



DISCUSSION PAPER

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Data and Information Management Considerations Arising Under the Proposed New Exploration Regulations

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INTERNATIONAL SEABED AUTHORITY

DISCUSSION PAPER CONCERNING DATA AND INFORMATION MANAGEMENT CONSIDERATIONS ARISING UNDER THE PROPOSED NEW EXPLOITATION REGULATIONS

1. INTRODUCTION

- 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.
- 1.3 This paper is limited to considering certain aspects of the management of data and information provided by contractors and prospective contractors to the ISA in respect of applications for, and pursuant to, exploitation contracts, and the management of such data and information under the ISA's proposed new Exploitation Regulations. Specifically, it seeks to explore:-
 - 1.3.1 The concept of confidentiality under UNCLOS;
 - 1.3.2 The presumption in favour of transparency and openness in the discharge by the ISA of its duties in line with international best practices;
 - 1.3.3 The balance between the competing duties of the ISA to manage the resources of the Area transparently and to preserve confidentiality over protected data and information, including that data and information treated by the ISA as confidential under the existing Exploration Regulations.
- 1.4 We set our observations in greater detail below.
- 1.5 Unless otherwise indicated, terms defined in UNCLOS shall have the same meaning in this paper.

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2. THE CONCEPT OF CONFIDENTIALITY UNDER UNCLOS

- 2.1 UNCLOS Article 134 provides that "*Activities in the Area shall be governed by the provisions of [Part XI].*" Accordingly, the provisions of UNCLOS Part XI and of Annex III should be considered when assessing the duties of confidentiality owed by the ISA in respect of "*activities in the Area*" (as that term is defined in Article 1(3) of UNCLOS) and the Exploitation Regulations and exploitation contracts should reflect them accordingly.
- 2.2 Part XI of UNCLOS provides that certain data and information is to be kept confidential. Specifically:-
- 2.2.1 **Article 163(8)** provides that members of Council organs, namely the Legal and Technical Commission and any future Economic Planning Commission (the "**Commissions**") may not disclose "*any industrial secret, proprietary data ... transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their duties for the Authority*".
- 2.2.2 **Article 168(2)** contains similar provisions in relation to the non-disclosure by the Secretary-General and the staff of the Secretariat of "*any industrial secret, proprietary data ... transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their employment with the Authority*".
- 2.2.3 **Article 181(2)** provides that "*Proprietary data, industrial secrets or similar information and personnel records shall not be placed in archives which are open to public inspection*".¹
- 2.3 We would observe that the obligations of confidentiality imposed by Articles 163(8) and 168(3) upon members of the Commissions and of the Secretary-General and the staff of the Secretariat are expressly qualified to be "*subject to their responsibilities*" to the Commissions and the ISA respectively. It might be inferred that this qualification was in each case presumably intended to ensure that confidential information is available to be used by the Commissions, and the Secretary-General and his staff in the proper performance of their duties, as contemplated, for example, under Annex III, article 14(1) and (2).
- 2.4 UNCLOS provides no definitions or other guidance as to the meanings of the terms "*industrial secrets*", "*proprietary data*" and "*other confidential information*". In light of the reference in Articles 163(8) and 168(2) to "*any industrial secret, proprietary data ... transferred to the Authority in accordance with Annex III, article 14*", it might be expected that confidentiality might arise out of the nature of the relevant information transferred. In this regard, Annex III, article 14 requires the "*operator*" to transfer "*all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work.*"

¹ We have been asked to consider whether the implication of this provision is that non-confidential data is open to public inspection. Our view is that this provision requires the Authority to ensure that "*proprietary data, industrial secrets or similar information and personnel records*" are not "*placed in archives which are open to public inspection*", whereas other kinds of information may (rather than shall) be "*placed in archives which are open to public inspection*", depending upon whether such information is confidential or not.

