International law and the sustainable governance of shared natural resources: A principled approach

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5 How the Sustainable Development Goals Promote a New Conception of Ocean Commons Governance*

ABSTRACT

This chapter explores public participation in the governance of marine areas beyond national jurisdiction, also known as ocean global commons or ocean commons. In particular, the role of the Sustainable Development Goals (SDGs) is examined in enhancing public access to information and participation in institutions managing these resources: regional fisheries management organizations (RFMOs) and the International Seabed Authority (ISA). The argument is that the SDGs contribute to developing a new conception of ocean commons governance by emphasizing civil society participation in achieving sustainable development. This argument is based on two reasons. First, the SDGs encourage institutions at all levels to strengthen public access to information and participation in decision making in order to increase transparency, accountability and effectiveness of their administration. Second, the study of public participation in RFMOs and the ISA shows that the existing conception of ocean commons governance primarily involves states and industry organizations and restricts access to civil society. This chapter concludes that the SDGs promote a new understanding of ocean commons governance in which public participation is integral to the governing process and necessary to ensure institutional transparency, accountability and effectiveness for sustainable development.

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1 INTRODUCTION

Areas beyond national jurisdiction (ABNJ) – often referred to as the global commons[1] – are protected by the general obligation of states to prevent, reduce and control environmental harm resulting from activities within their jurisdiction or control.[2] The ocean global commons – the high seas and its resources and the deep seabed (known in international law as the 'Area') and its resources – are also protected by specific legal regimes, including those established to regulate fishing on the high seas and deep seabed mining. However, neither the general obligation nor the specific legal regimes have been able to prevent significant harm being caused to marine resources. The Global Ocean Commission (GOC)[3] recently concluded 'the high seas are facing a cycle of declining ecosystem health and productivity'.[4] Investigating the factors causing such decline, the GOC found that one of them is weak high seas governance.[5] In particular, it found that in the management regime for the high seas 'transparency, accountability and compliance-reporting are especially weak',[6] with 'very little accountability at the global level.'[7] Legal scholars also identify lack of effective compliance mechanisms as one of the factors contributing to degradation of the global commons,[8] and the ocean commons in particular.[9]

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1 See, e.g., K. Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar Publishing 2015) 71 – 75; N. Schrijver, 'Managing the Global Commons: Common Good or Common Sink?' (2016) *Third World Quarterly* 37(1252), 1252 – 1253.

2 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc A/CONF.48/14/Rev.1, Principle 21; Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc A/CONF.151/26 (Vol. I) ('Rio Declaration'), Principle 2. See also UN Framework Convention on Climate Change (May 1992) 1771 U.N.T.S. 107, Preamble; Convention on Biological Diversity (5 June 1992) 1760 U.N.T.S. 79, article 3; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226, at 241 – 242, para. 29; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, Draft article 3.

3 Independent commission established in 2013 to raise awareness and promote action to address ocean degradation. It was conceived by the Pew Charitable Trusts and hosted by Somerville College at the University of Oxford. Members of the GOC included José María Figueres (former President of Costa Rica), Vladimir Golitsyn (President of the International Tribunal for the Law of the Sea), and Pascal Lamy (Former Director-General of the WTO).

4 Global Ocean Commission, *From Decline to Recovery: A Rescue Package for the Global Ocean* (2014) <http://www.some.ox.ac.uk/research/global-ocean-commission/> at 16.

5 *Ibid.* at 16-18.

6 *Ibid.* at 7.

7 *Ibid.*

8 Schrijver, above n 1, 1261.

9 D. Bhomawat, 'Shark-finning: Damage to Global Commons' (2016) *Environmental Policy and Law* 46, 56, 61; S. Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) *Ocean Development and International Law* 47, 89.

Public access to information and participation in global environmental governance has led to increased transparency, accountability, effectiveness and legitimacy of decision-making processes.[10] Thus, even though the engagement of civil society may decrease efficiency for being resource consuming (in terms of time and money),[11] and even may result in 'lowest-common-denominator solutions if decision-makers strive to accommodate as many views as possible',[12] public participation is desirable and actively promoted by the international community. Principle 10 of the 1992 Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development (UNCED), proclaims 'environmental issues are best handled with participation of all concerned citizens'.[13] It furthermore provides for access to information, public participation and access to justice in environmental matters. Agenda 21, the Plan of Action on Sustainable Development also adopted at UNCED, states that 'one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making'.[14] Twenty years later, the UN Conference on Sustainable Development (Rio + 20) reconfirmed Principle 10 in its outcome document *The Future We Want*, underscoring participatory rights as an essential component in the promotion of sustainable development.[15] At the regional level, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[16] and the Regional Agreement on Access to Information, Participation and Justice in

10 See, e.g., J. Ebbesson, 'Principle 10: Public Participation' in Jorge E. Viñuales (ed) *The Rio Declaration on Environment and Development* (OUP 2015); T. Kramarz and S. Park, 'Accountability in Global Environmental Governance: A Meaningful Tool for Action?' (2016) *Global Environmental Politics* 16(1), 6; T. Bernauer and R. Gampfer, 'Effects of Civil Society Involvement on Popular Legitimacy of Global Environmental Governance' (2013) *Global Environmental Change* 23, 439.

11 C. Pahl-Wostl, 'A Conceptual Framework for Analysing Adaptive Capacity and Multi-level Learning Processes in Resource Governance Regimes' (2009) *Global Environmental Change* 19, 354, 357. See also Gemma Carr, Günter Blöschl and Daniel Peter Loucks, 'Evaluating Participation in Water Resource Management: A Review' (2012) *Water Resources Research* 48, W11401, 2.

12 N.P. Spyke, 'Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence' (1999) *Boston College Environmental Affairs Law Review* 26(263), 273.

13 Rio Declaration, above n 2.

14 Agenda 21: Programme of Action for Sustainable Development, UN Doc A/CONF.151/26 (Vol. I), Chapter 23, para. 2.

15 The Future We Want, UN Doc A/RES/66/288, para. 43. See also M. Orellana, 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' (2016) 25 *RECIEL* 50, 51 – 52, for an account of how the sustainable development discourse has affirmed the centrality of access rights in governance.

16 'Aarhus Convention' (25 June 1998) 2161 U.N.T.S. 447.

Environmental Matters in Latin America and the Caribbean[17] constitute examples of the extensive support that the international community affords to Rio Principle 10.

The type of development envisioned by the 2030 Agenda for Sustainable Development is that it should not only be sustainable, but also inclusive. In the Agenda, states agree to foster peaceful, just and inclusive societies, declaring that this 'is an agenda of the people, by the people and for the people – and this, we believe, will ensure its success'.[18] In this chapter, I explore 'inclusiveness' from the perspective of civil society participation in the governance of marine areas beyond the limits of national jurisdiction also known as ocean global commons or ocean commons. In particular, I examine the role of the SDGs in enhancing public participation in institutions managing the ocean global commons: regional fisheries management organizations (RFMOs) and the International Seabed Authority (ISA). I focus for present purposes on two SDGs: SDG 14 'Conserve and sustainably use the oceans, seas and marine resources for sustainable development',[19] and SDG 16 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[20] I argue that the SDGs promote a new conception of ocean commons governance by emphasizing civil society participation in achieving sustainable development. Prevailing practice primarily involves states and industry organizations (i.e. companies and industry associations) and restricts access to civil society. This reality is now being challenged by the SDGs, which encourage governing institutions at all levels to strengthen public participation in order to increase transparency, accountability and effectiveness of their administration. The SDGs thus promote a new understanding of ocean commons governance in which public participation is integral to the governing process and necessary to ensure institutional transparency, accountability and effectiveness for sustainable development.

