal of Community & Applied Social Psychology* 193, 195; Weblor, Kastenholz and Renn; Tania M Schusler, Daniel J Decker and Max J Pfeffer, ‘Social Learning for Collaborative Natural Resource Management’ (2003) 16 *Society & Natural Resources* 309, 315.

and between inshore and offshore stakeholders have been improved as the result of the interactive participation used in the creation of the East Marine Plans. Interviewees stated:

...I did not liaise much about gravel extraction so I learned a bit of that. I had no idea that the Ramblers Association had any involvement with this, there we go, I was vaguely aware that they really existed. (Interviewee 1 - Local industry stakeholder)

I think the marine plan has been helpful, just **getting a better understanding of how you might coexist with other stakeholders. That's quite difficult I think both from a space perspective but also from a temporal time perspective, which I definitely hadn't thought about before.** (Interviewee 2 - National industry stakeholder)

Data collected from interviews shows that, along with the improved understanding of and respect for other stakeholders' interests, some interviewees had begun to think about the integration between their interests with other sectors. They realised the importance of the integration of marine management during their participation. Interviewees commented:

We do not have much direct liaison with offshore sectors. So, that highlighted an area we probably need to think about throughout the process. (Interviewee 7 - National industry stakeholder)

[I am] **more aware now of the local authorities' desires to maximise economic growth.** So that I suppose [I am] becoming more aware of the economic drivers in the east region. (Interviewee 3 - Local regulatory body)

I think it [participation] indicated to me **what the real potential was in marine environment that we have here.** So [I] think about that a lot more. **It made me consider probably why the European perceive on it is important, from all perspectives, the environmental and economic and everything.** (Interviewee 10 - Local interest stakeholder)

Based on the improved understanding of other participants and their interests, the interview data show signs of *self-reflection*, a component of the social learning process.⁸⁶ Through gaining new information and extending existing knowledge through interacting with other participants, individuals begin to reflect on their own interests and actions.⁸⁷ As investigated in chapter 7, some of the interviewees begin to review the obstacles, such as insufficient resources and inadequate data, to their influence and participation in the production of the East Marine Plans.⁸⁸ The interaction with other stakeholders also deepened their cognition of themselves, which could bring benefits to their own development. Interviewees 3 and 7 noted:

I think, probably after participation, made me more aware of differences between different marine sectors. The impression is that the marine aggregate industry are very well organised, very good at communication. Because of that they were quite influential, certainly if you compare that to [our sector] which is not so good at communicating. Probably locally [our sector] is influential but [we] do not tend to group together and have a big national voice. (Interviewee 3 - Local regulatory body)

I suppose the offshore element, we've never really looked at so much ... all of our developments are inshore and in the coastal areas. **So we've never really sort of considered what could impact us strategically in the offshore area so that was quite useful to have a think about that for us.** (Interviewee 7 - National industry stakeholder)

Data collected from interviews show some indications of the start of a social learning process. It is worth pointing out that no evidence emerged from the interview data about any alterations to stakeholders' action, resulting from the interactive learning

⁸⁶ Maria E Fernandez-Gimenez and others, 'Adaptive Management and Social Learning in Collaborative and Community-Based Monitoring: A Study of Five Community-Based Forestry Organizations in the Western USA' (2008) 13 *Ecology and Society* 4, 6; Claudia Pahl-Wostl, 'Towards Sustainability in the Water Sector – The Importance of Human Actors and Processes of Social Learning' (2002) 64 *Aquatic Sciences* 394, 399.

⁸⁷ Ioan Fazey, John A Fazey and Della MA Fazey, 'Learning More Effectively from Experience' (2005) 10 *Ecology and Society*; Thomas Webler, Hans Kastenholtz and Ortwin Renn, 'Public Participation in Impact Assessment: A Social Learning Perspective' (1995) 15 *Environmental Impact Assessment Review* 443, 446.

⁸⁸ See discussion in s 7.3.2 in ch 7, 225-226.

process. This is because marine planning does not address any specific issues in marine areas, but instead aims to provide higher perspectives on marine management and to map the development vision in certain marine regions. Stakeholders do not need to carry out any particular actions to respond to the production of marine plans. Change might happen at the marine licensing level or on other specific marine matters. However, broadening the limited views and knowledge about marine issues and becoming more aware of other marine stakeholders' interests and needs are prerequisites for change. Data collected from the interviews show some indications of these prerequisites. It seems that social learning was initiated in the production of East Marine Plans as the result of interactive participation.

8.3.2. Social Network and Institutional Trust

This subsection evaluates the promotion of social networking and institutional trust as results of public participation in the East Marine Plans. Trust and relationship networks among resource users and agencies are factors for improving compliance with policies and regulations, reducing the cost of implementation, and facilitating information exchange in natural resource management.⁸⁹ As described in Chapter 2, social networks include three-layer relationships: within a homogeneous group, among heterogeneous groups, and between different hierarchies.⁹⁰ Data collected from the interviews show that all the three layers of relationship networks were established or strengthened through participation in the East Marine Plans.

The development of relationships *within homogeneous groups* is the process of "bonding" social capital.⁹¹ Some of the interviewees were representatives of associated marine sectors, umbrella organisations, and land planning authorities. Some of them reported an improved understanding of and cooperation with their members or lower-level authorities during the production of the East Marine Plans. Therefore, internal relationships within homogeneous groups improved. Interviewees 2 and 4 commented:

⁸⁹ See discussion in s 2.1.3.2 in ch 2, 26-28.

⁹⁰ Quentin Grafton, 'Social Capital and Fisheries Governance' (2005) 48 *Ocean & Coastal Management* 753.

⁹¹ Rory Eames, 'Partnerships in Civil Society: Linking Bridging and Bonding Social Capital' in Keen Meg, Valerie A Brown and Rob Dyball (eds), *Social Learning in Environmental Management: Towards a Sustainable Future* (Earthscan 2005) 84.