In this regard, Art 181.1 provides that the archives of the ISA, "*wherever located*", are to be "*inviolable*". "*Inviolability*" is a concept that is used in the Vienna Convention on Diplomatic Relations. In that context, it has been observed that the term "*inviolability*" is "*not particularly precise*", but "*no doubt implies immunity from all interference, whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interferences or from mere insult ...*" (Parry, *British Digest of International Law*, Part VII).

To that extent, it might be inferred that (1) the archives of the ISA are not generally open to public inspection and (2) that particular kinds of information (e.g. as identified in Article 181.2 as well possibly as official communications under Article 181.3) are specifically to be treated as confidential.

However, Annex III, article 14 does not give any further guidance as to the nature of the information that is to be treated as confidential.

- 2.5 Whilst Annex III, Article 14 does not add a great deal to any understanding of the confidentiality regime imposed by UNCLOS, it would seem that applying the general principles of treaty interpretation set out in the Vienna Convention on the Law of Treaties, UNCLOS seeks to protect data and information that (i) has commercial value and which, if disclosed, could prejudice the legitimate commercial interests of a Contractor and/or offer a competitor a competitive advantage; and (ii) contains information of a private nature relating to individuals. For the purposes of this paper, we will assume this definition to be materially correct.

3. **DESIGNING AN INFORMATION MANAGEMENT REGIME FOR THE EXPLOITATION REGULATIONS**

- 3.1 The drafting of the Exploitation Regulations provides an opportunity for the ISA to clarify the meaning and effect of its duties of confidentiality in UNCLOS and to establish a regime which protects properly confidential information provided to the ISA in a manner that is consistent with UNCLOS.

- 3.2 However, in drafting a confidentiality regime for the Exploitation Regulations, there are two points that require consideration by the ISA. These are:-

3.2.1 First, the extent to which any desire for greater transparency and openness in respect of "*activities in the Area*" and a more restrictive view as to what information should be protected on grounds of confidentiality should be reflected in the provisions of the Exploitation Regulations and their application; and

3.2.2 Second, how to balance against this desire the legitimate expectations of contractors that the ISA will treat their data and information confidentially, including under any existing obligations concerning confidentiality (e.g. under the Exploration Regulations) which would be inconsistent with a more transparent or open regime, and the extent to which the two regimes can or should be merged.

- 3.3 We deal with each of these in turn.

(1) *The desire for greater transparency*

- 3.4 In light of the special status of the Area under UNCLOS Part XI and the designation of its resources as the Common Heritage of Mankind, a number of members of the ISA and stakeholders have been increasingly keen to ensure that the provisions of UNCLOS concerning confidentiality are not given broader interpretation than is necessary so that only material that is genuinely confidential is protected from disclosure.

- 3.5 It is noteworthy in this regard that during negotiations on the Exploration Regulations, "*several delegations*" were concerned that "*excessive levels of confidentiality*" were incompatible with the principle that the resources of the Area are the Common Heritage of Mankind.²

- 3.6 Indeed, there appears to be more recent agreement as to the need for transparency and openness regarding the work of the ISA. For example, in the Summary Report of the President of the ISA Council on the work of the Council's Twentieth Session (14 – 25 July 2014), it was noted that delegations had "*discussed the issue of 'transparency and openness' as an essential element of the work of the Commission and the Authority as a whole*".³ Whilst this point was noted in relation to the work of the LTC (and of the ISA) generally, rather than in respect of access to information specifically, the report observes that:-

² Michael C Wood, *International Seabed Authority: The First Four Years*, 3 Max Planck UNYB 3 (1999), 173 at 233.

³ Summary report of the President of the Council of the International Seabed Authority on the work of the Council during the Twentieth Session (Report ISBA/20/C/32), paragraph 16.

"Strong interest was expressed in increasing transparency and dialogue on the development of the Commission's work. Many delegations recommended that the Commission continue to explore initiatives, including the holding of open meetings and publishing surveys, in particular on issues of general interest to member States and other stakeholders of the Authority, with a view to ensuring broad participation on those initiatives."

3.7 If the prevailing view amongst stakeholders expressed in such open meetings and surveys is that there should be less confidentiality and more openness, momentum may build to ensure that the Exploitation Regulations reflect this.

