

TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 31TH SESSION: COUNCIL - PART I

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. Name(s) of Delegation(s) making the proposal:

Germany

2. Please indicate the relevant provision to which the textual proposal refers.

Topic: Confidential Information, DR 89 - 91

3. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the “track changes” function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

Regulation 89

Confidentiality of 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];~~

3. “Confidential Information” does not mean or include data and information that:

~~(d) Are required to be disclosed under the rules, regulations and procedures of the Authority to protect the Marine Environment or human health and safety;~~

~~(f) Alt. are environmental data, including all baseline and monitoring information;~~

~~5. bis. If the Secretary-General/Commission [or], a Member State[, or another any 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. During the consultations, the Secretary-General shall [apply-comply with] the applicable Standards and take into account the 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 referred to an internal administrative review panel established by the Council for this purpose, whose decision shall be final for the purposes dealt with in accordance with Part XII of these Regulations.~~

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 or with the prior written consent of a Contractor concerned), release such information to any person ~~other than external to the Authority [who is not an official]~~s, staff or authorised representatives ~~of the Authority, a Member of its constituent organs or is otherwise authorised]~~ acting within the scope of their functions ~~under these Regulations]~~. To ensure the confidentiality of such information, the Council shall ~~[establish][maintain and apply]~~ procedures, consistent with the provisions of the Convention, governing the handling of

Confidential Information ~~by~~ officials, staff and authorised representatives, including consultants and external experts engaged by the Authority ~~organs of the Authority~~, and any other person participating in any activity or programme of the Authority. [...]

~~[3. Officials, staff and authorised representatives of the Authority, including members of The Commission,] subsidiary organs acting in their official capacity of the Authority, shall comply with the terms of the written declaration and the Authority's procedures governing the handling of Confidential Information. protect the confidentiality of Confidential Information submitted to them pursuant to these Regulations or an Exploitation Contract issued under these Regulations. [In accordance with the provisions of Article 163(8), of the Convention, m][M]embers of the Commission subsidiary organs 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.]~~

3. bis The Secretary-General shall establish and maintain a Confidential Information Register to record all instances in which data or information has been designated as Confidential Information. The Register shall, at a minimum, indicate the identity of the designating party, the legal basis and justification for the designation, the applicable category of the confidentiality as set out in regulation 89, paragraph 2, and the date of designation and the applicable expiration date of the review period. The Secretary-General shall use the Confidential Information Register to inform periodic reviews of confidentiality status in accordance with the applicable Standards and to support reporting to the Council.

~~[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.]~~

~~[Alt. to 3 and 4. Organs of the Authority shall protect the confidentiality of Confidential Information submitted to them pursuant to these Regulations or an Exploitation Contract issued under these Regulations. Members of organs of the Authority 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 [or duties 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 official, staff member or authorised representative of the Authority, including consultants or external experts ~~[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~~Secretary-General, ~~upon becoming aware of the breach,~~ shall notify the relevant Contractor and Sponsoring State or States. [Any cases of breach of obligations relating to Confidential Information held by the Authority, shall be referred to the Compliance Committee.]

Regulation 91

Data and Information to be submitted upon expiration or termination of an Exploitation Contract

~~[...]1. ter The information and data submitted by the Contractor in accordance with paragraph 1 shall be accompanied by a report providing a summary of the exploitation activities[, including on the Contractor's compliance with its obligations and any incidents].]~~

[2. Upon termination or expiration of an Exploitation Contract, ~~the Contractor and~~ the Secretary-General upon the instruction of [the Commission][a data committee convened for this purpose] ~~shall~~ ~~may~~ consult together ~~and,~~ in accordance with the provisions of this regulation and the applicable Standards and taking into account the Guidelines, ~~the Secretary-General~~ shall ~~to~~ specify ~~to the Contractor~~ the data and information to be submitted to the Authority.]

3. If a former Contractor fails to transmit the data and information required under paragraph 1 within the prescribed period, the Secretary-General shall notify the former Contractor in writing and provide a final deadline for submission. If the former Contractor does not comply within that final deadline, the Secretary-General shall refer the matter to the Compliance Committee, which shall report to the Council with recommendations for appropriate action, including, where applicable, the withholding of any outstanding financial entitlements or the initiation of recovery proceedings for any costs incurred by the Authority in obtaining or reconstructing the missing data or information.

4. Please indicate the rationale for the proposal.

DR 89:

- In the interests of transparent data-sharing, we continue to support deletion of sub-paragraph (2)(a), and to prefer sub-paragraph (3)(f Alt).
- We consider it important to retain sub-paragraph 3(d) to avoid the Authority being in a situation where it is forced to breach its own rules - for example if one regulation requires disclosure of information to the sponsoring State, but the draft regulation requires confidentiality.
- We support in paragraph (5 bis) that there should be a procedure to deal with potential disagreements over whether any particular data should be confidential or not. We think the drafting can be simplified to allow a challenge to a confidentiality designation by any Stakeholder, and at any time (noting that stakeholder interests, and the nature of a designation, may legitimately change over time).
- In paragraph (5 bis), we question the reference to part XII of the regulations, which refers disputes to ITLOS. We believe some kind of internal administrative review procedure - perhaps an ad hoc panel - would be a more appropriate and efficient way to resolve a dispute over data disclosure, rather than a reference to ITLOS who are unlikely to have jurisdiction in any event.

DR90:

- We suggest various edits designed to remove inconsistency or ambiguity regarding who is bound by these obligations. We believe this should be clear and comprehensive, but the nature of the obligations are that they should apply to individuals rather than institutional organs.
- With regards the reference to 'establishing' procedures, Germany recalls the data management strategy that we understand already exists (but we believe has yet to be published, or shared with the Council). We are interested to explore what that existing strategy covers, and whether the procedures referred to in draft regulation 90 might be included in this document.
- We support proposed paragraph (3 bis), which helpfully reflects that confidential status of information can in some cases change over time.

- We consider the final wording in paragraph (6) important to retain as a place-holder, otherwise there is no process specified, in the event there is a data breach. Though we would welcome discussion as to whether such internal matters would properly fall within the ambit of the Compliance Committee, or whether separate internal oversight functions might be needed for matters such as this which relate to ISA personnel, rather than Contractors. We note that the Committee's own members might be subject of such referrals, in which case a separate independent oversight mechanism would be preferable.

DR91:

- We think (1 ter)'s requirement for a summary report of exploitation activities upon contract termination is a matter more properly addressed via the Closure obligations (DRs59-61) and can be deleted here.
- Paragraph (2) should not give the Contractor the role to advise the Authority on what data it is required to submit. Determining mandatory data requirements is a regulatory function and should be carried out through an (identified) independent and technically competent assessment. We had suggested a data committee in the past, but can be flexible on this – the Commission may also be an appropriate body.
- We consider it necessary that regulation 91 should include a clear consequence or process for cases in which required data are not transmitted to the Authority, recalling that the compliance provisions of the regulations may not apply to a former Contractor who is no longer under contract. We suggest some language to that end.