These notes refer to the Commonwealth Development Corporation Act 1999 (c.20) which received Royal Assent on 27 July 1999

COMMONWEALTH DEVELOPMENT CORPORATION ACT 1999

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Commonwealth Development Corporation Act which received Royal Assent on 27 July 1999. They have been prepared by the Department for International Development in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The Act's main purpose is to permit the transformation of the Commonwealth Development Corporation ("CDC") from a statutory corporation (see paragraph 10), governed by its own legislation (primarily the Commonwealth Development Corporation Act 1978) into a public company limited by shares ("plc") governed, as other plcs, primarily by the Companies Act 1985. The transformation will take place without making CDC into a new legal entity. The purpose of this transformation is to make CDC a suitable vehicle for a Public/Private Partnership with private investors. In particular, as a plc, CDC will have a share capital (it does not at present) and will be able to issue shares. The Act also makes provision for the Government to continue to give certain financial assistance to CDC in the period in which it remains wholly owned by Government and to enable CDC to restructure financially.

4. Although initially the Government will be the sole shareholder, the intention of the Act is to prepare the way for the eventual sale of the majority holding in CDC plc. The Government intends to retain a substantial minority holding in CDC plc and the Secretary of State will have certain reserved rights as holder of a "Golden Share".

BACKGROUND

5. CDC has existed since 1948. It is a statutory corporation sponsored by the Department for International Development ("DFID"). The Corporation is the Government's main instrument for directly mobilising investment in developing countries (not confined to the Commonwealth), particularly the poorer economies. It now has an investment portfolio that totalled £1.56 billion at the close of 1997, with around 80% of the portfolio in countries with a GNP/per capita of less than US$1,600. CDC finances from its own resources some £300 million of new investment each year. The Corporation's activities cover investments in a wide range of sectors including infrastructure, agri-business, manufacturing and financial services. As well as making investments alongside other investors, CDC also has a portfolio of businesses majority-owned and managed by CDC.

6. In October 1997 the Prime Minister announced that the Government proposed that CDC would be transformed into a Public/Private Partnership. The principal reason for this is to facilitate the introduction of private capital into CDC. Under the Partnership proposals, CDC will have the status of a plc and the majority of its shares will be held by private investors. There will be a transitional period between the creation of the share capital and eventual sale of the majority shareholding during which time CDC will continue to be wholly Government-owned. Timing of the sale will be determined at a later date, taking account of how the market views both CDC and pre-emerging market conditions at the time when the Partnership is created.

THE ACT

7. The Act has three main areas:

- provision for the process of registering CDC as a plc (sections 1 to 7);
- provision relating to the financial relationship between the Government and CDC in the period leading up to the sale of shares to private investors (sections 8 to 17); and
- the entrenchment of the Government's involvement in CDC so that the Secretary of State cannot lose his special share, vary his rights relating to that share, or reduce his shareholding in CDC below 25%, without Parliamentary approval (section 18).

8. It also makes certain connected and supplementary provision, including expanding CDC's powers in the period before registration and broadening the scope of the information and assistance it may be required to give to the Secretary of State in preparing for the Partnership during that period.

9. The Act does not include provisions determining the relationship between CDC plc and Government under the subsequent Public/Private Partnership or list the reserved rights of the Golden Shareholder (the Secretary of State).

COMMENTARY ON SECTIONS

Note on terminology: functions which the Act gives to the "Secretary of State" will in practice be performed by the Secretary of State for International Development.

Registration under the Companies Act 1985

10. The principal purpose of the first seven sections in the Act is to transform CDC to a plc. At the moment, CDC is a "statutory corporation". This means that it is established as a legal entity by an Act of Parliament. The original Act was the Overseas Resources Development Act 1948, but that has been repealed, and the relevant Act is now the Commonwealth Development Corporation Act 1978 ("the 1978 Act"). Its present constitution is set out in the 1978 Act and regulations made under it.

11. In its first seven sections, the Act brings about CDC's conversion to its new status by providing for CDC's registration as a plc under the Companies Act 1985, whereupon CDC exchanges its present constitution under the 1978 Act for a constitution appropriate to a plc. CDC will remain the same legal person but will have been transformed from the status of a statutory corporation to that of a plc.

12. After consulting CDC, the Secretary of State is to determine the day on which CDC is to file documents with the registrar of companies for England and Wales (referred to here as the "registrar") to enable that official to register CDC as a plc and to grant a certificate to that effect. The documents to be filed will, broadly, enable CDC to have the same attributes, after registration, as any other plc, for example, a constitution (memorandum and articles), a share capital, directors, secretary etc. The Companies Act 1985 and other legislation will apply thereafter to CDC as they do to any other plc (with a few necessary modifications to reflect CDC's change of status from a statutory corporation).

Section 1: Initial steps

13. Section 1 gives the Secretary of State the power to determine the day on which CDC is to file certain documents with the registrar and lists the steps to be taken by the Secretary of State, in consultation with CDC, prior to the day for the filing of documents with the registrar. The steps include nominating the directors and company secretary, and nominating (with the consent of the Treasury: see section 22(1)(a)) the persons to whom shares are to be initially allotted. The "authorised minimum" referred to in subsection (6) of section 1 is defined in section 118 of the Companies Act 1985 and is currently £50,000. The reason for having this provision is that under EC law all public companies are required to have an allotted share capital of at least this amount.

