

## The Pew Charitable Trusts Response to Consultation on the ISA Strategic Plan 2024-2028

### *General Comments*

The next 5 years of the ISA's operation will be a pivotal moment in its history. There is wide public interest in shaping how the ISA as an organisation will identify and navigate the complex challenges it faces. The Strategic Plan appears to be a key instrument in this regard. Wide public participation and due process should be applied to its drafting and development and member States or independent parties should take the lead in assessing the ISA's performance. Holistic criticism of what has worked well and what has not, what has been progressed and what has not, should inform the development of the new Strategic Plan. Sufficient time must also be given to enable a meaningful review of the proposed Strategic Plan (and assessment of the previous Strategic Plan) by stakeholders, and a full opportunity for comments and feedback to be taken into account. A 4-week consultation period is not sufficient, particularly where there been inadequate notification of the consultation to the wider public or stakeholders with interest in the ISA's work.

As such, we recommend that this draft not be adopted at the July session and that member states, observers and other stakeholders be given additional time to comment. To help enable further consideration on this draft, the Assembly could extend the current Strategic Plan for another year. We also recommend that the ISA conduct its second periodic review under Article 154 and that the outcomes from this review be used to further develop the next Strategic Plan.

### *General questions*

- 1. Does the Draft Strategic Plan for the period 2024-2028 clearly encapsulate the mandate and responsibilities set out for the Authority by the Convention and the 1994 Agreement?**

Whilst addressing this question, we would like to highlight that the ISA and its membership are not responsible *only* to adhere to UNCLOS, but also to operate within the constraints of other relevant provisions and principles of international law, and global policy commitments.

Para 4(i) in the "Introduction" introduces the requirement to apply the **precautionary approach**. No where else in the Plan is the word 'precaution' used, and there is no indication in the Plan of specific steps the ISA will take to operationalise the precautionary approach. We would propose a new Strategic Direction ('SD') under SD 2 (regulatory framework), focused on the ISA developing a precautionary approach, both procedurally and substantively, to decision-making on applications for plans of work.<sup>1</sup>

We would also suggest a new Strategic Direction under SD 3 (protection of the marine environment) for the ISA Assembly and Council to develop and adopt an **environmental policy**, that not only outlines how to apply the precautionary principle/approach but also assists to translate environmental obligations set forth in UNCLOS into goals and actions at the ISA, and ensures that exploitation does not commence in the absence of the scientific data essential to evidence-based decision-making.

The Strategic Plan's focus on the protection of the marine environment (SD 3) and marine scientific research (SD 4) are welcomed. We also appreciate the important recognition in the "Context and Challenges" section of the "*considerable scientific, technical and commercial*

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<sup>1</sup> See: Jaeckel, A. L. (2017). 'The International Seabed Authority and the Precautionary Principle'. Leiden, The Netherlands: Brill | Nijhoff: <https://doi.org/10.1163/9789004332287>

*uncertainty*” in which the ISA currently operates. Key to delivering SD 3 will be understanding the environments that may be impacted by mining (as acknowledged in SD 4.5). Such understanding will be enhanced by baseline data collected via exploration activities and/or other marine scientific research projects. We would welcome the need for **sufficient baseline data collection** to be expressly included in the SDs, alongside acknowledgement of the ISA’s own role to set the rules for what constitutes adequate baselines, in order for the environment, and the impacts upon them, to be sufficiently understood and monitored. We consider the issue of such rules by the ISA a matter of considerable urgency over the course of the next five years, and beyond, and also noting the sampling programmes already taking place under exploration contracts.

**Public participation** should be a key objective for the ISA<sup>2</sup>. Terminology used in SD 3.3. of “*stakeholder participation, as appropriate*” and the focus on access to environmental information from DeepData is too narrow and limiting. SDs 8.2 and 9.4 are more encouraging, and we welcome the aim of ‘more inclusive decision-making’ and ‘open, meaningful and constructive dialogue’. We would suggest that use of the term ‘stakeholder’ be replaced with ‘public’ (or that stakeholder is defined in the document) to reflect the ISA’s duty to act on behalf of humankind as a whole. We also consider the wording of SDs 8 and 9 should be amended to require proactive and broader information-sharing and outreach by the ISA, with a specific aim to reach an audience beyond the narrow coterie of organisations already on the ISA mailing list.

