



# DISCUSSION PAPER

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## **Dispute Resolution Considerations Arising Under the Proposed New Exploitation Regulations**

**April 2016**

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## INTERNATIONAL SEABED AUTHORITY

### DISCUSSION PAPER CONCERNING DISPUTE RESOLUTION CONSIDERATIONS ARISING UNDER THE PROPOSED NEW EXPLOITATION REGULATIONS

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#### 1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This discussion paper has been prepared for our client, the International Seabed Authority (the "**ISA**"). Herbert Smith Freehills owes no duties to and accepts no liability toward any person except the ISA in relation to this discussion paper.

1.2 In particular, but without limitation, this discussion paper:-

1.2.1 May not be used or relied upon by any person other than the ISA;

1.2.2 Does not make and may not be construed as making any recommendation concerning the matters considered;

1.2.3 May not be used to construe any of the ISA's Exploration Regulations, the Exploitation Regulations (as may be approved in due course), any exploration contracts, exploitation contracts or other related legal instruments.

1.1 This paper is limited to considering certain questions of jurisdiction over disputes arising out of or in connection with "*activities in the Area*". It does so by considering the provisions of UNCLOS with respect to disputes arising in connection with "*activities in the Area*" and the extent to which they are subject to the jurisdiction of the Seabed Disputes Chamber (the "**Chamber**") under Article 187.<sup>1</sup>

1.2 In summary, UNCLOS confers a wide jurisdiction upon the Chamber over disputes arising from "*activities in the Area*". However:-

1.2.1 The Chamber's jurisdiction is neither comprehensive nor universal:-

(A) A number of disputes are excluded from the Chamber's jurisdiction by implication of Article 187 and the terms in which it has been drafted;

(B) Other disputes are subject to an optional alternative jurisdiction under Article 188; and

(C) Others again are excluded by Article 189.

1.2.2 Nevertheless, there are good reasons for seeking to confer a wider jurisdiction over disputes arising from "*activities in the Area*" upon a single body such as the Chamber. These include certainty of venue, familiarity with its procedure, consistency of decisions and the building of a body of jurisprudence to guide parties in the future to ensure conformity of approach in relation to "*activities in the Area*".

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<sup>1</sup> It is outside the scope of this paper to deal with the advisory jurisdiction of the Chamber as set out in Article 191 UNCLOS.

- 1.2.3 In certain measure, the Chamber's jurisdiction to hear disputes may be extended by appropriate drafting in the Exploitation Regulations and exploitation contracts. In such cases, consideration should be given to ensuring that multiple proceedings between the same parties or involving the same subject-matter are, to the extent practical and possible, avoided in favour of consolidation of proceedings or the hearing of such disputes concurrently.
- 1.2.4 However, given the large variety of disputes that could arise from "*activities in the Area*", there will remain potentially significant gaps in the Chamber's jurisdiction. This is likely to be particularly so where third party users of the high seas and non-UNCLOS States are involved. In such cases, it will be very difficult to confer jurisdiction on the Chamber other than by agreement on an *ad hoc* basis.
- 1.2.5 In addition, there may be good reasons for considering whether certain types of dispute should be heard before a different forum, subject to the supervisory jurisdiction of the Chamber. Such disputes might include technical disputes, which could be referred to an expert, or panel of experts, for determination, or administrative appeals.
- 1.3 We comment on these matters in greater detail below.
- 2. THE SCOPE OF THE CHAMBER'S JURISDICTION**
- 2.1 UNCLOS Article 187 sets out in some detail the various different categories of disputes in respect of which jurisdiction is conferred upon the Chamber.
- 2.2 Article 187, read in conjunction with Article 188, suggests that for a variety of disputes, the Chamber's jurisdiction is absolute. These include in summary:-
- 2.2.1 Disputes between a State Party and the ISA concerning their respective "*acts or omissions*" that are "*in violation of*" Part XI, its relevant Annexes or the rules, regulations and procedures of the ISA: Article 187(b)(i);
- 2.2.2 Disputes between a State Party and the ISA concerning "*acts*" of the ISA "*alleged to be in excess of jurisdiction or a misuse of power*": Article 187(b)(ii);
- 2.2.3 Disputes between parties to a contract concerning "*acts or omissions*" of a party "*relating to activities in the Area and directed to the other party or directly affecting its legitimate interests*": Article 187(c)(ii);
- 2.2.4 Disputes between the ISA and a prospective contractor concerning the refusal of a contract "*or a legal issue arising in the negotiation of the contract*": Article 187(d); and
- 2.2.5 Disputes between the ISA, a State Party, a state enterprise or a natural or juridical person sponsored by a State Party concerning liability of the ISA under UNCLOS Annex III, Article 22: Article 187(e).
- 2.3 However, the conferral of jurisdiction upon the Chamber by Article 187 is not compulsory in all cases. Article 188 qualifies Article 187 by making clear that certain disputes may at the option of a disputing party be referred not to the Chamber, but to other fora. By way of summary:-
- 2.3.1 Disputes between States Parties concerning the interpretation or application of UNCLOS Part XI under Article 187(a) may be referred at the request of either State Party to an *ad hoc* chamber of the Chamber, or upon the request of all States Parties to a special chamber of ITLOS.<sup>2</sup>