Section 2: Filing of documents

14. This section places a duty on CDC to deliver to the registrar the documents listed in Schedule 1 on the filing day. The list of documents delivered to the registrar is closely modelled on the filing requirements of the Companies Act 1985 and includes CDC's memorandum and articles of association which must be approved by the Secretary of State. Section 2 (5) provides for the Companies Act 1985 to apply to the documents delivered to the registrar with a few modifications set out in Part I of Schedule 2. These modifications are necessary to reflect the fact that CDC is not following the usual company formation route: it is being transformed from the status of statutory corporation to the status of plc. The detail of these modifications is discussed in paragraph 68 below.

15. The purpose of section 2 (3) is to make clear that in the unlikely event of CDC being unable to state that it has adequate net assets to make the statement required by paragraph 6 of Schedule 1 (see the more detailed discussion in paragraphs 66 and 67 below), it will be released from its statutory duty to file the documents with the registrar. In this event (or if CDC fails to discharge its duty under section 2 (1) for any other reason) the Secretary of State is able to restart the process on a later date by virtue of section 2(4).

Section 3: Appointing day for registration

16. On the day appointed under this section ("registration day") CDC's transformation to a plc will take place. The purposes of this section are, first, to provide a mechanism for ensuring that, before the Secretary of State makes the order appointing a day as registration day, all the documents required to be filed with the registrar have in fact been filed and are in order and, secondly, to allow CDC to prepare for the administrative consequences of registration. Consequently, the Secretary of State is not under a duty to name the appointed day until he has received notification from the registrar that he is satisfied that the documents are in order. If the registrar is not satisfied, the Secretary of State is able to restart the process on a later day by virtue of section 3 (4).

Section 4: Registration

17. This section sets out the details of the process by which CDC is registered by the registrar under the Companies Act 1985 as a plc on the registration day. *Subsections (1)* and *(2)* of section 4 are necessary to ensure that the provisions of the Act dovetail with the provisions of the Companies Act 1985. They reflect the fact noted above that CDC is not being formed as a new company under Part I of the Companies Act 1985 but is being transformed from the status of a statutory corporation to the status of a plc. The Act therefore specifies that, notwithstanding this fact, the registrar is under the same duty to register and retain CDC's memorandum and articles as he would be in relation to a newly formed company by virtue of section 12 of the Companies Act 1985. It is at the moment of registration of those documents that CDC's conversion to plc status occurs.

18. *Subsection (3)* describes the contents of the certificate given to CDC by the registrar upon its registration under the Companies Act 1985. The certificate given to CDC is

similar but not identical to that given by the registrar under section 13 of the Companies Act 1985. The main difference is that the certificate does not state on it that CDC is incorporated as a new company as is the case under Part I of the Companies Act 1985. Since CDC has already been incorporated as a statutory corporation, the certificate indicates that CDC "remains incorporated."

19. *Subsection (5)* is again modelled on the provisions of the Companies Act 1985 which provide that the certificate is conclusive evidence of certain matters, i.e. that once a certificate is given the matters in relation to which it is conclusive evidence cannot be re-opened. The main difference between this subsection and the equivalent Companies Act provision is that the certificate is to be conclusive evidence of the time of day at which registration occurs. This is necessary because there needs to be certainty about the time at which CDC's change in status occurs so that CDC can know which constitution it is operating under in the conduct of its affairs at any given time of the day.

Section 5: Effect of registration

20. This section sets out the matters which occur on CDC's registration under the Companies Act 1985 and makes provision for the consequences of CDC's transformation. *Subsection (1)* provides for certain modifications to the Companies Act 1985 to take effect on registration. These are described in more detail in paragraphs 69 to 85 below. *Subsection (2)* provides for the repeal of CDC's present constitution (with the exceptions indicated) under the 1978 Act to occur at the time of registration, i.e. the time at which it acquires its new constitution appropriate to a plc, so that on registration CDC effectively "swaps" constitutions.

21. *Subsection (3)* provides for CDC to be known by the name in its memorandum. The preservation of section 28 in this subsection makes it clear that CDC is nevertheless free, as is any other company registered under the Companies Act 1985, to change its name in accordance with the provisions of that Act.

22. *Subsection (4)* is modelled on section 13(5) of the Companies Act 1985 and provides for those persons nominated by the Secretary of State under section 1 of the Act to take up their offices on CDC's registration.

Section 6: Initial Allotment of Shares

23. This section deals with the initial allotment of shares provided for by the Secretary of State in the order made by him under section 1(3). At present CDC is a statutory corporation without a share capital and without shareholders. This section, together with the Secretary of State's order under section 1(3), provides the mechanism whereby CDC acquires its initial share capital as a plc and its first shareholders. *Subsection (1)* makes clear that the effect of the Secretary of State's order under section 1(3) is to give those persons he nominates as allottees the unconditional right to be included in CDC's register of members, i.e. to acquire the same rights as if those shares had been allotted in accordance with the provisions of the Companies Act 1985. Paragraph 7 of Part II of Schedule 2 then provides that those persons nominated by the Secretary of State are entered in CDC's register of members on registration, thereby becoming the first members of CDC plc.