The way we try to manage consultation is that we send out a consultation to our members and then we ask for input, so that we can hopefully get as many views from our members as possible. **I think it has been helpful for my sense anyway to get a better understanding from our members as to importance of the east marine area and the marine environment.** I did not get any kind of data [from our members] particularly, but from a high-level perspective, **I think it is being helpful to understand some of their issues.** (Interviewee 2 - National industry stakeholder)

In terms of our participation, what worked best is **when we could put some resource into forming a coherent position with other local authorities in our county.** (Interviewee 4 - Local planning authority)

An improvement in *the relationships among different marine users*, which is the process of “bridging” social capital, was revealed in the interviews. Some interviewees noted:

Our relationships that we have built through the marine planning has been quite helpful to other processes such as marine protected areas. (Interviewee 8 - NGO)

I think it [participation in the East Marine Plans] has really improved our relationships. We don't always see eye-to-eye but we know all the stakeholders and so to succeed in doing that. [When] these potential opposing sides can have a conversation, that is a success. We are able to be in the same room together, consider and debate issues. **I think for me again [going] back to marine planning being a process, in doing that, bringing the whole marine community together to discuss how to the management the seas and I think we have achieved that.** (Interviewee 5 - NGO)

Building relationships with other stakeholders was a motivation for participating in the East Marine Plans by an interviewee. Interviewee 3 mentioned that:

As we are relatively new organisations, we do need to work to promote our organisation amongst other stakeholders. [At] the district councils,

borough councils level, there is not much awareness of who we are, what we do. So we thought it was an opportunity to explain what group of people, who we are. (Interviewee 3 - Local regulatory body)

Alongside the enhanced relationships among the homogeneous and heterogeneous marine sectors, the participatory process in the East Marine Plans enabled some interviewees to establish or promote awareness of their relationships with the MMO. Interviewees stated:

I had a better understanding of how other people, particularly the MMO, are approaching [issues]. **Maybe [this] gave me a better insight into how I should be doing things if I want to get attention from the MMO or DEFRA.** (Interviewee 1 - Local industry stakeholder)

We engaged with the MMO which was great, because they are an organisation that we want to be involved with our partnership, so that was a very positive output of being involved in that process. (Interviewee 12 - Coastal stakeholder partnership)

I suppose you could say that awareness of them [the MMO] did change as the result of the marine plan to that extent really. Before the marine plan started, going back to 2010, I knew very little about them. (Interviewee 9 - Local authority)

Involvement with the marine plans furthered our knowledge of the MMO as the marine planning authority in the inshore and offshore zones, **thus providing the long-term benefit of knowing who to contact for licences for foreshore works.** (Interviewee 13 - Local planning authority (written responses))

Data collected from interviews therefore indicate that an establishment or improvement of relationships at all three-layer social networks occurred during the process of participation in the East Marine Plans.

As discussed in chapter 2, the perception of an institution's competence and the procedural justice during stakeholder participation are critical factors regarding

institutional trust building in natural resource management.⁹² Although a good participatory process cannot be guaranteed to improve the overall level of institutional trust when stakeholders have rather negative opinions on the capacity of an institution, a bad participatory process cannot change mistrust situations.

A complex and mixed situation regarding institutional trust emerged in the case of the East Marine Plans. Evidence shows that the involvement of stakeholders did to some extent promote the level of trust in the MMO. However, as discussed in section 8.1.1, some interviewees discovered the limited power and influence that the MMO had in making marine plans, which adversely influenced their trust in the MMO.

As revealed in chapter 3, the MMO's capacity was questioned because there are insufficient marine professionals in the organisation.⁹³ Some interviewees confirmed this concern. The perception of an institution's competence is a crucial factor regarding building institutional trust in nature resource management.⁹⁴ Before the East Marine Plans, some interviewees had a relatively low level of institutional trust in the MMO due to its personnel issues. They noted:

I think the perception that I had, speaking to a few of the people in the MMO's team, was many of them were quite new to the MMO and they came from planning authorities on land. They had a lot of experience in planning and in consultation. They did not have any experience of the sea.
(Interviewee 1 - Local industry stakeholder)

We were also aware that there was a big transfer of the headquarters from London to Newcastle,⁹⁵ and there was a significant loss of

⁹² Marc J Stern, 'The Power of Trust: Toward a Theory of Local Opposition to Neighboring Protected Areas' (2008) 21 *Society & Natural Resources* 859, 868; Jessica E Leahy and Dorothy H Anderson, 'Trust Factors in Community-water Resource Management Agency Relationships' (2008) 87 *Landscape and Urban Planning* 100, 104.

⁹³ See s 3.1.2.2 in ch 3, 57-58.

⁹⁴ Leahy and Anderson (n 92) 104.

⁹⁵ The MMO Head Office was located at Newcastle when it was established. Therefore, there was no such transfer of the head office of the MMO. Interviewee 3 expressed this issue incorrectly. However, there was a problem of transferring marine experts to Newcastle. Interviewee 5 stated: "because they placed the MMO up in Newcastle ... they had to fill this brand new organisation. They had a lot of posts to fill and not everyone wants to live in Newcastle. So there was a debate originally [about] would it [the MMO] be placed down in Plymouth. In Plymouth there are marine biologists everywhere, so there is a lot of people

experienced staff because of that transfer. (Interviewee 3 - Local regulatory body)

We realised that because the MMO was a very new organisation, and a lot of their staff did not have marine expertise or they did not have ecological or environmental expertise. (Interviewee 8 - NGO)

There are no people in the MMO with an archaeological background so I do not think that helps. (Interviewee 6 - Independent consultant)

Interviewee data also show that some *interviewees' confidence in the MMO was improved* as a result of their participation in the East Marine Plans, particularly due to the application of some effective procedural criteria for participation, such as early, extensive and interactive participation, discussed in chapter 7. Interviewees commented:

I did not know very much about the MMO beforehand. I think they were very new. But I will say, **the fact that they engaged with us in a lot of [the] pre-consultation stages, I thought that was really good process, and I had a lot of confidence [in them] I guess.** (Interviewee 2 - National industry stakeholder)

I feel confident that the MMO has used best practice in terms of participation. They sent senior planning officers to come to meet us to talk about the process and how we can be involved. They invited us to all their workshops and events. That to me was a good practice ... I felt my initial impression was 'Wow! They are doing this very thoroughly'. The statement of public participation, I hadn't come across one of those before. I got the impression that it was very thorough. (Interviewee 3 - Local regulatory body)

As I said, my confidence was perhaps quite low at the start because the MMO was a very new organisation and it did not have a lot of marine

with marine biology expertise. But in Newcastle, there are a couple of courses in the university but it is not an enormous area for marine biology, so you have got less expertise".

experts. A lot of people come from terrestrial backgrounds. **But having said that, the MMO was very honest and open about that. So they did not try to be experts and they said immediately, 'There is a lot of stuff we do not know, please tell us, please give us information, we want to work with you' as the East Plans developed. So I increased my confidence of the MMO as time went on.** (Interviewee 8 - NGO)

Interview data, however, also show that the limited power of the MMO to make marine plans might have been the biggest obstacle to promoting the level of institutional trust in the MMO. Some interviewees commented that:

I have not seen that there is a strong body representing marine environment. My concern would be that [the MMO] need to be a stronger organisation that is recognisable and is representing that environment, in all ways environmentally, economically. I do not get the impression of they are an upfront and punchy organisation. (Interviewee 10 - Local interest stakeholder)

The MMO just don't seem to have the political backing behind them to make marine planning ... the political backing to lay down strong policies in the plan. (Interviewee 7 - National industry stakeholder)

I think in order for the MMO to produce a really plan-led system, **it needs to have more influence inside the government ...** Because the MMO is still a very small organisation in relative terms, and it is managed by DEFRA. The DEFRA is quite a small department in the government. **So I think I would have more confidence in the MMO if they had more power to influence government from the inside.** (Interviewee 8 - NGO)

The marine planning is about you can't override these big departments' policies. So it was about pulling them [the policies] together and coordinating to show about integration. So it is frustrating, because we would like to be able to use this process to actually have a review of these

policies. But because it [the MMO] is sponsored by the DEFRA, they just do not have that power. (Interviewee 5 - NGO)

The evaluation of institutional trust in the East Marine Plans case gives a mixed picture. The perception of an institution's competence and fair participatory process are two essentials for gaining institutional trust. In the East Marine Plans case, interview data shows some sign that the level of institutional trust in the MMO increased because of the participatory plan-making process. However, data collected from some interviewees indicate that their trust in the MMO was adversely influenced by the limited political power and influence of the MMO in marine planning, which they observed during the participation process. Therefore, it is difficult to evaluate whether the overall level of institutional trust in the MMO increased or decreased during the East Marine Plans process. The term "competence" discussed in previous studies on institutional trust mainly usually refers to the qualifications and knowledge of staff in a public institution.⁹⁶ However, the institution's independence of decision-making or its power and influence in the bureaucratic system are rarely covered as components of the competence of a public institution. The data collected from the East Marine Plans indicates that these factors might also affect institutional trust, and should be considered when investigating and evaluating the level of trust in a public institution.

8.3.3. Conflict Resolution

Competing interests, value clashes, inconsistent regulatory systems, and factual disputes are the main causes of conflict in the marine area.⁹⁷ Conflict resolution on marine matters tries to balance diverse interests, needs, and values among marine users via cooperation.⁹⁸ Thus, marine conflicts can be dealt with using indirect approaches,

⁹⁶ Mae A Davenport and others, 'Building Trust in Natural Resource Management Within Local Communities: A Case Study of the Midewin National Tallgrass Prairie' (2007) 39 *Environmental Management* 353, 359; Winter Greg, Christine A Vogt and Sarah McCaffrey, 'Examining Social Trust in Fuels Management Strategies' (2004) 102 *Journal of Forestry* 8, 9.

⁹⁷ See Peter Arbo and Phạm Thị Thanh Thủy, 'Use Conflicts in Marine Ecosystem-Based Management — The Case of Oil versus Fisheries' (2016) 122 *Ocean & Coastal Management* 77; Todd C Stevenson and Brian N Tissot, 'Evaluating Marine Protected Areas for Managing Marine Resource Conflict in Hawaii' (2013) 39 *Marine Policy* 215; Randall Bess and Ramana Rallapudi, 'Spatial Conflicts in New Zealand Fisheries: The Rights of Fishers and Protection of the Marine Environment' (2007) 31 *Marine Policy* 719.

⁹⁸ Olga Stepanova, 'Conflict Resolution in Coastal Resource Management: Comparative Analysis of Case Studies from Four European Countries' (2015) 103 *Ocean & Coastal Management* 109.

such as the promotion of understanding and building relationships and trust among marine users and regulatory authorities.

No evidence emerged in the interview data that shows that particular conflicts were resolved directly due to public participation in the East Marine Plans case. This is probably because conflict between different sectors usually only becomes obvious when there are proposals for specific projects or marine use applications. The East Marine Plans regulate the marine area and resources at a high strategic level. Most of the specific issues that may lead to intense conflicts are left to the project level. Resolving specific conflicts is unlikely to happen at the marine plan level. As one interviewee commented:

Marine planning is quite strategic, we do not have to get into arguments about individual projects or specific details and often those at the time when NGOs disagree with industries. But actually, at a high level, we all want quite similar things. (Interviewee 8 - NGO)

As shown above, data collected from interviews indicate that the interactive participatory process in the East Marine Plans has promoted mutual learning and triggered a social learning process.⁹⁹ Interview data also show that the relationships among and between stakeholders and the MMO were improved because of participation.¹⁰⁰ These benefits mentioned are likely to contribute to conflict resolution. Some interviewees noted that:

We are not getting our ecosystem benefits that we were hoping [for]. But what we were all getting is a conversation. We actually sat in the room all together with these stakeholders ... **It is about the process rather than the finished plan. It doesn't matter if no one reads the finished plan. The point is, to get to that finished plan, we all sat in a room, numerous times, to work out what to do; we did have a look at the various drafts.** Whether it has changed that much is difficult to say. But it means that we won't have a situation where, as we once did, the

⁹⁹ See s 8.3.1 above, 253-255.

¹⁰⁰ See s 8.3.2 above, 256-258.

department for transport, and shipping community hadn't even been consulted about ten proposals of offshore wind farms, so we are in the same room, we have that kind of conversation. (Interviewee 5 - NGO)

Talking about the meeting¹⁰¹ outside of the marine plan. **Would I have had the opportunity to do that if I had not been engaged in the marine planning process? Quite probably not, I suppose. Because I've made contacts there that, particularly within the MMO, who were receptive to the points of view I was making. It [participation] is an important opportunity for us, by providing an opportunity to look at things in different ways with other people, particular with the MMO itself and more broadly with DEFRA.** (Interviewee 1 - Local industry stakeholder)

Thus, although no direct evidence was found in the interviews to demonstrate that specific conflicts were addressed or mitigated as a result of involving stakeholders into marine planning process, the improved relationship and enhanced mutual understanding among stakeholders and the MMO can also contribute to establish a good atmosphere for addressing conflicts. Stakeholder participation can indirectly benefit conflict management in east marine areas.

8.4. Discussion and Conclusion

This chapter focused on two issues: whether and to what extent the normative, substantive and instrumental purposes of participation were achieved; second, how the participation process affected the fulfilment of the plural rationale for participation.

Data collected from interviewees and documentary analysis shows that, although they had some influence on non-essential issues in the production of the East Marine Plans, participants were not able to influence substantive issues in the East Marine Plans. Therefore, the normative rationale was not fully achieved in the East Marine Plans case. The participatory process did not result in the expected outcomes wanted by some stakeholders. Participants felt that they did not have a major influence on the East

¹⁰¹ "The meeting" mentioned was a co-working opportunity with the MMO, governmental bodies, and other stakeholders to address problems related to the industry that interviewee 1 represented.