<sup>2</sup> There are some apparent differences in the jurisdiction of the two. Annex VI, Article 36 limits the jurisdiction of the *ad hoc* chamber of the Seabed Disputes Chamber to only those disputes arising under UNCLOS Article 188.1(b). By contrast, a number of special chambers have been constituted by ITLOS, including (1) the Chamber for Summary Procedure, (2) the Chamber for Fisheries Disputes, (3) the Chamber for Marine Environment Disputes, (4) the Chamber for Maritime Delimitation Disputes and (5) Chambers "*for dealing with a particular dispute submitted to it if the parties so request*" under Annex VI,

- 2.3.2 On the other hand, disputes between parties to a contract concerning "*the interpretation or application of a contract*" under Article 187(c)(i) "*shall be submitted, at the request of any party to the dispute to binding commercial arbitration unless the parties otherwise agree*", and unless it concerns the interpretation of UNCLOS, be referred upon the request of any party.
- 2.4 Article 187(f) additionally provides that the Chamber has jurisdiction over "*other disputes for which the jurisdiction of the Chamber is specifically provided*" under UNCLOS. On one interpretation, it could be said that these include "*deciding claims that the application of any rules, regulations or procedures of the [ISA] in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations*" under UNCLOS and any corresponding claims for damages or other remedies pursuant to Article 189.

### 3. **DISPUTES FALLING OUTSIDE THE CHAMBER'S JURISDICTION**

- 3.1 Despite the breadth of UNCLOS provisions giving the Chamber jurisdiction, there will be a number of potential disputes that would likely fall outside the jurisdiction of the Chamber. Putting aside those matters specifically excluded from the jurisdiction of the Chamber by Article 189 (namely the exercise by the ISA of its discretionary power and declarations as to the conformity with UNCLOS or invalidity of the rules, regulations or procedures of the ISA) and those that fall to be determined under the dispute resolution procedures under the General Agreement on Tariffs and Trade,<sup>3</sup> these essentially fall into two categories.

#### (1) **Category 1 disputes**

- 3.2 The **first category** concerns those disputes which, when viewed against the language of Article 187 properly construed, fall outside the Chamber's jurisdiction. Three examples suggest themselves:-

#### ***Example 1: Disputes not concerning "activities in the Area"***

- 3.2.1 Article 187 makes clear in its introductory paragraph that the jurisdiction of the Chamber is restricted to disputes "*with respect to activities in the Area*". This term is defined by Article 1(3) of UNCLOS as "*all activities of exploration for, and exploitation of, the resources of the Area*". The definition in UNCLOS Article 1(3) was clarified by the Chamber in its Advisory Opinion of 1 February 2011 to include, "*first of all, the recovery of minerals from the seabed and their lifting to the water surface*", as well as "*Activities directly connected [therewith] such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest (including their disposal at sea)*".<sup>4</sup>
- 3.2.2 Notwithstanding the breadth of the UNCLOS definition and the Advisory Opinion, not all activities will fall within the term "*activities in the Area*". For example, the Chamber made clear that "*processing*" of the minerals usually done on land, as well as transportation to points on land from the part of the high seas superjacent to the part of the Area, are not deemed to be "*activities in the Area*" (paragraphs 95 and 96).

