

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Part IX

Information-gathering and handling

Regulation 89

Confidentiality of information

1. ~~[There shall be a presumption that any]~~ Data and information regarding the Plan of Work, Exploitation Contract, its schedules and annexes or the activities taken under the Exploitation Contract ~~[are]~~ [shall be] public, other than Confidential Information.
2. “Confidential Information” means:
 - (a) ~~[~~ Data and information that have 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;~~]~~
 - (b) Data and information relating to personnel matters, the 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;
 - (c) Data and information which have been categorized as Confidential Information by the Council; and
 - (d) Data and information designated by the Contractor as Confidential Information at the time it was disclosed to the Authority, provided that, subject to paragraph 5 below, such designation is deemed to be well founded by the ~~[Secretary-General]~~ [the Data Committee Legal and Technical Commission] in accordance with the applicable Standard~~]~~ on the basis that there would be substantial risk of serious or unfair economic prejudice if the data and information were to be released~~; and~~.
 - ~~—— [(e) Documents exempt from disclosure due to attorney-client privilege.]~~
3. “Confidential Information” does not mean or include data and information that:
 - (a) Are generally known or publicly available from other sources;
 - (b) Have been previously made available by the owner to others without an obligation concerning its confidentiality;
 - (c) Are already in the possession of the Authority with no obligation concerning its confidentiality;
 - (d) Are required to be disclosed under the ~~r~~Rules, regulations and procedures of the Authority [to protect the Marine Environment or human health and safety];

- (e) Are necessary for the formulation ~~{from time to time}~~ by the Authority of ~~r~~Rules, ~~r~~Regulations, ~~-and-p~~Procedures ~~{and decisions}~~ ~~{of the Authority}~~ concerning the Protection and ~~P~~preservation of the Marine Environment and safety, other than equipment design data;
- (f) Relate to the Protection and ~~P~~preservation of the Marine Environment, ~~f~~provided that ~~L{unless}~~ the Secretary-General may agree that such information is regarded as Confidential Information for a reasonable period where there are bona fide academic reasons for delaying its release;

[(f) Alt. Relate to the Protection and Preservation of the Marine Environment, provided that the Secretary-General may designate such information as Confidential Information for a reasonable period, subject to such conditions as may be appropriate, where the Commission agrees that there are bona fide academic reasons for delaying its release on the terms proposed by the Secretary-General and the decision including the reasons are reported to Council;]

~~[(f) Alt. 2. Are environmental data, including all baseline and monitoring information;]~~

- (g) Are 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}~~;
- (h) [Relate to Contractor payments to the Authority, governments, state enterprises, other Contractors, as well as payments and other forms of financial benefit received by the Contractor from Sponsoring States;
- (i) Relate to beneficial ownership of Contractors;
- (j) ~~[Relate to Sponsorship Agreements or other contractual arrangements between Contractors and Sponsoring States;]~~
- (k) The Contractor to which the data and information relates has given prior written consent to its disclosure;
- (l) The area to which the data and information relates is no longer covered by an Exploitation Contract; provided that following the expiration of a period of 10 years after it was passed to the Secretary-General, Confidential Information shall no longer be deemed to be such unless otherwise agreed between the Contractor and the ~~{SecretaryGeneral}~~, ~~{in accordance with the applicable Standard and taking into consideration the relevant Guidelines}~~ and save any data and information relating to personnel matters under paragraph 2 (b) above; or

[(m) Are in a category designated by the Council as not being Confidential Information.]

- 4. Confidential Information will be retained by the Authority and the Contractor in strictest confidence in accordance with Regulation 90 and shall not be disclosed to any third party ~~{without reasonable cause}~~ without the express prior written consent of the Contractor, which consent shall not be unreasonably withheld, conditioned or delayed, save that Confidential Information may be used by the Secretary-General and staff of the Authority's Secretariat, as authorized by the Secretary-General, and by members of the Commission as necessary for and relevant to the effective exercise of their powers and functions.
- 5. In connection with paragraph 2 (d) above, a Contractor shall, upon transferring data and information to the Authority, designate by notice in writing to the Secretary-General the Information or any part of it as Confidential Information [describing, in general and nonprejudicial terms, any information redacted or required to be withheld from publication on the basis of confidentiality with an explanation of the