Participatory decision-making is not only about access to information, but also about use of that information in decision-making and ‘**access to justice**’ i.e. recourse for affected individuals to raise concerns or appeals, and have them heard by an empowered and impartial review body. Such measures appear absent at the ISA currently, and are not addressed in the Strategic Plan. We would like to see these included. Repeating a call we have made numerous times over the years, a first step would be adoption by the ISA of a public participation policy or strategy. We note that the need to develop such a policy has been identified by member States and observers within the ISA’s intersessional working group on stakeholder consultation. We would also like to see creation of mechanisms for dispute resolution, administrative decision review, complaints-handling and whistle-blowing.

The Strategic Plan should include a new SD for engagement with **sponsoring States**, whether individually or collectively, to inform the development of the overarching regulatory regime, and to avoid jurisdictional gaps or overlaps in controls and regulation.<sup>3</sup>

In SD 2.2, we disagree with the prominence given to ‘sound commercial principles in order to promote investment’ as underpinning the rules, regulations and procedures of the ISA governing exploitation. ‘**Sound commercial principles**’ are referenced in UNCLOS in relation to (a) joint ventures with the Enterprise, and (b) the ISA’s production policy and not stated as a necessary underpinning to the ISA’s overall regime and regulatory framework for exploitation.

We welcome the emphasis on transparency as a guiding principle for a publicly accountable international organization like the ISA. Para 4 subpara (j) on **transparency** could be strengthened, to recognize that the ISA’s goal should be to ensure transparency and accountability not only in communicating outcomes, but also during the process of decision

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<sup>2</sup> See: Morgera and Lily ‘Public participation at the International Seabed Authority: An international human rights law analysis’. RECIEL. 2022; 31( 3): 374- 388. <https://doi.org/10.1111/reel.12472>; and Ardron, Lily & Jaeckel (2023). “Chapter 16: Public participation in the governance of deep-seabed mining in the Area”. Research Handbook on International Marine Environmental Law: Edward Elgar Publishing. <https://doi.org/10.4337/9781789909081.00026>

<sup>3</sup> International Seabed Authority (2016) Discussion Paper: ‘Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining’ <https://www.isa.org.jm/wp-content/uploads/2022/12/DP4.pdf>

making. We suggest that the strategic direction should reflect actionable goals that the ISA and its organs could take to promote transparency. These include opening meetings of the Legal and Technical Commission (as has been requested by Council<sup>4</sup>), ensuring fair and transparent procedures are followed in recruitment processes for external consultancies that are utilized from time to time, as well as some actionable goals towards enhancing the ISA's electronic public notice systems (including its website) so that stakeholders can more readily access developments at the ISA and the decisions it takes.

**2. How do you think the Strategic Plan and associated High-Level Action Plan have contributed to fulfil the mission of ISA (as per the mission statement)?**

It is not clear to us the specific role that these Plans have played in directing or driving forward the work of the ISA. We would encourage the ISA to conduct a thorough and impartial evaluation of the performance of the ISA against its Plans for 2019-2023.

We note that the draft Strategic Plan for 2024-2028 is almost identical to the 2019-2023 Plan. This suggests that little has changed over the last four years, which may indicate lack of progress by the ISA for the 2019-2023 reporting period. It would be good to investigate more thoroughly what directions and actions were not achieved under the previous Plans, and the reasons for this, to inform the ISA's work going forward.

The **review into the performance of the 2019-2023 Plan**<sup>5</sup>, commissioned by the Secretariat, lacks this more critical perspective. In the report, performance tends to be evaluated on the quantity, rather than quality or impact, of outputs. Deliverables that were less well-progressed are not highlighted (e.g. development of rules on liability, adoption of rules on benefit-sharing, the 'urgent need for technology transfer'). It appears the review did not take into account any external ISA documents (peer-reviewed literature, third-party reporting) and did not include interviews from representatives from the region of Africa or the Pacific, nor from any member State or organisation calling for a moratorium/precautionary pause. As a result, it is possible that relevant perspectives are being missed or under/over emphasised.

