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THE COMMON FUND FOR COMMODITIES

BY

*C.F. Amerasinghe**

The Common Fund for Commodities was adopted by Agreement in June 1980.¹ The Agreement is not in force until it is ratified, accepted or approved by at least 90 states and certain other requirements are met (Article 57). As yet the Agreement has not entered into force, some 61 states having ratified the Agreement to date, although 108 have signed it. This article will describe, analyze and highlight some of the more important legal aspects of this Agreement so as to give a clearer picture of this new institution and how it will operate.

The objectives of the Common Fund (Fund) are clearly stated in Article I of the Agreement. First, the Fund is to serve as a key instrument in attaining the agreed objectives of the Integrated Programme for Commodities set out in resolution 93(IV) of the United Nations Conference on Trade and Development (UNCTAD).^{1,1} These objectives are:

- (i) to achieve stable conditions in commodity trade, including avoidance of excessive price fluctuations, at levels which would:
 - (a) be remunerative and just to producers and equitable to consumers;
 - (b) take account of world inflation and changes in the world economic and monetary situations;
 - (c) promote equilibrium between supply and demand within expanding world commodity trade;

- (ii) to improve and sustain the real income of individual developing

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1. Agreement Establishing the Common Fund for Commodities, U.N. Doc. TD/IPC/CF/CONF/24 (1980) [hereinafter cited as Agreement]. The full text of the Agreement is reprinted as an appendix to this article.

1.1. 1 U.N. Conference on Trade and Development at 6, U.N. Doc. TD/218/Vol.1 (1977).

countries through increased export earnings, and to protect them from fluctuations in export earnings, especially from commodities;

(iii) to seek to improve market access and reliability of supply for primary products and the processed products thereof, bearing in mind the needs and interests of developing countries;

(iv) to diversify production in developing countries, including food production, and to expand processing of primary products in developing countries with a view to promoting their industrialization and increasing their export earnings;

(v) to improve the competitiveness of, and to encourage research and development on the problems of, natural products competing with synthetics and substitutes, and to consider the harmonization, where appropriate, of the production of synthetics and substitutes in developed countries with the supply of natural products produced in developing countries;

(vi) to improve market structures in the field of raw materials and commodities of export interest to developing countries; and

(vii) to improve marketing, distribution and transport systems for commodity exports of developing countries, including an increase in their participation in these activities and their earnings from them.

Second, the Fund must facilitate the conclusion and functioning of international commodity agreements or arrangements (ICAs), particularly in regard to commodities of special interest to developing countries.

In order to fulfill the above objectives the Fund is to exercise the functions of:

(i) contributing to the financing of international buffer stocks and internationally co-ordinated national stocks within the framework of ICAs (through its First Account);

(ii) financing measures in the field of commodities other than stocking (through its Second Account); and

(iii) promoting co-ordination and consultation with regard to measures in the field of commodities other than stocking and their financing, with a view to providing a commodity focus.^{1,2}

Membership and Capital Structure

Article 4 states that membership in the Fund will be open to all member states of the United Nations or members of any of its specialized agen-

1.2. Agreement, *supra* note 1, Article 3.

cies or of the International Atomic Energy Agency and to any intergovernmental organization of regional economic integration which exercises competence in fields of activity of the Fund. Such intergovernmental organizations will not be required to undertake any financial obligations to the Fund, nor will they hold any right of vote.

Article 9 provides that initially the Directly Contributed Capital of the Fund, which will be available for subscription by its members, amounts to \$470 million, of which \$370 million will be in the form of paid-in shares and \$100 million in the form of payable shares. The latter amount will not be used in the Fund's operations and will be subject to call only if needed to meet the Fund's liabilities arising from borrowings for the First Account.² The payable capital will serve as a guarantee for any borrowings for the First Account.