Marine Plans. This is possibly related to the insufficient collaboration and transparency in producing the East Marine Plans revealed in chapter 7. As chapter 7 found, some interviewees commented that they did not have enough opportunities to discuss and negotiate issues with other participants and the MMO during producing the East Marine Plans.¹⁰² As a result, their participation seemed more like consultation than collaboration. The inadequate link between stakeholders' input and the East Marine Plans might be another reason why some participants argued that they did not substantively affect the East Marine Plans.¹⁰³ A final possible reason is that, in the East Marine Plans case, the MMO had limited independence and power to make marine plans, particularly at the final stage. The outcomes of participation at the early stage of marine planning reached by the MMO and stakeholders were not reflected in the final East Marine Plans since it was difficult for the MMO to resist the influence of governmental departments.

The evaluation of the substantive rationale for participation found that the quality of the evidence base for the East Marine Plans improved through participation. Therefore, the substantive rationale for participation was achieved. Although demonstrating how it can enhance the implementation or the outcome of decision making is difficult, this research identified some possibilities about how public participation can contribute to the implementation of the East Marine Plans. As found in chapter 7, early and broad participation allowed participants to realise the data gaps in the evidence base for the East Marine Plans.¹⁰⁴ They were thus able to input data into the marine planning process at an early stage thereby achieving the substantive rationale for participation.

Determining the fulfilment of the instrumental rationale for participation is rather complex. Interview data show that social learning process regarding marine issues was triggered due to the participatory process of the East Marine Plans. However, there is no evidence for any change to individual actions or the generation of joint actions among participants. Regarding social network building, interview data indicate that three-layer relationship networks, including those within a homogeneous group, those among

¹⁰² See s 7.5 in ch 7, 230.

¹⁰³ See s 7.4 in ch 7, 227.

¹⁰⁴ See s 7.2 in ch 7, 217.

heterogeneous groups, and those between the MMO and participants, improved due to participation. Summarising the change in the level of institutional trust in the East Marine Plans is rather difficult. Data indicate that the participation did contribute to improve the level of institutional trust in the MMO among some stakeholders, but other stakeholders realised the limited power and influence that the MMO had in marine planning, which had an adverse effect on institutional trust. Therefore, it is difficult to evaluate whether the overall level of institutional trust changed due to participation. The last component of the instrumental function is conflict resolution. No data was found to show specific conflicts were addressed because of participation, but this is due to the strategic nature of marine planning. Data show, however, that the promotion of mutual learning and relationship building among participants and the MMO could indirectly benefit the management and mitigation of conflicts hereafter. Therefore, the instrumental rationale for participation was fulfilled to some extent. The fulfilment of the instrumental functions of participation is closely related to the performance of the procedural criteria for participation. As found in chapter 7, early participation enabled stakeholders to establish network relationships with the MMO from the initial period of the planning process.¹⁰⁵ Broad and interactive forms of participation provided a platform for different stakeholders to be involved in the same events, and therefore benefited direct communication, mutual learning, and network building.

¹⁰⁵ *ibid.*

Chapter 9. Conclusion

This thesis has considered three research questions:

- What strategy of public participation is appropriate for English marine planning? Do the English land and marine planning systems share the same rationales for participation?
- Can this participation strategy can be ensured under the current regulatory regime at the international and the English domestic levels, and if so, to what extent?
- How is public participation implemented in the English marine planning process under the current regulatory system? Are there any weaknesses in the current policies and obligations concerning public participation in producing marine plans?

The previous chapters addressed these questions. The following sections will provide brief summaries of the answers to them.

9.1. Public Participation in Marine Spatial Planning Process: A Theoretical Perspective

The theoretical study in this thesis connected the theory of public participation with the reality of English marine planning. There are three rationales for participation, namely the normative, substantive, and instrumental rationales. The normative rationale focuses on the process and the influence of participation. The substantive rationale concentrates on improving the quality of decision-making. The instrumental rationale emphasises the achievement of social functions through participation. Although they have different functions, the three rationales for participation are compatible since there are no clear-cut boundaries among their components. The three rationales are closely related; therefore, applying a pluralist rationale for public participation which combines them is economical.

This thesis has argued that integration is the main characteristic needed for marine planning. Four challenges for English marine planning have been highlighted. First, because of the multiple uses of marine space and the fragmented governance pattern

in the English sea, conflict management is essential for the marine planning process. Second, the generation of marine plans should be grounded in a robust database. However, the insufficient and fragmented database used for English marine planning is well documented. Third, the MMO, the newly established authority responsible for English marine planning, has faced questions about its capacity and democratic basis. The final obstacle to English marine planning emphasised in this thesis is the insufficient mutual understanding among marine-interested parties and the low level of awareness and knowledge of marine matters among the public.

Public participation addresses these challenges. According to the substantive rationale, public participation can bring information and knowledge into the decision-making process to fill data gaps in marine planning and therefore improve the quality of marine plans. Based on the instrumental rationale, public participation has social functions such as facilitating social learning, building trust and relationships amongst participants and decision-makers, and addressing conflict. The normative rationale for public participation can not only enhance the democratic legitimacy of marine plans but also support the fulfilment of the substantive and instrumental rationales. Therefore, this thesis has argued that English marine planning should apply a pluralist rationale for public participation to address these challenges.

There are various levels of public participation that match different purposes and natures of proposed decisions. Based on the integrated nature and challenges identified above, collaborative participation is deemed as the appropriate level of participation for English marine planning. Early and broad participation, easy access to information and participation, interaction and transparency, are the procedural criteria needed to fulfil the collaborative level of participation needed in the English marine planning context.

9.2. Public Participation in Marine Spatial Planning Process: A Legal Perspective

This part examines the regulations for public participation that are set out in international and English domestic law, to investigate whether and to what extent procedural criteria for collaborative participation have been set in regulatory regimes.

9.2.1. International Law Level

The analysis of the obligations and the review of the National Implementation Reports found that, although it is the most comprehensive and advanced legal instrument concerning public participation, the Aarhus Convention does not provide a robust legal basis for the procedural criteria for collaborative participation. The procedural criteria for early participation and transparency of decision-making are emphasised by the Convention generally. However, without clearly pointing out what an early period in decision-making is in practice, the commitment of early participation is difficult to achieve. Whether and how public input was used in decision-making is opaque because of the lack of a feedback mechanism for those who provided comments on draft proposals. The technical nature and low quality of the information/consultation documents provided hindered easy access to information. The implementation of easy access to participation under the Convention faces two obstacles. The first is the classification of “the public” and “the public concerned”. The second is the thresholds set at the domestic level for triggering an environmental assessment for projects, plans and programmes. As a result, the public has limited access to participation. The Convention regulates few interactive participation opportunities. Consultation and notification are the main approaches identified in the Aarhus Convention. These are at a low level in the participation ladder and are normally considered tokenistic participation. Thus, achieving collaborative participation under the Aarhus Convention seems challenging.