We are surprised to see no mention of the Assembly's 5-yearly general and systematic review of how the international regime of the Area has operated in practice, as is required by UNCLOS Article 154. The last (and to date, only) **Article 154 periodic review** was conducted in 2015-2017, and as such another review must now be due. We would like to see such a review both included as a required action under the Strategic Plan for 2024-2028, but also operating as a feedback loop that can reflect upon and improve the ISA's strategic planning and delivery in the future.

**3. To what extent to do you think the work of ISA provides a useful model for sustainable management of the global commons as Steward of the Area and its resources?**

The relevance of this question (and terminology) to the matter at hand is unclear to us.

**4. What should be the priorities of the Authority for the next five years?**

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<sup>4</sup> Decision of the Council of the International Seabed Authority relating to the reports of the Chair of the Legal and Technical Commission, ISBA/27/C/44

<sup>5</sup> <https://www.isa.org.jm/wp-content/uploads/2023/05/Review-of-implementation-of-ISA-SP-2019-2023-Final.pdf>

There are well-founded concerns around a current lack of the scientific information necessary for the ISA to fulfil its duty of environmental protection under Article 145 UNCLOS<sup>6</sup>. More scientific understanding is required both to develop the ISA's regulatory regime (SD 2) and for the ISA to be able to take responsible permitting decisions for the first plans of work for exploitation that may be submitted during this Plan's period. We therefore see as a key and urgent priority for the ISA the elaboration of **environmental thresholds** (classifying specific levels of impact that are acceptable or unacceptable). This may require additional scientific information than is currently available.

In this regard we refer again to the requirement for an overarching ISA environmental policy, as well as adequate baseline data – as elaborated in our response to Q1, above. We would further recommend that the ISA in the next five years should take a greater role in directing research efforts to close the critical scientific gaps. The Strategic Plan could introduce more leadership and targeted science programmes from the ISA in this regard, for example via a new Strategic Direction (under SD 3) to develop and coordinate a **targeted scientific research agenda for all regions** in the Area where exploration is taking place. The aim would be the collection of sufficient environmental information to enable the ISA to set and implement relevant rules to ensure the effective protection of the marine environment as required by, inter alia, article 145 and Part XII. It could also be added into SD 4.3 (strengthen alliances with other organisations) and/or SD 4.4 (engagement with scientific community) that the ISA will engage with independent scientific partners on the development and delivery of this research agenda. In this regard, we welcome news of the ISA's new Seabed Sustainability Knowledge Initiative (SSKI) and believe region-specific research agendas could help SSKI project managers identify and prioritize SSKI products that will help close key scientific gaps. Clear institutional environmental goals (elaborated by the ISA's decision-making organs, in an environment policy) would also help provide member State ownership of and direction to this new project. The Plan could usefully elaborate on how SSKI may also contribute to its SDs.

Alongside the need for an enhanced research agenda, we would like to see the ISA prioritise the consultative development, publication and implementation of an agreed upon **data management strategy**, which is clear about how data is collected, categorised, handled and made publicly available. This appears absent from the Plan as currently drafted (though we welcome acknowledgement of the need to 'further develop and reinforce the operational capabilities of DeepData' in particular.<sup>7</sup>)

We note that the Strategic Plan focuses on development of the regulatory regime for exploitation. Alongside this, we would welcome inclusion of a Strategic Direction focused on **implementing existing rules, regulations and procedures for exploration**, and ensuring contractor compliance under the 31 exploration contracts already issued, with monitoring and reporting on those contracts to member States and the public.

We also consider reform of the **environmental impact assessment** procedures under the ISA's exploration regulations an urgent priority<sup>8</sup>, particularly as we can expect increased test-mining activities from exploration contractors in the next 5 years. We note that concerns about inadequate controls in the exploration regime were also shared by some member States within the intersessional working group on test mining.

