



**Ref. No. 7/703/1<sup>25</sup>**

The Ministry of Foreign Affairs and Foreign Trade presents its compliments to the Secretariat of the International Seabed Authority (ISA) and has the honour to refer to the latter's Note No. ISA/EOSG/2019/152, dated 3<sup>rd</sup> May 2019, requesting comments on the first draft of the High-Level Action Plan for the International Seabed Authority for the 2019-2023 period as well as draft Key Performance Indicators.

The Ministry further has the honour to enclose herewith comments on the High-Level Action Plan (HLAP).

The Ministry of Foreign Affairs and Foreign Trade avails itself of this opportunity to renew to the Secretariat of the International Seabed Authority (ISA), the assurances of its highest consideration.



Secretariat  
International Seabed Authority

**KINGSTON**

29<sup>th</sup> May 2019

## **Jamaica's Draft Comments on High Level Action Plan (HLAP) and Key Performance Indicators (KPI)**

- 1) Does the high-Level Action Plan (HLAP) reflect accurately the actions and outputs that the Authority needs to undertake to meet the expected outcomes set out in the Strategic Plan of the Authority for the 2019-2023 period?
- 2) Are the Key Performance Indicators (KPIs) sufficiently clear and precise to assess the performance of the Authority towards achieving the strategic directions set out in the Strategic Plan of the Authority for the 2019-2023 period?

The Report of the Secretary-General on the implementation of the Strategic Plan for the ISA addressing Draft Performance Indicators for the 2019-2023 period notes that,

As the next step in the development of the Strategic Plan, the Assembly requested the Secretary-General *inter alia* “to prepare a high-level action plan and to include key performance indicators and a list of outputs for the next five years, taking into account available financial and human resources” (ISBA/24/A/10, point 3).

In general, the performance indicators (PI) are sufficiently clear and precise. However, the PI may not be read in isolation but in relation to the high level actions (HLA) and outputs.

Most outputs with a specific target date are projected for completion in 2019 without any reference to follow-up actions required in the ensuing years. HLA and outputs should be established for the complete 2019-2023 period. HLA establish the basis for measuring the successful implementation of the Strategic Plan in accordance with the agreed performance indicators which, as indicated in the Secretary-General's Report, will be reviewed and evaluated regularly.

It may be noted, for example, that performance indicator (PI) 2.1 addresses the “Adoption of rules, regulations and procedures as well as standards and guidelines covering all phases of deep sea mineral exploration and exploitation.” However, the HLA and outputs do not provide a clear path to the adoption of the

draft Exploitation Regulations and accompanying standards and guidelines. The same comment may be made in relation to PI 3.1 and PI 7.1.

There are certain instances where further refinement of the text of PI would seem to be desirable. For example, PI 5.3 and PI 5.4 both address capacity-building activities. PI 5.3 refers to activities with “*effective results*” for the receiving member States; PI 5.4 refers to activities with “*long-term impact*” for the receiving member States. It is not clear what criteria will be used to distinguish activities with *effective results* from those with *long-term impact*. Indeed, those activities that are most effective may be said to be those with long-term impact on the receiving member States.

Some performance indicators appear to suggest insufficient ambition on the part of the ISA. For example, PI 6.6 is limited to “Identification of possible approaches to the establishment of the Enterprise.” In light of the Polish proposal for a joint-venture with the Enterprise and the work to be undertaken in relation thereto, it appears almost derisory to suggest that for the period ending in 2023 the Authority would have made no further progress than to identify possible approaches to the operationalization of the Enterprise.

Additionally, with respect to PI 6.1, we would note that the number and percentage of Members from developing States attending ISA meetings is dependant, in part, on the importance of matters included in the agenda of those meetings. The relevance and importance of matters addressed by the Assembly, in particular, for the achievement of SDGs for Members from developing States requires greater attention. An HLA associated with PI 6.1 could provide for questionnaires to be sent to developing States not attending particular meetings of the ISA addressing the extent to which they prioritize ISA matters in the pre-exploitation phase and ways in which the work of the Assembly may be made more relevant to national priorities and agendas.

The following specific comments concern the identified HLA and outputs as presented in the High Level Action Plan of the International Seabed Authority and Priorities for the 2019-2023 Period.