Article 10 deals with the subscription of shares. Each member of the Fund will be required to subscribe \$1 million (of which it may allocate a part to the Second Account, with a view to an aggregate allocation of not less than about \$70 million). The rest of the Directly Contributed Capital has been apportioned among the various groups according to a scale of assessment based on "ability to pay". The distribution within each group was decided upon by the group itself on the basis of either shares in world commodity trade or ability to pay or a combination of both. The amounts to be subscribed by each member State are listed in Schedule A of the agreement. The amount to be subscribed under the additional assessment by the various groups are as follows:

Group of 77 (119 countries)	\$ 32,000,000
Group B (24 Developed Market Economy countries)	\$217,600,000
Group D (Socialist countries of Eastern Europe)	\$ 39,000,000
China	\$ 15,000,000
Others (12)	\$ 3,400,000
	Total \$307,000,000

The apportionment of the total subscription between paid-in and payable shares is as follows:

2. Agreement, *supra* note 1, Article 11(4).

	<u>Paid in</u>	<u>Payable</u>
Group of 77	\$140,600,000	\$ 10,400,000
Group B	\$170,700,000	\$ 70,900,000
Group D	\$ 33,300,000	\$ 12,700,000
China	\$ 11,100,000	\$ 4,900,000
Others	<u>\$ 14,300,000</u>	<u>\$ 1,100,000</u>
Total	\$370,000,000	\$100,000,000

Article 12 provides for review of the adequacy of subscriptions, if the 47,000 shares of Directly Contributed Capital are not subscribed within 18 months after the entry into force of the agreement. On the basis of this review unsubscribed shares may be made available for subscription. Provision is further made for the issue of additional shares of Directly Contributed Capital after reviews made at later dates.

Article 11(3) provides that the paid-in shares amounting to \$370 million will be paid in in three stages:

the first tranche will consist of 30 per cent of the total amount in cash; the second tranche (to be provided one year later) will consist of 20 per cent cash and 10 per cent in the form of promissory notes to be encashed as and when decided by the Executive Board of the Fund; and the third tranche (to be provided two years later) will consist of the remaining 40 per cent in the form of promissory notes. The encashment of notes in respect of the amount allocated to the First Account will be subject to a decision by a two-thirds majority, having due regard to operational needs.

There are three other principal sources of capital for the Fund: (i) voluntary contributions,³ (ii) resources deriving from the association of international commodity organizations (ICOs) with the Fund⁴ and (iii) borrowings.⁵

The Fund is authorized to accept voluntary contributions from Members and other sources both for the First and Second Accounts. A target of \$280 million had been set for initial voluntary contributions to the Second Account. Pledges announced up to the time of adoption of the Agreement establishing the Common Fund amounted to about \$223 million. There is provision for the periodic replenishment of the resources of the Second Account on a voluntary basis.

3. Agreement, *supra* note 1, Article 13.

4. Agreement, *supra* note 1, Article 14.

5. Agreement, *supra* note 1, Article 15.

Some resources required for First Account operations will be derived from the association of ICOs. Each ICO associated with the Fund will be required to deposit with the Fund, in full or in installments, one third of its maximum financial requirements for stocking (MFR) and its participants will be required to provide "guarantee capital" equivalent to the remaining two thirds. Cash deposits may be withdrawn whenever needed by the ICO concerned but in such an event a pledge or an assignment of equivalent stock will have to be given to the Fund.

The Fund may also borrow for both its First and Second Account operations from its members, international financial institutions and capital markets. There are certain limits placed, however, on borrowings for First Account operations.

Operations

Article 16 states that operations will be through two accounts: the First and Second Accounts. The First Account is to contribute to the financing of commodity stocking and the Second Account is to finance measures in the field of commodities other than stocking, without jeopardizing the integral unity of the Fund.

(a) First Account

First Account operations are provided for in Article 17. Only ICOs which have concluded an association agreement with the Fund will be able to use the facilities of the First Account. To qualify for association, the ICA concerned must comprise producers and consumers covering the bulk of world trade in the commodity in question. Furthermore, if the ICA provides for international buffer stocks, it must conform to the principle of joint buffer-stock financing by producers and consumers. Levy-financed ICAs will be eligible for association. Associated ICOs will normally use the Fund as their only banker for their buffer-stocking operations. The Fund will pay interest on ICO deposits and will charge interest on its loans to ICOs.

The borrowings of an associated ICO will be backed not only by the Guarantee Capital provided by its participants but also by stock warrants in respect of stocks acquired by the ICO. In the event of an imminent default by an associated ICO, the Fund will first consult with the ICO on measures to avoid such default. These could take the form, for example, of additional financial support by the participants in the ICO. If the ICO defaults notwithstanding any such measures, the Fund will have recourse to the Guarantee Capital provided by participants in the defaulting ICO and thereafter, if necessary, to its stock warrants.