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<sup>6</sup> See: Amon et al (2022) 'Assessment of scientific gaps related to the effective environmental management of deep-seabed mining', *Marine Policy*, Volume 138, 2022, <https://doi.org/10.1016/j.marpol.2022.105006>.

<sup>7</sup> See: M Rabone et al (2023) 'A review of the International Seabed Authority database DeepData from a biological perspective: challenges and opportunities in the UN Ocean Decade', *Database*, <https://doi.org/10.1093/database/baad013>

<sup>8</sup> See: 7<sup>th</sup> report of the Code Project (2023) [https://www.pewtrusts.org/-/media/assets/2023/03/cp-eia-2023\\_02032023\\_cp.pdf](https://www.pewtrusts.org/-/media/assets/2023/03/cp-eia-2023_02032023_cp.pdf)

Similarly SD 1.4's wording that the ISA will 'promote... implementation' of the ISA's rules is inappropriately weak. The aim should be to 'ensure', or to '**monitor and enforce implementation of the rules of the ISA**'. The requirement for the ISA to develop an inspectorate function and programme of inspections for the purposes of compliance monitoring and enforcement should also be added to the Strategic Plan as an important focus for 2024-2028.

Although the ISA's regulatory regime rightly receives significant attention in the Strategic Plan, no express reference is made to the need to develop a suite of **Standards and Guidelines**, as subsidiary documents to the Exploitation Regulations currently under negotiation. This seems an odd omission given the likely dominance, complexity and urgency of this particular part of the ISA's work over the next few years.

We also note that no express reference is made to the development of a **payment regime for exploitation** (in the "Context and Challenges", or any other part of the Strategic Plan). This is a fundamental and contentious part of the ISA's regime, and unless and until progress is made towards consensus on the terms of the payment regime, elements of the payment regime may present a blockage to adoption of the Exploitation Regulations. For these reasons, we would recommend specific mention and prioritisation is given in the Strategic Plan for progressing the relevant negotiations and regulations on the financial terms of exploitation contracts.

#### *Specific questions*

##### **5. Does the "Mission Statement" (unchanged from the first strategic plan) continue to accurately reflect the mandate of the Authority?**

Departures from the language of UNCLOS should be avoided in describing the mandate of the ISA. For example, UNCLOS does not mandate the ISA to '*promote*' the development of the resources of the Area, as is described in the Mission Statement.

##### **6. How do you consider that the context and challenges identified remain relevant? Should there be any new elements identified?**

The **triple planetary crisis** should be highlighted in the Context and Challenges section. The inter-linked and urgent pressures presented by the current state of global pollution, biodiversity loss, and climate crisis, are essential context in shaping the way in which the ISA operates.

It is positive to see the **global biodiversity framework**, and the **BBNJ treaty**, identified as relevant context for the ISA's work.

It seems odd that, apart from a possible oblique nod in paragraph 12, the pressure of the **2-year rule** triggering, and the anticipation of receiving a world-first application for exploitation in the Area during the Plan period<sup>9</sup> (potentially, before the ISA has achieved readiness in terms of RRP and institutional capacity), are not included as relevant context and challenges.

During the last Strategic Plan period, a movement calling for a **moratorium** (or similar deferral in exploitation) at the ISA has built momentum. Such voices have included ISA member States, Parliamentarians, private sector, financial institutions, fishery organisations, scientists and civil society. This seems highly pertinent to the ISA's operating environment, and appropriate to include in the "Context and Challenges" section.

In the "Context and Challenges" paragraphs on **equitable benefit-sharing criteria**, it is unclear what is meant by the challenge '*to understand the financial and economic model for*

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<sup>9</sup> [https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA\\_26\\_C\\_38-2108753E.pdf](https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_C_38-2108753E.pdf)

*deep seabed mining in an environment of considerable commercial uncertainty, including the trends of and the factors affecting supply, demand and prices of minerals which may be derived from the Area, bearing in mind the interests of both importing and exporting countries, and in particular of the developing States among them*". Commercial uncertainty and metal supply and demand issues, appear to be relevant to the viability of deep sea mining projects, and thus a challenge for potential mine operators and investors. It is less clear how these are primary considerations for the ISA's Assembly in developing criteria for how to share financial benefits equitably across humankind. We suggest deletion of this sentence, and suggest the workstream on benefit-sharing should focus instead on understanding the views of the Council and Assembly on this important component of the ISA's regime, as well as other stakeholders, the wider public – and with specific focus on developing States, and self-determining peoples.