**TABLE 1: Strategic Directions and Corresponding High-Level Actions (HLAs)**

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**1. Realize the role of the Authority in a global context**

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HLA 1.2.3 provides for the consideration of “issues” under the Convention and international law relevant to the role of the ISA. Article 160(2)(k) of the UN Convention on the Law of the Sea (UNCLOS) provides for the Assembly considering “problems of a general nature in connection with activities in the Area arising in particular for developing States ...”. The objective of preparing a Strategic Plan with HLA and PI is with a view to setting tangible activities and markers. HLA 1.2.3 could be stated with greater specificity. Addressing matters concerning biological diversity in areas beyond national jurisdiction (BBNJ) and the implications of the negotiations on an agreement in New York is a specific issue that should be addressed in the 2019-2023 period. HLA 1.2.4 appears designed to address the potential for inadvertently creating conflicting mandates in possibly establishing new institutions with jurisdiction in areas beyond national jurisdiction (ABNJ). This is an issue that the Council and Assembly should deliberate upon. Should there be other specific issues such as the laying of cables and pipelines or the treatment of underwater cultural heritage, it would be useful to flag these issues under HLA 1.2.3.

HLA 1.3.1 This HLA is not framed as a statement of a tangible measure to be undertaken. HLA should state concrete actions to be undertaken within the period 2019-2023 for which the ISA can be held to account. Strategic direction 1.3 lies at the heart of the ISA's mandate and requires the development of the rules on the environment, a benefit-sharing mechanism and compensation for land-based producers in a way that maintains the viability of seabed mining. An HLA that could be proposed as a first step may provide for promoting understanding of the different perspectives of Member States of the benefits that it is believed should accrue from activities in the Area. This may be facilitated through, *inter alia*, presentations by officials and debates with open participation during Council and Assembly sessions (possibly luncheon side-events), and workshops. The adoption and implementation of the balanced regulations, rules and guidelines reflecting the shared understandings / consensus of Member States within the five-year Strategic Plan is, undoubtedly, the ultimate goal.

HLA 1.4.1 Reference is made to providing “interpretation and clarification if requested”. The interpretation of the legal regime is tasked to the Seabed Disputes Chamber under UNCLOS. The Advisory Opinion of 1 February 2011 on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* provides useful guidance to the ISA, Member

States and Contractors. The possibility of seeking further authoritative guidance from the International Tribunal for the Law of the Sea (ITLOS) may be considered and would seem to be preferable to reliance on any other official source for the interpretation of applicable rules and regulations.

## **2. Strengthen the regulatory framework for activities in the Area**

HLA 2.2.1 Secretariat paper ISBA/25/C/11 (at para. 27) notes some of the difficulties with the definition of good industry practice in that it may appear overly complex and misleading and suggests possibly separating out the notion of best environmental practice. A first step in strengthening the regulatory framework is enhancing the clarity, understanding and appreciation of the terms used. We would suggest that this be incorporated into HLA 2.2.1

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HLA 2.4.1 The Enterprise was conceived as the principal means through which most developing countries would have a realistic opportunity to participate in activities in the Area. An HLA linked to this should therefore be included in relation to Strategic direction 2.4 as there is a need to make operational within the regulatory framework the principles of the Convention that are designed to facilitate the participation of developing States in the Area.

HLA 2.5.1 This addresses some of the work assigned to the Interim Director-General of the Enterprise under the 1994 Agreement, Annex, Section 2, para. 1 (a). The HLA may also usefully address how this work will be incorporated into the discussions of the LTC and Council on the draft Exploitation Regulations and the financial regime providing for royalties and/or profit-share, benefit-sharing and compensation for land-based producers.

## **3. Protect the marine environment**

The HLA are well structured in setting out what is to be developed, implemented and kept under review. This facilitates measuring progress establishing targets over the five-year period and through this, achieving tangible outcomes.

Implementation will require an accepted definition of confidential information and possibly the development of mechanisms to incentivise the sharing of information that might otherwise be treated as 'confidential'; e.g. HLA 3.3.1.



#### **4. Promote and encourage marine scientific research in the Area**

- [HLA 4.1.1 & HLA 4.1.2](#) The HLAs merely restate the Strategic direction 4.1. The HLA should indicate how this will be achieved similarly to HLA 4.1.3.

[HLA 4.4.1](#) The words “in the organization” are to be removed as they are limiting.

