

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28<sup>TH</sup> SESSION:  
COUNCIL - PART III**

*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](mailto:council@isa.org.jm).*

**1. Name of Working Group:**

Open-ended Working Group of the Council on the Financial Terms of a Contract

**2. Name(s) of Delegation(s) making the proposal:**

Submitted by Nauru Ocean Resources Inc., Tonga Offshore Mining Ltd. and Blue Minerals Jamaica Ltd.

**3. Please indicate the relevant provision to which the textual proposal refers.**

Draft Regulation 89(2)

**4. 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.**

2. “Confidential Information” means:

[...]

(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 in accordance with the relevant Standard}~~ on the basis that there would be substantial risk of serious or unfair economic prejudice or ~~{risk of harm}~~ if the data and information were to be released;

(e) ~~{documents exempt from disclosure due to attorney-client}~~ legal professional privilege or other legal rights and obligations that may prevent public disclosure.

**5. Please indicate the rationale for the proposal. [150-word limit]**

- We consider that the Secretary-General is the right person to be tasked with determining whether data and information has been properly designated as Confidential Information by Contractors under Draft Regulation 89(2)(d). Requiring this determination to be made by a Data Committee is unnecessarily bureaucratic and invites delay.

- We note that “attorney-client privilege” is one form of legal professional privilege but may not cover all forms of legal professional privilege (such as work product privilege or litigation privilege). We thus propose to amend Draft Regulation 89(3) to ensure it is clear that all forms of legal professional privilege are covered.
- We also suggest broadening Draft Regulation 89(2)(e) beyond legal professional privilege to include all legal rights and obligations that may prevent public disclosure.

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Draft Regulation 89(3)(f)alt

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

~~{(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~~ the Secretary-General agrees ~~considers 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;}~~ [...]

(g) Are a n-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);

**5. Please indicate the rationale for the proposal. [150-word limit]**

- We do not consider that the Secretary-General’s determination under Draft Regulation 89(3)(f)alt requires an additional level of review by the Commission. The Secretary-General is competent and able to make this determination and there is no need to involve the Commission which would merely delay the determination and needlessly occupy the Commission’s limited time.
- We also propose to remove arbitral awards from Draft Regulation 89(3)(g) as the arbitration process is often confidential in nature and can result in confidential arbitral awards.

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**3. Please indicate the relevant provision to which the textual proposal refers.**

Draft Regulation 89(3)(h), (j) and (m)

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

~~(h) {Relate to contractor payments to the Authority and Sponsoring State(s), governments, state enterprises, other contractors, as well as payments and other forms of financial benefit received by the contractor from Sponsoring States;~~

[...]

~~(j) [Relate to Sponsorship Agreements or other contractual arrangements between contractors and Sponsoring States; or]~~

[...]

~~(m) are in a category designated by the Council as not being Confidential Information.~~

**5. Please indicate the rationale for the proposal. [150-word limit]**

- We consider that the only payments relevant to the Authority are those made to the Authority itself and to the Contractor’s Sponsoring State(s). As such we propose to delete the references to other payments and benefits from Draft Regulation 89(3)(h).

- We also propose to delete Draft Regulation 89(3)(j) as we consider that the Authority does not have power to disclose a Sponsorship Agreement or other contractual arrangement between a Contractor and its Sponsoring State(s). Doing so without consent would also encroach upon the sovereign rights of Sponsoring States.
- Sponsorship Agreements or other contractual arrangements between Contractors and Sponsoring States are negotiated independently and without the Authority's involvement. They contain commercially sensitive information. We do not consider there are circumstances whereby the disclosure of such documents would be permissible without the consent of the parties to the agreement.
- We also propose to remove Draft Regulation 89(3)(m) as it is unclear what "category designated by Council" may mean in the future. This sub-paragraph also poses the risk that the Council defines such categories in an overly broad manner that is prejudicial to Contractors.

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Submitted by Nauru Ocean Resources Inc., Tonga Offshore Mining Ltd. and Blue Minerals Jamaica Ltd.

**3. Please indicate the relevant provision to which the textual proposal refers.**

Draft Regulation 89(5)

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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 non-prejudicial 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}~~, 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 ~~{Standard or}~~ policy guidance from the Council. ~~{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].

**5. Please indicate the rationale for the proposal. [150-word limit]**

- We oppose the part of Draft Regulation 89(5) that requires Contractors to provide description of information designated as Confidential. We consider that such descriptions are unnecessary, onerous on Contractors and potentially prejudicial.
- We also consider that the Secretary-General should be empowered to make a judgement with respect to a designation of information as confidential. Consistent with that position, we consider that member States or other Stakeholders should not be involved in the process and not be entitled to object to designation of specific information as confidential. We also do not consider that there is a need for the Data Committee to be involved in the process of dealing with Confidential Information.
- We strongly support the proposal to include cross-references to relevant provisions or an Annex of the Regulations setting out an administrative decision review procedure.