The next section discusses the nature of the SDGs and their potential to influence national and international law and policy. The following section explains that public participation is not only a fundamental element in the drafting and subsequent implementation of the SDGs, but also a means to achieving the goal of building strong institutions at all levels set in SDG 16. Subsequently, section 4 provides an account of the current situation of the ocean global commons and relates it to the goal of sustainable use of marine

17 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, open for signature on 27 September 2018, not in force) available at https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf.

18 Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1, 21 October 2015 ('2030 Agenda'), para. 52.

19 *Ibid.* at 23.

20 *Ibid.* at 25.

resources envisioned in SDG 14. Section 5 examines public participation in RFMOs and the ISA and shows that SDG 16 provides a guiding framework for achieving SDG 14 by way of building strong institutions, *inter alia*, via ensuring public access to information and participation in decision making. This chapter concludes with the argument that through this guiding framework, the SDGs promote a new conception of ocean commons governance.

Some terminological clarification is required before continuing to the next section. First, the term 'civil society' is used as defined by the Panel of Eminent Persons on United Nations – Civil Society Relations meaning 'the associations of citizens (outside their families, friends and businesses) entered into voluntarily to advance their interests, ideas and ideologies. The term does not include profit-making activity (the private sector) or governing (the public sector).'[21] Second, the term 'public participation' refers to civil society access to information and participation in decision-making processes within governing institutions. It does not include 'access to justice' (the third 'pillar' found in Rio Principle 10). This is because no institutionalized access to justice procedure open to civil society organizations currently exists within governance structures for the ocean global commons. Finally, the terms 'marine areas beyond national jurisdiction' 'ocean global commons' and 'ocean commons' are used interchangeably and refer to the high seas and its living resources and the Area and its resources.[22]

2 NON-BINDING, YET INFLUENTIAL

The SDGs, contained in a resolution of the United Nations General Assembly (UNGA), are not legally biding. This does not, however, mean that the SDGs lack the capacity to influence national and international law and policy.[23]

21 We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations – Civil Society Relations, UN Doc A/58/817 (11 June 2004), at 13.

22 This is based on the definitions and legal regimes established by the United Nations Convention on the Law of the Sea (UNCLOS, below n 55) discussed below. UNCLOS defines the high seas as all parts of the sea beyond national jurisdiction (article 86) and establishes a regime for the conservation and management of the living resources of the high seas (articles 116 – 120), which limits states' freedom of fishing (article 87). In addition, UNCLOS defines the Area as the seabed and its subsoil beyond national jurisdiction (article 1) and establishes a regime for the management of the Area and its resources based on the principle of common heritage of mankind (Part XI).

23 Several ways in which the SDGs could be 'non-binding yet influential' have been explored in the literature. See e.g., R.E. Kim, 'The Nexus Between International Law and the Sustainable Development Goals' (2016) *RECIEL* 25(15), 16, arguing that the SDGs are grounded in international agreements and are best conceptualized as a '*subset* of existing intergovernmental commitments'; O. Spijkers, 'The Cross-fertilization Between the Sustainable Development Goals and International Water Law' (2016) *RECIEL* 25(39), 40 – 41, stating that if states are influenced by the SDGs when applying a treaty, this could constitute relevant subsequent

Indeed, states are expected to take ownership and translate the SDGs into domestic public policies.[24] In addition, the 2030 Agenda is grounded in international human rights treaties[25] reinforcing states' international legally binding obligations to protect human rights. Furthermore, the Agenda encourages states to achieve the SDGs in accordance with existing international agreements, expressly mentioning World Trade Organization (WTO) agreements[26] and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[27] the World Health Organization Framework Convention on Tobacco Control,[28] the Convention on the Rights of the Child,[29] the United Nations Framework Convention on Climate Change,[30] and the United Nations Convention on the Law of the Sea (UNCLOS).[31] Referring states and stakeholders to existing international agreements strongly suggests consensus on combining or integrating such agreements with the SDGs, as it were, in order to achieve the overarching goal of sustainable development.[32]

It follows from this interpretation that SDG 14 does not operate in a vacuum. In fact, SDG 14 directs efforts to enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS,[33] causing one to think that there was general agreement on combining UNCLOS and the SDGs to achieve sustainable oceans. Seen in this light, UNCLOS provides a normative framework for implementing SDG 14, while SDG 14 draws attention to priority areas regarding ocean sustainability. This potential for synergy between UNCLOS and the SDGs has been acknowledged by the ISA and is beginning to appear – albeit more timidly – in the work of the RFMOs. Indeed, the President of the ISA Council stated in 2015 that SDG 14 'goes to the heart of the responsibilities of the International Seabed Authority'[34] and that it 'will bring accountability to all organizations and agencies that play a role

practice of such treaty in accordance with the Vienna Convention on the Law of Treaties; Mallory Orme, Zoë Cuthbert, Francesco Sindico et al., 'Good Transboundary Water Governance in the 2015 Sustainable Development Goals: A Legal Perspective' (2015) 40 *Water International* 969, 970 – 971, stating that although the SDGs are not legally binding, they 'still have governing implications' because states must 'translate the SDGs into national targets, and develop and implement policies to achieve the SDGs' and 'engage not only across sectors but also across borders'.

24 Transforming our world, above n 18, para. 66.
25 *Ibid.* para. 10.
26 *Ibid.* SDG 10, target 10a.
27 *Ibid.* SDG 3, target 3b.
28 *Ibid.* SDG 3, target 3a.
29 *Ibid.* para. 67.
30 *Ibid.* SDG 13, target 13a.
31 *Ibid.* SDG 14, target 14c.
32 See Kim, above n 23, 16 – 17.
33 Transforming our world, above n 18, target 14c.
34 Opening Statement by President of the Council Ambassador Peter Thomson, International Seabed Authority, Kingston, Jamaica, 21st Session, 14 July 2015 <https://www.isa.org.jm/files/documents/EN/21Sess/CnclPres.pdf> at 2.

in the sustainability of [the] ocean's health'.[35] In addition, the Secretary-General of the ISA stated in May 2017 that 'deep seabed mining can be carried out sustainably in a manner that contributes to the realization of SDG 14'.[36] The 2030 Agenda and SDGs have also been acknowledged by member states in RFMO meetings,[37] possibly indicating that the SDGs could indeed influence the way RFMOs manage high seas fisheries.

The SDGs may not be legally binding in the strict sense of the word, but they are deeply rooted in international law and call on states to fulfil their legally binding obligations in the light of their vision and ambition to transform our world by 2030. As shown below, the interaction between the existing legal framework applicable to the ocean commons and the SDGs could have as a result that civil society organizations join states and industry organizations as principal actors in ocean commons governance. In section 5, I propose several ways through which increased public participation in ocean commons governance could be achieved. If we agree that 'contemporary international law is often the product of a complex and evolving interplay of instruments, both binding and non-binding',[38] the interplay between the binding legal framework and the non-binding SDGs could encourage and even facilitate these proposals, thereby promoting a new conception of ocean commons governance.

3 PUBLIC PARTICIPATION

In contrast to the Millennium Development Goals (MDGs), which were criticized for having been drafted behind closed doors without stakeholder consultations,[39] the SDGs were envisioned to be the result of an inclusive and trans-

35 *Ibid.* at 3.

36 Statement by Secretary-General Michael Lodge at the ISA/COMRA Contract Extension Signing Ceremony, 11 May 2017, Beijing <https://www.isa.org.jm/sites/default/files/documents/EN/SG-Stats/sg-comra.pdf> at 4.

37 See, e.g. Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC), Thirteenth Regular Session of the Commission, Denarau Island, Fiji, 5 – 9 December 2016, Summary Report of 2 March 2017 <https://www.wcpfc.int/system/files/WCPFC13%20Summary%20Report%20final_issued%202%20March%202017%20complete.pdf> Statement by the Minister for Fisheries of Papua New Guinea, para. 26, at 7-8; WCPFC, Twelfth Regular Session of the Technical and Compliance Committee, Pohnpei, Federated States of Micronesia, 21 – 27 September 2016, Report of 17 November 2016 <https://www.wcpfc.int/system/files/TCC12%20Summary%20Report%2017%20Nov%202016.pdf> Attachment A: Opening Remarks from the Federated States of Micronesia, at 70; Inter-American Tropical Tuna Commission (IATTC), 90th Meeting, La Jolla, California (USA) <http://www.iattc.org/Meetings/Meetings2016/June/pdf-files/IATTC-90-Minutes.pdf> Appendix 5b, Statement by Chile, at 99.