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Article 15.2 (as was the case in the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)). It is conceivable that a dispute that might be referred to an *ad hoc* chamber under Article 188.1(b) may conceivably be subject to the jurisdiction of any of the special chambers (most obviously, the Chamber for Summary Procedure in the event of an application for provisional measures).

<sup>3</sup> Section 6(1) of the Part XI Agreement confirms that the provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area and that where the States Parties concerned are parties to such agreements, they shall have recourse to the dispute settlement procedures of those agreements.

<sup>4</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 (the "**Advisory Opinion**") at paragraphs 94 and 95.

3.2.3 Consequently, if there is a dispute which is wholly or partially outside the Area, the jurisdiction of the Chamber will be subject to challenge. Such disputes might include those where there is a mineral deposit that straddles the Area and the continental shelf claimed by a State party, or where rights in the high seas superjacent to the Area are being exercised. The situation may become more complicated where there is a lack of clarity as to the limits of the Area.

**Example 2: Disputes concerning the ISA arising under other Parts of UNCLOS**

3.2.4 Similarly, disputes under Article 187(b)(i) between a State Party and the ISA may not be subject to the jurisdiction of the Chamber if they are not "*in violation of*" Part XI and its Annexes.

3.2.5 Consequently, a dispute arising with the ISA in relation to other Parts of UNCLOS, for example concerning interference with the rights of third parties under Part VII (High Seas), Part XII (Protection and Preservation of the Marine Environment) or Part XIII (Marine Scientific Research), would not be subject to the jurisdiction of the Chamber.

**Example 3: Disputes qualified by Article 187(c)(ii)**

3.2.6 Article 187(c)(ii) confers jurisdiction upon the Chamber in respect of "*acts or omissions*" of a party to a contract – whether a State Party, the ISA, the Enterprise, state enterprises or natural or juridical persons – "*relating to activities in the Area and directed to the other party or directly affecting its legitimate interests*".

3.2.7 The language of Article 187(c)(ii) raises a number of questions regarding the qualifications necessary for the Chamber to exercise jurisdiction. Amongst these are how it may be alleged or proven that the Respondent's activities were "*directed to*" the complainant – the choice of the words "*directed to*" suggests that negligence might not be enough and that evidence of malice (i.e. intention) may be necessary.

3.2.8 If that is right, it might be said that the alternative limb of Article 187(c)(ii), namely that the activities are said to be "*directly affecting [the complainant's] legitimate interests*" would ensure that claims of negligence are within the jurisdiction of the Chamber. In such case, the complainant would have to satisfy two tests to show that the Chamber would have jurisdiction.

3.2.9 First, it would have to identify its "*legitimate interests*". The intended meaning and effect of this term is somewhat unclear and open to interpretation (and argument).

3.2.10 Second, questions arise as to how the complainant's "*legitimate interests*" might be said to be "*directly affected*". Put differently, jurisdiction could be easily challenged on the basis that those interests had been "*indirectly affected*", perhaps on grounds of causation or foreseeability.

3.3 It is entirely possible that other disputes will be outside the jurisdiction of the Chamber on a strict interpretation of Article 187.