24. *Subsection (2)* specifies how the shares are to be treated. The intention is that the shares should be paid up from CDC's existing reserves, rather than by a cash payment. *Paragraphs (a)* and *(b)* ensure that the Companies Act 1985 consequences applying to shares which are not fully paid up in cash of an amount equal to the shares' nominal value do not ensue. *Paragraph (a)* puts beyond doubt the question whether the shares are fully paid up by reason of the movement of funds mentioned above. If a share is not fully paid up, the member of the company concerned is liable to pay the unpaid portion of the shares if a call is made on those shares (section 1 Companies Act 1985). Further, a public limited company cannot have shares paid up as to less than 25% (section 101(1) Companies Act 1985). *Paragraph (b)* puts beyond doubt the question whether two

provisions of the Companies Act 1985 apply to the payment. These provisions are: (1) section 103 which stipulates that certain conditions must be fulfilled where shares in a public company are paid for in non cash consideration; and (2) section 130 which provides that if shares are issued at a premium, i.e. for more than their nominal (or face) value, a company is obliged to open a share premium account to which special rules apply. *Paragraph (c)* specifies the tax consequences of this initial issue of shares.

25. *Subsection (3)* disapplies (in relation to the initial allotment of shares only) section 88 of the Companies Act 1985 which places an obligation on a company to deliver details of an allotment of shares to the registrar in the form prescribed by that section. This is unnecessary in the case of CDC's initial allotment of shares since details of the allotments are contained in the Secretary of State's order made under section 1(3)(b) which is delivered to the registrar.

Section 7: Repeal of 1978 Act; savings etc.

26. This section deals with certain matters arising from the repeal of the 1978 Act (CDC's present constitution) and preserves the effect of certain provisions of that Act.

27. *Subsection (1)* provides that section 1(1) of the 1978 Act, which simply confirms the existence of CDC as a body corporate, is not to be repealed as that body corporate (i.e. legal entity) continues to exist as CDC plc. This continued existence of the body corporate does not, however, affect normal insolvency arrangements applicable to a plc, nor does it affect CDC's ability to adopt a new name under its memorandum of association.

28. The effect of *subsections (2) and (4)* is that CDC must produce a report on its activities, together with audited accounts (as required by the 1978 Act), for its last full financial year before registration. CDC's financial year runs from January to December. Without this provision, depending on the timing, it is possible that section 5(2) might repeal these duties before they were fulfilled for that year.

29. *Subsection (3)* refers to section 14 of the 1978 Act which places an obligation on CDC to maintain a reserve fund which is subject to a restriction that the fund can only be used for the purposes of CDC, the statutory corporation. That section of the 1978 Act is to be repealed on registration. This provision is intended to remove any doubt that CDC will have the same powers and be subject to the same obligations in respect of its funds as any other plc.

Financial assistance by Government

30. As explained above, the main purpose of the Act is to put CDC into a legal form which will provide a vehicle for the introduction of private capital, through the sale of shares and other forms of securities. The other aspect of Government involvement will be continuing Government financial assistance to CDC in the period before the sale of its shares to private investors and to enable CDC to restructure its balance sheet. However, there will be a period of Government ownership, during which provisions relating to the continuation of existing financial assistance are required.

Section 8: Repayment of old loans etc.

31. The Government's financial relationship with CDC is governed by the 1978 Act (which this Act will repeal on CDC's registration). The main purpose of section 8 is to maintain that relationship unaltered, pending financial restructuring.

32. Three provisions of the 1978 Act are mentioned in this section:

- Section 9 of the 1978 Act permits CDC to borrow money and allows the Secretary of State to lend money to CDC from the *National Loans Fund ("NLF")* (with the consent of the Treasury). This is the Government's fund for borrowing and lending. It is held at the Bank of England and operated by the Treasury. This has been of assistance to CDC especially for short-term borrowings. No borrowings by CDC from the NLF were outstanding at the time these explanatory notes were prepared.

- Section 10 of the 1978 Act empowers the Secretary of State (with the consent of the Treasury) to make financial "advances" to CDC in order to provide it with working capital. These are, in effect, loans which CDC repays over time on terms specified by the Secretary of State, with the Treasury's approval. At the time these explanatory notes were prepared, a cumulative total of some £755 million was outstanding. The advances have been interest-free since 1995.

- Section 11 allows the Government to give CDC or one of its subsidiaries a *guarantee*. A guarantee is an arrangement whereby the Government agrees with a third party (e.g. a bank or other lender) that if CDC or (as the case may be) a subsidiary of CDC defaults on its financial obligations (e.g. fails to keep up repayments on a loan, or to pay interest or any other charges) the Government will meet those obligations instead. The existence of a guarantee can give greater confidence to a lender that it will be repaid and so can help CDC to borrow at lower rates of interest, for example.

33. The effect of section 8 is that the terms of all funding provided to CDC under the powers of the 1978 Act can continue to apply, even after registration; and *subsection (2)(b)* permits the Secretary of State after registration to vary the terms on which an advance or guarantee was provided, if CDC and (see section 22(1)(b)) the Treasury consent. *Subsection (4)* preserves the effect of provisions requiring the Secretary of State to render accounts of sums issued and received by him under the 1978 Act, and *subsection (5)* preserves the effect of guarantees given under the 1978 Act, and the effect of similar accounting provisions in relation to them.