38 A. Boyle and C. Chinkin, *The Making of International Law* (Oxford 2007) 210.

39 UN System Task Team on the Post-2015 UN Development Agenda, *Review of the Contributions of the MDG Agenda to Foster Development: Lessons for the Post-2015 UN Development Agenda* <http://www.un.org/millenniumgoals/pdf/mdg_assessment_Aug.pdf> at 7; see

parent intergovernmental process open to all stakeholders.[40] In fact, the Open Working Group on Sustainable Development Goals (OWG) had the mandate to ensure the full involvement of expertise from civil society in order to provide a diversity of perspectives and experience.[41] Accordingly, a process of public consultations took place during the elaboration of the SDGs.[42] Additionally, civil society is called on to support implementation of the SDGs together with governments, the private sector and the UN system.[43] Indeed, the process of follow-up and review of implementation of the SDGs at all levels is to be 'open, inclusive, participatory and transparent for all people and will support reporting by all relevant stakeholders'.[44] Therefore, review of implementation progress at the national level is to draw on contributions from, among others, civil society.[45] At the global level, regular reviews are to include civil society and provide a platform for partnerships, including through the participation of 'major groups and other relevant stakeholders'.[46] Civil society organizations are called to contribute not only to follow-up and review processes, but also to SDG implementation in their areas of expertise.[47] In addition to being essential to the drafting and subsequent implementation of the SDGs, public participation is a means to achieve the specific goal of building strong institutions at all levels set in SDG 16.

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also S. Wisor, 'After the MDGs: Citizen Deliberation and the Post-2015 Development Framework' (2012) *Ethics and International Affairs* 26, 113, 119 – 120; V.P. Nanda, 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2015 – 2016) *Denver Journal of International Law and Policy* 44(389), 398.

40 The Future We Want, above n 15, para. 248.

41 *Ibid.*

42 2030 Agenda, above n 18, para. 6. See also Synthesis Report of the Secretary-General on the Post-2015 Agenda, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet* (December 2014) <http://www.un.org/disabilities/documents/reports/SG_Synthesis_Report_Road_to_Dignity_by_2030.pdf> para. 37(a). For an analysis of public participation in the drafting process of the SDGs see O. Spijkers and A. Honniball, 'Developing Global Public Participation (2): Shaping the Sustainable Development Goals' (2015) *International Community Law Review* 17, 251.

43 2030 Agenda, above n 18, paras 39 and 60.

44 *Ibid.* para. 74 (d).

45 *Ibid.* para. 79.

46 *Ibid.* paras 84 and 89. 'Major groups' refers to nine sectors of society that constitute the main channels for participation in UN activities related to sustainable development. These are women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, scientific and technological community, and farmers. See Agenda 21, above n 14, Section III. 'Other relevant stakeholders' are also invited to participate in UN processes related to sustainable development. These include private philanthropic organizations, educational and academic entities, persons with disabilities and volunteer groups. See UN Doc A/RES/67/290 Format and organizational aspects of the high-level political forum on sustainable development (23 August 2013), para. 16.

47 2030 Agenda, above n 18, para 41. See also SDG 17, target 17.

Sustainable Development Goal 16 is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[48] Strong institutions (effective, accountable and inclusive) are instrumental in promoting peaceful and inclusive societies and providing access to justice for all. Therefore, this chapter specifically focuses on the goal of building strong institutions and the role of public participation in achieving such a goal in the context of the ocean global commons. Three of the targets supporting the achievement of SDG 16 directly contribute to building strong institutions. Target 16.6 is to 'develop effective, accountable and transparent institutions at all levels'; target 16.7 is to 'ensure responsive, inclusive, participatory, and representative decision making at all levels'; and target 16.10 is to 'ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements'.[49]

As mentioned in the introduction, public access to information and participation in environmental matters increase transparency, accountability and effectiveness of decision making and are both widely supported by the international community. SDG 16 confirms this support, drawing attention to the role that public participation plays in achieving the goal of strong institutions for sustainable management. The goal is to build strong institutions *at all levels* of governance, therefore including institutions managing the ocean global commons. In addition, according to the three relevant targets, strong institutions are to be built through effectiveness, accountability, and transparency,[50] responsiveness, inclusiveness, participation and representation,[51] and through public access to information.[52] Bearing in mind that weak governing institutions have been found to be one of the factors causing ocean degradation,[53] and that ocean commons are currently managed with minimal public participation, SDG 16 promotes a new conception of ocean commons governance. It does so by aiming at building strong institutions through, *inter alia*, ensuring public access to information and public participation in decision making. As shown below, the existing conception of ocean commons governance features states and industry representatives as primary actors with civil society organizations – and the conservation interests they represent – playing a role of secondary importance. The new conception, based on SDG 16 and intending to achieve SDG 14, strengthens the role of civil society organizations in ensuring transparency, accountability and effectiveness of institutions managing the ocean commons.

48 2030 Agenda, above n 18, at 25.
49 *Ibid.* at 25-26.
50 Target 16.6.
51 Target 16.7.
52 Target 16.10.
53 Global Ocean Commission, above n 4.

4 Ocean commons and sustainable development goal 14

4.1 Ocean Commons

The ocean covers nearly three-quarters of the Earth's surface area.[54] The high seas, defined as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State',[55] constitute 64 per cent of the total surface of the ocean.[56] High seas ecosystem services include air purification, waste treatment and lifecycle maintenance, carbon capture and storage, fisheries, genetic resources, and recreational benefits.[57] The high seas also provide non-living resources such as oil, gas and minerals.[58] The 1982 UNCLOS reserves the high seas for peaceful purposes[59] and guarantees 'freedom of the high seas' for all states, coastal or land-locked.[60] Freedom of the high seas comprises, *inter alia*, freedom of navigation and overflight, freedom to lay submarine cables and pipelines, to construct artificial islands and other installations, freedom of scientific research and freedom of fishing.[61] Despite efforts made by the international community to protect the marine environment, the ocean faces several challenges. These include overfishing, acidification, pollution and biodiversity loss.

The Food and Agriculture Organization of the United Nations' report *State of World Fisheries and Aquaculture 2016* (FAO Report) found that 31.4 per cent of the world's marine fish stocks were fished at a biologically unsustainable level and therefore overfished.[62] The report states further that most of the stocks of the 10 most productive fish species 'are fully fished with no potential for increases in production; the remainder are overfished with increases in their production only possible after successful stock restoration'.[63] In addition, the Intergovernmental Panel on Climate Change found that the ocean has absorbed 30 per cent of the emitted anthropogenic CO_2, increasing its acidity.[64] Ocean acidification has impacts on the physiology, behaviour and population

54 *Ibid.* at 4.
55 United Nations Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 3, Art. 86.
56 Global Ocean Commission, above n 4, at 4.
57 *Ibid.* at 5.
58 *Ibid.*
59 Above n 55, article 88.
60 *Ibid.* article 87.
61 *Ibid.* article 87(a) and (e).
62 Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2016: Contributing to Food Security and Nutrition for All* (Rome 2016) <http://www.fao.org/3/a-i5555e.pdf> at 5 – 6.
63 *Ibid.* at 6.
64 IPCC, *Climate Change 2014: Synthesis Report.* Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Geneva

dynamics of organisms, particularly those building a calcium carbonate shell (e.g., molluscs and reef-building corals).[65] Moreover, the warming of the global oceans, combined with overfishing, threatens the world's richest areas for marine biodiversity.[66] Furthermore, marine litter (or debris) – mostly made up of plastic polymers, the majority of which are not biodegradable and will persist for decades and probably centuries[67] – affects habitats, ecological function, and exposes marine fauna to entanglement, suffocation, and/or ingestion of debris.[68] Finally, marine biodiversity loss 'not only impairs the ability of marine ecosystems to feed a growing human population but also sabotages their stability and recovery potential in a rapidly changing marine environment'.[69]