3.8 The importance of transparency and openness was also highlighted in the ISA's Report, *Developing a Regulatory Framework for Mineral Exploitation in the Area*:-

"A tension could exist between the existing confidentiality provisions contained in the Exploration Regulations and the transparency demands of an exploitation framework, particularly public access to relevant data and information and participation in the environmental decision-making process. There is a growing call in the extractive industries for greater levels of transparency through information disclosure and a presumption that information relating to contracts and activities under contracts is publicly available, save for confidential information."⁴

3.9 Indeed, and as noted by the Seabed Disputes Chamber in its Advisory Opinion in 2011, *"it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation"*. If so, the management of these risks would militate in favour of less confidentiality, particularly concerning technologies and processes.

(2) Legitimate expectations of contractors that their data and information will be treated confidentially

3.10 Nevertheless, the ISA needs to be mindful of the fact that it will need to respect confidentiality of data and information in accordance with the legitimate expectations of contractors in accordance with the legal protections provided by UNCLOS.

3.11 By way of example, there is no question that contractors and prospective contractors have a legitimate expectation that data and information which they submit to the ISA under Annex III, Article 14, should be protected, particularly where disclosure could prejudice their commercial interests or give a competitor a commercial advantage.

3.12 In addition, the ISA will be familiar with its own Regulations for Prospecting and Exploration for Polymetallic Nodules,⁵ Polymetallic Sulphides,⁶ and Cobalt-Rich Ferromanganese Crusts⁷ (together, the "**Exploration Regulations**"). These contain provisions regarding confidentiality of data and information in substantially the same terms.⁸ Insofar as material, they provide as follows:-

"1. Data and information submitted or transferred to the [ISA] ... and designated by the contractor, in consultation with the Secretary-General, as being of a confidential nature, shall be considered confidential unless it is data and information which:

- (a) Is generally known or publicly available from other sources;*
- (b) Has been previously made available by the owner to others without an obligation concerning its confidentiality; or*

⁴ Developing a Regulatory Framework for Mineral Exploitation in the Area, March 2015

⁵ Annex to ISBA/19/C/17

⁶ Annex to ISBA/16/A/12/Rev.1

⁷ Annex to ISBA/18/A/11

⁸ Regulation 36 in the Nodules Regulations and Regulation 38 in the Crusts and Sulphides Regulations

(c) Is already in the possession of the Authority with no obligation concerning its confidentiality.

2. Data and information that is necessary for the formulation by the Authority of rules, regulations and procedures concerning protection and preservation of the marine environment and safety, other than proprietary equipment design data, shall not be deemed confidential."