## 7. Are the “Results and Priority Outputs” appropriate and is there a clear link between the “Strategic Directions” and the “Results and Priority Outputs”?

In answering this question, we presume it relates to the “Expected Outcomes” section of the draft Plan (as there is no section labelled “Results and Priority Outputs”). Broadly this section lists various duties given to the ISA by UNCLOS, and as such is appropriate.

There is a clear link between the “Strategic Directions” and the “Outcomes”. Though the ordering is different (e.g. SD 1 relates to the 7<sup>th</sup> list item in Outcomes; SD 2 relates to the 1<sup>st</sup> and 10<sup>th</sup> list item in Outcomes; SD 3 relates to the 1<sup>st</sup> and the 9<sup>th</sup> list item in Outcomes etc). Re-ordering so that the lists follow a more aligned order would make the document more user-friendly.

In relation to specific outcomes:

- We suggest that the outcome for **marine scientific research** (MSR) should be strengthened. The outcome should not be ‘*an ability*’ to promote and encourage MSR; the promotion and encouragement must actually happen. Paragraph 35(c) should be re-phrased as a more measurable outcome e.g. an increase in the public dissemination of information deriving from MSR in the Area.
- Similarly for paragraph (h), the ‘*identification and prioritization of technical assistance needs for developing States*’ reads as an underwhelming outcome. We suggest this outcome be re-phrased as the delivery of **technical assistance** that meets the needs and interests of developing States (as identified by developing States).
- Paragraph (j) does not describe ‘**criteria for economic assistance**’ as an expected outcome, although the development of such criteria is expressly covered in the wording of Strategic Direction 2.6. These should be aligned.
- We welcome SD 1.5’s aim to promote “**reasonable regard**” between activities in the Area and other activities in the marine environment, and also SD 3.2’s aim to develop and implement regional environmental management plans (‘REMPs’), but we do not see an outcome that clearly covers these points. We suggest that the adoption of REMPs for each exploration region, developed via consultative processes and informed by science, and which clearly map all relevant marine users and interests in the region, would be a good starting point ‘outcome’ for both SD 1.5 and SD 3.2.

We consider that the link between the “Context and Challenges” section and the “Strategic Direction” and “Outcomes” sections is less clearly made. For example:

- The UNCLOS provisions relating to **technology transfer** are well-described in the “Context and Challenges” section, but there is no Strategic Direction or Outcome that addresses this important component of the regime.

- The ISA's "social mandate" is mentioned in the "Context and Challenges" section, but there is no mention made in the Strategic Plan of engagement in public outreach, to raise awareness of the ISA's work, and to garner public views on the complex issues at stake. Nor are **human rights** mentioned. Or youth, women, workers, indigenous peoples, self-determining peoples, coastal communities, environmental defenders - or indeed any communities, save for the 'scientific community'.

**8. Are there any specific observations or comments that Member States and other stakeholders wish to make in connection with any other aspect of the Draft Strategic Plan for 2024-2028?**

We wish to make the following additional comments, which relate to both the content of the draft Strategic Plan and also the process by which it is being developed.

It is our understanding that an **Action Plan** will also be produced for 2024-2028 (or annually, within that period?) and hence the Strategic Plan is intended to be a high-level document. It would be helpful to have a copy of a draft Action Plan alongside the draft Strategic Plan for delegates to be able to identify that all relevant content is included across the two documents (and located appropriately). Reading the Strategic Plan in isolation suggests that more 'SMART' language and objectives would give the strategic directions clearer actionable meaning and better allow for monitoring and evaluation of progress.