Concerning marine mineral resources found in the seabed beyond national jurisdiction, the so-called Area,[70] three types are commercially viable: polymetallic manganese nodules, cobalt-rich ferromanganese crusts and polymetallic sulphides.[71] Polymetallic manganese nodules are found on or just below the surface of the deep seabed and contain manganese, nickel, cobalt and copper.[72] Cobalt-rich ferromanganese crusts are deposits formed from direct precipitation of minerals from seawater onto hard substrates (rock on seamounts and active mountain chains), containing minor but significant concentrations of cobalt, titanium, nickel, platinum, molybdenum, tellurium, cerium, other metallic and rare earth elements.[73] Polymetallic sulphides are

2014)<https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf> at 4.

65 *Ibid.* at 67.

66 F. Ramirez, Francisco Ramírez, Isabel Afán, Lloyd S. Davis and André Chiaradia, 'Climate Impacts on Global Hot Spots of Marine Biodiversity' (2017) *Science Advances* 3, 1 – 7.

67 UNEP and GRID-Arendal, *Marine Litter Vital Graphics* (2016) <http://staging.unep.org/docs/MarineLitter.pdf> at 7. See also David K.A. Barnes, Francois Galgani, Richard C. Thompson et al., 'Accumulation and Fragmentation of Plastic Debris in Global Environments' (2009) *Phil. Trans. R. Soc.* B 364(1985), 1992 – 1993.

68 UNEP and GRID-Arendal, above n 67, at 6, 8. See also Marcus Eriksen, Laurent C.M. Lebreton, Henry S. Carson et al., 'Plastic Pollution in the World's Oceans: More than 5 Trillion Plastic Pieces Weighing over 250,000 Tons Afloat at Sea' (2014) *PLoS ONE* 9: e111913, at 2, 11.

69 Boris Worm, Edward B. Barbier, Nicola Beaumont et al., 'Impacts of Biodiversity Loss on Ocean Ecosystem Services' (2006) *Science* 314 (787), 790. See also Douglas J. McCauley, Malin L. Pinsky, Stephen R. Palumbi et al., 'Marine Defaunation: Animal Loss in the Global Ocean' (2015) *Science* 347(247), 1255641 – 1255643.

70 UNCLOS defines the Area as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', above n 55, article 1(1) (1).

71 E. Ramirez-Llodra, A. Brandt, R. Danovaro et al., 'Deep, Diverse and Definitely Different: Unique Attributes of the World's Largest Ecosystem' (2010) *Biogeosciences* 7(2851), 2882.

72 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/19/C/17 (22 July 2013) hereinafter Nodules Exploration Regulations, Regulation 1(3)(d).

73 Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISBA/18/A/11 (27 July 2012) hereinafter Crusts Exploration Regulations, Regulation 1(3)(a).

hydrothermally formed deposits of sulphides and accompanying mineral resources, which contain concentrations of metals including, *inter alia*, copper, lead, zinc, gold and silver.[74] The Area not only yields significant mineral resources, but also 'is predicted to hold millions of yet-to-be described species'.[75] As an example, the Clarion-Clipperton Zone (CCZ), located in the Eastern Central Pacific, is not only known to have the richest deposits of polymetallic nodules in terms of nodule abundance and metal concentration,[76] but also holds rich and abundant megafauna.[77]

Deep seabed mining in ABNJ is currently in the exploration phase. As of February 2018, the ISA has entered into 15-year contracts for exploration for minerals in the Area with 28 contractors.[78] During its 22nd session (2016), the Council of the ISA approved six applications for extension of contracts for exploration,[79] four of which were signed during the 23rd session (2017).[80] Applications for exploitation licences are expected after the contracts or the extension periods expire.[81] More than half of the contracts are for exploration for polymetallic nodules in the CCZ.[82]

Nodule mining is expected to have long-lasting impacts.[83] A single nodule mining operation is projected to remove nodules and near-surface sediments from 300-700 km^2 of seafloor per year,[84] which would cause 'near total faunal

74 Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/A/12/Rev.1 (7 May 2010) hereinafter Sulphides Exploration Regulations, Regulation 1(3)(d).

75 Kathryn J. Mengerink, Cindy L. Van Dover, Jeff Ardron et al., 'A Call for Deep-Ocean Stewardship' (2014) 344 *Science* 696, 696.

76 Environmental Management Plan for the Clarion-Clipperton Zone, ISBA/17/LTC/7 (13 July 2011) para. 16.

77 Diva J. Amon, Amanda F. Ziegler, Thomas G. Dahlgren et al., 'Insights into the Abundance and Diversity of Abyssal Megafauna in a Polymetallic-nodule Region in the Eastern Clarion-Clipperton Zone' (2016) *Scientific Reports* 6, 30492.

78 ISA, 'Deep Seabed Minerals Contractors' <https://www.isa.org.jm/deep-seabed-minerals-contractors>.

79 Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISBA/23/A/2 (5 June 2017) para. 67.

80 *Ibid.*, para. 71. See also ISA, Selected Decisions and Documents of the Twenty-Third Session, 07-18 August 2017, available at <https://www.isa.org.jm/sites/default/files/files/documents/en_3.pdf, at 17, para. 71.

81 Nodules Exploration Regulations, above n 72, Regulation 26; Crusts Exploration Regulations, above n 73, Regulation 28; Sulphides Exploration Regulations, above n 74, Regulation 28.

82 ISA, above n 78.

83 ISA, Towards an ISA Environmental Management Strategy for the Area, ISA Technical Study No. 17 (March 2017) <https://www.isa.org.jm/sites/default/files/files/documents/berlinrep-web.pdf> at 11.

84 Eva Ramírez-Llodra, Paul A. Tyler, Maria C. Baker et al., 'Man and the Last Great Wilderness: Human Impact on the Deep Sea' (2011) 6 PLoS ONE e22588, at 11. See also ISA, Biodiversity, Species Ranges, and Gene Flow in the Abyssal Pacific Nodule Province: Predicting and Managing the Impacts of Deep Seabed Mining, ISA Technical Study No. 3 (2008) <https://www.isa.org.jm/sites/default/files/files/documents/techstudy3.pdf> at 4.

mortality in the area directly mined'.[85] In addition, redeposition of sediments suspended by mining activities 'will disturb seafloor communities over an area perhaps two to five times greater'.[86] Experimental disturbances carried out to study possible impacts of mining operations showed that many nodule-attached organisms as well as mobile species 'did not reach pre-disturbance abundances decades after the disturbance took place'.[87] In addition, the biogeochemical functions of the sediments were affected, indicating impacts on the food web of the flora and fauna found on the seafloor.[88] Notwithstanding, deep seabed ecosystems remain poorly known[89] and, as acknowledged by the Environmental Management Plan for the CCZ, 'the degree of impacts raised by potential deep sea mining is still unknown'.[90] This uncertainty calls for a precautionary approach and constitutes a main challenge in the current process of developing a legal framework to regulate the exploitation phase.[91]