**(2) Category 2 disputes**

3.4 The **second category** of disputes are those where one or more of the parties is outside the Chamber's jurisdiction. Whilst it is outside the scope of this Discussion Paper to identify every possible dispute that could arise, some of the more obvious claims might include, amongst others:-

3.4.1 **Disputes between a contractor and a neighbouring coastal State:** these may involve disputes under Article 142 regarding "*Activities in the Area with respect to deposits in the Area which lie across limits of national jurisdiction*" (not all of which will be subject to the jurisdiction of the Chamber under Article 187(b)) and potentially also acts or omissions of the contractor which have allegedly caused loss or damage in the maritime area of the neighbouring coastal State;

- 3.4.2 **Disputes between neighbouring contractors:** for example, these might arise from a collision of contractor vessels or vessels or where one contractor encroaches on another contractor's licenced area;
  - 3.4.3 **Disputes with third parties,** for example disputes between the ISA, the Enterprise or a contractor with a third party user of the high seas such as a fisherman, a pipe-line layer, a cable-operator or a vessel conducting marine scientific research;
  - 3.4.4 **Disputes involving a non-UNCLOS State,** including disputes over whether a contract area overlaps with the continental shelf claimed by a non-UNCLOS State.
- 3.5 Subject to whether those involved in any such dispute are party to UNCLOS or another relevant multilateral convention, some of these disputes may find their way to ITLOS, whether under UNCLOS or under the dispute resolution mechanisms of such other multilateral conventions, including:-
- 3.5.1 The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas;
  - 3.5.2 The 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;
  - 3.5.3 The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972;
  - 3.5.4 The Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific (“Galapagos Agreement”);
  - 3.5.5 The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean;
  - 3.5.6 The Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean;
  - 3.5.7 The Convention on the Protection of the Underwater Cultural Heritage; and
  - 3.5.8 Nairobi International Convention on the Removal of Wrecks, 2007.
- 3.6 However, it is unlikely that ITLOS would have jurisdiction in respect of the ISA in such cases for two reasons. First, the dispute resolution provisions of these agreements for the most part concern only the States parties to them; and second, even if it wished, the ISA would have no right to intervene in ITLOS proceedings under Annex VI, Article 31 because it is not a State party.
- 3.7 Moreover, and insofar as disputes brought by States or private parties against other private parties (e.g. contractors and private third parties) are concerned, in the absence of an agreed dispute resolution clause, the most likely venue will be municipal courts. In such cases, the ISA is unlikely to be suable in light of its immunity from legal process under UNCLOS Article 178 (although were it to commence proceedings, it might be deemed to waive that immunity).
- 4. DESIRABILITY OF EXTENDING THE CHAMBER'S GENERAL JURISDICTION**
- 4.1 If it is accepted that the Chamber's jurisdiction is neither comprehensive nor universal, the question arises whether, and the extent to which, the Chamber's jurisdiction should be expanded to embrace other disputes or parties, and the benefits of doing so.
- 4.2 It is a given that in the course of mining activities on the deep seabed, disputes can be expected to arise. While many disputes arising from “*activities in the Area*” are likely to be fairly simple, turning on points of contractual interpretation or regulatory compliance, there is a real risk of much more significant disputes which may be of high value and with potentially wide legal and practical significance. These may arise because:-

