



International Coffee Council  
116<sup>th</sup> Session  
9 – 11 March 2016  
Addis Ababa, Ethiopia

## **Use of the Special Fund**

### **Background**

1. Further to the meeting of the Finance and Administration Committee on 25 September 2014, the Council asked the Executive Director to raise the issue of the use of the Special Fund with the Council in March 2015 (see document ICC-113-13, paragraph 36). The Executive Director also asked the ICO's solicitors, Collyer Bristow, to prepare an opinion on the use of the Special Fund. Exporting Members have conducted discussions in the intervening period on the use of the Special Fund.

2. Annex I contains the opinion of the solicitors and a draft Resolution proposing a mechanism for the use of the Special Fund has been drawn up and is attached as Annex II.

### **Action**

The Council is requested to take note of this document and, if appropriate, to approve the attached draft Resolution.

25 FEBRUARY 2015

**INTERNATIONAL COFFEE ORGANIZATION**

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Opinion on the Legal status of the Special Fund

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## **1. SUMMARY**

The status of the International Coffee Organization ("ICO") is a legal person having the legal capacities of a body corporate. The constitution of the ICO is in the first instance determined by the consecutive treaties and the competent bodies of the Organization itself as prescribed in those treaties.

The Special Fund was established first by the 1976 Agreement and secondly by the 1983 Agreement. Reference to the Special Fund is not included in the subsequent Agreements of 1994, 2001 and 2007. The position would appear to be that the 1983 Agreement has ceased to be in force in relation to the Fund. The Executive Director is appointed as the chief administrative officer of the Organisation. The Executive Director may conclude that a liquidation of the Special Fund is desirable and he may decide to proceed and liquidate the Fund and distribute its resources. This may be open to a challenge by one or other Members as being an ultra vires act and to that extent it would be prudent to seek approval for this course of action by the required vote of the Council in that it is the Council which has vested in it all powers specifically conferred by the 2007 Agreement. Although under Art. 55(5) of the 1983 Agreement the Fund is to be managed and administered by a committee composed of the exporting Members of the Executive Board with the Executive Director, if as seems to be the case, the 1983 Agreement is no longer in force, then it would be prudent for the Council as a whole to vote in favour of liquidation of the Fund rather than to rely solely on the support of the exporting Members (being the sole contributors to the Fund).

## **2. STATUS OF ICO**

The ICO is a body established by treaty between sovereign states. The most recent treaty was concluded in 2007, and runs initially for a period of ten years when it may be extended, either with or without amendment (2007 Agreement, Art. 48). Member states are countries which import or export coffee.

The status of the ICO in the UK is governed by the International Organisations Act 1968 (the "Act"). By an Order in Council (SI 1969/733, as amended by SI 1975/1209 and SI 1999/2034) made under section 1(1) of the Act, the ICO is granted the "legal capacities of a body corporate".

## **3. APPLICABLE LAW**

The question arises as to the body of law which should be referred to in the event of a dispute, either with third parties or between Members of the ICO. There is no reported decision involving the ICO relating to this point. However, the status of the International Tin Council ("ITC"), which was also granted the legal capacities of a body corporate, has been judicially considered by the House of Lords in a 1989 case.

The House of Lords in the ITC case held that provisions of domestic law, such as the Companies Acts and laws of unincorporated associations, do not apply. ITC was neither an English nor a foreign corporation and was the creation of a treaty. This has been considered in subsequent case law to enunciate the general principle that the proper law of an international organisation, which governs its constitution and existence, is public international law. According to public international law, where the matter relates to the internal activities or functioning of the internal organs of the organisation, the correct procedure should be ascertained from the organisation's constitution.

If, however, the constitutional documents contain a jurisdiction and choice of law clause nominating the jurisdiction and body of law of a domestic state, the English courts would recognise such jurisdiction and choice of law clauses. There is no such clause in the International Coffee Agreements. The distribution of the funds held by the Special Fund of the ICO is a matter of internal organisation and therefore falls to be governed, in the first instance, by the rules of the constitution.

The constitution can only regulate the functioning of an international organisation in general terms, with more detailed provisions necessarily being made by the competent bodies of the organisation itself.

In the absence of express provision in the constitution regarding a particular matter, the generally accepted approach is to apply the doctrine of implied powers.

