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## **Report of the co-ordinators of the working group of 21, T. T. B. Koh (Singapore) and P. B. Engo (United Republic of Cameroon), to the First Committee**

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# DOCUMENTS OF THE FIRST COMMITTEE

## DOCUMENT A/CONF.62/C.1/L.30

### Report of the co-ordinators of the working group of 21, T. T. B. Koh (Singapore) and P. B. Engo (United Republic of Cameroon), to the First Committee

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The working group of 21 spent the assigned first three weeks of the eleventh session negotiating the outstanding issues identified in document A/CONF.62/116.<sup>47</sup> As usual it was co-chaired by the President of the Conference, Mr. T. T. B. Koh (Singapore), and the Chairman of the First Committee, Mr. P. B. Engo (United Republic of Cameroon).

The Co-Chairmen of the working group submit to the First Committee this report which contains their commentaries and concrete proposals on two of those issues based on the negotiations.

#### I. PREPARATORY COMMISSION

1. The working group of 21 continued its consideration of the resolution for establishing a Preparatory Commission on the basis of the texts suggested by the President and the Chairman of the First Committee in document WG.21/Informal Paper 17.

2. The preambular paragraphs were considered to be generally acceptable and no discussion took place on them.

3. Regarding the first operative paragraph, the issue was raised whether or not the establishment of the Commission depended solely on the act of the adoption of the resolution or whether its establishment would not automatically trigger its capacity to exercise powers and functions until other conditions were fulfilled. The second aspect of this issue was to be found in paragraph 9 of WG.21/Informal Paper 17. It has been moved into operative paragraph 1, thus providing the link between the establishment of the Commission and its being convened.

4. Clarification seemed necessary, particularly in the French and Spanish texts, as to whether convening implied the meeting of the members within the fixed time period. The redrafted paragraph 1 therefore clarifies that question with the appropriate change.

5. On the issue as to who should be permitted to participate in the Commission, some industrialized States continued to press for signature to the final act as appropriate qualification for membership. Some among them also found a link between that question and the question as to how the expenses of the Commission would be met. There was widespread support for maintaining the existing provision, it being explained that it was necessary to ensure at least a qualified undertaking to comply with the objectives and purposes of the convention for participation in the Commission. It was felt that the extent of participation in the work of the Commission was a matter of choice, depending on whether the State was willing to sign the convention or merely to sign the final act. The magnitude of the commitment should determine the level of participation and accordingly operative

paragraph 2 remains unchanged so that signatories to the final act may participate fully in the work, but not in the decision-making processes.

6. Various perspectives were expressed on the decision-making procedure of the Commission. On the issue of the adoption of its rules of procedure, they ranged from simple majority to consensus. A similar pattern manifested itself with regard to the questions of substance. We were of the opinion that in the circumstances it would appear most appropriate to recommend that the rules of procedure of the Conference should apply to the adoption of the Commission's rules of procedure. Thereafter, the Commission should be in a position to determine its own rules for decision-making. Operative paragraph 4 reflects our thinking in this regard.

7. Several aspects of the Commission's functions were examined and the appropriate solutions are reflected in the revised text. The question of the internal administrative and financial regulations has been linked to the rules, regulations and procedures in general (new para. 5 (g)). It was noted that the internal regulations were part of the same functions as rules, regulations and procedures. This accounts for the manner in which this paragraph is re-formulated.

8. A new sub-paragraph (h) has been included in paragraph 5 to empower the Commission to perform functions assigned to it by the draft resolution governing preparatory investment in pioneer activities relating to polymetallic nodules. The relevance of this addition to the Commission's functions is dealt with in the report on that draft resolution.

9. A new sub-paragraph (i) has also been added requiring the Commission to prepare studies on the problems of developing land-based producers whose economies would be seriously affected. This additional function is based on the informal proposal of the Group of 77 (WG.21/Informal Paper 23).

10. The functions of the Commission relating to the Enterprise have been transferred from paragraph 5 of WG.21/Informal Paper 17 to paragraph 8 of annex I to this report. It has thus been made clear that a special commission would be established to perform functions required by the resolution on preparatory investments (para. 12 of annex II to this report) and to take all necessary measures to ensure that the Enterprise becomes operational, effectively and expeditiously.

11. The functions of the Commission relating to arrangements for the International Tribunal for the Law of the Sea, and the report relating thereto, have been incorporated in operative paragraph 9, thereby separating this function from those contemplated by paragraph 10.

12. As for the final report referred to in operative paragraph 10 dealing with all matters within its mandate, the

<sup>47</sup>*Ibid.*, vol. XV (United Nations publication, Sales No. E.83.V.4).

changes to the text of the operative paragraph are primarily consequential.