- 4.2.1 The technology required for deep seabed mining is new, complex and in many respects untested.
- 4.2.2 The risks of problems occurring are increased by the depths at which, and the distances from shore where mining activities are expected to be undertaken.
- 4.3 Such disputes may be very complex in nature whether from a legal, technical or scientific perspective. There is also every likelihood that disputes may be procedurally complex to the extent that they involve multiple parties of differing legal personalities, whether States Parties, international organisations such as the ISA, state enterprises, or private companies and individuals – or a combination of all of the above.
- 4.4 Given these risks and uncertainties, there is a question for the ISA as to whether it is content for disputes to be heard before a variety of different courts and tribunals – assuming they have jurisdiction – or whether there are benefits both for it and for those whose activities it is organising and administering in seeking to have as many disputes as possible heard before a single tribunal such as the Chamber.
- 4.5 Whilst it is certainly plausible that, as those who drafted UNCLOS Article 187 apparently recognised, a single, specialist tribunal in the form of the Chamber would be desirable for the efficient resolution of disputes in the Area, it is of course recognised that it will not be practical or possible to provide that all potential disputes may be heard before the same forum. This is partly a consequence of the drafting of UNCLOS Articles 188 and 189, and partly because it is difficult to see how any party, whether a State, the ISA or a contractor, could compel any other party with whom it has no contract or who is not otherwise required by UNCLOS to submit to the tribunal of that party's choice so to submit; principal amongst these parties will be those claiming rights under other Parts of UNCLOS or other treaties (e.g. scientists, fishermen and cable-layers), in addition to States who are not States Parties to UNCLOS and those under the jurisdiction and control of those States. Absent *ad hoc* agreement to submit to the jurisdiction of the Chamber, it should be accepted that disputes with such parties will be heard before those courts and tribunals (if any) that are competent to hear them (as explained in paragraphs 3.5 – 3.7 above).
- 4.6 Nevertheless, in relation to other disputes, there may be good reasons for considering whether to use the opportunity now presented by the preparation of the Exploitation Regulations and the awarding of exploitation contracts to expand the jurisdiction of the Chamber to include at least some of those disputes not expressly excluded by UNCLOS from the Chamber's jurisdiction.
- 4.7 Amongst other reasons, it should be recognised that if jurisdiction over "*activities in the Area*" is fragmented, the importance of the Chamber and the authority of its decisions risks being diluted. If that is to be avoided, then it will be important to try to channel disputes towards the Chamber so that it has a fair opportunity to establish itself as the specialist tribunal concerned with disputes relating to "*activities in the Area*".
- 4.8 If the Chamber is established as the principal authority having jurisdiction to determine disputes arising from "*activities in the Area*", there is an increased likelihood that decisions emanating from the same tribunal will be consistent with each other. If so, an important requirement of Part XI becomes more readily achievable, namely the obligation upon States Parties, state enterprises and natural and juridical persons as well as the ISA to "*ensure*" under Article 139.1 that their "*activities in the Area*" are "*carried out in conformity with*" Part XI. In this regard, a consistent jurisprudence will necessarily encourage conformity with Part XI. At the same time, consistency of decisions will be key in building confidence amongst States and contractors of the stability and predictability of the legal regime in force in the Area.
- 4.9 If these considerations are important to the ISA, then it should in consultation with the Chamber consider the extent to which proceedings before and awards made by the Chamber may be made public. In this regard, we would observe that:-
- 4.9.1 The provisions of Annex VI, Article 40 concerning the application of the

procedures of ITLOS apply to the Chamber to the extent that they are "*not incompatible*". Of interest are the provisions of Article 26.2, which provide that hearings before ITLOS shall be public (unless the Tribunal decides otherwise or the parties so demand), and of Article 30.4, which provide that ITLOS judgments are to be read in open court.

- 4.9.2 By way of illustrative comparison, proceedings before and awards made by a commercial arbitral tribunal under the optional jurisdiction created by Article 188.2 are unlikely to be public. Article 188.2(c) provides that in the absence of express provision, the rules governing the arbitration are to be the UNCITRAL Rules. Since UNCLOS was signed in 1982 and entered into effect in 1994, the UNCITRAL Rules 2010 will not apply to arbitrations commenced pursuant to Article 188.2.<sup>5</sup> Instead, the rather less modern UNCITRAL Rules 1976 will apply; these require that hearings are held "*in camera*" (Article 25.4) and make clear that the award may only be published with the consent of both parties (Article 32.5). Whilst it is open to the ISA to specify alternative arbitral rules, few commercial arbitral rules with which we are familiar provide for open and transparent proceedings<sup>6</sup> other than the UNCITRAL Rules 2010, as amended in 2013 to incorporate the UNCITRAL Rules of Transparency on Treaty-based Investor State Arbitration. For these reasons, we would suggest that if the ISA were minded to retain the right of a contractor to go to arbitration, it should be expressly in accordance with the UNCITRAL Rules 2010 or in accordance with the ISA's own bespoke rules (as to the drafting of which, we would be happy to advise the ISA). This may be achieved either by qualifying the submission in UNCLOS Article 188.2 or by specifically providing in each exploitation contract the arbitral rules that are to apply.
- 4.10 In conjunction with considering whether to expand the jurisdiction of the Chamber, a second issue for the ISA to consider is the extent to which it wishes to limit the risk of a multiplicity of proceedings involving the same parties or the same matters in dispute. This is important because it is likely that as more contractors move to the exploitation phase and levels of activity in the Area increase, so too will the risk increase of a major incident involving multiple parties. In such case, there is a real risk that disputes arising from that incident will be heard before a variety of different tribunals.
- 4.11 By way of example, if two contractor vessels were to collide, the disputes that could arise might include:-
- 4.11.1 A claim by one contractor against the other in respect of loss or damage to the other's vessel;
- 4.11.2 A claim for damages for personal injury or death from the crew of one contractor vessel against the other contractor;
- 4.11.3 A claim from one contractor or sponsoring State against the ISA for failure to adequately monitor the other contractor, allegedly engaged in unsafe practices;