In the absence of expressed or implied provision within the constitution for a given event, whether relating to relations with third parties or concerning the internal functioning of the organisation, the general rules of international law may be applied. With regard to the European Community, the European Court of Justice has been prepared to apply general principles of law, such as estoppel and legal certainty to assist in the legal order of the Communities. It may be logical to apply such principles to the ICO in the absence of express or implied constitutional provision. It is not clear exactly what principles may be applied in this way although the concept of returning funds to contributors is familiar to English law.

#### **4. APPLICABILITY OF SUBSEQUENT AGREEMENTS**

The question arises as to what comprises the constitution to which reference must be made. The ICO has been established and maintained by consecutive treaties (1967, 1976, 1983, 1994, 2001 and 2007) which are expressed to be in force for a specified number of years. The membership of the ICO has changed over the years.

As there are several treaties, each expressed to be a continuation of the previous treaty, it is necessary to consider the principles of international law as to which treaty prevails. The general principle is that this question should be determined by construction of the relevant provisions of the treaties. In the absence of express or implied provisions, the Vienna Convention on the Law of

Treaties, Art. 56, provides that the validity and continuance of a treaty is governed by the intentions of the parties.

## **5. CURRENT STATUS OF THE SPECIAL FUND**

In September 1990 the Special Fund Committee recommended that the Fund should cease to finance activities after 30th September 1991 and that any activities undertaken by the staff of the Fund should be incorporated into the Administrative Budget from financial year 1991/1992 onwards. The balance of the Special Fund Account as at 30th September 1991 was US \$747,098. The Special Fund Accounts are considered by the Finance and Administration Committee and approved by exporting Members each year.

The Accounts for the financial year to 30<sup>th</sup> September 2014 showed a balance of US \$1,377,809, including US \$5,303 received in interest during the year. There has been no expenditure from the resources of the Fund apart from audit fees and bank charges.

## **6. 1976 AND 1983 AGREEMENTS**

The Special Fund was established first by the 1976 Agreement and secondly by the 1983 Agreement. Art. 68(1) of the 1983 Agreement provides that the 1983 Agreement shall remain in force for a period of 6 years until 30th September, 1989 unless extended under the provisions of paragraph (2) of that Article. That Agreement was subsequently extended three times and continued until replaced by the 1994 Agreement which was in turn replaced by the 2001 and 2007 Agreements. On the basis that there is no current extension in force in respect of the 1983 Agreement, it can be argued that it is no longer in force. This means that the 1983 Agreement no longer provides a valid basis for decision making.

The question arises as to whether all the 1983 Agreement Members have any right to a share in the assets of the Fund. The provisions of Art. 67(2) of the 1983 Agreement provide:

"A Member which has ceased to participate in this Agreement shall not be entitled to any share of the proceeds of liquidation or the other assets of the Organization."

The question turns upon whether the 1983 Agreement Members still participate in the 1983 Agreement. They may seek to argue that their refusal to participate in the 1994 or subsequent Agreements does not affect their continued acceptance or participation in the 1983 Agreement and that there are no express provisions in the 1983 Agreement for its termination. However, if the 1983 Agreement is no longer in force, then it is arguable that one cannot participate in something that no longer has continuing validity. The more logical position is that the 1983 Agreement Members can no longer "participate" in the 1983 Agreement and are not entitled to a distribution from the assets.

## **7. EFFECTS OF ART 49 OF THE 1994 AGREEMENT**

Art. 49 of the 1994 Agreement is relevant to the validity and duration of the 1983 Agreement. It provides:

- "(1) This Agreement shall be considered as a continuation of the International Coffee Agreement 1983, as extended.
- (2) In order to facilitate the uninterrupted continuation of the International Coffee Agreement 1983, as extended:
  - (a) all acts by or on behalf of the Organization or any of its organs under the International Coffee Agreement 1983, as extended, in effect on 30th September, 1994, the terms of which do not provide for expiry on that date, shall remain in effect unless changed under the provisions of this Agreement;..."

All acts made under the 1983 Agreement, up until 30th September, 1994, unless expressly provided to end at a certain date, shall remain in effect. Decisions after 30th September 1994 will be pursuant to the 1994 Agreement, which came into force on 1st October, 1994.

On the face of it, Art. 49(1) appears to contradict Art. 68 of the 1983 Agreement, which provides for the Agreement to have a limited duration. In that the 1994 provision is later than the 1983 provision, it could be argued that the later provision implicitly repeals the earlier one. The doctrine of implicit repeal is recognized under public international law. The 1983 Agreement would then be argued to have been extended for at least the life of the 1994 Agreement, the Special Fund provisions being in force under that and subsequent Agreements (which have similar provisions).

