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

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.