Section 9: New loans to CDC

34. Section 9 allows the Secretary of State to provide loans to CDC, by means of the NLF, while the Corporation remains wholly Government-owned: see *subsections (1)* and *(2)*.

35. Although the NLF is operated by the Treasury, loans made from it are routed via the Secretary of State's account at the Office of the Paymaster-General. Thus, NLF loans are made by the Secretary of State.

36. The terms of such loans are determined by the Secretary of State, with the consent of the Treasury: see *subsection (3)* and section 22(1)(d). *Subsection (4)* provides that when the Corporation repays the loan or pays interest on it to the Secretary of State he must pay the sums received back into the NLF.

Section 10: New guarantees

37. Section 10 permits two kinds of guarantee (see paragraph 32 above), which are:

- those that may be given by the Treasury to CDC itself; and

- those that may be given by the Secretary of State with the consent of the Treasury (see section 22(1)(e)) to companies associated with CDC (as defined in section 25).

38. The Treasury is not permitted to guarantee sums borrowed by CDC from the Secretary of State or from a company associated with CDC (see *subsection (2)*), and the Secretary of State is not permitted to guarantee sums borrowed by a company associated with CDC from another such company or from CDC itself (*subsection (4)*). By *subsection (5)*, a guarantee may be given only when CDC is wholly owned by the Crown: that expression is defined in section 25. A guarantee cannot be given unless the Treasury or the Secretary of State (as the case may be) has entered into an agreement so that, if CDC or the associated company defaults on its obligations and the Government has to make payments to the person to whom it gave the guarantee, CDC or the associated company will be liable to repay the Government: see *subsection (7)*.

Section 11: Guarantees; Supplemental

39. Section 11 contains provisions to supplement section 10. *Subsections (1)* to *(3)* are technical provisions concerning the sources from which sums needed to meet calls on guarantees are to be drawn (i.e. to pay the third party if CDC or its associated company defaults), and the destination of any sums received to repay the Government under the agreements made under section 10(7) (see above).

40. *Subsections (4)* to *(7)* place on the Treasury and the Secretary of State certain duties to give information to Parliament about guarantees. If the Treasury gives a guarantee it must lay a statement of the guarantee before each House as soon as is practicable after giving it: *subsection (4)*. Under *subsection (5)*, if the Treasury makes a payment under a guarantee, it must:

- lay a statement relating to the sum before Parliament as soon as practicable after the end of the financial year in which the payment was made (and in practice that statement will appear in the annual Supplementary Statements to the Consolidated Fund Accounts); and
- as soon as practicable after the end of any subsequent financial year in which an obligation guaranteed by the Treasury is still outstanding, the Treasury shall lay a statement relating to the sum owing before each House.

41. Under *subsection (6)*, as soon as practicable after the Secretary of State has

- given a guarantee under section 10, or
- made a payment to fulfil a guarantee,

he shall lay a statement of the guarantee or the sum before each House. *Subsection (7)* requires the Secretary of State or the Treasury to lay a statement before each House if CDC or an associated company fails to make any payment required of it under an agreement made in accordance with section 10 (7).

Section 12: Other assistance

42. The Secretary of State's principal general power to give developmental assistance is to be found in section 1(1) of the Overseas Development and Co-operation Act 1980. Section 1(9) of that Act presently provides that section 1(1) cannot be used to give assistance to CDC. Section 12 repeals that restriction, giving CDC, in legal terms, the same access to funding from the development assistance programme as other bodies. At present financial assistance to CDC is provided under the 1978 Act, and CDC is only funded from the development assistance programme in so far as the 1978 Act allows.

Section 13: Accounts

43. Section 13 places a duty on the Secretary of State to produce accounts for each financial year on any loans made to CDC under section 9, and any sums received from it under that section. It also provides for those accounts to be examined each financial year (beginning 1 April) by the Comptroller and Auditor General, who is to lay copies of the accounts and his report before each House of Parliament.

Section 14: Waiver of payments

44. This section enables the Secretary of State to waive the requirement for CDC to repay "advances" or to make payments in respect of sums issued to meet guarantees while CDC is wholly owned by Government. Registration in itself will not change CDC's financial relationship with Government. However, in the period after registration and while CDC remains wholly Government-owned some restructuring will take place, once CDC has assumed the legal structure of a public limited company. This section will assist in that financial restructuring. This power may in practice be used in conjunction with sections 16 and 17 of the Act, so that, as existing debt owed to the Government

(see paragraph 32 above) is written off under this section, securities may be issued by CDC to the Secretary of State (or persons nominated by him) under those sections.

Section 15: Limit on Government assistance

45. This section sets a limit of £1,500 million on the total amount of financial assistance by Government to CDC. The types of assistance that are to count as part of the total are listed in *subsection (2)*. The existing limit set on borrowing, by the 1978 Act, is £1,100 million but can be raised to £1,500 million by order made by the Secretary of State with the consent of the Treasury.

Miscellaneous

Section 16: Requirement to issue securities

46. Section 16 empowers the Secretary of State, following consultation with CDC and with the consent of the Treasury (see section 22(1)(h)), to direct the Corporation or one of the companies associated with it (see section 25) to issue securities to the Secretary of State (or a person nominated by him). This is only whilst the Corporation remains wholly Government-owned. Securities are defined in section 26(1) and may include, for example, shares and debentures. “A person nominated by the Secretary of State” could be a nominee (who acts on the Secretary’s behalf) or an independent third party, such as a bank. Section 19(2)(b) makes it clear that this is so by indicating that a person who holds securities by virtue of section 16 on the Secretary of State’s behalf is to hold and deal with them as the Secretary of State directs. By implication, therefore, an independent third party can also hold shares or securities by virtue of section 16.

