

Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments

THE FEDERAL REPUBLIC OF GERMANY and THE FEDERATION OF MALAYA,

DESIRING to foster and strengthen economic co-operation between the Federal Republic of Germany and the Federation of Malaya,

INTENDING to create favourable conditions for investment by nationals and companies of either Contracting Party in the territory of the other Contracting Party, and

RECOGNISING that a contractual protection of such investments is likely to promote private business initiative and to increase the prosperity of both nations,

HAVE AGREED AS FOLLOWS:—

Article 1.

For the purpose of this Agreement:—

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

(a) Movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights;

(b) Shares or other kinds of interest in companies;

(c) Title to money or to any performance having an economic value;

(d) Copyright, industrial property rights, technical processes, trade-names, and goodwill; and

(e) Such business concessions under public law, including concessions regarding the prospecting for, or the extraction or winning of, natural resources, as give to their holder a legal position of some duration.

The said term shall refer:—

(i) In respect of investments in the territory of the Federal Republic of Germany, to all investments made in accordance with its legislation, and

(ii) In respect of investments in the territory of the Federation of Malaya, to all investments made in projects classified by the appropriate Ministry of the Federation of Malaya in accordance with its legislation and administrative practice as an "approved 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 to be stipulated for each individual case.

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.

(2) The term "returns" shall mean the amounts derived from an investment as profit or interest for a specific period.

(3) The term "nationals" shall mean:—

(a) In respect of the Federal Republic of Germany, Germans within the meaning of the Basic Law for the Federal Republic of Germany, and

(b) In respect of the Federation of Malaya, a person who is a citizen of the Federation according to its Constitution.

(4) The term "companies" shall mean:—

(a) In respect of the Federal Republic of Germany, any juridical person as well as any commercial company or other company or association with or without legal personality, having its seat in the territory of the Federal Republic of Germany and lawfully existing consistent with legal provisions irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit, and

(b) In respect of the Federation of Malaya, any company with a limited liability incorporated in the territory of the Federation of Malaya, or any juridical person or any association of persons lawfully constituted in accordance with its legislation.

Article 2.

(1) Each Contracting Party will endeavour to admit the investment by nationals or companies of the other Contracting Party in accordance with its legislation and administrative practice, and to promote such investments as far as possible.

(2) Unless specific stipulations made in the document of admission provide otherwise, investments by nationals or companies of either Contracting Party in the territory of the other Contracting Party, shall not be subjected to treatment less favourable than that accorded to investments by nationals or companies of the other Contracting Party or investments by nationals or companies of any third party on the ground that ownership, or control directly or indirectly, of them is vested in nationals or companies of the former Contracting Party.

Article 3.

Unless specific stipulations made in the document of admission provide otherwise, neither Contracting Party shall subject in its territory nationals or companies of the other Contracting Party as regards their activities in connection with investments, including the effective management, use or enjoyment of such investments, to treatment less favourable than that accorded to its own nationals or companies or to nationals or companies of any third party as regards their activities in connection with investments.

Article 4.

(1) The investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be expropriated except for a public purpose, nor shall they be expropriated without prompt, adequate and effective compensation which shall be freely transferable between the territories of the two Contracting Parties. The legality of any such expropriation and the quantum of compensation shall be subject to review by due process of law in the territory of the Contracting Party in which the investment has been expropriated.

(2) The provisions of paragraph (1) above shall likewise apply to returns from investments.

Article 5.

Either Contracting Party shall permit the transfer between the territories of the two Contracting Parties by nationals or companies of the other Contracting Party of the capital in and returns from their investments, and, in the event of liquidation, the proceeds from such liquidation.

Article 6.

If a Contracting Party makes payment to any of its nationals or companies under a guarantee it has granted in respect to an investment, the other Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 10, recognise the transfer of any right or title of such national or company to the former Contracting Party and the subrogation of the former Contracting Party to any such right or title.

Article 7.