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<sup>5</sup> See Article 1(2) of the UNCITRAL Rules 2010: "*The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.*" As observed by one leading commentator, "*Thus, for example, the 2010 Rules would not apply if an offer to arbitrate was made in [a] treaty concluded before August 15, 2010, even if an investor filed a claim – and accepted the arbitration agreement – after that date.*"; Caron, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford, 2013).

<sup>6</sup> If the ISA wishes to consider commercial arbitration further, it should however consider the desirability or otherwise of specifying arbitral rules too closely associated with any particular jurisdiction e.g. London Court of International Arbitration (UK), the Singapore International Arbitration Centre (Singapore) and the Stockholm Chamber of Commerce (Sweden), amongst others; even the International Chamber of Commerce may be perceived by some to be too closely associated with its host country, France. This may explain the default provision in UNCLOS for commercial arbitration to be undertaken in accordance with the UNCITRAL Rules.

- 4.11.4 A claim from a neighbouring coastal State against one or both contractors or the ISA in respect of damage caused to its marine environment from the collision.
- 4.12 It is possible that the Chamber would have jurisdiction over some of these disputes (e.g. claims against the ISA brought by a State Party under Article 187(b)(i) or between parties to the relevant contract under Article 187(c)(ii)) but the concern arising is that even if the Chamber does have jurisdiction over these disputes, they will be heard as separate proceedings. Accordingly, the result may be proceedings involving substantially the same facts and/or parties heard in separate proceedings before the Chamber and/or before other international and municipal courts and tribunals. The consequence of multiple proceedings will extend beyond delays in reaching a final determination of all disputes, and the attendant costs consequences, but particularly where more than one tribunal is involved is also likely to result in inconsistent judgments and awards.
- 4.13 There exists an opportunity for the ISA to establish a regime that will help to mitigate some of these risks. The simplest way to do this would be to insert relatively widely drafted dispute resolution provisions in the Exploitation Regulations and/or in exploitation contracts requiring any party involved in "*activities in the Area*" pursuant to the Exploitation Regulations and/or an exploitation contract to submit to the jurisdiction of the Chamber (or other court or tribunal designated by the ISA).
- 4.14 Before doing so, it would clearly be both appropriate and necessary to seek the views of the Chamber to ensure not only that it would be happy to accept disputes within the scope of any such clause, but also how it would feel most comfortable in any extension of its jurisdiction to accept such disputes. Amongst other questions to discuss with the Chamber are whether the Chamber would be prepared to hear pure contractor to contractor disputes (i.e. not involving the ISA or any States Parties) or whether these would be referred to a "commercial" list in the Chamber, or to commercial arbitration (perhaps under the supervisory jurisdiction of the Chamber), rather than to litigation in national courts as currently seems most likely.
- 4.15 In addition, the ISA should consider consulting with the Chamber over the procedural rules it would adopt for disputes in the Area; amongst other things that the ISA might consider are:-
- 4.15.1 Provisions as to consolidation of disputes involving the same parties and/or the same subject-matter, or at least the power to have such disputes heard concurrently
- 4.15.1 Provisions as to the desirability of ensuring that the evidence and material before the Chamber and its judgment or award should be made publicly available in the interests of transparency and consistency.