13. There was a discussion of the question as to the Commission meeting at the seat of the Authority. The representative of Jamaica informed the working group of the action that had been taken to prepare for the Commission to function at the seat of the Authority, indicating that adequate facilities would be available well before the Commission was set up. The Special Representative of the Secretary-General made the formal statement required by General Assembly resolution 31/140.

14. There appeared to be no need to change the existing provision regarding the life of the Commission. On the question of funding the Commission, although the discussions indicated that the industrialized States linked this issue to the requirement for membership, there was inadequate support on the record to vary the existing provisions. However, the need to obtain the approval of the General Assembly before it was called upon to meet the expenses from its regular budget has been recognized and so recorded in operative paragraph 13. Paragraph 15 calling on the Secretary-General to bring the contents of this resolution to the attention of the General Assembly has also been changed to reflect the outcome of the negotiations.

## II. TREATMENT OF PREPARATORY INVESTMENT

15. It is a demonstrable reality that six consortia and one State have been investing funds in the development of seabed mining technology, equipment and expertise. The programme of their research and development has arrived at a point when they must invest substantial amounts of funds in site-specific activities. The industrialized countries representing those consortia have been demanding that the Conference and the convention on the law of the sea should recognize these preparatory investments. We feel that this is a legitimate request provided that the preparatory investments of these pioneers will be brought within the framework of the convention and provided that the interim arrangement is transitory in character. In preparing our compromise proposal we have derived great assistance from the proposals contained in documents TPIC/2, TPIC/3, TPIC/4 and TRIP/5.

16. The sponsors of the proposal contained in document TPIC/2 have suggested that the interim arrangement should take the form of a protocol. The sponsors of TPIC/3 and TPIC/5 proposed that it should take the form of a resolution. We feel that there is greater merit in embodying a scheme for the treatment of preparatory investments in a resolution than in a protocol.

17. The proposals contained in documents TPIC/2, TPIC/3 and TPIC/5 adopt an identical approach on the identification of the pioneer investors. The approach is by stipulating certain objective criteria. In our compromise proposal, we have adopted the same approach. We define a pioneer investor as one who has expended, prior to 1 January 1983, \$US 30 million in pioneering activities, of which amount at least 10 per cent must have been spent on site-specific activities.

18. The question may be asked why have we decided to close the door on the identification of pioneer investors on 1 January 1983? We have done so because the whole rationale of this interim arrangement is to take account of the existing reality that a very small number of consortia and one State have been making substantial investments in the development of seabed mining technology, equipment and expertise. It would be inconsistent with the rationale to keep the door open until the entry into force of the convention. We are not persuaded by the argument that the door must be kept open until the entry into force of the convention because to do otherwise would offend the principle of non-discrimination.

19. In our view, it is necessary to link this interim arrangement to the convention. In view of this, it seems to us only logical that the pioneer investor or its certifying State must be a signatory of the convention. We are not persuaded by the argument that such a requirement could lead to delay or defeat the urgency felt by the pioneers. All that the industrialized countries concerned have to do to avoid delay and to respond to the urgency is to accelerate their domestic decision-making process for the signature of the convention.

20. In our compromise proposal, we have suggested that every pioneer investor who satisfies the requirements of the resolution shall be allocated a pioneer area. The pioneer investor shall have the exclusive right to carry out pioneering activities in the pioneer area allocated to him. Upon the entry into force of the convention, the pioneer investor may apply to the Authority for a contract of exploration and exploitation, in accordance with the convention. Such application shall be approved by the Authority.

21. The size of areas for exploration shall not exceed 150,000 square kilometres. Every application by a pioneer investor to the Commission shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow for 2 mining operations. The application shall indicate the co-ordinates of the area. It shall also divide the area into two parts of equal estimated commercial value.

22. In our compromise proposal, we have suggested that each pioneer investor shall be entitled to only one pioneer area.

23. In our proposal, we have suggested that the banking system shall apply on a strictly one-on-one basis. In other words, if seven pioneer areas are allocated to seven pioneer investors, the Preparatory Commission shall designate seven reserved areas for the Enterprise.

24. The production ceiling and production authorization referred to in article 151 and annex III, article 7, will apply. The only difference is that in the allocation of production authorization, the pioneer investors shall have priority over all other applicants except in respect of the Enterprise as contained in article 151, paragraph 2 (c). In the event of a competition between two or more pioneer investors for production authorization, the provisions of annex III, article 7, shall apply unless they agree to some other arrangement.