4.2 Sustainable Development Goal 14

Sustainable Development Goal 14 (SDG 14) is to 'conserve and sustainably use the oceans, seas and marine resources for sustainable development'.[92] Several of the targets under SDG 14 direct efforts towards tackling the main challenges faced by the ocean commons described above.[93] Target 14.1 sets the objective of preventing and significantly reducing marine pollution of all kinds, including marine debris pollution. Target 14.2 aims at achieving sustainable management and protection of marine and coastal ecosystems. Target 14.3 directs actions towards minimizing and addressing the impacts of ocean acidification. Particularly relevant to the argument in this chapter are targets 14.4 and 14.6, which aim at tackling overfishing. Target 14.4 draws attention to the ineffective regulation of fishing activities, calling on governance institutions to '*effectively* regulate harvesting and end overfishing, illegal, unreported

85 Ramírez-Llodra et al., above n 84.
86 *Ibid*.
87 ISA, above n 83, 11.
88 *Ibid.*
89 Amon et al., above n 77.
90 Environmental Management Plan for the Clarion-Clipperton Zone, above n 76, para. 25.
91 ISA, Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and all Stakeholders (July 2016) containing a first working draft of the Regulations and Standard Contract Terms on Exploitation for Mineral Resources in the Area <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf>. See also ISA, 'Ongoing Development of Regulations on Exploitation of Mineral Resources in the Area' <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area> for a chronological list of activities undertaken and documents issued in the drafting process.
92 2030 Agenda, above n 18, at 23.
93 *Ibid.* at 23-24.

and unregulated fishing and destructive fishing practices … in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics'.[94] Target 14.6 addresses the issue of subsidies granted to the fishing industry setting the objective of 'prohibit[ing] certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies'. Also relevant to the argument is target 14.c, which aims to 'enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea'. By referring to UNCLOS, SDG 14 highlights the critical role that the Law of the Sea – including the law applicable to high seas fisheries and deep seabed minerals – plays in the sustainable management of marine resources.

Regarding public participation, SDG 14 does not expressly mention public access to information and participation in decision making; however, it does contain an implicit reference by acknowledging the role of UNCLOS. As discussed below, the legal regime established by UNCLOS and its implementing agreements does include procedures – albeit modest – for the engagement of civil society in the management of the ocean global commons. In addition, target 14.a also makes an implicit reference to civil society participation by directing efforts to 'increase scientific knowledge, develop research capacity and transfer marine technology'. This calls attention to the role that civil society organizations engaged in ocean research play in improving ocean health.

5 Public participation in ocean commons governance

This section examines public participation in institutions managing high seas fisheries and seabed minerals in the Area -RFMOs and the ISA, also referred to as the Authority, respectively. Each subsection provides a brief introduction of the organization's roles, functions and competences especially regarding environmental protection, followed by a study of the legal framework for public participation and its implementation. Each subsection links this legal framework to the SDGs showing that SDG 16 provides a guiding framework for achieving SDG 14 through strong institutions. I propose several ways through which increased public participation in ocean commons governance could be achieved, namely (i) through making RFMO rules on NGO participation less restrictive, e.g., via substantially reducing or eliminating NGO participation fees; (ii) through including NGO representatives in RFMO performance reviews; (iii) through developing ISA procedures to determine confidentiality of data (such procedures are currently non-existent); (iv) through providing public

94 Emphasis added.

access to all environmental data available to the ISA; and (v) through ensuring public participation in all Legal and Technical Commission (LTC) meetings discussing environmental protection.

5.1 Public Participation in Regional Fisheries Management Organizations

5.1.1 Role of RFMOs in governance of high seas fisheries

According to UNCLOS all states have the right for their nationals to engage in fishing on the high seas provided that they observe their treaty obligations and the rights, duties and interests of the coastal states.[95] UNCLOS requires states to take measures for their respective nationals for the conservation of living resources,[96] and to cooperate with each other in the conservation and management of living resources, for instance through the establishment of fisheries organizations.[97] The Fish Stocks Agreement (FSA) elaborates states' duty to cooperate regarding two particular stocks: straddling and highly migratory fish stocks.[98] It provides for the establishment of RFMOs, which have become the principal institutions entrusted with the conservation and management of high seas fisheries at the regional level.[99]

RFMOs are intergovernmental organizations for the management of fisheries in specific areas of the high seas with a mandate to adopt measures that are binding upon their members. RFMOs essentially provide a forum for states to cooperate and adopt conservation and management measures. Where no RFMO exists for a particular fish stock, states must cooperate in order to establish one.[100] Where an RFMO does exist, states intending to fish for the resource under the jurisdiction of the RFMO must join it or, at least, follow its rules.[101] States having a real interest in the fisheries concerned are entitled to become a member of a relevant RFMO.[102] Only those states which are members of an RFMO, or which agree to follow its rules, have access to the fishery resources

95 UNCLOS, above n 55, article 116.
96 Article 117.
97 Article 118.
98 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 August 1995) 2167 U.N.T.S. 3, article 2 (FSA). Straddling fish stocks occur both within a country's exclusive economic zone and in the adjacent high seas (UNCLOS article 63) e.g., cod, jack mackerel and squid. Highly migratory fish stocks regularly travel long distances through both the high seas and areas under national jurisdiction (UNCLOS article 64 and Annex I), e.g., tuna, swordfish and oceanic sharks.
99 *Ibid.* FSA Part III.
100 FSA, above n 98, article 8(5).
101 *Ibid.* article 8(3).
102 *Ibid.*

to which those rules apply.[103] Most RFMOs manage specific fish stocks only, such as tuna and tuna-like species or deep-sea stocks.[104]

RFMO member states have the responsibility to agree on participatory rights such as allocations of allowable catch (fishing quotas), or levels of fishing effort (e.g. fishing days),[105] ensuring that these measures maintain or restore stocks at levels capable of producing maximum sustainable yield (also referred to as 'maximum sustainable catch').[106] In addition, members must ensure that said measures are based on the best available scientific information,[107] and apply the precautionary approach.[108] Measures should also take into account the interdependence of fish stocks and dependent and associated species as well as the special requirements of developing states.[109] Furthermore, members must adopt standards for the responsible conduct of fishing operations,[110] review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species.[111] They must also ensure implementation of the recommendations and decisions of the organization.[112]

Notwithstanding this legal framework, unsustainable fishing practices in the high seas constitute a persisting cause of ocean degradation. Performance reviews conducted following the 2006 UNGA Resolution on Sustainable Fisheries[113] show that RFMOs have generally 'failed to live up to expectations'.[114] They reveal common problems such as poor data provision, failure to adopt appropriate conservation measures and inadequate compliance with manage-

103 *Ibid.* article 8(4).

104 Examples of RFMOs are: Northwest Atlantic Fisheries Organization (NAFO), Commission for the Conservation of Southern Bluefin Tuna (CCSBT), North Atlantic Salmon Conservation Organization (NASCO), International Commission for the Conservation of Atlantic Tunas (ICCAT).

105 FSA, article 10(b).

106 *Ibid.* article 5(b).

107 *Ibid.*

108 *Ibid.* article 5(c) and article 6.

109 *Ibid.* article 5(b).

110 *Ibid.* article 10(c).

111 *Ibid.* article 10(d).

112 *Ibid.* article 10(l).

113 Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, UN Doc A/RES/61/105 (8 December 2006), para. 73.

114 Global Ocean Commission, above n 4, at 9. See also Kristina M. Gjerde, Duncan Currie, Kateryna Wowk et al., 'Ocean in Peril: Reforming the Management of Global Ocean Living Resources in Areas Beyond National Jurisdiction' (2013) *Marine Pollution Bulletin* 74(540), 541; S. Cullis-Suzuki and D. Pauly, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations' (2010) *Marine Policy* 34(1036), 1042; Michael W. Lodge, David Anderson, Terje Løbach et al., *Recommended Best Practices for Regional Fisheries Management Organizations*, 'Introduction and Overview' (Chatham House 2007) ix.

ment measures.[115] In addition, the GOC found that RFMOs are 'largely unaccountable'.[116] The above-cited FAO Report confirms that RFMOs face 'substantial challenges', including 'lack of political commitment and comprehensive compliance by members'.[117] It adds that regional fisheries bodies (including RFMOs) 'can only be as effective as member States allow' and their performance 'depends directly on their members' participation, engagement and political will'.[118] In light of this situation, and bearing in mind that public access to information and participation in decision making can improve transparency, accountability and effectiveness of governing institutions, the SDGs potentially could provide direction for achieving sustainable use of high seas fisheries. This is done, in part, through strengthening RFMOs by ensuring that civil society organizations have access to information and participation mechanisms.