(1) To the extent that those concerned have not made any other arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situated, transfers of funds in pursuance of Article 4, 5 and 6 shall be made without undue delay and at the rate of exchange effective for current transactions on the day the transfer is made.

(2) The rate of exchange effective for current transactions shall be based on the par values agreed with the International Monetary Fund and shall lie within the margins above or below such parity admitted under Section 3 of Article IV of the Articles of Agreement of the International Monetary Fund.

(3) If at the date of transfer no rate of exchange within the meaning of paragraph (2) above exists in respect of the Contracting Party concerned, the official rate fixed by such Contracting Party for its currency in relation to the U.S. dollar or to another freely convertible currency or to gold shall be applied. If no such rate has been fixed, the appropriate agencies of the Contracting Party in whose territory the capital is invested shall admit a rate of exchange that is fair and equitable.

Article 8.

If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to this Agreement, result in a position entitling investments by nationals or companies of the other Contracting Party to treatment more favourable than is provided for by this Agreement such position shall not be affected by this Agreement. Either Contracting Party shall observe any other obligation it may have entered into with regard to investments within its territory by nationals or companies of the other Contracting Party.

Article 9.

The two Contracting Parties shall co-operate with each other in furthering the interchange and use of scientific and technical knowledge and development of training facilities particularly in the interest of increasing productivity and improving standards of living in their territories.

Article 10.

(1) Disputes concerning the interpretation or application of this Agreement should, if possible, be settled by the Governments of the two Contracting Parties.

(2) If a dispute cannot thus be settled it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be established in each individual case, each Contracting Party appointing one member, and these two members shall then agree upon a national of a third party as their Chairman to be appointed by the Governments of the two Contracting Parties. Such members shall be appointed within two months, and such Chairman within three months, after either Contracting Party has made known to the other Contracting Party that it wants the dispute to be submitted to an arbitral tribunal.

(4) If the periods specified in paragraph (3) have not been observed, either Contracting Party may, in the absence of any other relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise incapacitated from discharging his function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is incapacitated from discharging his function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 11.

This Agreement shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Federation of Malaya within three months from the entry into force of this Agreement.

Article 12.

(1) This Agreement shall enter into force on the day the Governments of the two Contracting Parties notify each other that their constitutional requirements for the entering into force of this Agreement have been fulfilled.

(2) This Agreement shall remain in force for a period of five years and shall continue in force thereafter unless, after the expiry of the initial period of five years, either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting Party.

(3) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 11 shall remain in force for a further period of ten years from that date.

DONE at Kuala Lumpur, this 22nd day of December, one thousand nine hundred and sixty in six originals, two in the German, two in the Malay and two in the English language, in the event of a divergence between any of the texts of this Agreement the English text shall prevail.

For the Federal Republic of Germany:

Von Keller

For the Federation of Malaya:

Mohamed Khir Bin Johari

PROTOCOL

At the time of signing the Agreement concerning the Promotion and Reciprocal Protection of Investments concluded between the Federal Republic of Germany and the Federation of Malaya, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Agreement:

(1) The term "companies" referred to in paragraph (4) of Article 1 shall not include a branch or branches of any juridical person, company or association which has its seat or is incorporated or constituted in the territory or by or under the law of a third party.

(2) The expression "document of admission" referred to in Articles 2 and 3 shall mean a document by which a Contracting Party admits in its territory an investment within the meaning of paragraph (1) of Article 1 to be made by a national or a company of the other Contracting Party. Such "document of admission" shall specify the favours, immunities and conditions which the former Contracting Party grants or imposes in respect of the investment admitted. Subject to the provisions of paragraph (2) of Article 2 and of Article 3, the contents of such document shall not affect the provisions of this Agreement.

(3) Article 3 shall not apply to entry, sojourn and activity as an employee.

(4) The following restrictions shall, in particular, be deemed to be "treatment less favourable" referred to in Article 3: restricting the purchases of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind: impeding the marketing of products inside or outside the country, as well as any other measure having a similar effect.