25. In practice, we do not expect this to be a major problem for the following reasons. First, the door for the entry of pioneer investors will be closed on 1 January 1983. The number of pioneer investors is likely to be small, not exceeding seven. Secondly, it must be remembered that not all pioneer investors are likely to be ready to begin commercial production at the same time. Thirdly, even those which are ready to begin commercial production may not be in a position to produce at full capacity. Some will be producing at half capacity while others may be producing at three-quarters capacity.

26. Under our compromise proposal, the pioneer investor cannot begin commercial production before the entry into force of the convention. He can do so only after he has been awarded a contract of exploitation.

27. The scheme is very definitely linked to the convention and its annexes. It foresees the convention and ensures conformity with it before and after its entry into force.

28. Under our proposal, the pioneer investor will be required to pay a registration fee of \$US 500,000.

29. In order to ensure that the Enterprise is able to carry out activities in the Area, in the same time-frame as States and other entities, we have required the registered pioneer investors to do four things for the Enterprise. First, to carry

out exploration in any reserved area, at the request of the Preparatory Commission, on a cost-reimbursable basis. Secondly, to provide training at all levels for personnel designated by the Preparatory Commission. The proposal by France contained in TPIC/4 will provide the Commission with a very valuable model of what can be done in this field. Thirdly, to be prepared, prior to the entry into force of the convention, to perform the obligations prescribed by the convention relating to the transfer of technology. Fourthly, to ensure that the necessary funds are made available to the Enterprise in a timely manner.

30. If the Conference adopts the resolution establishing the Preparatory Commission and the resolution on the treatment of preparatory investments, consequential changes may have to be made in article 308, paragraph 4, in order to ensure that the registration of pioneer investors, the allocation of pioneer areas and the priorities given to them shall be binding on the Authority, upon entry into force of the convention.

#### ANNEX I

##### Draft resolution establishing the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea

*The Third United Nations Conference on the Law of the Sea in the City of Caracas,*

Having this day adopted the Convention on the Law of the Sea which provides for the establishment of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea,

Having decided to take all possible measures to ensure the entry into effective operation without undue delay of the Authority and the Tribunal and to make the necessary arrangements for the commencement of their functions,

Having decided that a Preparatory Commission should be established for the fulfilment of these purposes as follows:

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. The Commission shall be convened upon signature of or accession to the Convention by fifty States by the Secretary-General of the United Nations to meet no sooner than 60 days and no later than 90 days thereafter.

2. The Commission shall consist of the representatives of States which have signed the Convention or acceded to it. The representatives of signatories to the Final Act may participate fully in the deliberations of the Commission as observers but shall not be entitled to participate in the taking of decisions.

3. The Commission shall elect its Chairman and other officers.

4. The rules of procedure of the Third United Nations Conference on the Law of the Sea shall apply *mutatis mutandis* with respect to the adoption of the rules of procedure of the Commission.

5. The Commission shall:

(a) prepare the provisional agenda for the first session of the Assembly and of the Council, and, as appropriate, recommendations relating to items thereon;

(b) prepare draft rules of procedure for the Assembly and the Council;

(c) make recommendations concerning the budget for the first financial period of the Authority;

(d) make recommendations concerning relationships between the Authority and the United Nations and other international organizations;

(e) make recommendations concerning the Secretariat of the Authority in accordance with the relevant provisions of the Convention;

(f) make studies as necessary, concerning the establishment of the headquarters of the Authority, and prepare recommendations relating thereto;

(g) prepare such draft rules, regulations and procedures as it deems necessary to enable the Authority to commence its functions,

including draft regulations concerning the financial management and internal administration of the Authority;

(h) exercise the powers and functions assigned to it with regard to the treatment of preparatory investments under resolution \_\_\_\_\_ of this date;

(i) undertake studies on the problems which would be encountered by developing land-based producers likely to be most seriously affected by the production of the Area with a view to minimizing their difficulties and helping them to make the necessary economic adjustment, including the establishment of a compensation fund and submit recommendations to the Authority thereon.

6. The Commission shall have such legal capacity as is necessary for the performance of its functions and fulfilment of its purposes as set forth in this resolution.

7. The Commission may establish such subsidiary bodies as it deems necessary for the performance of its functions and shall determine their functions and rules of procedure. It may also make use of, as appropriate, outside sources of expertise in accordance with United Nations practices to facilitate the work of any technical or specialized bodies so established.

8. The Commission shall establish a special commission for the Enterprise and entrust to it the functions referred to in paragraph 11 of resolution \_\_\_\_\_. The special commission shall take all necessary measures for the early entry into effective operation of the Enterprise.