In the event that the Fund cannot otherwise meet its liabilities in respect of its First Account borrowings in general, it is to meet such liabilities

out of the following resources in the following order, provided that, if an associated ICO has failed to meet its obligations toward the Fund, the Fund has already, to the fullest extent possible, made use of the resources referred to in the previous paragraph:

- (a) the Special Reserve established under Article 16 of the Agreement;
- (b) proceeds of subscriptions of paid-in shares allocated to the First Account;
- (c) proceeds of subscriptions of payable shares;
- (d) proceeds of *pro rata* calls of Guarantee Capital and Guarantees provided by participants in a defaulting associated ICO by virtue of their participation in other associated ICOs.

If the Fund is unable, even after such recourse, to meet its liabilities in respect of its First Account borrowings, the Directly Contributed Capital of the Fund will be increased by the amount needed to meet such liabilities and the Governing Council of the Fund will meet in an emergency session to decide upon the modalities for such increase.

To meet its liabilities other than liabilities arising from the default of an associated ICO, the Fund may have recourse to the entire Guarantee Capital available to it, after it has had recourse to the Special Reserve, to the proceeds of subscriptions of paid-in shares allocated to the First Account and to the proceeds of subscriptions of payable shares.

(b) Second Account

Second Account operations are dealt with in Article 18. Through its Second Account, the Fund will finance commodity development measures, aimed at improving the structural conditions in markets and at enhancing the long term competitiveness and prospects of particular commodities. These will include research and development, productivity improvements, marketing and measures designed to assist, as a rule by means of joint financing or through technical assistance, vertical diversification.

The measures to be financed through the Second Account will have to be sponsored and followed up by producers and consumers within the framework of an international commodity body (ICB) meeting specified criteria, namely:

- (a) it must be established on an intergovernmental basis, with membership open to all States Members of the United Nations or members of any of its specialized agencies;
- (b) it must be concerned on a continuing basis with the trade, production and consumption aspects of the commodity;
- (c) its membership must comprise producers and consumers representing an adequate share of exports and of imports of the commodity;

- (d) it must have an effective decision-making process that reflects the interests of all its participants;
- (e) it must be in a position to adopt a suitable method for ensuring the proper discharge of any technical or other responsibilities arising from its association with the activities of the Second Account.

The Second Account will provide grants as well as loans. The terms and conditions of loans will depend on the type of measures financed, as well as the economic situation of the recipients. In determining priorities for the use of the resources of the Second Account, due emphasis will be given to the commodities of interest to the least developed countries. In considering projects for the Second Account, due emphasis will be given to the commodities of interest to developing countries, particularly those of small producers or exporters. There is provision for a close working relationship with existing international and regional financial institutions and for the avoidance, as far as possible, of any duplication of their activities. It is envisaged that the Fund may undertake co-financing with such institutions.

Although the bulk of the resources of the Second Account will be derived from voluntary contributions, the Fund is authorized to borrow for the Second Account from governments and international financial institutions, provided such borrowing is on concessional terms and its proceeds are held entirely separately from other resources.

Organization and Management

(a) Structure

The Fund will be an autonomous institution with its own Governing Council,⁶ on which each member will be represented, and an Executive Board⁷ consisting of 28 Executive Directors to be elected by the Governing Council. It will also have a Managing Director, who will be the Chairman of the Executive Board, and the necessary staff to carry out its functions.⁸ The Governing Council will establish a Consultative Committee to advise the Executive Board on matters related to the operations of the Second Account.⁹ The Governing Council will have all the powers of the Fund vested in it. It will take important decisions and will delegate all or any of its powers, except certain specified powers, to the Executive Board. The latter is to be responsible for the conduct of the operations of the Fund and

6. Agreement, *supra* note 1, Article 20.

7. Agreement, *supra* note 1, Article 22.

8. Agreement, *supra* note 1, Article 24.

9. Agreement, *supra* note 1, Article 25.

to report to the Governing Council. The Managing Director is the chief executive officer of the Fund and must conduct, under the direction of the Governing Council and Executive Board, the ordinary business of the Fund. He is to be responsible for the organization, appointment and dismissal of the staff. In appointing the staff the Managing Director must, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to recruiting personnel on as wide a geographical basis as possible. The Managing Director and staff, in the discharge of their functions, are to owe their duty entirely to the Fund and to no other authority. Each member State is to respect the international character of this duty and shall refrain from all attempts to influence the Managing Director or any of the staff in the discharge of their functions.