[HLA 4.2.2](#) This should address how research results and analysis will be disseminated and appears linked to HLA 4.3.2 and HLA 4.4.2.

[HLA 4.5.1](#) This restates the initial statement in Strategic direction 4.5 but fails to address how the process for assessing the environmental implications of activities in the Area will be developed. Additionally, there is no indication of what will be done with the information. It is proposed that it be presented to the Council periodically.

[HLA 4.5.2](#) Strategic direction 4.5 does not deal with the dissemination of information. This would seem more aligned with Strategic direction 4.2.

#### **5. Build capacity for developing countries**

[HLA 5.1.1](#) Greater specificity is required. How will the identification of the needs of developing States be facilitated? Will there be questionnaires for missions to complete, focus groups or regional workshops, etcetera? The desire is to have measurable defined actions that may be assessed.

- [HLA 5.4.2](#) May “facilitate” entail the provision of incentives to Contractors and/or the inclusion of appropriate language in the draft Exploitation Regulations, possibly supplementing the text of DR 39?

#### **6. Ensure fully integrated participation by developing States**

[HLA 6.1.1](#) The word “Consider” should be replaced with “Develop”. The meaningful nature of the work to be undertaken by the Assembly in advancing the achievement of the SDGs will shape developing State participation in the implementation of the regime for the Area and the work of the ISA. The progress made on the benefit-sharing regime, the operationalization of the Enterprise and compensation to land-based developing country producers are important to the

majority of developing countries. The protection of the environment and BBNJ are matters on which many developing countries are actively involved. Facilitating greater engagement of the Assembly where all Member States are represented will assist in enhancing participation in and prioritization of the work of the ISA.

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HLA No HLA is included for Strategic direction 6.2. We are of the view that HLA should be identified for all tasks. A review such as contemplated by Strategic direction 6.2 could be a matter for the consideration of the Assembly in accordance with UNCLOS, Article 160(2) (k) and the basis of a study initiated by the Assembly under Article 160(2)(j).

HLA No HLA is included for Strategic direction 6.4. The 1994 Agreement, Section 2(1) (e) requires the interim Director-General of the Enterprise to evaluate the information and data relating to reserved areas for the ISA. Table 2 refers to a "Report on detailed resources assessment of the reserved areas that are available to the enterprise and developing States". The HLA could therefore provide for a report to be prepared. We further observe that in some instances the source of the obligation (whether UNCLOS or the 1994 Agreement) which informs the Strategic direction is stated. However, in instances such as this it is not. We would recommend that a consistent approach be adopted throughout the text.

#### **7. Ensure equitable sharing of financial and other economic benefits**

No comment

#### **8. Improve the organizational performance of the Authority**

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HLA 8.1.6 Clarify or perhaps refine the phrase "in a constant state of production"

#### **9. Commit to transparency**

No comment

### **TABLE 2: HIGH-LEVEL ACTIONS (HLAs) AND RELATED OUTPUTS**

HLA 1.1.1 The Assembly should be listed as an associated organ in light of the charge given to the Assembly under UNCLOS, Article 160(2)(k) to consider problems of a general nature in connection with activities in the Area arising in particular for developing States.

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[HLA 1.1.2](#) The comment in relation to HLA 1.1.1 applies equally here also.

[HLA 1.3.1](#) Article 136 of UNCLOS defines the Area and its resources as the Common Heritage of Mankind; Article 140 elaborates on the benefits to be provided for mankind as a whole; and Article 150(i) of UNCLOS establishes as one of the policies relating to activities in the Area the development of the common heritage for the benefit of mankind as a whole. The tangible realization of the Common Heritage of Mankind in the Area and its resources is central to the work of the ISA. It is not merely a task to be assigned to the Assembly but must inform the work of all organs of the Authority which should be listed as associated organs. Specific measurable outputs should be established by which to measure progress; please see some suggestions advanced in the comments on HLA 1.3.1 under Table 1.

[HLA 1.4.2](#) This action should be continuous.

[HLA 1.5.1](#) The requirement for reasonable regard for other users of the marine environment must be refined in the draft Exploitation Regulations. We would suggest that the LTC and Council be included as associated organs.

The Strategic Direction listed on page 13 is incorrect; SD 1 is repeated instead of SD 2.