47. *Subsection (4)* makes provision in relation to shares so issued, which is similar to section 6(2) (see explanation in paragraph 24 above).

Section 17: Acquisition of securities

48. Section 17 empowers the Secretary of State (or a person nominated by the Secretary of State) with the consent of the Treasury (see section 22(1)(j)) to acquire securities of CDC or one of its subsidiaries. The purchase of these securities will be paid for from money provided by Parliament.

49. Unlike the previous section, this provides for the Secretary of State to buy the securities. It also applies, not just when CDC is wholly Government-owned, but at any time after that.

50. It is unlikely that the power will be used to buy securities in the open market (although it could be used that way). It is more likely to be used to provide additional funds to CDC, by buying debt securities issued on terms that provide a commercial rate of return to the Secretary of State. Unlike section 16, here the meaning of “a nominated person” is restricted, by virtue of section 19(2), to a person who must hold and deal with securities or rights as the Secretary of State directs, and does not include an independent third party.

Section 18: Crown share-holding

51. This section entrenches the Government involvement in CDC so that certain changes to the position can only take place with Parliamentary approval. Government involvement will have two main aspects. First, it is intended that the Government should hold at least 25% of the issued ordinary share capital of CDC. Second, the Government’s special share, to consist of one special rights redeemable preference share of £1 in the capital of CDC, gives the Secretary of State certain rights under the articles of association of CDC in relation to the Government’s role in the intended public/private partnership. For example, the articles of association will not allow the investment policy of CDC to be altered without the consent of the special shareholder. Section 18 will prevent the

Secretary of State from reducing his shareholding below 25%, losing his special share, or varying any rights under the articles in relation to it, without Parliamentary approval.

52. *Subsection (1)* places a duty on the Secretary of State to ensure that the government holds (within the meaning of section 24) at least 25% of CDC's issued ordinary share capital and also ensures that the Government will continue to hold any special share (described in section 18(2)) in CDC.

53. If the Secretary of State wishes either to reduce the Crown shareholding in CDC below 25% or, for example, to require CDC to redeem the special share under the articles of association of CDC, he will have to seek Parliament's approval to do so (by making an order under section 18(5)): see paragraph 56 below.

54. *Subsection (3)* prevents the Secretary of State from consenting to any alteration of CDC's articles of association which requires his consent as special shareholder unless a statement of the intended consent has been laid before and approved by resolution of Parliament. This means that the Secretary of State would not be able to consent, without Parliamentary approval, to a change in the articles of association so that, for example, he gave up his right of veto as regards any alteration to the investment policy of CDC. The Secretary of State's duty under section 18(1) will continue notwithstanding any change to the articles under this subsection.

55. *Subsection (4)* makes it clear that the title of a third party relating to shares in CDC, would not be affected if, for example, the Crown's shareholding inadvertently fell below 25% as a result of a sale, for instance, to that third party.

56. *Subsection (5)* gives the Secretary of State powers to amend or repeal the section. The Secretary of State could return to Parliament therefore for approval to a restructuring of CDC or, for example, in relation to a change of policy as regards the extent of Government involvement in CDC so that, for instance, he was absolved from the duty to ensure that the Government maintained a 25% share-holding in the company.

Section 19: Securities held by or for Crown

57. Section 19 stipulates that the proceeds of the sale of shares in CDC or income received by the Secretary of State (or a person nominated by the Secretary of State) from dividends or securities should be paid into the Consolidated Fund. It also provides that a person holding securities-

- by virtue of section 6, under the initial share allotment, or
    - on behalf of the Secretary of State by virtue of a direction of his under section 16, or
- acquired by virtue of section 17,

shall deal with them as the Secretary of State may (with the consent of the Treasury) direct.

Section 21: Trustee Investments Act 1961

58. This is a technical provision which facilitates investment in CDC by the trustees of trust funds. The 1961 Act broadens the powers of trustees by allowing them to invest the funds for which they are responsible in a wider range of investments, including certain types of company shares. However, to help ensure that funds are not wasted by investment in loss-making or financially unsound businesses, the Act allows trustees to invest only in companies with a proven "track-record" of paying dividends on shares over the five years prior to the investment the trustee wants to make. Since CDC is at present a statutory corporation with no shares, it has not had the opportunity to build up that track-record. Thus, this provision avoids the application of the limitation in the 1961 Act by deeming CDC to have paid the necessary dividends in past years.

Section 22: Treasury Consent

59. The purpose of this section is to ensure that the Secretary of State can act only with the approval of Treasury in taking certain financial steps during the period in which the Corporation is wholly Government-owned or in buying securities in CDC plc after the sale of shares. The actions which need the Treasury's consent are:

- making an order under section 1(3) to specify CDC's accounting reference date and provide for the allotment of shares;
- varying the terms of a loan under the 1978 Act, under section 8(2);
- making a loan out of the NLF under section 9;
- determining the terms of a loan under section 9, the terms of a guarantee under section 10 or the terms on which sums paid by the Secretary of State under a guarantee will be repaid to him;
- determining how to calculate the sterling equivalent of any sum (section 15);
- giving a guarantee under section 10;
- forgiving a debt owed to the Government, under section 14;
- directing the issue of securities etc. under section 16;
- acquiring securities etc. under section 17;
- disposing of securities acquired under section 6, 16 or 17;
- issuing a direction under section 19 to certain persons holding securities etc.

