

28 January 2021

The Pew Charitable Trusts welcomes the public consultation process initiated by the Secretariat of the International Seabed Authority (ISA) on its draft Communications and Stakeholder Engagement Strategy and submits the following comments in response to the “Zero Draft” circulated on 7 December 2020.

The development of a targeted Communications and Stakeholder Engagement Strategy is an important opportunity for the ISA to consider its evolving needs and obligations as it transitions from a convening forum to a regulator of industry. As it stands, however, this document seems focused almost exclusively on listing existing, restrictive procedural rules and detailing the ISA’s gatekeeping functions. It does not reflect what is needed: an explanation of the principles and strategic approaches that could improve information sharing, consultations and public participation at an increasingly important international organization. As a stakeholder ourselves, we wish to express strong concern that this Zero Draft does not meet the opportunity presented and should not define the way in which the ISA views ‘stakeholder engagement’.

A robust engagement policy should be the bedrock upon which the ISA builds to deliver its unique mandate to work on behalf of all humankind. Obligations for effective stakeholder participation of course go beyond the scope and mandates of the ISA itself, as these are enshrined in numerous multilateral agreements¹ and declarations², particularly those dealing with environmental decision making. The right to information³, participation⁴, and remedy⁵ are recognized as internationally protected human rights, for instance, while the 2030 Agenda for Sustainable Development similarly lays out the role of multi-stakeholder participation and urges the creation of enabling environments for public participation in the development of effective, transparent and accountable global institutions. SDG 16, in relation to justice and strong institutions, includes targets to “ensure public access to information” and to “develop effective, accountable and transparent institutions” and “ensure responsive, inclusive, participatory and representative decision-making” at all levels⁶.

The ISA’s draft Communications and Stakeholder Engagement Strategy should therefore not only be tied to the ISA’s current and time-limited strategic plan but should look beyond 2023. The Strategy should also acknowledge the context in which it is developed, including that seabed mining is entering new territory; there is limited knowledge of deep-sea ecosystems and environments; the processes and technology that

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UNTC vol. 2162, p.447 (Aarhus Agreement); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, C.N.195.2018, Treaties-XXVII.18 of 9 April 2018) (Escazu Agreement).

² See, e.g., UN General Assembly, The World Charter for Nature, UN Doc. A/RES/37/7 (28 Oct. 1982), Art. 23; Agenda 21; Rio Declaration, Principle 10.

³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 19.

⁴ *Id.*, Art. 25.

⁵ *Id.*, Art. 2(3).

⁶ SDG Targets 16.6, 16.7, & 16.10.

will be used for exploitation are still being developed, and the environmental impacts are not fully understood. The ISA needs to design its Strategy in light of these specific parameters and related stakeholder interests to prescribe specific opportunities for meaningful engagement, identify any challenges presented by its distinctive circumstances, and offer a roadmap for implementation.

This will require: (1) acknowledging key factors underpinning the importance of stakeholder engagement for the ISA; (2) building a strategy for responsiveness; (3) establishing specific opportunities for engagement, (4) assigning clearly defined responsibilities, objectives, and capacities, (5) promoting institutional transparency, (6) taking a forward-looking view and (7) detailing a review mechanism.

1. Key factors underpinning the importance of stakeholder engagement for the ISA

It is recommended that the draft Strategy set out some of the key reasons why the ISA must conduct effective communications and stakeholder engagement, and indeed why it will be beneficial to do so, including:

- **Supporting implementation of the “common heritage of mankind”**

The resources of the Area do not belong to the ISA’s member States, nor to the states party to the United Nations Convention on the Law of the Sea (UNCLOS); they belong instead to humankind, and it is on behalf of humankind that the ISA is empowered to act. Although the ISA is bound by the decisions of its member governments, it is incumbent upon the organization to try and look beyond its membership to consider other stakeholders, including marginalized and vulnerable communities, as well as future generations.

A ‘stakeholder’ is, as the name implies, any person who holds a stake in the ISA’s work. Given the ISA’s mandate to work on behalf of humankind to administer resources that are the common heritage of humankind, every person future and present is a stakeholder in the ISA’s business. The Strategy should explicitly recognize the ISA’s obligation to all of humankind and describe specifically how this mandate will be considered in designing and implementing stakeholder engagement mechanisms.