[HLA 2.1.1](#) Target dates are not established post 2019. As this is a five-year Strategic Plan, projected timelines which are realistic and achievable should be included for the entire period. The action listed under 2.1.1 (v) should be continuous.

[HLA 2.1.2](#) This should be a continuous exercise and not limited to 2019.

[HLA 2.2.1](#) No output is stated. We would suggest that this be made a standing item on the Council's agenda. The LTC and Secretariat may compile and report annually on studies etc addressing good industry practice and best practices for environmental management and assess the extent to which this is being incorporated by contractors voluntarily or whether consideration should be given to amending the rules, regulations and procedures of the ISA.

[HLA 2.4.1](#) No output is provided. We would suggest possibly maintaining and publishing consolidated statistics on the participation of developing countries



highlighting, for example, the number of developing States submitting comments on ISA documents (as requested from time to time), participating in training programmes and workshops, holding exploration contracts or sponsoring contractors, etc. This would require that the Secretariat also serve as a responsible organ in addition to the Assembly.

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[HLA 2.5.1 & HLA 2.6](#) The timelines should be extended post 2020 to address the incorporation of the findings and study in developing a payment mechanism, equitable-sharing regime, and compensation for land-based producers.

[HLA 3.1.1](#) Follow-up actions post 2019 should be stated. Additionally, as regards the inspection mechanism addressed in (iv), while UNCLOS Article 162(2)(z) charges the Council with establishing an appropriate mechanism for directing and supervising a staff of inspectors, the LTC also has a role and should be included as an associated organ. Article 165(2)(m) provides the LTC with an important role in making recommendations to the Council concerning the direction and supervision of a staff of inspectors. Having the benefit of the views of the LTC on the inspection mechanism to be examined by Council would seem appropriate.

[HLA 3.1.2](#) Follow up actions post 2019 should be stated.

[HLA 3.1.4](#) As suggested in the previous segment it would be useful for the Secretariat to report to Council on developments with regard to best environmental practices and available techniques. Such a report should be included as an output whereas none is currently stated.

[HLA 3.2.2](#) A measurable output is the extent to which REMPs are being implemented in 2023. We would also note that the Secretariat will have a role in facilitating cooperation with other international and regional bodies with a mandate to establish marine protected areas and other conservation measures. As such, the Secretariat should be included as an associated organ.

[HLA 3.2.4](#) No output is stated. We would suggest providing for inter-agency MOUs.

[HLA 3.3.1](#) The need for consensus on what constitutes non-confidential information or the mechanism for determining same is important and constitutes an associated output that should be provided for.

HLA 3.3.2 Participation is encouraged where mechanisms are put in place to show how stakeholders' views are taken into account. How this may be addressed is an associated output that could be stated.

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HLA 3.4.3 No output is stated. We would suggest providing for inter-agency MOUs.

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HLA 3.5.2 No output is stated. We would suggest that the matter be included as a standing item on the Council's agenda.

HLA 3.5.4 No output is stated. We would suggest providing for inter-agency MOUs. The Secretariat would therefore also have a role as a responsible organ.

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HLA 4.1.1 & 4.1. 2 The Council and Secretariat should also be included as associated organs.

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HLA 5.2.2 No output is stated. We would suggest that reference may be made to the matter being treated in the context of the Secretary-General's annual report to the Assembly.

HLA 5.3.1 The reason for the inclusion of the LTC as playing a coordinating role under (iii) is not clear.

HLA 5.4.1 The LTC should be included as an associated organ given the LTC's role in reviewing the formal written plans of work and subsequent supervision upon request of the Council of activities in the Area as provided in UNCLOS, Article 165(2)(b) & (c).

HLA 6.1.1 & HLA 6.1.2 Identification of the needs of developing countries as provided under HLA 6.1.2 precedes consideration of the measures to increase participation as provided under HLA 6.1.1. However, the target completion year for HLA 6.1.1 is 2020, while that for HLA 6.1.2 is 2023. HLA 6.1.2 has two components. Addressing the needs of developing States is the second component of HLA 6.1.2 and this would logically follow HLA 6.1.1. An adjustment of the HLA and target dates is therefore required. Additionally, the description in the second column of HLA 6.1.1 does not address the full scope of HLA 6.1.1 which speaks more broadly to "the implementation of the regime of the Area". The description is limited to the work of the ISA and marine scientific programmes. The participation of

developing States in the exploration and exploitation of mineral resources whether individually or collectively with all Members through the Enterprise should also be addressed. The role of the Secretariat as an associated organ with respect to HLA 6.1.2 should also be included.