Section 23: House of Commons disqualification

60. Members of the present Board are disqualified from being Members of Parliament, or Members of the Northern Ireland Assembly. After registration, disqualification will only apply to any Directors of CDC appointed by the Secretary of State.

Section 24: Powers and duties of Corporation before registration

61. The effect of this section is to give CDC additional powers and duties to enable work in preparation for the establishment of the public/private partnership to be carried out between Royal Assent and CDC's registration (at which point CDC will have the usual powers of a plc). *Subsection (1)* gives CDC the power to do various matters related to the preparation of the Public/Private Partnership and *subsection (2)* places a duty on CDC to supply information or assistance to the Secretary of State on request.

General

Section 25: Interpretation: companies and shares

62. The purpose of section 24 is to explain what is meant in the Act by a wholly Government-owned company and an associated company. Following the creation of share capital, the Government will continue to wholly own the Corporation when the Secretary of State (or his nominee) is the only shareholder. This section also describes the mechanism by which a company becomes "associated" with CDC. There are various consequences in the Act for a company which is associated with CDC: in particular it can be subject to the powers described in sections 16 and 17. In order for a company to acquire the status of associated company it must be wholly owned by the Crown (within the meaning given in the Act) and must be designated as such by order of the Secretary of State made by statutory instrument. The purpose of *subsection (5)* is to deal with the case of CDC's investments. CDC wholly owns, as part of its investment portfolio, certain overseas companies. It is not intended that these companies should

be designated "associated" companies, and, for the avoidance of doubt, this subsection allows that possibility to be formally excluded; if those companies are designated under this subsection there is no possibility of them being designated "associated".

SCHEDULES

Schedule 1: Documents to be filed

63. This Schedule contains the list of documents CDC is under a duty to deliver to the registrar by virtue of section 2. The list is closely modelled on the filing requirements of the Companies Act 1985. Part I of Schedule 2 specifies the modifications to that Act which apply to this Schedule (see paragraph 68 below).

64. The first two documents are the memorandum and articles of association of CDC. These are the constitutional documents of a company containing certain specified information about the company (such as its objects) and the company's internal regulations. These paragraphs make clear that CDC's constitutional documents must comply with the requirements of the Companies Act 1985 which apply to the constitutional documents of a plc, with the modifications set out in Part I of Schedule 2.

65. The statement under *paragraph 3* is again intended to fulfil one of the filing requirements of the Companies Act 1985. It requires the particulars of CDC's directors and secretary as nominated by the Secretary of State under section 1 to be filed with the registrar.

66. *Paragraphs 4-6* are based upon the requirements of section 43 (and the following sections) of the Companies Act 1985. These sections provide the means by which a private company can convert to the status of a public company. As noted above, there are EC law obligations applying to public companies which stipulate the minimum amount of share capital such a company may have. Section 43 of the Companies Act 1985 implements these EC requirements by, broadly, requiring that a company wishing to change its status to public company status must be able to demonstrate to the registrar that it has sufficient net assets to support its share capital and undistributable reserves. Since CDC is converting to public company status, it too must comply with these EC law-derived requirements.

67. Consequently, these paragraphs of the Act replicate the requirements of section 43 with the modifications which are necessary to reflect the fact that CDC is a statutory corporation without a share capital at the time it needs to demonstrate that it has sufficient net assets. The statements made by the auditors and by CDC are, therefore, made on the assumption that CDC has been converted to plc status at the time the statements are made and that its share capital has been created in accordance with the Secretary of State's order under section 1(3)(b). In addition there is an assumption that CDC has not given notice of intention to carry on business as an investment company since different provisions of the Companies Act 1985 apply to investment companies.

Schedule 2: Modification of Companies Act 1985, etc.

Part I: Modifications before registration

68. These modifications apply to Schedule 1. They all make provision for the fact that there are to be no subscribers to CDC's memorandum of association. Under Part I of the Companies Act 1985, a necessary step in the formation of a new company is for the persons wishing to set up a new company to subscribe their names to a memorandum of association which will become one of the constitutional documents of the company. The subscribers become the first members of a newly formed company. They are required, in addition, to sign the articles of association and the statement containing the names and particulars of the company's future directors and secretaries. It is not necessary or appropriate for CDC to have subscribers since it is not being formed as a new company: it already exists as a statutory corporation. Consequently the Companies Act 1985 will

have effect with the modifications necessary to reflect the fact that there will be no subscribers.

Part II: Modifications on and after registration

69. The modifications in this Part are necessary to provide for the fact that CDC is not brought under the governing regime of the Companies Act 1985 (and other relevant legislation) by the usual route of formation as a new company.

