

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.

Regulation 90

Procedures to ensure confidentiality

1. The Secretary-General shall be responsible for maintaining the confidentiality of all Confidential Information [held by the Authority] and shall not ~~(, except where legally obliged to do so, following a legal direction or with a lawful cause or good cause or on the basis of Rules, Regulations or Procedures of the Authority, on the basis of the directions of a competent court or tribunal, or with~~ the prior written consent of a Contractor [concerned], release such information to any person external to the Authority. To ensure the confidentiality of such information, the ~~[Secretary-General]~~ [Council] shall establish procedures, consistent with the provisions of the Convention, governing the handling of Confidential Information [by members of the Secretariat, members of the Commission, members of the Council] [by organs of the Authority], and any other person participating in any activity or programme of the Authority. Such procedures shall include:

(a) The maintenance of Confidential Information in secure facilities and the development of security procedures to prevent unauthorized access to or removal of such information; and

(b) The development and maintenance of a classification, log and inventory system of all written information received, including its type and source and the routing from the time of receipt until final disposition.

2. A person who is authorized pursuant to these Regulations to access Confidential Information shall not disclose such information except as permitted under the Convention and these Regulations. The Secretary-General shall require ~~[such persons]~~ [any person who is authorized to access Confidential Information] to make a written declaration witnessed by the Secretary-General or duly authorized representative to the effect that the person so authorized:

(a) Acknowledges his or her legal obligation under the Convention and these Regulations with respect to the non-disclosure of Confidential Information; and

(b) Agrees to comply with the applicable Regulations and procedures established to ensure the confidentiality of such information.

3. The Commission shall protect the confidentiality of Confidential Information submitted to it pursuant to these Regulations or an Exploitation Cecontract issued under these Regulations. In accordance with the provisions of Article 163(8), of the Convention, members of the Commission shall not disclose or use, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Article 14 of Annex III to the Convention

or any other Confidential Information coming to their knowledge by reason of their duties for the Authority.

4. The Secretary-General and staff of the Authority shall not disclose or use, even after the termination of their functions with the Authority, any industrial secret, proprietary data which are transferred to the Authority in accordance with Article 14 of Annex III to the Convention or any other Confidential Information coming to their knowledge by reason of their employment with the Authority.

5. Taking into account the responsibility and liability of the Authority pursuant to Article 22 of Annex III to the Convention, the Authority may take such action as may be appropriate against any person who, by reason of his or her duties for the Authority, has access to any Confidential Information and who breaches any of the obligations relating to confidentiality contained in the rules, regulations and procedures of the Authority.

6. In the case of any breach of obligations relating to Confidential Information held by the Authority, the Authority, ~~upon becoming aware of the breach,~~ shall notify the relevant Contractor and Sponsoring State ~~for States~~.

Comment

A number of delegations pointed out the imprecise formulation of ‘*lawful cause*’ or ‘*good cause*’ or ‘*legal direction*’. Alternative wording is now proposed. It has been suggested that ‘*legal direction*’ should be confined to court or tribunal order for disclosure, which is now reflected. It bears noting, however, that orderly courts or tribunals would not have jurisdiction to compel the Authority to disclosure. This reference should be therefore construed as reference to courts or tribunals acting in accordance with jurisdiction conferred upon them under international law, including over the Authority. It has been proposed to use the phrase “*where legally obliged*” to do so, to capture all relevant scenarios, which is now proposed for the consideration.

In **paragraph (1)** we support language that expands permitted cases of disclosure beyond legal obligation and consent of the Contractor. Such instances could include: for the purposes of legal proceedings, to report suspected criminal conduct, to prevent imminent threat to life or the marine environment, or in the case of suspicion of a violation of the Regulations as raised by the Director-General of the Enterprise in July 2024. At a minimum, there must be an exception for when the ISA is legally obligated to release information; the ISA cannot be required to obtain the Contractor’s permission in those circumstances and does not want to bind itself to be unable to cooperate with such legal proceedings.

DR90 requires certain information-handling procedures. We note that DR39 (‘Books, records and samples’) had referred to “*the Authority’s data and information management policy*”. It may be helpful to make a connection between that document, and the procedures the Secretary-General is required to develop here, particularly if they are part of the same policy. Moreover, we have yet to see the data management strategy that we understand the Secretariat has been working on for some time - and had previously been conducting workshops on with contractors intersessionally. Opening the existing data management strategy to public comment, could be a helpful step here to help us understand what matters are covered by which policy or procedure. For example, as we raised in relation to DR89 (above), is there a time limit for confidential classification of data, or does the classification apply indefinitely?

DR90(1) indicates that the Council (as an organ of the Authority) may be given access to Confidential Information. This seems sensible given the Council is the body with responsibility to take decisions about Contracts and compliance matters, which may necessitate consideration of items deemed confidential. **Paragraph (2)** requires any person provided with access to Confidential Information to make a witnessed written declaration. As raised by Ghana on behalf of the African Group in July 2024’s session, we are unsure it is practicable that every Council delegate should be required to sign a declaration with the SG. Delegates do not attend the Council in an individual capacity as they represent a Government with whom they may need to share the information more broadly, for instructions.