(b) Voting

The voting structure of the Fund provides for the allocation of 47,000 votes to the countries of the Group of 77, 42,000 to the countries of Group B, 8,000 to countries of Group D, 3,000 to China and about 4,400 to countries not included in any group.¹⁰ Each country will hold 150 basic votes. The balance of each group's share has been distributed to members of that group in proportion to each member's share in the total Directly Contributed Capital. In addition, each member will receive one vote for each \$50,000 of Guarantee Capital provided by it by virtue of its participation in associated ICOs. The Governing Council will keep the voting structure under constant review and if the actual distribution of votes among the groups is significantly different from that indicated above, will make any necessary adjustment. Such adjustments may be necessitated by variations in (i) the membership of the Fund; (ii) the Directly Contributed Capital; and (iii) the Guarantee Capital (consequent upon the association of ICOs).

Decisions will, wherever possible, be taken without a vote. The most important decisions, including constitutional decisions (such as amendments to the articles of agreement) and decisions with significant financial implications for members (such as increases in the Fund's capital), will be taken by a three-fourths majority. Other important decisions (such as approval of association agreements and of projects to be financed by the Second Account) will be taken by a two-thirds majority and the remaining decisions by a simple majority. Each Executive Director is entitled to cast the number of votes attributable to the members he represents but the votes need not be cast as a unit.

(c) Relations with other organizations

Pursuant to Article 29, the Fund may enter into negotiations with the

10. The Agreement indicates the votes allocated to each country in a Schedule. Agreement, *supra* note 1, Schedule D and Schedule D Annex.

UN with a view to concluding an agreement to bring the Fund into relationship with the UN as one of its specialized agencies; the Fund may also co-operate closely with UNCTAD and the organizations of the UN system, other intergovernmental organizations, international financial institutions, non-governmental organizations and governmental agencies concerned with related fields of activities and, if deemed necessary, enter into agreements with such bodies.

Status, Privileges and Immunities

The status, privileges and immunities of the Fund are provided for in Articles 40 through 50 of the Agreement. They are more or less similar to the provisions on the subject contained in the Articles of Agreement of the World Bank. To enable the Fund to fulfill the functions with which it is entrusted, a certain status and certain privileges and immunities are to be accorded to the Fund in the territory of each Member State. The Fund is to possess full juridical personality, and, in particular, the capacity to conclude international agreements with States and international organizations, to enter into contracts, to acquire and dispose of immovable and movable property, and to institute legal proceedings. The Fund is to enjoy immunity from every form of legal process, except for actions which may be brought against the Fund:

- (a) by lenders of funds borrowed by the Fund with respect to such funds;
- (b) by buyers or holders of securities issued by the Fund with respect to such securities; and
- (c) by assignees and successors in interest thereof with respect to the above-mentioned transactions.

No action in a court of law may be brought against the Fund by Members, Associated ICOs, ICBs, or their participants, or persons acting for or deriving claims from them, except in the above-mentioned cases. Property and assets of the Fund, wherever located and by whomsoever held, are to be immune from search, any form of taking, foreclosure, seizure, all forms of attachment, injunction, or other judicial process impeding disbursement of funds or covering or impeding disposition of any commodity stocks or Stock Warrants, and any other interlocutory measures before the delivery of a final judgment against the Fund by a court having jurisdiction in accordance with the provisions of the Agreement. The Fund may agree with its creditors to limit the property or assets of the Fund which may be subject to execution in satisfaction of a final judgment.

The property and assets of the Fund, wherever located and by whomso-

ever held, are to be immune from search, requisition, confiscation, expropriation and any other form of interference or taking whether by executive or legislative action. The archives of the Fund, wherever located, are to be inviolable.

To the extent necessary to carry out the operations provided for in the Agreement and subject to the provisions of the Agreement, all property and assets of the Fund are to be free from restrictions, regulations, controls, and moratoria of any nature. As far as may be compatible with any international convention on telecommunications in force and concluded under the auspices of the International Telecommunication Union to which a Member is a party, the official communications of the Fund are to be accorded by each Member the same treatment that is accorded to the official communications of other Members.

All Governors, Executive Directors, their alternates, the Managing Director, members of the Consultative Committee, experts performing missions for the Fund, and the staff, other than persons in domestic service of the Fund:

(a) are to be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives such immunity;

(b) when they are not nationals of the Member concerned, are to be accorded, together with their families forming part of their household, the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by such Member to the representatives, officials and employees of comparable rank of other international financial institutions of which it is a member; and

(c) are to be granted the same treatment in respect of travelling facilities as is accorded by each Member to representatives, officials and employees of comparable rank of other international financial institutions of which it is a member.