- 3.13 The precise nature of the "*data and information*" to which confidentiality will attach is not defined in the Exploration Regulations. Whilst the Exploration Regulations appear to encompass a broader range of data and information than did earlier drafts (which attempted to tie the concept of confidentiality to data and information of a "*proprietary*" or "*commercially sensitive nature*"), it seems that the test of confidentiality is whether the "*data and information*" concerned has been designated as "*confidential*" by the Contractor, "*in consultation with the Secretary-General*". Once so designated, the confidential nature of the data and information is to be reviewed after 10 years of submission or upon expiration of the exploration contract; confidentiality will only be preserved thereafter "*if the contractor establishes that there would be a substantial risk of serious and unfair economic prejudice if the data and information were to be released*".
- 3.14 An issue is likely to arise in respect of any change in the treatment by the ISA of "*data and information*" designated by a contractor as confidential under the Exploration Regulations, where that "*data and information*" was submitted within the last 10 years or under an unexpired exploration contract. Clearly, the confidential nature of such "*data and information*" will have to be protected by the ISA unless the contractor agrees to waive its right to have it protected. Contractors are unlikely to agree to a waiver except as a condition of the grant of any exploitation contract. As it is unlikely that this approach will ensure that all "*data and information*" designated as confidential will lose its confidentiality, the ISA is likely to operate a two-tier system in respect of "*data and information*" submitted under the Exploration Regulations and data and information to be submitted under the Exploitation Regulations. It would be advisable for the ISA to make enquiries with all those contractors (both current and former) and proposed contractors that have previously submitted information and data to establish which of that information and data, if any, need to be protected on confidentiality grounds. The ISA can then form its own views as to whether such information and data is truly confidential or not, and then how best to treat it.
- 3.15 If there is to be a move towards greater transparency and openness within the exploitation regime, then it is difficult to see any alternative to the ISA running two separate confidentiality regimes in parallel, at least initially, and possibly pending a test case or advisory opinion from the Seabed Disputes Chamber concerning and clarifying the scope and extent of confidentiality under UNCLOS Part XI and the ISA's duties in respect of it. Until then, there will be a degree of administrative inconvenience to the ISA in managing those regimes in accordance with its obligations and an inconsistency of approach in relation to very similar data and information submitted under the different regulations. The ISA will obviously be at greater risk of breaching the potentially wider scope of the confidentiality obligations under the Exploration Regulations and to manage that risk, it will be important to have an effective archive that clearly distinguishes between data and information submitted under the different regulations. We would also raise for consideration whether there may be a risk that the ISA could be vulnerable to a claim for breach of confidence if it discloses data and information submitted by one contractor (A) under the new Exploitation Regulations and which is not designated as confidential, but which is derived from data and information that has been designated by another contractor (B) as confidential under the Exploration Regulations; whether or not this is likely to arise, in such a case, the ISA may be subject to a claim for breach of confidence by B. To mitigate against that risk, the ISA should consider whether to adopt a policy of obtaining warranties from contractors that no information submitted by them to the ISA is confidential such that it may be disclosed by the ISA in the proper performance of its duties; the ISA may also consider seeking an indemnity from contractors in relation to disclosure of information not

designated by the submitting contractor as confidential, but which belongs to a third party that considers that information to be confidential.

4. DRAFTING OF NEW REGULATIONS ON CONFIDENTIALITY

4.1 In light of the lack of definition in both UNCLOS and the Exploration Regulations as to the terms concerning what data and information is to be kept confidential, the preparation of the Exploitation Regulations offers an opportunity to set out a more clearly defined regime.

4.2 In this connection, it would seem that a key objective for the ISA is to develop an information management regime in the Exploitation Regulations which strikes a balance, consistently with UNCLOS, in ensuring that there is sufficient data and information that is publicly available about activities in the Area whilst ensuring that the confidentiality of protected classes of data and information is preserved.

4.3 Whether this is an opportunity that the ISA wishes to embrace, and if so, to what extent, is of course a matter that needs careful consideration. There is a balance to be struck in seeking to provide greater certainty in the use of clear definitions of terms in UNCLOS as against the positive advantages of ensuring that the Exploitation Regulations are sufficiently flexible to adapt over time to changing technologies, processes and perceptions of what may be confidential and what may not be.

4.4 Nevertheless, we would suggest that the ISA consider provisions in the new Exploitation Regulations to include the following:-

4.4.1 A broad definition of Information to include all data and information in any format whatsoever and of all kinds, including "*industrial secrets*", "*proprietary data*" and "*other confidential information*", as each of these terms is understood under UNCLOS. In the interests of the flexibility of a long-term regime, we would not define any of these sub-classes of Information exhaustively.

4.4.2 A definition of Confidential Information to the effect that it is:-

- (A) Information, including (i) industrial secrets, proprietary data or other information that has commercial value and which, if disclosed, would [significantly] prejudice the legitimate commercial interests of a Contractor or offer a competitor a [significant] competitive advantage; and (ii) that of a private nature relating to individuals.⁹ Consideration should be given as to whether the inclusion of the words "*significant*" and "*significantly*" render this definition too restrictive;
- (B) Information that has been designated as Confidential Information by a contractor in consultation with the Secretary General under the Exploration Regulations and which remains Confidential Information in accordance with the Exploration Regulations;
- (C) Information designated as or deemed to be Confidential Information by UNCLOS, including personnel matters, health records of individual employees or other documents in which employees have a reasonable expectation of privacy and other matters that involve the privacy of individuals;