However, it can also be argued that Art. 49(1) should not be read as an implicit repeal of Art. 68, 1983 Agreement and should be read in the context of the whole of Art. 49 which is entitled, "Supplementary and transitional provisions". This view suggests that the provision is of no more than transitional effect, which when read with Art. 49(2) seeks to provide for the validity of acts which, although made under the 1983 Agreement have effect under the 1994 Agreement. This appears to be the better view in the context of the whole Agreement, particularly since provisions relating to the Special Fund were excluded from the 1994 Agreement. To construe Art. 49(1) as still giving effect to such provisions would have the effect of frustrating the deliberate enactment of an Agreement with a different content.

## **8. VIENNA CONVENTION ON THE LAW OF TREATIES**

In the event that no conclusions can be drawn on the effect of Art. 49 of the 1994 Agreement versus Art. 6 of the 1983 Agreement, the provisions of the Vienna Convention on the law of treaties may need to be considered.

Art. 59(1) of the Convention provides that a treaty shall be considered as terminated if all parties to it conclude a later treaty relating to the same subject matter and:

- (a) it appears from the latter treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the treaties are not capable of being applied at the same time.

Art. 59(2) provides that the earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

There may be some difficulty in arguing sub-paragraph (a) in that not all the parties of the 1983 concluded the 1994 Agreement. There is, perhaps, a stronger argument to be made for the suspension of the Special Fund provisions on the basis of Art. 59(2).

To the extent that certain Members of the ICO have not ratified this Convention it appears that they are still bound by this Art. 59 on the basis that it states the position at customary international law and accordingly is binding on all entities with international legal personality.

## **9. STATUS OF THE SPECIAL FUND**

In relation to the 1983 Agreement Members, the governing provisions of the Special Fund ceased to be in force and so did not provide a valid basis for decision making once the last extension made under the 1983 Agreement came to an end.

Any further activities concerning the Fund, unless perhaps arguably directed at immediate liquidation, lack legal validity. The Executive Director may conclude that a liquidation of the Fund is desirable. However, there is nothing in the Agreement, or any powers made under that Agreement, which appear to allow the Executive Director to liquidate the fund without recourse to any other body. In practical terms, he could of course do so, whilst being aware that his actions may be subject to challenge, possibly in the Council.

## **10. ROLE OF THE COUNCIL**

Art. 9 of the 2007 Agreement provides that all powers specifically conferred by that Agreement shall be vested in the Council. The Council shall endeavor to take all decisions and make all recommendations by consensus. If consensus cannot be reached then this will be by distributed according to majority votes of 70% or more of exporting Members and 70% or more of importing Members present and voting. Importing and exporting Members have a total of 1,000 votes each. Five votes are allocated to each Member, the remainder being allocated in accordance with the average volume of imports or exports of coffee of that Member in the preceding four years. There is



no provision in the Agreement for the jurisdiction of an external body. Art. 17 of the 2007 Agreement provides for the appointment of the Executive Director as the chief administrative officer of the Organisation.

## **11. CONCLUSION**

The Executive Director may, given the need to produce a decision which is legally binding on all Members, wish to submit a draft resolution/proposal to the Council in terms:-

- (i) that all activities of the Special Fund cease,
- (ii) that all remaining assets of the Special Fund be distributed to the exporting Members of the Fund, and
- (iii) making proposals as to the partition and mechanism for distribution of the Fund amongst the exporting Members.

The Council, as supreme body of the Organization, has jurisdiction to decide any dispute concerning the interpretation and application of the Agreements. In practical terms, a decision becomes unimpeachable once sanctioned by the Council.

In conclusion it is open to the Council to legitimise such course of action in relation to the Special Fund as appropriate by passing the necessary vote.

**DRAFT RESOLUTION**

**PROPOSED USE OF THE SPECIAL FUND**

WHEREAS:

The Special Fund of the Organization was established by the 1976 Agreement and the 1983 Agreement by exporting Members; and

The balance of the Special Fund stood at US\$1,369,621 per the Fund's latest audited accounts at 30 September 2015; and

The Organization requested Collyer Bristow, a firm of solicitors, to opine on the legal status of the Special Fund and the mechanism for distribution of the Fund,

THE INTERNATIONAL COFFEE COUNCIL

RESOLVES:

1. That all activities of the Special Fund cease.
2. That all remaining assets of the Special Fund be distributed to the exporting Members of the Fund in accordance with a mechanism for distribution of the Fund decided upon by the exporting Members.