It is good to see reflected in the Strategic Plan the importance for the ISA to "strengthen its institutional capacity and functioning" [SD 8.1], we consider Outcome (e) [*An Authority with the institutional capacity, public acceptance, credibility and state of readiness to act as a "fit-for-purpose" regulator of activities in the Area by reference to contemporary benchmarks, and as a publicly accountable supervisory body that facilitates access to information and values contributions by stakeholders*] to be particularly well-worded. However, it's hard to see how this outcome could be achieved without further direction in the Strategic Plan with regards issues of **institutional accountability**. As drafted, the Plan lacks specificity on the 'organisational performance' of the ISA section (e.g. SD 8: *keep work programmes and working methodologies under review* - who will do this, how and when?) More 'SMART' language around what will be delivered and by whom is likely to lead to greater success in this area. As mentioned above, the Article 154 periodic review process is also relevant here.

We consider some more specifics about the **institutional capacity** required at the ISA would help to make the institutional capacity objective more measurable.

- a) Institutional capacity around revenue collection, administration and financial auditing.
- b) Institutional accountability mechanisms (for dispute resolution, administrative decision review, complaints-handling and whistle-blowing).
- c) Elaboration of the Economic Planning Commission.
- d) Preparations for an independent functioning of the Enterprise.
- e) Development of compliance and enforcement mechanisms and capacity needs.
- f) Institutional mechanisms to ensure access to necessary scientific expertise at the ISA<sup>10</sup>.
- g) Data management capabilities.

We would also welcome a formal and independent review of ISA institutional capabilities and accountability, reported to Assembly – e.g. under the Article 154 period review cycle.

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<sup>10</sup> See 8<sup>th</sup> report of the Code Project (2023), [https://www.pewtrusts.org/-/media/assets/2023/04/code-project\\_enhancing-scientific-expertise-at-the-isa.pdf](https://www.pewtrusts.org/-/media/assets/2023/04/code-project_enhancing-scientific-expertise-at-the-isa.pdf)

It is good to see the operationalisation of the Enterprise included as an “Outcome”. We note that there is no reference in the Strategic Plan to the development of rules or agreements relating to **joint ventures between contractors and the Enterprise**. This may be a relevant workstream for the period, and we would suggest that it is added.

**Flag states** are listed as a stakeholder and rights-holder in the introduction to the draft Plan, but no further mention is made as to the relevance of the role of flag States or the international shipping regime. There is no Strategic Direction for the ISA to work upon how the flag state regime interacts with the ISA’s development of its regulatory regime, nor how the ISA may need to coordinate with flag States in practice, particularly with regards to implementing ISA inspection and compliance mechanisms on ships.

Strategic Direction 5.2. is to ‘*develop the ISA Partnership Fund as the main platform for resource mobilization, capacity development and the provision of technical assistance*’. The **Partnership Fund** is not mentioned elsewhere in the Strategic Plan. Some context and introduction may be useful. This is a new fund, established in 2022, absorbing and replacing the previous Endowment Fund for Marine Scientific Research in the Area. Given the newness and the reliance placed upon this fund for delivery of technical assistance to developing States, it would be good to see in this Strategic Plan period an action for monitoring and evaluation of the operation and performance of the fund (led by developing States).

It is not clear to us what is meant by the wording of Strategic Direction 5.3: “**Enable capacity development measures to be mainstreamed into relevant initiatives.**” It would be helpful if the Plan could be re-worded for clearer and more actionable meaning, or if further explanation could be included as to what comprise ‘relevant initiatives’, and what such mainstreaming entails.

The next 5 years of the ISA’s operation may be a pivotal moment in history. There is wide public interest in shaping how the ISA as an organisation will identify and navigate the complex challenges it faces. The Strategic Plan appears to be a key instrument in this regard. Wide public participation and **due process** should be applied to its drafting and development. Member states or independent parties should take the lead in assessing the ISA’s performance, not the Secretariat. Holistic criticism of what has worked well and what has not, what has been progressed and what has not, should inform the development of the new Strategic Plan. Sufficient time should be given to enable a meaningful review of the proposed new Strategic Plan (and assessment of the previous Strategic Plan) by stakeholders, and a full opportunity for comments and feedback to be taken into account. A 3-4 week consultation period is not sufficient, particularly where there been no notification of the consultation to the wider public or stakeholders with interest in the ISA’s work.