9. The Commission shall prepare a report containing recommendations for submission to the meeting of the States Parties to be convened in accordance with annex VI, article 4, regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.

10. The Commission shall prepare a final report on all matters within its mandate, except as provided in paragraph 9, for presentation to the Assembly at its first session. Any action which may be taken on any part of the report must be in strict conformity with the powers and functions entrusted to the respective organs in accordance with provisions of the Convention.

11. The Commission shall meet at the seat of the Authority if facilities are available, and as often as necessary for the expeditious performance of its functions.

12. The Commission shall remain in existence until the conclusion of the first session of the Assembly, at which time its property and records shall be transferred to the Authority.

13. The expenses of the Preparatory Commission shall be met from the regular budget of the United Nations, subject to the approval of the General Assembly of the United Nations.

14. The Secretary-General of the United Nations shall make available to the Preparatory Commission such secretariat services as may be required.

15. The Secretary-General of the United Nations shall bring this resolution, in particular paragraphs 13 and 14, to the attention of the General Assembly for necessary action.

#### ANNEX II

##### Draft resolution governing preparatory investment in pioneer activities relating to polymetallic nodules

*The Third United Nations Conference on the Law of the Sea,*

Having this day adopted the Convention on the Law of the Sea (the "Convention"),

Having this day also established by resolution the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea (the "Commission") and directed it to prepare such draft rules, regulations and procedures as it deems necessary to enable the Authority to commence its functions, as well as to make recommendations for the early entry into effective operation of the Enterprise,

Desirous of making provision for investments by States and other entities made in a manner compatible with the international régime set forth in Part XI of the Convention and the annexes relating thereto, prior to the entry into force of the Convention,

Recognizing the need to ensure that the Enterprise will be provided with the funds, technology and expertise necessary to enable it to keep pace with the States and other entities referred to in the preceding paragraph, with respect to activities in the Area,

Decides as follows:

1. For the purposes of this resolution:

(a) "pioneer investor" means a signatory of the Convention or any State entity or natural or juridical person which possesses the nationality of such State or is effectively controlled by it or its nationals, or any group of the foregoing which, prior to 1 January 1983, has expended at least \$US 30 million (United States dollars calculated in constant dollars relative to 1982), or, relative to a developing State, such smaller amount as the Preparatory Commission shall determine to be substantial, in pioneer activities and has spent no less than 10 per cent of that amount in the location, surveying and evaluation of a specific portion of the Area;

(b) "pioneer activities" means undertakings, commitments of resources, investigations, findings, research, engineering development, and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules, and to the determination of the technical and economic feasibility of exploitation. Pioneer activities include:

- (i) any at-sea observation and evaluation activity which has as its objective the establishment and documentation of:
  - a. the nature, shape, concentration, location and grade of polymetallic nodules;
  - b. the environmental, technical and other appropriate factors which must be taken into account prior to exploitation;
- (ii) the taking from the deep sea-bed of polymetallic nodules with a view to the designing, fabricating and testing of equipment which is intended to be used in the exploitation of polymetallic nodules;

(c) "certifying State" means a signatory of the Convention standing in the same relation to a pioneer investor as would a sponsoring State pursuant to annex III, article 4, and which certifies the level of investment specified in subparagraph (a);

(d) "polymetallic nodules" means one of the resources of the Area, consisting of any deposit or accretion on or just below the surface of the deep sea-bed consisting of nodules which contain manganese, nickel, cobalt and copper;

(e) "pioneer area" means an area allocated by the Commission to a pioneer investor for pioneer activities pursuant to this resolution. It shall not exceed 150,000 square kilometres;

(f) "Area", "Authority", "activities in the Area" and "resources" shall have the meanings assigned to those terms under the Convention.

2. As soon as the Preparatory Commission begins to function, any signatory of the Convention may apply to the Commission on its own behalf or on behalf of any entity specified in subparagraph 1 (a) hereof, for registration as a pioneer investor and for allocation to it of the pioneer area specified in the application. The Commission shall register the applicant as a pioneer investor and allocate to it the pioneer area applied for if the application:

(a) in the case of a signatory, is accompanied by a statement certifying the level of expenditure made in accordance with subparagraph 1 (a); and, in the case of any other entity specified in subparagraph 1 (a), a certificate concerning such level of expenditure issued by the signatory of which it is a national; and

(b) is otherwise in conformity with the provisions of this resolution. The Commission shall notify the applicant forthwith of such registration.

