

Buenos Aires, 28th September 2018

WRITTEN COMMENTS BY THE ARGENTINE REPUBLIC ON THE DRAFT REGULATIONS ON THE EXPLOITATION OF MINERAL RESOURCES IN THE AREA (ISBA/24/LTC/WP.1/REV. 1)

The Argentine Republic is of the opinion that it is of the utmost importance to preserve the role of the Legal and Technical Commission in the development of the Draft Regulations on the Exploitation of Mineral resources in the Area, as well as the central role of the Member States of the Authority in the definition of the content of such regulations.

In the light of the aforesaid, we would like to make the following comments on the Draft Regulations on the Exploitation of Mineral resources in the Area:

Draft Regulations 5, 6 (1) (2) (3)

In the context provided by the draft regulations it is appropriate to define precisely the meaning of the expression “*effective control*”.

This expression is included in many articles in the Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) [(see article 139, paragraph 1 and article 153, paragraph 2 (b)], as well as in article 4, paragraph 3, 5 and article 9, paragraph 4 of its Annex III. In addition, this expression is referred to in regulations 9 (b), 10.3 (a), 11, paragraph 1 and 2 and 17.1 of the Nodules Regulations.

Even though the Legal and Technical Commission has produced numerous documents on the issue (/ISBA/20/LTC/10, ISBA/20/C/20, ISBA/20/C/31, ISBA/21/LTC/12, among others), the organs of the Authority have not reached a definitive conclusion yet.

From the point of view of Argentina, it is necessary to understand by *effective control* an economic/material reality, taking into account that on many occasions the applicable normative texts refer to the *effective control* exercised by persons of the nationality of a given State. Consequently, hardly could it be a purely regulatory/legal control, when reference is made to its exercise by individuals and not by States.

Although Argentina has already expressed this opinion at the last meeting of the Council, we would like to reiterate it since it has not received much attention.

Draft Regulation 12 (4)

Even though there are no observations to be made regarding the drafting of this regulation, it should be noted the importance of the inclusion of the final reference of paragraph 4 (“to the extent to which the proposed Plan of Work contributes to realizing benefits for mankind as a whole”).

Draft Regulation 13 (4).

The inclusion of the reference to Article 87 of the UNCLOS in this Draft Regulation is pertinent and it contemplates the comments made by Argentina on previous versions of this Draft Regulations.

Draft Regulations 19 and 21.

The new drafting of the Draft Regulation 21 (3) (4) duly enhances the participation of the Legal and Technical Commission in the process regarding the application to renew an exploitation contract.

Nevertheless, according to draft regulations 19 and 21, potential contractors able to offer better financial or environmental conditions to the Authority in the future may be impeded of gaining access to the exploitation of a category of resources in the area of the contract, if that category is already being exploited in that area by another contractor that reports less benefits to the Authority.

In light of this, we would like to reiterate the suggestion to include a legal mechanism, which could take place in a potential second instance of renewal of the exploitation contract, in order to open to the concurrence of other interested parties a certain area.

Draft Regulation 22.

It should be made clear in this regulation that the search for an alternative Sponsoring State requires the modification of those factual conditions that enable a State to exercise such sponsorship [nationality of the company or those who exercise *effective control*, according to Draft Regulation 6 (1)].

Draft Regulation 25 (3).

Even though there are no observations to be made regarding the drafting of this regulation, it should be noted that this point supports the understanding that our country has held regarding the concept of *effective control*, by linking the change of control with the ownership of the contractor.

On the other hand, it is suggested to refer explicitly, in this regulation, to the relationship between the change of control and the potential need to seek the sponsorship of the State corresponding to that change.

Draft Regulation 41 (4) (5).

This draft regulation confers on the Secretary General a task / function / right that corresponds, in purity, to the Authority itself, in which the Member States are represented.

Attention is drawn to this circumstance, which is still maintained despite the fact that many delegations observed it during the debates on the subject.

Draft Regulation 45 (1).

Again, attention is drawn to the fact that the *effective control* and the place of constitution of a company are mentioned as differentiated realities.

Draft Regulation 55.

It should be noted that the elimination of the last paragraph of the previous version of this Draft Regulation is convenient, in the light of the comments made above to the Draft Regulation 41 (4) (5) and those made by the Argentine delegation when this Draft Regulation was regarded in the last meeting of the Council.

Draft Regulation 56 (1) (2).

Again, it is necessary to reiterate what has been said about the draft regulation 41 (4) (5).

Part VII, Financial terms of an exploitation contract (Draft Regulations 60-86).

Although the Legal and Technical Commission has specified some issues regarding the draft Regulations, by and large it is noted that the framework is still insufficient to guarantee full transparency of the financial mechanisms concerning the exploitation contracts.

In this sense, for example, the draft regulation 73 fails to specify to which Authority's organ it is incumbent to order the audit of the books that the contractor must keep in accordance with Article 72.

The draft regulation 74, for its part, fails to indicate or clarify the term that the contractor will have to pay the royalties after going through the audit of the Secretary General.

The lack of clarification determines that the evaluation of compliance with the rules and principles of Part XI of UNCLOS is still a difficult task, bearing in mind that it is necessary to examine whether the payment system financially compensates for the exploitation of the Common of Heritage of Mankind and if an equitable distribution of the benefits derived from exploitation is contemplated.

In relation to the above, substantial differences persist in terms of the characteristics of the payment system. In this regard, it should be noted that Algeria (NOTE MPANY / No. 05 / MR / 18 addressed to the Secretary General of the Authority on July 9), in its role as coordinator of the African Group, has criticized that the regulations projected at the present time do not include a fee for royalties. Likewise, the African Group is of the opinion that, in any case, royalties should be adjusted to a variable criterion linked to a profitability *proxy*.

This latter possibility is, *a priori*, convenient, insofar as it deals with eventual variations in the profitability of mineral exploitation activities, whose prices present considerable volatility over time, without the need to activate continuous review mechanisms.

On the other hand, it is recalled that some Members of the Council have demanded caution in the analysis of these and other related issues, such as how to ensure that the benefits are effectively shared and about the impact that mining exploitation would have on traditional mining countries.

Draft Regulation 87.

We consider that the modifications made in the drafting of this Draft Resolution are pertinent as they are aimed at clarifying what is to be understood for “Confidential Information” and what is not.

Draft Regulation 95.

The new drafting of this Draft Regulation takes into account the previous suggestions made by Argentina related to the importance of determining

which organ of the Authority is responsible for each function. In particular, it duly refers to the role of the Legal and Technical Commission and the Council in the assessment of the inspectors' qualifications and experience. Therefore, the modification is considered convenient.

Draft Regulation 98.

We consider the inclusion of the last sentence of this Draft Regulation pertinent as it takes into account the previous suggestions made by Argentina related to the importance of enhancing the roles of the Legal and Technical Commission and the Council in the Draft Regulations in procedures such as the inspections.

Draft Regulation 103

In relation to this draft regulation, it is considered appropriate to add that those States that do not take the necessary measures referred to therein will be liable to incur international responsibility in accordance with applicable international regulations.

In spite of the aforesaid, Argentina reserves the right to make further comments to the draft regulations on the exploitation of mineral resources in the Area in the corresponding instances.