70. *Paragraph 2* reflects the fact that CDC is not being *incorporated* (i.e. formed as new body corporate) under the Companies Act 1985; CDC has already been incorporated, originally under the Overseas Resources Development Act 1948. CDC is, however, being *registered* under the Companies Act 1985. Since certain provisions of the Companies Act 1985 refer to a company's incorporation under the Companies Act 1985 (e.g. section 366 which specifies the date of a company's first general meeting by reference to its date of incorporation) in order for those provisions to operate with respect to CDC, it is necessary for those references to incorporation to be read as references to its registration. This provision applies to the Companies Act 1985 and all other legislation other than taxation legislation, where it is appropriate for references to a body corporate's incorporation to continue to be taken as references to CDC's incorporation.

71. *Paragraph 4* ensures that references to a company's certificate of incorporation in the Companies Act 1985 (and elsewhere) can be construed as a reference to CDC's certificate which is to be called "a certificate of registration" to reflect the fact that CDC is not being incorporated by virtue of the Act.

72. *Paragraph 5*: section 735 of the Companies Act 1985 contains a definition of "company". It is defined, so far as relevant here, as a company formed and registered under the Companies Act 1985. CDC will not have been formed under the Companies Act 1985; it will have changed status from a statutory corporation to a plc. Thus, in order to make clear that CDC nonetheless falls within the definition, this paragraph provides that references to companies formed and registered are to have effect as if the reference to formation were omitted. This provision also applies to any other statutory references to companies formed and registered under the Companies Act 1985.

73. *Paragraph 6* disapplies section 13 of the Companies Act 1985. Many of the provisions in that section are inappropriate to CDC since they deal with the position of a newly formed company. The Act contains corresponding provisions adapted to CDC's circumstances which have been discussed in the paragraphs above.

74. *Paragraph 7* is closely modelled on section 22 of the Companies Act 1985 and provides the mechanism by which CDC acquires its first members as a plc. It differs from the Companies Act 1985 provision in that the persons nominated by the Secretary of State become CDC's first members.

75. *Paragraph 8* refers to section 34 of the Companies Act 1985. This section imposes penalties on a person who trades or carries on business with a name of which "limited" is the last word, unless that person has been duly incorporated with limited liability. CDC was incorporated as a statutory corporation and was not incorporated with limited liability. Although this provision is not of immediate relevance to CDC since CDC will be a *public* limited company and this provision is aimed at *private* limited companies, this provision ensures that CDC will not be prevented from converting to private company status at some point in the future.

76. *Paragraph 9* disapplies two related provisions of the Companies Act 1985 and the Insolvency Act 1986. Section 117 of the Companies Act 1985 imposes an obligation on a company registered as a public company on its original incorporation to obtain a certificate from the registrar before it may do business or exercise its borrowing powers. Section 122(1)(b) of the Insolvency Act 1986 provides that a company may in certain

circumstances be wound up by the Court for lack of a certificate under section 117. The section 117 obligation implements EC law minimum capital requirements; it imposes an obligation on a company applying for the certificate to demonstrate to the registrar that it has adequate share capital. CDC will already be complying with equivalent obligations as discussed in paragraphs 66 and 67 above and therefore need not comply with this provision which is not appropriate to CDC's circumstances since CDC is already carrying on business as a statutory corporation.

77. *Paragraphs 10 and 11* deal with the fact that CDC is carrying on business as a statutory corporation and already has accounting and financial cycles. It is therefore necessary to make special provision for CDC's first accounting reference period and financial year as a plc to dovetail with CDC's current cycles. Thereafter CDC will be subject to the same regime as all other "Companies Act" companies.

78. *Paragraph 12* permits CDC to have the status of an investment company within the meaning of section 266 CA 1985. There are two main reasons for this. First, different rules apply to the distributability of an investment company’s profits. The usual rules governing the distributability of a company’s profits are extended in the case of an investment company, by virtue of section 265 CA 1985, to permit additional profits to be distributed to its members. Secondly, an investment company is able to prepare its accounts differently from an ordinary company by virtue of special provisions contained in Part V of Schedule 4 to the CA 1985, provided that it complies with the conditions contained in that part. Despite the fact that CDC’s business is very similar to that of an investment company, it will not be able to comply with all the conditions set out in section 266 CA 1985 which must be satisfied before a company can have the status of an investment company, nor with all the conditions contained in Part V of Schedule 4. The purpose of this paragraph, therefore, is to ensure that for the duration of the exempt period, which is the same as the exempt period for tax purposes (see paragraphs on Schedule 3 below), CDC will nonetheless be able to have that status and to prepare its accounts accordingly.

79. *Paragraph 13* provides for a charge created by CDC whilst a statutory corporation to be subject to the Companies Act 1985 provisions applying to charges, provided that the charge in question is of a kind that would be caught by the Companies Act provisions. The effect of this paragraph is that any such charge must be registered with the registrar within 21 days of CDC's registration. Failure to do so renders the charge void against liquidators, administrators and creditors. This provision does not affect the validity of any action taken to enforce the charge before CDC's conversion.

80. *Sub-paragraph (4)* places CDC under an additional duty to notify persons entitled to the charge of the fact that it will become subject to the new regime. This additional duty reflects the fact that under section 399 (1) of the Companies Act 1985 any person interested in the charge may apply for it to be registered. Since persons entitled to the charge may not necessarily be aware of the fact that CDC is converting to plc status, they may not have the opportunity to register the charge themselves unless they have been notified by CDC in the way provided for.

