

No. 17179

**SWITZERLAND
and
MALAYSIA**

Agreement concerning the promotion and reciprocal protection of investments (with exchanges of letters). Signed at Kuala Lumpur on 1 March 1978

Authentic texts: French, Malay and English.

Registered by Switzerland on 15 November 1978.

**SUISSE
et
MALAISIE**

Convention concernant l'encouragement et la protection réciproque des investissements (avec échanges de lettres). Signée à Kuala Lumpur le 1^{er} mars 1978

Textes authentiques : français, malais et anglais.

Enregistrée par la Suisse le 15 novembre 1978.

AGREEMENT¹ BETWEEN THE GOVERNMENT OF THE SWISS CONFEDERATION AND THE GOVERNMENT OF MALAYSIA CONCERNING THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Swiss Federal Council and the Government of Malaysia,
Desirous of strengthening economic co-operation between both States,
Intending to create favourable conditions for capital investments in both States and to intensify co-operation between the nationals and companies of both States in the field of science, technology and industry,

Recognising the need to protect investments by nationals and companies of both States and to stimulate the flow of capital with a view to fostering the economic prosperity of both States;

Have agreed as follows:

Article 1. Each Contracting Party shall in its territory promote as far as possible the investment by nationals and companies of the other Party and admit such investment in accordance with its legislation.

Article 2. For the purpose of this Agreement:

(1) "National" means physical persons who, according to the law of each Contracting Party, are considered as citizens of that State.

(2) "Company" means:

- (i) With respect to the Swiss Confederation, company, institution or foundation with legal personality, as well as partnership firm or limited partnership and other association without legal personality incorporated under Swiss law or in which Swiss nationals have directly or indirectly a substantial interest;
- (ii) With respect to Malaysia, any company with a limited liability incorporated in the territory of Malaysia, or any juridical person or any association of persons lawfully constituted in accordance with its legislation.

(3) (a) The term "investment" shall comprise every kind of asset and more particularly, though not exclusively:

- (i) Movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges, usufructs, and similar rights;
- (ii) Shares and other kinds of interest in companies;
- (iii) Titles to money or to any performance having an economic value;
- (iv) Copyrights, industrial property rights (such as patents for inventions, trademarks, industrial designs), know-how, trade names and goodwill; and
- (v) Business concessions under public law, including concessions to search for, extract or exploit natural resources.

(b) Provided that such asset when invested:

- (i) In Malaysia, is invested in a project classified by the appropriate Ministry in Malaysia in accordance with its legislation and administrative practice as an "ap-

¹ Came into force on 9 June 1978, i.e., the date on which both Governments notified each other of the completion of their constitutional requirements, in accordance with article 10 (1).

proved project". The classification as an "approved project" may, on application, be accorded to investments made prior to the date of the entry into force of this Agreement on conditions resulting from the relevant laws applicable to each individual case.

(ii) In the Swiss Confederation, is invested under the relevant laws and regulations.

(c) Any alteration of the form in which assets are invested shall not affect their classification as investment provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested.

(4) "Return" shall mean the amounts yielded by an investment as net profit or interest for a specific period.

Article 3. (1) Each Contracting Party shall protect within its territory the investment made in accordance with its legislation by nationals or companies of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, selling and, should it so happen, liquidation of such investment. In particular, each Contracting Party shall facilitate the granting of the necessary permits, in connection with such investments and with the carrying out of contracts of licence and technical assistance, both commercial and administrative, as well as with the activities of consultants and other qualified persons of foreign nationality.

(2) Each Contracting Party shall in particular ensure fair and equitable treatment within its territory to the investment of the nationals or companies of the other Contracting Party; this treatment shall be no less favourable to that granted by the Party to its own nationals or companies or to the treatment granted to nationals or companies of the most favoured nation.

(3) Notwithstanding the provisions of Article 3, a Contracting State which has concluded or will conclude with one or more other states an agreement regarding the formation of a customs union, a free trade or any regional and inter-regional arrangement, shall be free to grant a more favourable treatment to investments by nationals and companies of the Party or Parties which are also parties to the said agreement, or by nationals and companies of some of these Parties.

Article 4. (1) Each Contracting Party in whose territory investments have been made by nationals or companies of the other Contracting Party, shall allow the free transfer of:

- (a) Interest, dividends, benefits and other current returns;
- (b) Amortisation and contractual repayment of foreign loans for which Exchange Control approval has been obtained;
- (c) Amounts assigned to cover expenses relating to the management of the investment;
- (d) Additional contribution of capital necessary for the maintenance or development of the investment;
- (e) Royalties and other payments deriving from right of licence and commercial, administrative or technical assistance.

(2) Each Contracting Party shall allow the free transfer of proceeds of partial or total liquidations of capital, including possible increment values. Notwithstanding the provisions of this clause, either Contracting Party may reserve the right to restrict for balance of payments reason the transfer of such proceeds to twenty percent of total investment per annum.

Article 5. Neither of the Parties shall take measures of expropriation, nationalisation or dispossession, either direct or indirect, against investments belonging to nationals or companies of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law and provided that provisions be made for effective and adequate compensation. The amount of compensation, which shall have been fixed at the time of expropriation, nationalisation or dispossession, shall be settled in convertible and transferable currency and be paid without undue delay to the person entitled thereto.

Article 6. Subject to the provisions of Article 2 (3) paragraphs (b) (i) and (b) (ii), the present Agreement shall also apply to investments made in the territory of either Contracting Party in accordance with the legislation or rules and regulations, by nationals or companies of the other Contracting Party prior to the entry into force of this Agreement.

Article 7. Provisions more favourable than those of this Agreement and which have been agreed upon by either of the Contracting Parties with nationals or companies of the other Contracting Party prior to the entry into force of this Agreement shall not be invalidated by this Agreement.