The draft Strategy’s definition of stakeholders focuses only on those entities who are [already] ‘*interacting with the ISA*’. This is a limited pool – many States do not engage at the ISA and it is rare for the Assembly to achieve its 51% quorum (84 States). Similarly, observer organization participation is limited and does not represent a wide membership or demographic. There are no observer organizations representing indigenous communities, youth, or women, and few representing interests of the global south.

Yet some of the greatest impacts from activities in the Area might be experienced by persons not directly represented by participants in ISA sessions. UNCLOS specifically recognises the interests and needs of land-locked States and peoples who have not attained full independence or other self-governing status; coastal communities adjacent to mining sites may fear environmental impacts to their local waters; developing countries with economies reliant upon land-based metal production might see metal markets impacted by deep seabed mining. Many countries are not engaged at the ISA but are none the less important ‘stakeholders’ in its work. Indeed, of the 13 developing States recently identified with the potential to suffer

adverse economic impacts as a result of polymetallic nodule mining⁷, two are not signatories to UNCLOS⁸, and nine did not attend any ISA sessions in the last three years⁹.

A broader definition of ‘stakeholder’ in the Strategy would better acknowledge the ISA’s duty to be proactive in reaching the widest possible audience.

- **Strengthening legitimacy of decision making**

Broad stakeholder engagement in decision-making would be a sign of the ISA’s integrity and accountability. External scrutiny will help to identify the best possible outcomes and give decisions greater legitimacy. This kind of “social license” is particularly important if the ISA is to soon undertake an elevated regulatory role for exploitation.

A participatory approach should be adopted in the ISA’s forthcoming decisions about whether, and under what conditions, to permit commercial-scale exploitation of the deep seabed for the first time. This will provide stakeholders with an opportunity to understand proposed activities and identify any impacts on their interests, to mitigate any tension amongst stakeholders with competing views, to collaborate in assessing acceptable environmental impacts in each circumstance (weighed against the corresponding benefits), and to facilitate a mutual exchange of interaction among all interested parties. It also provides a chance to consider traditional knowledge, customs and practices¹⁰. A decision based on the contributions of all interested and affected parties will bind them together to a common understanding, and should enhance co-operation and the sustainability of the project, while avoiding delay, later challenges and the need to amend Plans of Work or contract terms in the future¹¹.

- **Encouraging effective implementation of ISA mandate through strategic consultations**

To date there has been little in the way of public engagement regarding strategic concerns such as:

- the potential environmental impacts of seabed mining considered in the context of alternative methods for increasing metal supply or decreasing metal demand;
- regional environmental management planning;
- the role and trigger points for Environmental Impact Assessments (EIAs) for exploration and exploitation activities; and
- the institutional arrangements necessary for effective administration of activities in the Area.

The first Contractor to undertake meaningful consultation in an EIA process for exploitation is likely to face questions regarding these strategic concerns, which that individual Contractor will be ill-equipped and misplaced to answer. The ISA should consult on these strategic questions first.

2. Setting out clear obligations for institutional responsiveness

⁷ <https://www.isa.org.jm/news/isa-releases-study-potential-impact-mineral-production-international-seabed-area-economies>

⁸ Peru and Eritrea.

⁹ The exceptions being Chile, Gabon, Madagascar and Papua New Guinea.

¹⁰ https://dsm.gsd.spc.int/images/pdf_files/dsm_brochures/DSM_Brochure13.pdf

¹¹ https://dsm.gsd.spc.int/images/pdf_files/dsm_brochures/DSM_Brochure14.pdf

The Strategy must, as a matter of priority, lay out plans for an ISA response to stakeholder comments. Sending information to stakeholders, and receiving inputs back from them, is only part of the story of proper stakeholder engagement. Making meaningful use of stakeholder inputs, and providing recourse for disputes of relevant decisions, are also essential.