Measures taken for reasons of public order or security or public health or morality shall not be deemed to be "treatment less favourable" within the meaning of Article 3.

(5) The expression "Adequate compensation" referred to in paragraph (1) of Article 4 shall mean just and equitable compensation which represents the fair market value of the investment expropriated.

(6) The term "expropriation" referred to in paragraph (1) of Article 4 shall also pertain to acts of sovereign power which are tantamount to expropriation or requisitioning, as well as measures of nationalization.

(7) The term "liquidation" referred to in Article 5 shall be deemed to include any disposal effected for the Purpose of completely or partly giving up the investment concerned.

(8) A transfer of funds shall be deemed to have been made "without undue delay" within the meaning of paragraph (1) of Article 7 if made within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request for such transfer has been submitted and may on no account exceed two months.

(9) Either Contracting Party shall refrain from any measures which contrary to the principles of free competition, may

prevent or hinder sea-going vessels of other Contracting Party from participating in the transport of goods that are intended for investment within the meaning of this Agreement. This also applies to goods acquired in the territory of either Contracting Party or of any third Party which funds of an enterprise in which capital is invested within the meaning of this Agreement.

(10 Without prejudice to any other method of determining nationality, any person shall in particular be deemed to be a national of a Contracting Party who is in possession of a national passport issued by the appropriate authorities of the Contracting Party concerned.

DONE at Kuala Lumpur, this 22nd day of December, one thousand nine hundred and sixty in six originals, two in the German, two in the Malay and two in the English language, in the event of a divergence between any of the texts of this Agreement the English text shall prevail.

For the Federal Republic of Germany:

Von Keller

For the Federation of Malaya:

Mohamed Khir Bin Johari

The Chairman of the German Delegation

Kuala Lumpur, 22nd December, 1960

Mr. Minister,

I have the honour to refer to the Agreement concerning the Promotion and Reciprocal Protection of Investments between the Federal Republic of Germany and the Federation of Malaya signed today and to confirm the following additional understanding reached during our negotiations:

"To facilitate and promote investments by German nationals or companies in the territory of the Federation of Malaya, the Government of the Federation of Malaya undertakes, to grant, to the extent specified in the document of admission relating to such investments and in accordance with the procedure laid down under its law and legislative and administrative regulations, the necessary passes to German nationals, who in connection with such investments desire to enter into, and stay in the Federation of Malaya and to carry on an activity as an employee unless reasons of public order or security or public health or morality warrant otherwise".

I shall be grateful if you would kindly confirm the above understanding.

Accept, Mr. Minister, the assurances of my highest consideration

Von Keller

The Honorable the Minister of Commerce and Industry

Federation of Malaya

Enche' Mohamed Khir Bin Johari

Kuala Lumpur

Federal House Kuala Lumpur

Minister for Commerce and Industry

Federation of Malaya

22nd December, 1960

Mr. Chairman,

I have the honour to acknowledge receipt of your letter dated 22nd December, 1960, which reads as follows:

"I have the honour to refer to the Agreement concerning the Promotion and Reciprocal Protection of Investments between

the Federal Republic of Germany and the Federation of Malaya signed today and to confirm the following additional understanding reached during our negotiations:"

"To facilitate and promote investments by German nationals or companies in the territory of the Federation of Malaya, the Government of the Federation of Malaya undertakes, to grant, to the extent specified in the document of admission relating to such investments and in accordance with the procedure laid down under its law and legislative and administrative regulations, the necessary passes to German nationals, who in connection with such investments desire to enter into, and stay in the Federation of Malaya and to carry on an activity as an employee unless reasons of public order or security or public health or morality warrant otherwise".

"I shall be grateful if you would kindly confirm the above understanding".

I have further the honour to confirm the understanding contained in your letter.

Accept, Mr. Chirman, the assurances of my high consideration.

Mohamed Khir Bin Johari

The Chairman of the German Delegation

Counsellor 1st class to the Federal Ministry of Foreign Affairs

Dr. Rupprecht von Keller

Kuala Lumpur