The investigation of the CBD Convention system found that a complete and consistent system of public participation was not established under the CBD system. There is no general obligation regarding public participation under the CBD Convention. The provisions regarding participation are fragmented and directed towards different, but less defined, individuals and groups. Therefore, the Convention does not ensure the procedural criteria for collaborative participation. The requirements for public participation regulated by the Nagoya Protocol, the Cartagena Protocol, and marine-related COP Decisions are weak and general, and do not enable to supplement, or specify the public participation requirements under the main Convention. Thus, the CBD

Convention does little to support collaborative participation at the international law level.

The investigation of the UNCLOS, Helsinki Conventions, OSPAR Convention, Barcelona Conventions, MSFD, and MSPD found that requirements for public information and participation have not been well set out in most of these legal instruments. First, there are no direct requirements set in the UNCLOS regarding public participation issues. Second, although some nonbinding documents regarding public participation have been recently set out in them, the binding obligations on public participation are very limited under the Helsinki and OSPAR Conventions. The Barcelona Convention system, which includes the 1995 Barcelona Convention and its protocols, is the most advanced regional marine instrument in terms of the requirements for public participation. General obligations for public participation were set out in the 1995 Barcelona Convention. Procedural criteria for collaborative participation were set out in the ICZM Protocol to the convention. In addition to these three regional marine conventions, as the two key strategies for the EU marine management, this thesis investigated the MSFD and the MSPD. The requirements concerning public participation set out in the two Directives are insufficient and unclear, particularly in the MSPD. Neither the general level nor the detailed procedures are clearly regulated under the two Directives. Therefore, a clear and comprehensive strategy for collaborative participation in marine management has not been fully established in marine regulations at the international and regional levels.

Soft law, particularly Rio Declaration, is the driving force for establishing international rules for public participation. However, recent soft law instruments are not able to make a substantive contribution to the development of public participation at the international law level. They have neither put forward a higher-level strategy for public participation, which goes beyond the Aarhus Convention, nor detailed and filled gaps in existing obligations. This thesis also argues that, so far, the norm of public participation has not become a customary rule in or a general principle of international law. Improving requirements for public participation set in treaties remains the main approach for developing opportunities for public participation at the international law level.

9.2.2. Domestic Law Level

At the English domestic law level, the primary rationale for public participation in the current English land and marine planning systems is different. Granting planning power back to the people is the dominant motivation for public participation in the current English land planning system, while improving the quality of marine plans is the main driving force for public participation in the English marine planning process. In other words, under the current English land planning system, the normative rationale is the dominant motivation for public participation, while the substantive rationale is the primary rationale for public participation in the marine planning context. Public participation is a means to an end in the English marine planning context, but an end in itself in the English territorial planning context.

The review of the history of the development of public participation in English land planning found that a robust and comprehensive theoretical basis for public participation should be established when public participation is introduced into the decision-making context; otherwise, its real value might be undermined in practice. The current land planning is based on the normative rationale for participation which focuses on democracy and power sharing. However, empowering local communities on planning issues can be limited by inadequate capacity at the neighbourhood level, and flexibility concerning public participation given to local planning authorities.

The MCAA 2099 and the *Description* established the system of public participation in English marine planning. The Cabinet's consultation documents also provide useful views of this system. The investigation of the procedural criteria for collaborative participation under this system found that: first, it regulates early and broad participation. Anyone can be involved in the marine planning process from the preparation stage of the marine plans. Second, the lack of obligations regarding the quality of information can be a potential barrier to the implementation of easy access to information and participation. Third, a deficiency in requirements regarding the decision to run an Independent Investigation may decrease the level of transparency of marine planning as a whole. Although a statutory feedback mechanism is established for the final formal consultation period, whether the criterion for transparency can be ensured at scoping and developing stages during marine planning is unclear. Fourth, in terms of the interaction criterion, the MCAA 2009 only regulates a few interactive

opportunities in marine planning. Consultation is still the main participation approach applied under the MCAA 2009.

9.3. Public Participation in Marine Spatial Planning Process: An Empirical Perspective

The East Marine Planning process officially started in April 2011 and the plans were adopted in April 2014. From a procedural perspective, the creation of the East Marine Plans was a participatory process. A range of participation events and activities was carried out throughout the production of the East Marine Plans. Three informal consultations on key documents of the East Marine Plans and one formal consultation on the draft marine plans were conducted. This went beyond the statutory requirement for public consultation in marine planning. In terms of the implementation of procedural criteria for collaborative participation, data collected from interviews and documentary analysis indicate that early and broad participation was applied in the production of the East Marine Plans. The implementation of easy access to information and participation, however, met some difficulties. Data collected from the East Marine Plans show that tight period allowed for participation was a barrier to public participation. The length of the consultation documents and technical language used in them were reported as obstacles to easy access to information and participation. Insufficient staff resources and inadequate data that stakeholders held were also considered by some interviewees as barriers for them to participate effectively in the production of the East Marine Plans. The evaluation of the transparency criterion revealed two problems. First, there was lack of a clear connection between the participants' input and the East Marine Plans. Second, the determination of an Independent Investigation was considered opaque. The assessment of the interaction criterion found that although activities and events for direct communication among different stakeholders were provided in producing the marine plans, limited opportunities for negotiation and discussion were offered during these activities.

Data collected from interviews and documentary analysis show that, although some stakeholders' comments were accepted, substantive issues in the final East Marine Plans, such as the hierarchy of marine sectors and the different weights given to environmental

issues and economic development, were not impacted by stakeholders' comments. Therefore, the normative rationale for participation was not fully fulfilled in the East Marine Plans case. The evaluation of the substantive rationale for participation found that data provided by participants contributed to the improvement of the quality of evidence base of the East Marine Plans. Therefore, the substantive rationale for participation was achieved. The research finding on the fulfilment of the instrumental rationale for participation is quite mixed. Data collected from interviews show that the social learning process was triggered. All three-layers of relationship networks were established or strengthened. Participation activities enhanced the level of institutional trust in the MMO to some extent. However, the limited independence and power of the MMO in making the East Marine Plans negatively affected the level of institutional trust. No specific conflicts were resolved because of participation. However, some indications of conflict resolution, such as the improved relationships and communication among stakeholders, emerged from the interview data. Thus, the instrumental rationale for participation was achieved to some extent in the case of the East Marine Plans.