In this regard, we appreciate the steps outlined in page 11 of the draft Strategy document identifying different levels of engagement, but recommend that ‘responding to comments’ should also be included in the list. Embedding the Strategy with a commitment to (i) respond to stakeholders’ inputs and (ii) provide justification for subsequent decision-making, will help promote public trust and confidence in the work of the ISA, and to evidence a legitimate decision-making process.

In detailing the responsibility of various ISA organs to respond to stakeholder inputs, an analysis should be conducted about whether requisite capacity exists within the institution to do so, and if not, what additional resources would be required.

The draft Strategy is also silent on effective access by stakeholders to administrative and/or judicial proceedings if they have cause to dispute decisions taken by the ISA. This should be included in the Strategy; access to justice is an important pillar of institutional accountability, especially in relation to environmental decision-making. The Strategy could helpfully include, for example, the creation of an ISA Ombudsman, who can receive and review any institutional concerns or complaints identified by stakeholders in a confidential and impartial manner.

This type of openness to ad hoc stakeholder inputs encourages better compliance from all parties. The ISA should have clear avenues for civil society to raise concerns about Contractor activities with the ISA, as well as whistle-blowing opportunities for Contractors themselves. There should also be a complaints procedure that allows members of the public to raise concerns about ISA organ activities in a confidential way to an independent body (like an Ombudsman). These types of measures increase public trust and confidence and can also bolster the ISA’s regulatory capacity by bringing potential matters of concern to their attention for investigation. These items are absent from the draft Strategy under consultation.

Given the diverse roles and responsibilities of the ISA, it would be helpful for the Strategy to lay out the different steps at which information-sharing or consultation will be necessary, which departments within the institution would be responsible for conducting and responding to them, what types of engagement methods may be used, and what appeal or review opportunities there will be for resulting decisions.

3. Establishing specific opportunities for engagement

It would be helpful for the Strategy to detail the existing processes through which stakeholders are currently consulted or can reasonably expect to be consulted in the future. Mandatory versus discretionary consultation or publication trigger points should be identified, and where there are discretionary powers, the strategy should highlight by whom and how these can be exercised (or a plan for this being settled).

The following are a few examples of processes underway where robust stakeholder engagement are an important element and where mandatory consultation points should be included -

- Development of the Exploitation Regulations

Specific opportunities for inputs into the development of the Regulations should be communicated widely with reasonable timeframes and modalities for responses. Responsibility for these consultations

should be tasked to the LTC (or any other relevant subsidiary or advisory committees) with support from the OLA section of the ISA Secretariat. The results of the consultations should be published and made available to the Council. Subsequent revisions of the draft Exploitation Regulations should be annotated so that changes and their source can be identified. A report should indicate any stakeholder comments that are not taken forward, with the rationale.

- Preparation and execution of EIAs by Contractors

The ISA should commit to ensuring that Contractors undertake and evidence the nature, extent and outcomes of stakeholder consultations in scoping and conducting any EIAs, evaluating environmental baseline studies, developing management and mitigation measures, and proposing environmental conditionalities before finalizing any EIA report (or Environmental Impact Statement – EIS).

It is important also that the ISA plan on conducting its own consultations such that stakeholders are given a meaningful chance to respond to complex documents and the ISA can respond to, and take into account in the ISA's own deliberations, comments received. The responsibility for ensuring appropriate consultation activities and processes would most likely sit with the LTC, supported by the OEMMR section of the Secretariat (or with appropriate subsidiary organs that may be created).

- Stakeholder engagement in the development of Regional Environmental Management Plans (REMPs)

REMPs are critical management tools and their development requires diverse expertise. Stakeholders from the scientific community, other marine users, environmental managers and policy makers, and civil society should all be provided an opportunity to participate in their development. While the development and review of REMPs is of course a broader issue than the focus of a stakeholder engagement policy document, this Strategy could signal its wider commitment to an inclusive and participatory approach in REMP-related processes. It may also be prudent to establish a REMP steering committee (or committees), supported by the ISA Secretariat OEMMR section, which would hold the responsibility for ensuring appropriate consultation activities and processes.