Article 8. Where one Contracting Party has granted any financial security against non-commercial risks in respect of an investment by a national or company in the territory of the other Contracting Party and payment has been made by the first Contracting Party to its national or company, the other Contracting Party shall recognise the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor.

Article 9. (1) Disputes as to the interpretation or application of the provisions of this Agreement shall be settled by the two Contracting Parties through the diplomatic channels.

(2) If both Contracting Parties cannot reach an agreement, the dispute shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator and these two arbitrators shall nominate a Chairman who shall be a national of a third State.

(3) If either Contracting Party fails to appoint its arbitrator within 2 months of the request made by the other Contracting Party for such appointment, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

(4) If both arbitrators cannot come to an agreement about the choice of the Chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

(5) If, in the case specified under paragraphs 3 and 4 of this article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President and if the latter is prevented or if he is a national of either Contracting Party, the appointment shall be made by the next senior Judge of the Court who is not a national of either Contracting Party.

(6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its procedure.

(7) The decision of the tribunal shall be by majority vote and shall be binding for each Contracting Party.

(8) Each Contracting Party shall bear the expenses incurred in respect of its own member and of its counsel in the arbitral proceedings; other joint expenses shall be borne in equal parts by both Contracting Parties.

Article 10. (1) This Agreement shall come into force on the day when both Governments will have notified each other that they have complied with the constitutional requirements for the conclusion and entry into force of international agreements and shall remain binding for a period of five years. Unless either of the Contracting Parties shall have given notice of termination six months before the expiry of the aforementioned period, the validity of this Agreement shall be deemed to have been extended for a further period of two years and thereafter to be extended for every two years.

(2) In case of official notice as to the termination of the Agreement, the provisions of Articles 1 to 9 shall continue to be effective for a further period of ten years for investments made before official notice was given.

DONE in six originals at Kuala Lumpur, this 1st day of March 1978, two in French, two in Bahasa Malaysia, and two in English, each text being equally authoritative. In the case of a divergence between any of the texts of this Agreement, the English text shall prevail.

For the Swiss Federal Council:

[Signed]

Ambassador KLAUS JACOBI
(Delegate of Federal Council
for Trade Agreements)

For the Government
of Malaysia:

[Signed]

Dr. MAHATHIR BIN MOHAMAD
(Minister of Trade
and Industry, Malaysia)

EXCHANGES OF LETTERS

I a

1st March 1978

Your Excellency,

I have the honour to refer to the Agreement between the Government of Malaysia and the Government of the Swiss Confederation concerning the promotion and reciprocal protection of investments signed at Kuala Lumpur on March 1st, 1978.

With reference to the said Agreement, the Government of Malaysia has the honour of requesting the Swiss Confederation to agree to the following that is:

“In respect of Article 3 paragraph 3 the Government of Malaysia shall be free to grant a more favourable treatment to investments by nationals or companies of the members of the Association of South East Asian Nations (ASEAN) whenever such treatment emanates from any arrangement concluded among ASEAN nations”.

I shall be grateful for your confirmation that the Government of the Swiss Confederation is in agreement with the aforesaid provision and that this letter and your reply shall constitute an agreement between the two Governments.

Accept, Your Excellency, the assurances of my highest consideration.

[Signed]

Dr. MAHATHIR BIN MOHAMAD
Minister of Trade and Industry

His Excellency Ambassador Klaus Jacobi
Delegate of the Federal Council for Trade Agreements
Kuala Lumpur

II a

THE DELEGATE FOR TRADE AGREEMENTS

Kuala Lumpur, March 1st, 1978

Excellency,

I have the honour to acknowledge receipt of your letter of today which reads as follows:

[See letter I a]

I have further the honour to confirm my agreement with the contents of your letter.

Please accept, Excellency, the assurances of my high consideration.

[Signed]

K. JACOBI
Delegate of the Federal Council
for Trade Agreements

His Excellency Dr. Mahathir bin Mohamad
Minister of Trade and Industry of Malaysia
Kuala Lumpur

I b

THE DELEGATE FOR TRADE AGREEMENTS

Kuala Lumpur, March 1st, 1978

Excellency,

In the course of the discussions which lead to the conclusion of the Convention between the Government of the Swiss Confederation and the Government of

Malaysia concerning the promotion and the reciprocal protection of investments, the two Contracting Parties have agreed upon the following:

The Government of the Swiss Confederation has taken due note that it is not the intention of the Government of Malaysia to grant better treatment to investments made by foreign nationals or companies than to investments made by its own nationals or companies. Should nevertheless the case of a more favourable treatment of investments made by foreign nationals or companies arise, then the alternative formula in article 3 paragraph 2 will have to be interpreted in a way which will assure Swiss nationals or companies also of this more favourable treatment.

I would appreciate it if you could confirm your agreement with the foregoing. Please accept, Excellency, the assurances of my high consideration.

[Signed]

K. JACOBI
Delegate of the Federal Council
for Trade Agreements

His Excellency Dr. Mahathir bin Mohamad
Minister of Trade and Industry of Malaysia
Kuala Lumpur

II b

1st March 1978

Your Excellency,

I have the honour to acknowledge receipt of your letter dated 1st March 1978 which reads as follows:

[See letter I b]

I have further the honour to confirm that the Government of the Federation of Malaysia is in agreement with the provision as set out in your letter of today's date and that Your Excellency's letter and this reply shall constitute an agreement between the two Governments.

Accept, Your Excellency, the assurances of my highest consideration.

[Signed]

DR. MAHATHIR BIN MOHAMAD
Minister of Trade and Industry

His Excellency Ambassador Klaus Jacobi
Delegate of the Federal Council for Trade Agreements
Kuala Lumpur