5.1.2 *Public participation in RFMOs in the light of the SDGs*

Article 12 of the FSA stipulates that states must provide for transparency in the decision-making process and other activities of RFMOs.[119] It also states that representatives from NGOs concerned with straddling and highly migratory fish stocks shall be afforded the opportunity to take part in meetings as observers or otherwise.[120] NGOs must have timely access to records and reports of RFMOs, and procedures allowing their participation 'shall not be unduly restrictive'.[121] Rules of procedure on NGO participation differ from one RFMO to another. Generally, NGOs may attend meetings, make oral statements upon invitation of the presiding officer and distribute documents through the Secretariat.[122] Even though civil society organizations have played a role in 'pushing the RFMOs towards a more precautionary approach'[123] and 'contributed to raising political and public awareness of the need for change'[124] in the way RFMOs work, it has been documented that 'in most RFMOs [NGOs] struggle to have their views heard and discussed and are often frustrated that they are not taken seriously in the decision-making process'.[125]

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115 Global Ocean Commission, above n 4, at 36. See also Gjerde et al., above n 114, at 542.
116 Global Ocean Commission, above n 4, at 36.
117 FAO, *The State of World Fisheries and Aquaculture 2016*, above n 62, at 95.
118 *Ibid*. at 8.
119 FSA, above n 98, article 12(1).
120 *Ibid.* article 12(2).
121 *Ibid.*
122 M.T. Petersson, L.M. Dellmuth, A. Merrie and H. Österblom, 'Patterns and trends in non-state actor participation in regional fisheries management organizations', 104 *Marine Policy* (2019) 146-156, 154.
123 *Ibid.* at 152.
124 FAO Report, above n 62, at 95.
125 Report of the Independent Review, International Commission for the Conservation of Atlantic Tunas (ICCAT) PLE-106/2008, September 2008 ('ICCAT 2008 Report') at 71.

The participation of civil society organizations – mostly NGOs – in RFMOs indeed tends to be constrained.[126] Some RFMOs request a participation fee from NGOs, which is perceived as 'a way to effectively discourage observer participation'.[127] For example, the rules of procedure of the Northwest Atlantic Fisheries Organization (NAFO) provide that NGOs with observer accreditation may be required to pay a fee 'which will cover the additional expenses generated by their participation'.[128] The amount of the fee is to be determined annually by the Executive Secretary.[129] Considering that lack of financial resources was found to be the main reason for poor representation of NGOs from low-income countries in international environmental institutions,[130] charging a fee, which can reach up to 500 USD to attend each meeting,[131] could be interpreted as a practice that unduly restricts access for NGOs from low-income countries, which in turn is in contravention of Article 12 of the FSA. In addition, a study of more than 500 NGOs participating in procedures of five tuna RFMOs found that fishing industry representatives are far more numerous than civil society organizations.[132] This finding suggests that conservation interests – primarily put forward by NGOs – would be under-represented, at least in five tuna RFMOs. The study also found that NGOs from high-income countries participate far more often than NGOs from low-income countries, with possible implications for representational diversity.[133] In this regard, it should be noted that the decline in fish stocks due to overfishing impoverishes coastal fishing communities in many coastal and island developing countries,[134] and that many developing countries have difficulty covering the high cost of adequate fisheries governance regimes.[135] Less restrictive participation policies could give NGOs from low-income countries the opportunity to voice their concerns within the established governance structures.

Reviews of RFMO performance confirm that NGO participation is frequently restricted.[136] As a response, some performance reviews include general recommendations to make RFMOs more inclusive with respect to NGOs. For instance, the performance review of the Commission for the Conservation of Southern

126 See e.g., Gjerde et al., above n 114, at 543.
127 ICCAT 2008 Report, above n 125, at 29.
128 NAFO Rules of Procedure and Financial Regulations, December 2014, Rule 5(c).
129 *Ibid.*
130 A.N. Uhre, 'Exploring the Diversity of Transnational Actors in Global Environmental Governance' (2014) *Interest Groups and Advocacy* 3, 59.
131 Report of the Independent Performance Review of ICCAT 2016, <https://www.iccat.int/Documents/Other/0-2nd_PERFORMANCE_REVIEW_TRI.pdf> at 61.
132 Petersson *et al.*, above n 122, at 153.
133 *Ibid.*
134 World Bank, *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (Washington DC 2017) <http://hdl.handle.net/10986/24056> at 7-8.
135 *Ibid.* at 18.
136 FAO Fisheries and Aquaculture Circular, *The Implementation of Performance Review Reports by Regional Fisheries Bodies 2004 – 2014*, FIPI/C1108 ('FAO Circular').

Bluefin Tuna (CCSBT) recommended 'creat[ing] rules that would allow NGOs easier access to CCSBT meetings',[137] while that of the North Atlantic Salmon Conservation Organization (NASCO) recommended that NASCO 'seek ways to increase NGO involvement'.'[138] In 2008, the first performance review of the International Commission for the Conservation of Atlantic Tunas (ICCAT) commented on concerns regarding 'a tendency for ICCAT to use more closed meetings with limited participation, and that this could lead to decisions that are not well understood or well considered, and could also decrease accountability'.[139] In addition, the review panel questioned ICCAT's practice of charging NGOs 500 USD for each meeting because of the 'broader role these groups have in representing special interest groups of importance in the ICCAT decision making process'.[140] The review panel recommended that ICCAT should 'review its policy on NGOs attendance at ICCAT meetings'.[141] In 2016, eight years after the first performance review, a second review found that ICCAT had not reviewed its policy on NGOs' attendance as recommended and that the participation fee, allowing attendance of two representatives, continued to apply with a supplemental 350 USD fee for each additional person in the observer delegation.[142] The reluctance to review public participation policies and the persistence of the participation fee suggest that RFMOs have little or no motivation to become more inclusive to NGOs and the public interest they represent.

A related issue is the lack of transparency in RFMO performance reviews. The 2006 UNGA Resolution on Sustainable Fisheries urged states to undertake performance reviews using transparent criteria and 'some element of independent evaluation'.[143] The GOC found that the reviews performed 'cannot be considered truly independent' because they were conducted by panels including members employed by either the RFMO or by member states.[144] Only a few RFMOs have involved NGO representatives in performance reviews.[145]

SDG 16 aims at building strong institutions, in part by ensuring 'responsive, inclusive, participatory and representative decision-making at all levels'. The FAO Report states 'governance of fisheries and aquaculture should be greatly influenced by the 2030 Agenda for Sustainable Development'.[146] In addition, the 2030 Agenda and SDGs are beginning to be acknowledged by member states

137 *Ibid.* at 14.
138 *Ibid.* at 37 – 38.
139 ICCAT 2008 Report, above n 125, at 29.
140 *Ibid.* at 71.
141 *Ibid.*
142 FAO Report, above n 62, at 61.
143 Above n 113, para 73.
144 GOC, above n 4, at 36. See also FAO Circular, above n 136, at 2.
145 FAO Circular, above n 136, at 3.
146 FAO Report, above n 62, at 7.

in RFMO meetings,[147] indicating that the SDGs could potentially influence the work of RFMOs. I submit that the interplay between UNCLOS, the FSA and the SDGs could (i) guide RFMOs' efforts towards making rules on NGO participation less restrictive, for instance through substantially reducing or eliminating NGO participation fees, and (ii) encourage more RFMO performance review procedures to include NGO representatives.