4. Assigning clearly defined responsibilities, objectives, and capacities

The ISA should also designate the parties responsible for ensuring stakeholder participation at each opportunity, including those listed in above section (3). The name and contact details of relevant personnel for enquiries relating to each process, should be made available, and a commitment made to respond to any such enquiries in a comprehensive and timely manner. It should be clarified that 'the ISA' is a multilateral organization represented by its States parties membership (supported administratively, but not run, by its Secretariat). This means that member states are responsible for implementation of the ISA's communications and stakeholder engagement strategy, while also being stakeholders themselves. The Strategy could explore explicitly how this set-up will be navigated in a transparent and accountable way.

A needs assessment could help all parties to understand the capabilities and funds that will be required to effectively discharge the relevant duties, including in the future as the ISA's responsibilities become increasingly complex. The Strategy could propose and encourage such a needs assessment as a priority action. An evaluation of current stakeholder engagement may also be helpful and could be incorporated into the next Article 154 review, which should be commenced shortly (the last report was presented in interim version to Assembly in 2016).

5. Encouraging institutional transparency

The Strategy should offer options to improve stakeholder access to information through enhanced institutional transparency. This might include a commitment to more comprehensive records of LTC and other subsidiary bodies' deliberations, as well as to proper records of Council meetings, greater inclusivity at workshops (with transparent and accountable procedures for attendee selection), better reporting of diverse views expressed, and methods for socialization of workshop outcomes and incorporation of differing viewpoints in the relevant workstream. Whistle-blowing and public complaints mechanisms should also be established, with requisite confidentiality and impartiality, to minimize barriers for stakeholders to raise legitimate concerns, and have these properly investigated and resolved. Summaries of complaints examined, and the results of those inquiries should be published.

In keeping with other multilateral bodies¹², the Strategy should promote the adoption of proactive access to information policies within the ISA. This should include the allocation of specific 'access to information' monitoring and oversight functions (which could be done via an Ombudsman), and appropriate dissemination of these policies to staff and stakeholders.

The Strategy could also reflect a commitment to best practices in communications by ISA personnel in publications or public fora, including social media. Implementing the Standards of Conduct for the International Civil Service, for example, could guard against confusion between comments made in a personal and in a professional capacity, or the perception of a lack of impartiality that may arise, undermining public trust and confidence in the Authority as an organisation .

6. Taking a forward-looking view

This document is largely descriptive of existing processes. In laying out a matrix of opportunities and responsibilities, the Strategy must consider how it will evolve to meet future needs of the institution, including for the potential onset of exploitation activities. To that extent, the ISA should take this opportunity to outline some of the challenges it faces in effective stakeholder participation – whether through capacity constraints, through low or skewed take-up of engagement opportunities, or through challenges derived from the “common heritage” status of mineral exploitation.

7. Review Mechanism

Finally, the Strategy should explain how communications and stakeholder engagement will be monitored, assessed and improved. It should also expand on plans to operationalize the Strategy through detailing operational objectives and measurable indicators. It could commit to a standardized review mechanism for specific outreach or engagement, and publish the quantitative results (e.g. how many people were reached, gender and geographical breakdown, how workshops were rated) and qualitative results (e.g. types of persons reached, whether the event had effective impact) while identifying areas for improvement. It should further include clearly defined opportunities for assessing emerging engagement needs, and for identifying capacities to meet them. One option would be a 3- or 5-year review of the Strategy by the Council.

To conclude: While we note and are encouraged by recent efforts to improve stakeholder engagement at the ISA, including through the development of a draft Strategy, we consider the current draft to have significant gaps, as outlined in general terms, above. We hope that this submission is duly considered and

¹² <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/InformationIntOrganizations.aspx>

that the draft be revised in light of the comments received during the consultation. The Pew Charitable Trusts is available to assist further in this regard, at the ISA's request. We also request that this submission be made available on the ISA website, as well as comments received by other stakeholders.

We thank you again for the opportunity to participate in this consultation and for your kind consideration of our submission.

With highest regards,

A handwritten signature in blue ink, appearing to read "Andrew Friedman", with a long horizontal flourish extending to the right.

Andrew Friedman
Seabed Mining Project
The Pew Charitable Trusts