9.4. Discussion and Suggestions

First, as it was found in the second part of this thesis, only general, inadequate and weak requirements for public participation have been set out in the existing international legal instruments related to marine management and protection. Thus, the performance of collaborative participation in marine planning does not have a robust legal basis at the international law level. Since adding/altering existing obligations in international law is never easy or practical, this thesis does not intend to suggest an amendment to these regulations investigated, instead, it suggests that soft instruments under international/regional law, such as the *Agreements* under the OSPAR Convention or the *Guidelines* under the Helsinki Convention or the *Implementation Guide* of the Aarhus Convention, and soft law can provide more explicit, ambitious and high level requirements (such as interaction) for public participation to guide the implementation of participation.

Second, at the English domestic regulatory level, the significance of the substantive rationale for participation has been acknowledged in policies and documents related to English marine planning. However, the value of the normative and instrumental rationales for participation has not been fully recognised. As found in the first part of this thesis, to meet the nature and challenges of English marine planning, a pluralist rationale for public participation should be applied. Thus, having a review on all potential benefits that public participation can bring into the marine planning process and clarifying them in relevant policies and documents might be necessary.

Third, given the thin regulations set out in the MPS and the non-statutory nature of the *Description*, statutory guidance on an effective public participation process is needed. Suggestions provided for the implementation of public participation below may provide some practical views for the statutory guidance. In addition, good practice of public participation in the East Marine Plans, such as early participation, which facilitated the fulfilment of the substantive and instrumental rationales, should be recognised.

Fourth, due to the lack of transparency in determining the need for an Independent Investigation, the criteria for triggering an Independent Investigation and the decision-making procedure of whether one will be conducted or not should be clearly regulated and published. In addition, Independent Investigation could draw on good practice concerning participation applied in Independent Examination in the land planning process, such as the assessment of cooperation between plan authorities and other bodies.

Fifth, insufficient time span for consultation, the readability of information/consultation document, and the lack of the management of participants' expectation have been revealed from the East Marine Plans case as obstacles to public participation, although both of the issues have been emphasised by the *Description* and the Cabinet's consultation documents and promised by the SPP of the East Marine Plans. Thus, in future marine planning practice, requirements for public participation in SPPs, the *Description*, and the Cabinet's consultation documents should be followed fully. Participants' expectations should be managed to avoid misunderstanding, mismatched expectations, and frustration as found in the East Marine Plans case. The level or levels of public participation should be clarified in the SPP to provide a clear picture of what

level of participation will be applied at different stages of the marine planning. The purpose of participation and consultation, what issues are open to consultation and discussion, and what issues have been decided need to be clarified before carrying out any activities.

Last but not least, public events and activities for marine planning should be conducted in a more targeted, effective, and interactive manner, bearing in mind that, at different stages, participants can play different roles in marine planning. They can enrich/verify evidence used for marine planning; they can identify conflicts, challenges and potential cooperation/co-exist opportunities among different marine uses and sectors; they are also able to provide comments on draft proposals. Thus, marine planners should try to maximise the benefits of public participation rather than limiting the function of participation to updating/informing the public and relevant stakeholders.

9.5. Limitations of this Research/Further Research

It is also worth pointing out some limitations of this study. As investigated in chapter 2, although the feasibility and necessity of applying a pluralist rationale for participation has been justified and recommended in this thesis, the three main rationales for participation can conflict depending on the conditions and definitions set for the elements under these rationales.¹ In addition, since this thesis mainly focuses on a practical strategy of public participation in the English marine planning context, the theory of public participation applied in this thesis sits at a mid-level theory of participation and does not cover all levels and forms of theories concerning participation issues, such as deliberative democracy and regulatory theory.² In the East Marine Plans case study, due to the difficulty of identifying and approaching members of the public who were engaged in the creation of the East Marine Plans, the sample of research participants mainly targeted stakeholders and representatives of the general public and local communities, such as land planning authorities, local interest groups and local industry representatives.³ Although these participants are considered representatives of the needs and interests of the general public and local communities, this does not

¹ More discussion see ch 2, 38.

² More discussion see ch 2, 21-22; ch 3, 60.

³ More discussion see ch 6, 208.

exclude the possibility that these representatives might only pursue their own interests rather than the public interest during the production of the East Marine Plans.

In addition to the limitations mentioned above, several issues related to this research topic need to be further investigated. First, this thesis has focused on English marine planning. Thus, the strategy and approaches for public participation in marine planning discussed in this research are more appropriate for the English marine planning regime. Marine planning also goes on in Scotland, Wales, and Northern Ireland. Comparative research on the strategies of public participation applied in the marine plans of these nations would be valuable. Second, little evidence on changing actions because of social learning and conflict resolution was collected in the East Marine Plans case, since the plans stay at the policy level and do not address specific issues or conflicts that occur at the project level. Research on social learning and conflict management at the project level would supplement the research findings of the East Marine Plans case. Third, although it raised the issue that the independence and influence of the MMO should be strengthened, this thesis does not provide feasible or effective measures for addressing this issue. Therefore, this issue should be investigated in future studies.

Annex 1: Cabinet Office' Consultation Documents

		Code of Practice on Consultation 2008	Consultation Principle 2012	Consultation Principle 2013	Consultation Principle 2016
Broad and early participation	When to consult	<p>“Formal consultation should take place at a stage when there is scope to influence the policy outcome.”(Criterion 1)</p> <p>“It is important that consultation takes place when the Government is ready to put sufficient information into the public domain to enable an effective and informed dialogue on the issues being consulted on...The consultation exercise should be scheduled as early as possible in the</p>	<p>“Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account.”(p 2)</p>	<p>“Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account.” (p1)</p>	<p>“Consult about policies or implementation plans when the development of the policies or plans is at a formative stage.” (Principle B)</p>

		project plan as these factors allow.” (Criterion 1.2)			
	Scope of participation	“Consideration should also be given to asking questions about which groups or sectors would be affected by the policy in question, and about any groups or sectors (e.g. small businesses or third sector organisations) that may be disproportionately affected by the proposals as presented in the consultation document.” (Criterion 3.4)	“Policy makers should think carefully about who needs to be consulted and ensure the consultation captures the full range of stakeholders affected.” (p2)	“Policy makers should be able to demonstrate that they have considered who needs to be consulted and ensure that the consultation captures the full range of stakeholders affected.” (p2)	“Consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it.” (Principle F)
Easy access to information and	Quality of information	“As far as is possible, consultation documents should be easy to understand: they should be concise, self-contained and	“Information provided to stakeholders should be easy to comprehend – it should be in an easily understandable format,	“Information provided to stakeholders should be easy to comprehend – it should be in an easily understandable format, use plain language and clarify	“Use plain English and avoid acronyms. Be clear what questions you are asking and limit the number of questions to those that are necessary. Make them easy to understand and easy to answer. Avoid lengthy