5.2 Public Participation in the International Seabed Authority

5.2.1 Role of the ISA in the governance of seabed minerals in the Area

The Area and its resources are the common heritage of mankind.[148] Consequently, claims of sovereignty over, or appropriation of, the Area or its resources are invalid and all rights in the resources are vested in mankind as a whole.[149] In addition, activities in the Area must be carried out for the benefit of mankind and the ISA, which acts on behalf of mankind,[150] must provide for the equitable sharing of financial and other economic benefits derived from such activities.[151] Furthermore, states have the responsibility to use the Area exclusively for peaceful purposes[152] and to ensure that activities are carried out in strict conformity with UNCLOS Part XI.[153] In its 2011 advisory opinion, the International Tribunal for the Law of the Sea stated:

> [T]he role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining.[154]

147 WCPFC, IATTC, above n 37.
148 UNCLOS, above n 55, article 136.
149 *Ibid.* article 137.
150 *Ibid.* article 137(2).
151 *Ibid.* article 140.
152 *Ibid* article 141.
153 *Ibid.* article 139.
154 Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, para. 226, see also para. 76. See also D. French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) *International Journal of Marine and Coastal Law* 26, 525, in particular pp. 544 – 546.

The principle of common heritage of mankind is central in the current negotiations on the draft text of a legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ.[155]

States parties to UNCLOS established the ISA to 'organize and control activities in the Area, particularly with a view to administering [its] resources'[156] and entrusted it with the responsibility to adopt regulations necessary for conducting exploration and related exploitation activities.[157] Regarding the protection of the marine environment, the ISA must adopt rules, regulations and procedures for 'the prevention, reduction and control of pollution and other hazards … and of interference with the ecological balance of the marine environment'.[158] In doing so it must pay particular attention to 'the need for protection from harmful effects of certain activities such as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines, and other devices related to these activities'.[159] The ISA must also provide for 'the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment'.[160] In performing these functions, the ISA must address 'the harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site'.[161] To date, the ISA has adopted Regulations on Prospecting and Exploration for the three above-mentioned types of commercially viable minerals: polymetallic nodules, polymetallic sulphides and ferromanganese crusts (Exploration Regulations).[162] All Exploration Regulations contain environmental provisions, including the obligation of the ISA and sponsoring states to apply a precautionary approach. The regulatory framework for the protection of the marine environment in the Area also includes the Environmental Management Plan

155 Chair's non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (2017), at 23 – 24. See also Chair's overview of the third session (2017) of the Preparatory Committee, at 4 – 5. Both documents are available at <http://www.un.org/depts/los/biodiversity/prepcom.htm>.

156 UNCLOS, above n 55, article 157(1).

157 *Ibid.* articles 160 para. 2(f)(ii) and 162 para. 2(o)(ii); UNCLOS Annex III, Art. 17; 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1836 U.N.T.S. 3 (28 July 1994) Annex, Section 1, para. 5(f).

158 UNCLOS, article 145(a).

159 *Ibid.*

160 *Ibid.* article 145(b).

161 *Ibid.* Annex III, article 17(f).

162 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, above n 72; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, above n 73; and Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, above n 74.

for the Clarion-Clipperton Zone,[163] and recommendations for the guidance of contractors in the assessment of environmental impacts arising from exploration activities.[164]

The Legal and Technical Commission (LTC), one of the organs of the ISA Council,[165] plays a crucial role in implementing the ISA's mandate to protect the marine environment. According to UNCLOS, the LTC must formulate and submit to the Council rules, regulations and procedures for exploration and exploitation activities in the Area, taking into account 'assessments of the environmental implications of [such] activities'.[166] The LTC must also keep such rules, regulations and procedures under review.[167] In addition, the LTC is required to prepare environmental impact assessments of activities in the Area and make recommendations to the Council on the protection of the marine environment.[168] These recommendations include issuing emergency orders to prevent serious environmental harm,[169] disapproving areas for exploitation when 'substantial evidence indicates the risk of serious harm to the marine environment',[170] and directing inspections of activities in the Area to ensure compliance with applicable (environmental) rules and regulations.[171] UNCLOS also requires the LTC to coordinate monitoring of the risks and effects of pollution resulting from exploration and exploitation activities.[172] The Exploration Regulations confer additional functions and competences on the LTC for environmental protection. They require the LTC to make recommendations to the Council on the establishment and implementation of environmental rules, regulations and procedures, and on the application of a precautionary approach and best environmental practices by the ISA and sponsoring states.[173] In addition, the LTC must 'develop and implement procedures for determining … whether proposed exploration activities in the Area would have serious harmful effects on vulnerable marine ecosystems', ensuring that 'those activities are managed to prevent such effects or not

163 Environmental Management Plan for the Clarion-Clipperton Zone, above n 76.
164 Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area, ISBA/19/LTC/8 (1 March 2013).
165 UNCLOS, above n 55, articles 163 and 165.
166 *Ibid.* article 165(2)(f).
167 *Ibid.* article 165(2)(g).
168 *Ibid.* article 165(2)(d) and (e).
169 *Ibid.* article 165(2)(k).
170 *Ibid.* article 165(2)(l).
171 *Ibid.* article 165(2)(m).
172 *Ibid.* article 165(2)(h).
173 Nodules Exploration Regulations, above n 72, Regulation 31(3); Crusts Exploration Regulations, above n 73, Regulation 33(3); Sulphides Exploration Regulations, above n 74, Regulation 33(3).

authorized to proceed'.[174] Finally, the LTC must determine whether a proposed exploration plan 'provides for effective protection and preservation of the marine environment including … the impact on biodiversity'.[175] It must not recommend approval of an exploration plan covering an area that has been disapproved for exploitation due to substantial evidence indicating the risk of serious environmental harm.[176]

In view of the significant competences invested in the LTC for the protection of the marine environment and considering that 'lack of transparency of the work of the LTC has been heavily criticized',[177] the next section pays particular attention to public access to information and participation in the LTC.

5.2.2 *Public participation in the ISA in the light of the SDGs*

Although the number of observers has increased in recent years and civil society organizations have organized side events and workshops during the ISA's annual sessions,[178] challenges exist regarding access to information and public participation in decision-making processes at the Authority. Currently, representatives of accredited organizations may attend meetings of the Assembly and the Council as observers.[179] Accredited organizations include NGOs with consultative status,[180] and upon invitation, other NGOs which have a demonstrated interest in matters under the consideration of the ISA.[181] At the Assembly, observers may sit at public meetings, make oral statements upon invitation of the President approved by the Assembly,[182] and submit written statements through the Secretariat.[183] At the Council, observers may parti-

174 Nodules Exploration Regulations, above n 72, Regulation 31(4); Crusts Exploration Regulations, above n 73, Regulation 33(4); Sulphides Exploration Regulations, above n 74, Regulation 33(4).

175 Nodules Exploration Regulations, above n 72, Regulation 21(4)(b); Crusts Exploration Regulations, above n 73, Regulation 23(4)(b); Sulphides Exploration Regulations, above n 74, Regulation 23(4)(b).

176 Nodules Exploration Regulations, above n 72, Regulation 21(6)(c); Crusts Exploration Regulations, above n 73, Regulation 23(6)(c); Sulphides Exploration, Regulations, above n 74, Regulation 23(6)(c).

177 Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154, Final Report (30 December 2016) (Seascape Consultants Ltd.) <https://www.isa.org.jm/files/documents/EN/Art154/Rep/ISA154-FinalRep-30122016.pdf> at 2.

178 A. Jaeckel, 'Current Legal Developments International Seabed Authority' (2016) 31 *The International Journal of Marine and Coastal Law* 706, 717 – 718.

179 UNCLOS, above n 55, article 169.

180 *Ibid.*

181 Rules of Procedure of the Assembly of the International Seabed Authority ('ROP Assembly') <http://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf> Rule 82(1)(e); Rules of Procedure of the Council of the International Seabed Authority ('ROP Council') <http://www.isa.org.jm/files/documents/EN/Regs/ROP_Council.pdf> Rule 75.