Within the scope of its official activities, the Fund, its assets, property, income and its operations and transactions authorized by the Agreement are to be exempt from all direct taxation and from all customs duties on goods imported or exported for its official use, provided that this shall not prevent any Member from imposing its normal taxes and customs duties on commodities which originate from the territory of such Member and which are forfeited to the Fund through any circumstance. The Fund may not claim exemption from taxes which are no more than charges for services rendered. When purchases of goods or services of substantial value necessary for the official activities of the Fund are made by or on behalf of the Fund, and when the price of such purchases includes taxes or duties, appropriate measures, to the extent possible and subject to the law of the Mem-

ber concerned, are to be taken by such Member to grant exemption from such taxes or duties or provide for their reimbursement. Goods imported or purchased under an exemption are not to be sold or otherwise disposed of in the territory of the Member which granted the exemption, except under conditions agreed with that Member.

No tax is to be levied by Members on or in respect of salaries and emoluments paid or any other form of payment made by the Fund to Governors, Executive Directors, their alternates, members of the Consultative Committee, the Managing Director and staff, as well as experts performing missions for the Fund, who are not their citizens, nationals or subjects.

No taxation of any kind is to be levied on any obligation or security issued or guaranteed by the Fund, including any dividend or interest thereon, by whomsoever held:

- (a) which discriminates against such obligation or security solely because it is issued or guaranteed by the Fund; or
- (b) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund.

The Fund may waive, to such extent and upon such conditions as it may determine, the immunities, exemptions and privileges described above in cases where its action would not prejudice the interests of the Fund. The Managing Director has the power, as may be delegated to him by the Governing Council, and the duty to waive the immunity of any of the staff, and experts performing missions for the Fund, in cases where the immunity would impede the course of justice and can be waived without prejudice to the interests of the Fund.

Amendments

Amendments to the Agreement are to be adopted by the Governing Council by a special majority as defined in the Agreement. Amendments enter into force six months after their adoption unless otherwise specified by the Governing Council. However, any amendment modifying:

- (a) the right of any Member to withdraw from the Fund;
- (b) any voting majority requirement provided for in the Agreement;
- (c) the limitation on liability of members for acts or obligations of the Fund provided in article 6;
- (d) the right to subscribe or not to subscribe Shares of Directly Contributed Capital pursuant to article 9, paragraph 5; or
- (e) the procedure for amending the Agreement;

does not come into force until accepted by all Members. Acceptance is

deemed to have been given unless any Member notifies its objection to the Managing Director in writing within six months after the adoption of the amendment. Such period of time may be extended by the Governing Council, at the request of any Member, at the time of the adoption of the amendment.

Interpretation

There is no provision for reference to the International Court of Justice or any other judicial tribunal of disputes arising between Members and the Fund or between Members from the interpretation or application of the Agreement. In this respect the Agreement follows the pattern of the statutes of many international financial institutions. Instead there is provision in Article 52 for reference of such disputes to the Executive Board of the Fund and thereafter, if so desired to the Governing Council of the Fund. It is only if the Governing Council cannot reach a decision that provision is made for reference to arbitration.

Other Provisions

There are extensive provisions dealing with the withdrawal and suspension of members,¹¹ the settlement of disputes relating to withdrawal and the termination of the Fund's operation,¹² and the termination of operations of the Fund.¹³ But these are not of such significance at this stage when the Fund has not even come into existence.

CONCLUSION

The establishment of the Common Fund must be regarded as a significant achievement in the quest for a new international economic order. It will be a unique institution in more ways than one. In contrast to the Bretton Woods institutions, in which the developing countries have only a peripheral management role, these countries will be participating in the Common Fund as important partners with developed countries. They will provide a substantial part of its resources. They will also have a strong voice in the management of the Fund, one of whose fundamental aims is to promote global action to improve market structures in international trade in commodities of interest to developing countries. It is expected to have universal membership, with the participation not only of the developing and

11. Agreement, *supra* note 1, Articles 30 through 33.

12. Agreement, *supra* note 1, Article 53.

13. Agreement, *supra* note 1, Articles 34 to 39.

developed market-economy countries but also of the socialist countries of Eastern Europe and China. Of equal importance is the fact that it will be an international co-operative endeavour which will take into account the interest of all countries. Its operations will provide substantial benefits for both developed and developing countries, whether producers or consumers of commodities.