## 5. SPECIALIST COMPETENCES

- 5.1 However the ISA answers the question over the desirability of giving the Chamber a more general jurisdiction over disputes in the Area, it should give consideration as to whether the Chamber is best suited for all disputes that are foreseeable, or whether there are some disputes that might be decided by other tribunals or decision makers. Such disputes might include:-
- 5.1.1 Technical disputes; and
- 5.1.2 Administrative appeals.
- 5.2 We deal with each in turn.

### Technical Disputes

- 5.3 It is likely that a number of the disputes that will arise in the Area will be of a technical nature. In such case, it may not be efficient to have such disputes determined by a predominantly legally-trained and focussed tribunal such as the Chamber. Instead, there may be something to be said for referring such disputes to an appropriately qualified expert or expert panel for determination.

- 5.4 Determination of technical issues by appropriately qualified experts is likely to be a very efficient means of dispute resolution. If each expert or expert panel is permitted to determine its own procedure, such procedures can be tailored to the particular dispute before the expert(s). In practice therefore, it is likely to be faster and cheaper than formal proceedings before the Chamber. This may be important in the context of a dispute in the course of ongoing “*activities in the Area*” where a quick decision is necessary for operations to continue.
- 5.5 If the ISA were attracted by this proposal, we would recommend that the expert or expert panel be subject to the supervisory jurisdiction of the Chamber. However, the ISA should consider:-
- 5.5.1 Which technical disputes should be dealt with by expert determination;
  - 5.5.2 The framework by which experts may be appointed – whether from a panel either kept by the ISA or from the lists of experts held in accordance with Article 2 of Annex VIII (recognising that not all these experts may be suitably qualified for all disputes) or in accordance with the free choice of the parties;
  - 5.5.3 Appointment of experts in default of appointment by a party (the Chamber could have a role in such circumstances);
  - 5.5.4 Whether the expert determination should be final and binding; and
  - 5.5.5 The extent to which the expert determination should be subject to review by, say, the Chamber, the circumstances in which the Chamber could review the determination and, where appropriate, overturn it (in municipal Anglo-American practice, such instances are typically limited to fraud and manifest error).

#### **Simple administrative appeals procedure**

- 5.6 Article 187(d) envisages that the Chamber has jurisdiction over disputes between the ISA and a prospective contractor. Such disputes are likely to be relatively straight-forward insofar as they will turn on the reasons why the contract was refused, or the terms upon which it will be or has been granted.
- 5.7 Before such disputes are submitted to the Chamber for a final determination, the ISA might consider whether in the interests of speed and cost, and in the interests of ensuring that the Chamber is not clogged with potentially expensive disputes concerning the ISA's administrative decisions, it would make sense for a simple internal administrative appeals procedure to decide the issue. A similar procedure already exists under Regulation 23.9 of the Exploration Regulations.
- 5.8 In addition, the ISA might want to consider establishing a system of administrative fines and penalties for failure by a contractor to comply with the Exploitation Regulations. A scale of penalties might be considered to ensure that for trivial or minor infractions (e.g. late or incomplete submission of its accounts or submission in an incorrect format), a relatively low level of penalty, but for more serious infractions, a larger penalty would be imposed. Consideration should also be given to the effects of non-payment and/or continuing or repeat breaches, and the sanctions for that (which might lie in forfeiture of the termination of the contract in accordance with its provisions).
- 5.9 Consistent with Annex III, article 19, any regime adopted by the ISA should be based on principles of due process, including notice that a penalty may be payable and an opportunity to be heard if the contractor objects to the penalty, followed by a clearly reasoned decision and a right of appeal to the Chamber for more serious cases.

**NOTE: This discussion paper is dated as of 12 February 2016 and will not be further updated.**