reasons. The Secretariat shall publish a copy of any such notice received upon receipt]. If the Secretary-General, [a Member State, or another Stakeholder] objects to such designation [within a period of 30 Days from the publication of the notice], the parties shall consult upon the nature of the data and information and whether it constitutes Confidential Information under this Regulation, [and consult the Data Committee as appropriate]. During the consultations, the Secretary-General shall take into account any relevant [policy guidance from the Council] [apply the applicable Standards and taking into consideration Guidelines]. [The Secretary-General shall report to the Council regarding the types and quantities of data that are designated confidential in accordance with this paragraph.] Any dispute arising as to the nature of the data and information shall be dealt with [through the administrative procedure described in [insert here cross reference to relevant provisions or Annex of the Regulations setting out administrative decision review procedures]] [in accordance with Part XII of these Regulations].

6. [Nothing in these Regulations shall affect the rights of a holder of intellectual property.]

Comments

- Revisions have been implemented based on discussions during the second part of the twenty-ninth session.
- The reference to attorney-client privilege has been removed since in circumstances where a document is shared with the Authority, any such privilege must already be deemed to have been waived.
- Delegations continue to diverge on whether to retain paragraph 2(a).
- Delegations continue to diverge on whether paragraph 2(f) or 2(f)alt is preferred.
- Several delegations urged a simplified paragraph 5, but no textual proposals have been put forward to that effect.
- Several delegations urged the removal of any reference to the Data Committee, which is no longer an organ envisaged.

We are generally very supportive of this DR89 and thank the delegates who have engaged to craft it with a focus on open access. Public access to environmental data, and ability to participate meaningfully in decisions about the common heritage of humankind, are essential principles that should underpin all of the ISA's decision-making.

The President's comment in the text-box about attorney-client privilege makes sense if one is only considering information that is shared with the ISA by a third-party. However there is also another very important source of information that will be held by the ISA and to which this DR89 should apply equally in our view, and that is **information generated by the organs of the ISA.**

Sub-paragraph (2)(a) of DR89, which seeks to retain long-term non-disclosure of Exploration data, is problematic and should be deleted. Applying two separate data classification regimes for Exploration and Exploitation simultaneously may lead to inconsistencies and confusion. It is unclear why information relating to an exploration contract would not be disclosable after that contract has expired, and the relevant Contractor has commenced an exploitation contract. If there is any data from Exploration that the Contractor considers should remain confidential, this can be managed under sub-paragraphs (b)-(d). Multiple Member States have suggested deletion of this provision, and we do not have record of support for keeping it, so we query why it is in brackets instead of deleted.

Regarding **sub-paragraph 89(2)(d)**, a specialised body to assess the designation of confidential information seemed a positive proposal and we had been interested to hear more detail (as discussed by the Council in July 2024). We are unclear as to why the idea is no longer being pursued. We suggest this is considered in tandem with the discussion of the Authority's Data Management Strategy, which we have yet to see.

For **sub-paragraph (3)(f)**, we prefer the Alt 2 text. The drafting of the other proposals in sub-paragraph (f) and (f alt) seems inappropriately narrow. In our view, the ISA's rules should designate all 'environmental data' as non-confidential as a default and should set reporting requirements that delineate properly between environmental information and commercially sensitive operational information. What comprises environmental data should be clearly defined, to avoid loopholes (e.g. are geological data 'environmental data'?) A Standard may an appropriate

instrument for this. For **paragraph (5)** we support amendments to counter-balance what would otherwise be an overly broad discretion to declare potentially large swathes of information as confidential. We do not support a time limit for challenges to confidentiality designations. There are many scenarios in which a Member State or other stakeholder would never be aware of such designation until they were actively seeking to access information, which may be long after it was first designated. We are also unsure whether it is legally correct to direct a dispute about data confidentiality to ITLOS – which seems to be the effect of paragraph (5). Part XI of UNCLOS sets specific and limited grounds for the types of claims that can be brought to ITLOS (Article 187) that would not seem likely to be triggered in this context. We suggest the ISA should instead institute an **administrative review process** for appeals against decisions taken by an officer or organ of the ISA, for example a reference to an independent ad hoc panel set-up by the Council, which can hear different parties views and take determine whether or the initial decision was lawfully and correctly taken.

We agree with the Netherlands and others that **paragraph (6)** is overly broad and likely unworkable.

We also would like to see DR89 recognise that data categorised as ‘Confidential Information’ initially may cease to qualify as such over time. We would like to see **time limits or review procedures** incorporated.