[HLA 6.2](#) No HLA is provided for Strategic direction 6.2 concerning the undertaking of a review of the extent of the participation by developing States in the Area, including identifying and understanding any specific barriers to such participation and addressing them accordingly, including through targeted outreach and partnerships. It is suggested that this could be a matter considered by the Assembly under UNCLOS, Article 160(2)(k) and the basis of a study initiated by the Assembly under Article 160(2)(j). HLA could be formulated accordingly.

[HLA 6.4](#) No HLA is provided for Strategic direction 6.4 concerning an assessment of reserved areas. This relates to the role assigned to the interim Director-General under the 1994 Agreement. The HLA may require that the technical assessment be undertaken or commissioned by the Secretariat. This appears to be what is contemplated although no HLA is stated.

[HLA 6.5.1](#) The Strategic Plan is for 2019-2023 but no actions beyond 2019 are contemplated.

[HLA 7.1.1](#) The 1994 Agreement, Annex, Section 9, para. 7(f) provides that the Assembly and Council shall take into account the recommendations of the Finance Committee on rules, regulations and procedures on equitable sharing. HLA 7.1.1 should therefore establish further target dates for the actions to be taken by the Council and Assembly. A 2020 or subsequent target date could be established for consideration of the FC study by the Council with a view to making recommendations to the Assembly thereon in accordance with UNCLOS Article 162(2)(o)(i).

[HLA 8.1.1](#) Note is taken of ISBA/19/A/12, Decision of the Assembly of 25 July 2013 concerning overhead charges for the administration and supervision of exploration contracts, which amended the standard clauses for exploration contracts to provide, *inter alia*, that the amount of the annual overhead charge may be revised by the Authority to reflect the costs actually and reasonably incurred. The Decision of the Assembly further called upon the Council to review the amount of the overhead charge every two years to ensure that it continues

to reflect the costs actually and reasonable incurred. The Secretary-General is charged with reporting annually on the implementation of the Decision to the Assembly. The Council and Assembly therefore must be included as associated organs with regard to (vii). The cost for the supervision and administration of the contracts for exploration is a matter of importance for the budget and the Council and Assembly should receive a full report on the exact costs involved.

HLA 8.1.4 The Assembly should be included as a responsible organ with respect to (ii) as the Assembly must approve the budget.

HLA 8.4.2 The Council and Assembly should be included as associated organs given the implications for the budget.

HLA 9.3.1 No output is provided. It may be suggested that the first step in raising awareness of the “chain of responsibility and accountability” would be to define the scope of the issues to be addressed and the nature of the ‘chain’ whether ‘soft law’ or ‘hard law’. The target date for this first step could be 2019 and the responsible organ would be the Secretariat.

HLA 9.3.2 The word “encourage” as opposed to “require” is used in (iii). The provision of a detailed programme of activities for a five-year period is desirable. The Exploration Regulations require the submission of a programme of activities and anticipated yearly expenditures in respect thereof for the immediate five-year period with a view to receiving approval of the plan of work for exploration. However, the contract remains in force for a fifteen-year period and no provision is made to annually review and update the plan for the succeeding five-year period. An output against this HLA may be for the Council to consider linking any extension of exploration contracts and the grant of any new contracts to the provision of a detailed programme of activities for rolling five-year periods, that is to say, the annual submission of a programme of activities for the ensuing five-year period (incorporating revisions as may be necessary to the activities to be undertaken during the four years remaining of the previous five-year programme). The draft Exploitation Regulations, DR 40, require contractors to submit an annual report on compliance with the terms of the exploitation contract and specifies what this shall include, including (m) details of any proposed modification to the Plan of Work and the reasons for such modifications. The adequacy of the language in the draft Exploitation Regulations may also be reviewed.

[HLA 9.3.3](#) No output has been included. We would suggest that a report on the effectiveness of working practices and procedures be included in the Secretary-General's annual report to the Assembly as an output to be included in the second column.

[HLA 9.4.1](#) No responsible organ is identified with respect to (ii). This should be the Assembly.

[HLA 9.4.2](#) No responsible organ is identified with respect to (ii). We would suggest that this be the Secretariat and that the Council be named as an associated organ.