<p>participati on</p>		<p>free of jargon." (Criterion 4.2)</p>	<p>use plain language and clarify the key issues, particularly where the consultation deals with complex subject matter." (p2)</p>	<p>the key issues, particularly where the consultation deals with complex subject matter." (p2) "Sufficient information should be made available to stakeholders to enable them to make informed comments. Relevant documentation should be posted online to enhance accessibility and opportunities for reuse." (p3)</p>	<p>documents when possible and consider merging those on related topics." (Principle A) "Give enough information to ensure that those consulted understand the issues and can give informed responses." (Principle C)</p>
	<p>Duration of consultation</p>	<p>"Under normal circumstances, consultations should last for a minimum of 12 weeks." (Criterion 2.1) "If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over the summer or Christmas break, or if the policy under</p>	<p>"Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity</p>	<p>"Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating</p>	<p>"Consultations should last for a proportionate amount of time. Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal." (Principle E) "When the consultation spans all or part of a holiday period, consider how this may affect consultation and take appropriate mitigating action." (Principle G)</p>

		<p>consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation.” (Criterion 2.2)</p>	<p>of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks... For a new and contentious policy, such as a new policy on nuclear energy, the full 12 weeks may still be appropriate. The capacity of the groups being consulted to respond should be taken into consideration.”(p2)</p>	<p>action. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks. The timing and length of a consultation should be decided on a case-by-case basis; there is no set formula for establishing the right length....For a new and contentious policy, 12 weeks or more may still be appropriate. When deciding on the timescale for a given consultation the capacity of the groups being consulted to respond should be taken into consideration.” (p2)</p>	
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	Other measures	“Departments should consider ways to publicise consultations at the time of, or if possible before, the launch-date so that consultees can take advantage of the full consultation period to prepare considered responses.” (Criterion 2.4)	“Relevant documentation should normally be posted online to enhance accessibility and opportunities for reuse.” (p3)	“In particular, if the policy will affect hard to reach or vulnerable groups, policy makers should take the necessary actions to engage effectively with these groups. Information should be disseminated and presented in a way likely to be accessible and useful to the stakeholders with a substantial interest in the subject matter.” (p2)	“ Consult stakeholders in a way that suits them. Charities may need more time to respond than businesses, for example.” (Principle G) “ Consider how to tailor consultation to the needs and preferences of particular groups, such as older people, younger people or people with disabilities that may not respond to traditional consultation methods.” (Principle F)
Interaction		“It will often be necessary to engage in an informal dialogue with stakeholders prior to a formal consultation to obtain initial evidence and to gain an understanding of the issues that will need to be raised in the formal consultation” (Criterion 1.4)	“Consideration should be given to more informal ways of engaging that may be appropriate – for example, email or webbased forums, public meetings, working groups, focus groups, and surveys – rather than always	“Consideration should be given to more informal forms of consultation that may be appropriate – for example, email or webbased forums, public meetings, working groups, focus groups, and surveys – rather than always reverting to a written consultation.” (p2)	“ Consultations are only part of a process of engagement. Consider whether informal iterative consultation is appropriate, using new digital tools and open, collaborative approaches. Consultation is not just about formal documents and responses. It is an on-going process.” (Principle D)

			reverting to a written consultation.” (p2)		
Transparency	Feedback on consultation exercise	“Following a consultation exercise, the Government should provide a summary of who responded to the consultation exercise and a summary of the views expressed to each question...This feedback should normally set out what decisions have been taken in light of what was learnt from the consultation exercise. This information should normally be published before or alongside any further action.” (Criterion 6.4)	“ Departments should make clear at least in broad terms how they have taken previous feedback into consideration, and what future plans (if any) they may have for engagement.” (p3)	“To encourage active participation, policy makers should explain what responses they have received and how these have been used in formulating the policy. The number of responses received should also be indicated. Consultation responses should usually be published within 12 weeks of the consultation closing. Where Departments do not publish a response within 12 weeks, they should provide a brief statement on why they have not done so.” (p3)	“ Publish any response on the same page on gov.uk as the original consultation, and ensure it is clear when the government has responded to the consultation. Explain the responses that have been received from consultees and how these have informed the policy. State how many responses have been received. ” (Principle I) “Government responses to consultations should be published...within 12 weeks of the consultation or provide an explanation why this is not possible. Where consultation concerns a statutory instrument publish responses before or at the same time as the instrument is laid, except in exceptional circumstances.” (Principle J)
	Management of stakehol	“Consultation exercises should be clear about the scope of the exercise,	“ The objectives of the consultation process should be clear. To avoid	“ The purpose of the consultation process should be clearly stated as should the	“ Consultations should have a purpose. Do not consult for the sake of it...Take consultation responses into account when

	der expectati on	setting out where there is room to influence policy development and what has already been decided, and so is not in the scope of the consultation.” (Criterion 3.2)	creating unrealistic expectations, any aspects of the proposal that have already been finalised and will not be subject to change should be clearly stated.”(p2-3)	stage of the development that the policy has reached. Also, to avoid creating unrealistic expectations, it should be apparent what aspects of the policy being consulted on are open to change and what decisions have already been taken.” (p2)	taking policy forward. Consult about policies or implementation plans when the development of the policies or plans is at a formative stage. Do not ask questions about issues on which you already have a final view.” (Principle B)
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Annex 2: Interview Questions

- 1 How did you first become aware of the East marine plans? When did this happen?
- 2 When did you start to participate in the plans?
- 3 Why you/your organisation decided to participate?
- 4 What do you think your contribution to the plans?
- 5 How do you see that your contribution was used? How satisfied are you with the use of your contribution?
- 6 Did you encounter any difficulties when participating in this process?
- 7 Can you tell me how familiar were you with marine issues and marine environment before you participated in the plans? How do you see your familiarity with these after your participation?
- 8 What were your understandings of other stakeholder's interests and concerns before you became involved in the plans? How would you describe your understanding of these now?
- 9 How has your participation in the marine plans affected your working decisions/business planning?
- 10 How would you describe the impact of the participatory process on your relationships with other stakeholders in the plan-making process?
- 11 Could you please tell me how much confidence you had in MMO to lead the marine plan procedure before you participated in the plans? Can you tell me about your confidence in the MMO now?
- 12 What do you think worked best in your engagement process? And what did not work so well?
- 13 Is there anything else you'd like to add before we end?