81. *Paragraph 14* ensures: (1) that CDC will be subject to the same fee regime in respect of the performance by the registrar of his functions as are all other companies; and (2) that the registrar can charge the same fee for a copy of CDC's certificate of registration as would apply in relation to a company’s certificate of incorporation.

82. *Paragraph 15* provides that neither the Secretary of State nor the Treasury is to be regarded as a shadow director of CDC or any associated company for certain purposes of the Companies Act 1985 during the period in which the Crown holds the special share (as defined in section 18(2)).

83. A shadow director is defined in the Companies Act 1985 as “ a person in accordance with whose directions or instructions the directors of the company are accustomed to act” (section 741 Companies Act 1985). The consequence of a person falling within

this definition is that he is subject to certain of the legal requirements which affect actual directors of a company. In addition, the company will be subject to certain legal requirements, and there may be consequences for third parties.

84. During the period in which the Crown holds the special share it is possible that, in the absence of this provision, the Secretary of State or the Treasury would be regarded as a shadow director of CDC and of certain of the associated companies.

85. Certain of the Companies Act 1985 provisions would apply if the Secretary of State or the Treasury were to be a "shadow director" would be cumbersome and time-consuming for the persons involved in the Public/Private Partnership to comply with and would serve no obvious purpose in the context of that Partnership. Those provisions are disapplied by virtue of *paragraph 14*. The sections which are disapplied impose duties of an administrative nature on shadow directors or the company, such as section 288 which imposes obligations on a company to keep particulars of its directors (name, address and occupation) and to notify the registrar of any changes, or impose restrictions on financial dealings between the company and its shadow directors or persons connected with them, such as section 320 which provides, broadly, that before certain transactions between a company and its directors can be entered into, a general meeting of the company must be held to approve the transaction.

86. *Schedule 3* makes provision for CDC's tax treatment after it has been transformed into a plc. The tax provisions serve three purposes, described in the paragraphs below.

(i) First, *paragraph 2* of Schedule 3 ensures that for the duration of the exempt period CDC will be exempt from UK corporation tax on its profits (and from a tax chargeable at the same rate as corporation tax on profits apportioned to CDC from its controlled foreign companies). The exempt period is to begin on a day appointed by the Secretary of State and comes to an end if: (1) an order has been made under clause 18(5) of the Bill as a result of which the Secretary of State is no longer obliged to hold the special share; and (2) the Crown actually ceases to hold the special share *(paragraph 1)*. *Paragraph 3* makes provision for the possibility of CDC moving its residence outside the UK in the event of the exempt period coming to an end. If CDC were to transfer its central management and control outside the UK, it might still be regarded as resident in the UK for tax purposes as a result of section 66 of the Finance Act 1988 which provides that a company is resident in the UK for tax purposes if it is incorporated in the UK This paragraph provides that if CDC has so transferred its central management and control and, subsequently, the exempt period ends, section 66 will be disapplied for a maximum period of seven years from the end of the exempt period. *Sub-paragraph 4* ensures that no charge to tax will arise as a result of CDC ceasing to be resident in the UK solely by virtue of the disapplication of section 66 of the Finance Act 1988.

(ii) Secondly, *paragraph 6* makes provision for the tax treatment of distributions (including dividends) made by CDC in the hands of the recipients. These provisions essentially provide for CDC's distributions to be treated as though they were coming from an overseas company. This is mainly to prevent recipients of CDCs distributions benefiting from provisions in UK tax legislation designed to prevent distributions being in effect charged twice to UK tax, once as profits of the company and then again in the hands of recipients. It would not be appropriate for recipients of CDC's distributions to benefit from these provisions as CDC will be exempt from corporation tax for the duration of the exempt period.

(iii) Thirdly, the tax provisions contain anti-avoidance provisions designed to ensure that members of the CDC group will not be able to benefit unfairly from CDC's tax exemption. The anti-avoidance provisions are contained in *paragraphs 4(1)* and*5* and ensure, for example, that members of CDC's group could not move assets into CDC in order to avoid a charge to UK corporation tax or offset any trading losses of CDC against their own liability to tax.

COMMENCEMENT

87. Any Act resulting from the Act will come into force on Royal Assent, but in fact, none of its provisions (except section 23: extra powers for CDC) will have any practical impact until the Secretary of State has determined the filing day under section 1(1). That will trigger the process culminating in registration, and upon registration, the rest of the Act (including, as explained in paragraph 20 above, the repeal of most of the 1978 Act) will take effect.

HANSARD REFERENCES

The following table sets out the date and Hansard references for each stage of this Act's passage through Parliament.

Stage	***Date***	***Hansard reference***
House of Lords		
Introduction	25 November 1998	Vol 595 Col 23
Second Reading	7 December 1998	Vol 595 Cols 720-742
Committee	12 January 1999	Vol 596 Cols CWH1-CWH16
Report	2 March 1999	Vol 597 Cols 1553-1559
Third Reading	9 March 1999	Vol 598 Cols 129-131
House of Commons		
Introduction	10 March 1999	Votes and Proceedings No 51, page 208
Second Reading	24 May 1999	Vol 332 Cols 38 - 80
Committee	17 and 22 June 1999	Hansard Standing Committee D
Report and Third Reading	14 July 1999	Vol 335 Cols 447-461 509-533

Royal Assent - 27 July 1999	House of Lords Hansard Vol 604 Col 1422
	House of Commons Hansard Vol 336 Col 152