182 ROP Assembly, *ibid.* Rule 82(5).

183 *Ibid.* Rule 82(6).

cipate in its deliberations upon invitation of the Council without the right to vote,[184] and submit written reports through the Secretariat.[185] The meetings of the LTC are held in private and are therefore closed to observers.[186] The LTC could decide to hold open meetings, for instance when discussing 'issues of general interest to members of the Authority, which do not involve the discussion of confidential information'.[187] In practice, however, the LTC rarely holds open meetings because of the confidentiality requirement.

Indeed, the Rules of Procedure require LTC members to sign a confidentiality agreement before assuming their functions.[188] The obligation not to disclose confidential information remains in place after the end of their duties.[189] Confidential information includes 'any industrial secret, proprietary data which are transferred to the Authority in accordance with annex III, article 14, of [UNCLOS], or any other confidential information coming to their knowledge by reason of their duties'.[190] Article 14 of Annex III provides '[t]he operator shall transfer to the Authority … all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work'. However, the LTC does not have procedures in place to determine which of the data provided by contractors is confidential and consequently, the contractor determines confidentiality.[191] Currently, all data contained in contract applications and annual reports of contractors submitted to the LTC are treated as confidential.[192] As a result, environmental data provided by contractors is unavailable to the public and LTC meetings are held in private. This contravenes UNCLOS and the Exploration Regulations, which expressly provide that environmental data shall not be deemed confidential.[193]

A comparative assessment of transparency practices found that the ISA generally scored much lower than the RFMOs, especially regarding availability

184 ROP Council, above n 181, Rule 75.
185 *Ibid.* Rule 32(2).
186 Rules of Procedure of the Legal and Technical Commission ('ROP LTC') <http://www.isa.org.jm/files/documents/EN/Regs/ROP_LTC.pdf> Rule 6.
187 *Ibid.*
188 *Ibid.* Rule 11(2).
189 *Ibid.* Rule 12(3).
190 *Ibid.* Rule 12(1).
191 J.A. Ardron, 'Transparency in the Operations of the International Seabed Authority: An Initial Assessment', 95 *Marine Policy* (2018) 324-331. See also *Co-Chairs Report of Griffith Law School and the International Seabed Authority Workshop Environmental Assessment and Management for Exploitation of Minerals in the Area* (Surfer's Paradise, 23 – 26 May 2016) ('Co-Chairs Report') <https://www.isa.org.jm/files/documents/EN/Pubs/2016/GLS-ISA-Rep.pdf> at 23.
192 Ardron, above n 191, at 3. See also Co-Chairs Report, above n 191, at 23.
193 UNCLOS, above n 55, Annex III, article 14(2); Nodules Exploration Regulations, above n 72, Regulation 36(2); Crusts Exploration Regulations, above n 73, Regulation 38(2); Sulphides Exploration, above n 74, Regulation 38(1).

of information, participation in decision making and access to outcomes.[194] The same study concluded that '[p]ublic access to information, decision making, compliance reporting and justice, would greatly improve the chances of the ISA achieving long-term regulatory success'.[195] In 2016, the final report of the first Periodic Review of the ISA Pursuant to UNCLOS Article 154 (Periodic Review Report) documented the views that, although arrangements for consultation and cooperation with intergovernmental organizations and NGOs were in place, 'this is an area where improvements can be made'; that 'better dialogue and interaction with other sectoral UN agencies … is needed'; and that these efforts are 'highly relevant in the context of wider discussions related to … Sustainable Development Goal 14'.[196] The review committee made several recommendations based on the Periodic Review Report regarding transparency and access to information.[197] First, the LTC 'should be encouraged to hold more open meetings in order to allow for greater transparency in its work'.[198] Second, 'non-confidential information, such as [that] relating to the protection and preservation of the marine environment, should be shared widely and be readily accessible'.[199] Third, the review committee advised that 'the sharing and accessing of environmental data collected by contractors seems to require improvement'.[200]

In addition to SDG 14, SDG 16 is highly relevant to ocean sustainability, including the sustainable management of deep seabed minerals in the Area, for it aims at building transparent, accountable and effective institutions at all levels. Because of the interplay and potential for synergy between UNCLOS and the SDGs, which has been acknowledged by the ISA,[201] SDG 16 and targets 16.6 (institutional transparency), 16.7 (inclusive and participatory decision making) and 16.10 (access to information) could guide actions towards strengthening the LTC. I propose that such actions could include (i) creating procedures to determine confidentiality of data provided by contractors; (ii) providing public access to all environmental data available to the ISA; and (iii) ensuring public participation in all LTC meetings discussing environmental matters. Such improvements would strengthen the LTC – and the ISA in

194 Ardron, above n 191.
195 *Ibid.* at 7.
196 Above n 177, at 40.
197 Letter dated 3 February 2017 from the Chair of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea to the Secretary-General of the International Seabed Authority, ISBA/23/A/3 (8 February 2017). See Annex 'Final report on the periodic review of the International Seabed Authority pursuant to article 154 of the United Nations Convention on the Law of the Sea'.
198 *Ibid.* Recommendation 16.
199 *Ibid.* Recommendation 18.
200 *Ibid.* Recommendation 6.
201 Opening Statement by President of the Council Ambassador Peter Thomson, above n 34 and Statement by Secretary-General Michael Lodge, above n 36.

general – for sustainably managing the common heritage of mankind for the benefit of present and future generations.

6 Conclusion

Civil society organizations were not only engaged in the drafting of the SDGs but also are called on to contribute expertise to follow-up and review processes. SDG 16 specifically encourages public access to information and participation in decision making as a way of strengthening institutions at all levels. Transparent, accountable and effective institutions are crucial at a time in which unsustainable fishing practices and imminent exploitation of deep seabed minerals threaten to deepen the ocean's rate of ecological decline. SDG 16 thus supports the achievement of SDG 14 – conserve and sustainably use the ocean and marine resources – providing a guiding framework to construct the institutional strength necessary to achieve ocean sustainability.

Institutions managing the ocean commons face several challenges that weaken their performance, including ineffectiveness, unaccountability and lack of transparency. Public participation can contribute to solving these problems; however, both RFMOs and the ISA provide only restricted public access to information and participation in decision making. To be sure, this chapter has shown that RFMOs tend to be reluctant to include NGOs in their decision-making processes. In addition, the ISA keeps environmental information provided by contractors confidential and its LTC – the organ with the most significant role regarding environmental protection – holds most of its meetings as closed sessions. From the perspective of public participation, therefore, the existing conception of ocean commons governance is one in which states and industry organizations are the main actors and civil society organizations are relegated to a secondary role.

In line with Rio Principle 10 – and its elaboration in subsequent international agreements – and reflecting the increasing support it has gained since its adoption in 1992 (including by current negotiations on the draft text of a binding agreement on the conservation and sustainable use of marine biological diversity in ABNJ),[202] the SDGs promote a new conception of ocean commons governance through encouraging public participation in building effective, accountable and transparent institutions. In the new conception, civil society organizations join states and industry organizations as principal actors in achieving sustainable governance of high seas fisheries and deep seabed

202 Chair's non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, above n 155. The Chair's non-paper shows that public participation is being discussed as one of the guiding principles and approaches for the new regime (see e.g., pp. 18, 37 and 70).

minerals in the Area. Guided by the SDGs, governing institutions could take steps towards improving existing participation mechanisms. RFMOs could make rules on NGO participation less restrictive as well as include NGOs in performance reviews. The ISA in turn could develop procedures to determine confidentiality of data provided by contractors, provide public access to all environmental data, and ensure public participation in LTC meetings discussing the protection of the marine environment. Such measures could support RFMOs and the ISA in moving much closer to achieving SDG 14.