Annex 3: Invitation Letters

Dear Madam/Sir,

I am undertaking a doctoral research at the Law School of the University of Hull. My research explores the public participation in the East Inshore and Offshore Marine Plans from the participants' perspectives investigating their experiences of engaging in the East Marine Plans.

The purpose of this research is to explore the experiences of stakeholders regarding to public participation in the process of the East Marine Plans. This research also aims at investigating the potential limitations of the current regulatory system in terms of public participation in the process of marine related decision-making process. The research findings will provide valuable insights in terms of public participation of creating future marine plans and improving public participation in marine planning process.

As one of the key stakeholders, your organisation has taken a significant position and played an active role in the process of creating the East Marine Plans. Therefore your experiences of public participation in the East Marine Plans would provide valuable information to me. I am aiming to recruit participants who participated in the process of the East Marine Plans on the behalf of your organisation. Therefore, I am writing to you to get your consent and ask kindly if you and/or your colleagues would be willing to inform about my study and give them my contact details. Participation will require only a face-to-face interview. More information about this research and interviews can be found in the attached information sheet.

I would be grateful if you could assist me in my study, it would be great help for me. Please do not hesitate to contact me if you have any questions. Thank you very much in advance. Looking forward to hearing from you

Yuchen Guo

PhD researcher

University of Hull, Cottingham Road, Hull, HU6 7RX

Email: Y. Guo@2013.hull.ac.uk

Mobile phone:07419211445

Dear xxx

Would you like to share your experience in relation to public participation in the East Inshore and Offshore Marine Plans?

My name is Yuchen Guo. I am conducting my doctorate research in law at the University of Hull Law School. I am writing to invite you to participate in a research project related to public participation in the East Inshore and Offshore Marine Plans in England. As a key stakeholder in the East Marine Plans, you are in a significant position to give us valuable information from your own participatory experiences.

The purpose of this research is to explore the experiences of stakeholders regarding public participation in the process of the East Marine Plans. The research findings will provide valuable insights in terms of public participation for creating future marine plans and for other marine decision-makings.

Participation will require only a face-to-face interview about how and when you engaged in the East Marine Plans and your opinions on this participatory process. The interview, to be arranged at your convenience, will last approximately 40-60 minutes and will take place at a location that is convenient for you. More information about this research and confidential issues can be found in the attached information sheet.

If you are interested in taking part and/or you would like to find out more about the project please contact me via email Y. Guo@2013.hull.ac.uk.

Thank you for taking the time to read this and hope to hear from you soon.

Sincerely,

Yuchen Guo

PhD researcher

University of Hull, Cottingham Road, Hull, HU6 7RX

Email: Y. Guo@2013.hull.ac.uk

Mobile phone:07419211445

Annex 4: Information sheet and Consent form

INFORMATION SHEET AND CONSENT FORM FOR PARTICIPANTS OF THE EAST MARINE PLANS

Project Title: Public Participation in the Marine Related Decision-Making Process—A Lesson Learned from Marine Legislation

Researcher: Yuchen Guo, University of Hull

Supervisors: Professor Richard Barnes – Law School University of Hull

Dr. Vesco Paskalev – Law School University of Hull

Purpose of the study

Public participation has been commonly recognised as a necessity and challenge in marine environmental protection and marine resource management. However, there is little research on public participation in marine related decision-making process, even though public participation is highly emphasised in England's marine regulations and policies. The purpose of this research is to explore the experiences of stakeholders regarding to public participation in the process of the **East Inshore and East Offshore Marine Plans in England (the East Marine Plans)**. This research also aims to explore the potential limitations of the current regulatory system in terms of public participation in the process of creating marine plans.

Procedures

Participating in the study will require an interview about your experiences of participation in the East Marine Plans. You will be asked about **when and how** did you engage in participatory activities. Other opinions related to the East Marine Plans will be asked as well. The interview will be audio recorded, subsequently the data will be typed up into a Word document, the main issues and topics will be identified and explored.

How much of your time will participation involve?

The interview will take approximately 40-60 minutes.

Will your participation in the research remain confidential?

Yes, if you agree to take part, all your information and responses will be kept confidential and data will be anonymous and stored securely. Your identities will be coded, with the identifying codes being stored separately from the information. All information, including records, will be stored on a username and password protected computer accessed only by the investigator. Only the investigator and supervisors will have access to the data and research findings. You can have access to your own original audio records and transcripts if you require. The research findings will be presented in investigator's PhD thesis and may be published in academic journals without disclosing your name and other identity information. It will be ensured that there is no detectable link between the data and the identities of its providers.

Payment

The participation is voluntary and you will receive no financial reward for it.

Risks

No risks are known to the investigator at this time.

Withdrawal

You are free to withdraw from the research at any time. Any personal information or data that you have provided will be destroyed or deleted as soon as possible after your withdrawal.

Who reviewed this study?

This research has undergone full ethical scrutiny and all procedures have been approved by the Faculty of Arts and Social Sciences Ethics Committee at the University of Hull.

What happens now?

If you are interested in taking part in the study you are asked to complete and sign the consent form. Then you will be given more specific instructions. Do not sign if you do not wish to take part. Please feel free to ask any questions that you may have. After

signing this form, please return it to Yuchen Guo to the following email address:
Y.Guo@2013.hull.ac.uk

Contact for Further Information

If you require any further information or have any questions about this study, please do not hesitate to contact the investigator Yuchen Guo at the University of Hull, email: Y.Guo@2013.hull.ac.uk. Mobile phone: 07419211445. You can also contact the supervisors Professor Richard Barnes at University of Hull law school via email: r.a.barnes@hull.ac.uk, or telephone: (0) 1482 46 6320 and Dr. Vesco Paskalev at University of Hull Law School via email: v.paskalev@hull.ac.uk, or telephone: (0) 1482 46 5747.

CONSENT FORM FOR PARTICIPANTS OF THE EAST MARINE PLANS

Project Title: Public Participation in the Marine Related Decision-Making Process— A Lesson Learned from Marine Legislation

Declaration of Consent

- I agree to take part in the above study.
- I confirm that I have read and understand the information sheet for the above study.
- I understand that my participation is voluntary and that I am free to withdraw at any time if I think it necessary.
- I understand this interview will be audio recorded and used for research purpose.
- I understand that the information collected will remain confidential and I give my permission for anonymised data to be used in research and publications.

Participant:

Organisation/Company:

Signature:

Date:

After signing this form, please return it to Yuchen Guo to the following email address:

Y.Guo@2013.hull.ac.uk

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