3. (a) Every application shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The application shall indicate the co-ordinates of the area, defining the total area and dividing it into two parts of equal estimated commercial value and contain all the data available to the applicant with respect to both parts of the area. Such data shall include, *inter alia*, information relating to mapping, sampling, the density of nodules and the composition of metals in them;

(b) Within 45 days of receiving the data required by paragraph 3 above, the Commission shall designate the part of the area to be reserved in accordance with the Convention for the conduct of activities by the Authority through the Enterprise or in association with developing States. This designation may be deferred for a further period of 45 days if the Commission requests an independent expert to assess whether all data required has been submitted to it. The other part of the area shall be allocated by the Commission to the pioneer investor as a pioneer area.

4. No pioneer investor may be registered in respect of more than one pioneer area.

5. (a) Certifying States shall ensure that areas in respect of which applications are made do not overlap with one another or with areas previously allocated as pioneer areas. The certifying States concerned shall keep the Commission currently and fully informed of any efforts to resolve conflicts with respect to overlapping claims, and the results thereof;

(b) Certifying States shall ensure that pioneer activities are conducted in a manner compatible with the Convention prior to its entry into force.

6. A pioneer investor registered pursuant to this resolution shall, as from the date of such registration, have the exclusive right to carry out pioneer activities in the pioneer area allocated to him.

7. (a) Every applicant for registration as a pioneer investor shall pay to the Commission a fee of \$US 500,000;

(b) Every registered pioneer investor shall agree to incur expenditures of not less than \$US 1 million each year with respect to the pioneer area allocated to it, until approval of its plan of work pursuant to paragraph 8. The financial arrangements undertaken pursuant to such plan of work shall be adjusted to take account of payments made pursuant to this paragraph.

8. (a) After the entry into force of the Convention and certification by the Commission in accordance with paragraph 11 hereof of compliance with the provisions of this resolution, the pioneer investor so registered may apply to the Authority for a plan of work for exploration and exploitation in accordance with the Convention. The Authority shall approve such application;

(b) When an application is made by an entity other than a State, pursuant to subparagraph (a), the certifying State shall be deemed to be the sponsoring State for the purpose of annex III, article 4, of the Convention, and shall thereupon assume such obligations.

9. In the allocation of production authorization, in accordance with article 151 of the Convention and annex III, article 7, the pioneer investors who have obtained approval of plans of work for exploration and exploitation shall have priority over all applicants other than the Enterprise as contained in paragraph 2 (c) of article 151. In the event of a competition between two or more pioneer investors for production authorization, the provisions of annex III, article 7, shall apply unless they agree to some other arrangement.

10. (a) Notwithstanding the provisions of paragraph 8, the Authority may not deal with any application for approval of a plan of work made, or deemed to be sponsored by, a State which, at the time the application is taken up for consideration has not ratified the Convention. If such State fails to ratify the Convention within six months after it has received a notification from the Authority that an application by it, or sponsored by it, is pending, its status as a pioneer investor or certifying State as the case may be, shall terminate, unless the Council, by a majority of three-fourths of its members present and voting, shall decide to postpone the terminal date by a period not exceeding six months;

(b) Nothing in this resolution shall preclude a pioneer investor from altering its nationality and sponsorship from that prevailing at the time of its registration as a pioneer investor. The pioneer investor shall give the Authority six months' notice in writing of any such alteration;

(c) Alteration of nationality and sponsorship pursuant to this paragraph shall not affect any right or priority conferred on a pioneer investor pursuant to paragraphs 6 and 8 of their resolution.

11. The Commission shall:

(a) provide pioneer investors with the certificates of compliance with the provisions of this resolution referred to in paragraph 8 hereof; and

(b) incorporate in its final report provided for in paragraph 10 of resolution \_\_\_\_\_ of the Conference, details of all registrations of pioneer investors and allocation of pioneer areas pursuant to this resolution.

12. In order to ensure that the Enterprise is able to carry out activities in the Area in such a manner as to remain in step with States and other entities, any registered pioneer investor shall:

(a) carry out exploration at the request of the Commission in the area reserved pursuant to paragraph 3 of this resolution in connection with its application for activities by the Authority through the Enterprise or in association with developing States, on a cost-re-imbursable basis;

(b) provide training at all levels for personnel designated by the Commission;

(c) be prepared, prior to the entry into force of the Convention, to perform the obligations prescribed in the provisions of the Convention relating to transfer of technology:

(d) ensure that the necessary funds are made available to the Enterprise in a timely manner in accordance with the provisions of the Convention.

13. The Authority and its organs shall be governed by the terms of this resolution.

14. If, five years after the date of its adoption, the Convention has not entered into force, the effect of the provisions of this resolution and all rights thereunder shall terminate.