⁹ The terms used here have their origins in general concepts of many municipal laws. "*Private*" and "*secret*" would mean "*not in the public domain*" or "*not generally available to the public*"; the distinction between the two would ensure protection of both commercial interests (for example "*proprietary data*" and "*industrial secrets*") and individual interests (for example "*personnel records*" which are protected under Art 181(2)). "*Commercial value*" is a concept that seems to be contemplated under Annex III, Art 5, given the right of the Enterprise or a developing State to have transferred to it "*technology ... not generally available on the open market*" on "*fair and reasonable commercial terms*". We would expect that this should be relatively easy to assess – either the information has a "*commercial value*" or it does not. Any such value will be a question of fact.

- (D) Other Information deemed to be Confidential Information under applicable law, including customary international law. The extent to which the applicable law should also include municipal law should be considered carefully as the level of protection in municipal law will vary widely.
- 4.4.3 In the drafting of the Exploitation Regulations, the ISA should give consideration as to whether there should be a general, but rebuttable presumption that Information should not be deemed to be Confidential Information, although it might be appropriate to provide explicitly that certain categories of Information can never be deemed to be Confidential. Those categories might include:-
- (A) Information necessary for the formulation by the Authority of rules, regulations and procedures concerning protection and preservation of the marine environment and safety, other than proprietary equipment design data;¹⁰
 - (B) Information that is generally known or publicly available from other sources;
 - (C) Information that is already in the possession of the ISA with no obligation concerning its confidentiality
- 4.4.4 In terms of any provision establishing a rebuttable presumption, it will be important to ensure that the presumption is carefully phrased to ensure it is not too widely cast (nor too narrowly construed).
- 4.4.5 Within any such provision, the ISA may consider that the following categories of Information should be presumed not to be Confidential Information insofar as:-
- (A) It is a contract for exploitation;
 - (B) It concerns activities in the Area;
 - (C) It is an award or judgment in connection with activities in the Area (save in relation to any Confidential Information contained in such award or judgment which may be redacted);
 - (D) It is Information that is not by its very nature Confidential Information.¹¹
- 4.4.6 An obligation upon the party transferring or submitting Information to the ISA to designate by notice in writing the Information or any part of it as Confidential Information. If the Secretary-General objects to such designation within a given period (say 30 days), the parties shall consult upon the nature of the Information and whether it constitutes Confidential Information. Any disputes as to the nature of the Information may be submitted to a third party decision-maker (for example, the Chamber or to an expert or panel of experts, as proposed in our discussion paper concerning dispute resolution) for a final and binding decision.
- 4.4.7 Obligations upon the ISA and its staff to:-
- (A) Protect and maintain the confidential nature of any Confidential Information which has been submitted to it.
 - (B) Not to transfer any Confidential Information to any third party except with the consent of the party that submitted the Confidential Information

¹⁰ This provision would be in accordance with Annex III, article 14(2)

¹¹ This might include, for example, information about financial and other payments including financial penalties that have been levied and collected.

- (C) Treat any Confidential Information in accordance with information management rules, regulations and procedures developed by the ISA from time to time.
 - (D) Keep and maintain accurate records and archives (in a manner contemplated by Article 181(2)) regarding all Confidential Information submitted to the ISA;
 - (E) Obtain undertakings from all ISA officers, staff, contractors and any other persons with access to Confidential Information to adhere to the ISA's obligations in respect of such Confidential Information;
- 4.4.8 Confidential Information may only be used by the ISA and its staff for the purposes for which it was received or as otherwise permitted under UNCLOS, including Annex III, article 14.
- 4.4.9 A reasonable period after which Confidential Information shall no longer be deemed to be such unless the party that submitted it can demonstrate to the satisfaction of the Secretary-General that it continues to satisfy the definition of Confidential Information in the Exploitation Regulations.

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