Beilage 2

CONFIDENTIAL

Memorandum on Discussions between Swiss and Canadian Officials

During the period from October 6 to October 15, 1959 inclusive, tentative and informal talks were held in Ottawa between Canadian and Swiss official representatives for the purpose of exploring the feasibility of a tempory transfer under Swiss legislation of the registered or head Offices (sièges) of Swiss firms from Switzerland to Canada in the event and for the duration of an international crisis. The relevant Swiss legislation comprised:

a) the Decree of the Swiss Federal Council Concerning the Protection of Juridic Persons, Partnership Firms and Singly Owned Firms by Measures of Conservation (of the 12th of April, 1957, as amended on the 4th of July, 1958); and

b) the Executive Ordinance Pertaining to the Decree of the Swiss Federal Council Concerning the Protection of Juridic Persons, Partnership Firms and Singly Owned Firms by Measures of Conservation (of the 12th of April, 1957).

Plenary discussions between the Swiss and Canadian groups were held on October 6, 7 and 14 during which the following points were discussed.

1. The Status under Canadian Law of Swiss Firms

It would appear that there is no law of Canada or of a province that would prevent a corporation from migrating to Canada in the sense that the management would come to Canada and function here.

It is a rule of international law, recognized in Canada, that foreign corporations are recognized in Canada as artificial personalities capable of sustaining rights and obligations and of pursuing remedies. Accordingly, it would appear that the corporate status of a Swiss corporation transferring its head office to Canada would continue to be recognized in Canada without re-incorporation and that its constitution would continue to be governed by the recognized laws of the incorporating jurisdiction. Of course, if the activities of such a corporation in Canada constitute a carrying on of the business of the corporation it would be necessary to obtain a licence under relevant provincial legislation dealing with foreign

corporations, and it would also be necessary to comply with any provincial or federal laws pertaining to the carrying on of such a business. Whether a company is carrying on a business in Canada within the meaning of any law in relation thereto, can be determined only on the basis of the facts of a particular case.

It would seem that a foreign company already carrying on business in Canada by means of a branch office could readily convert the branch office into a head office without further difficulty.

2. The Effect of Canadian Enemy Property Legislation on Swiss Firms

Under Canadian Revised Regulations concerning Trading with the Enemy (1943), which are a Schedule to the Trading with the Enemy (Transitional Powers Act), Chapter 24 of the Statutes of 1947 (11 George VI), it appears that as far as concerns existing Canadian law, and assuming that such law would still be in force at the relevant time, the Swiss firms in question, presumably being persons or bodies of persons constituted or incorporated within or under the laws of Switzerland, would be enemies under and for the purposes of the Canadian law, should Switzerland be occupied by an enemy or become a proscribed territory, by the mere fact of their being so constituted or incorporated.

It was felt, however, that once the Custodian had satisfied himself that a Swiss firm was not acting on behalf of or under the control of an enemy, but was on the contrary being managed and controlled bona fide by persons (Swiss or others) who were not "real" enemies, it might be possible for him to cease treating such Swiss firms as enemy and also, in the case of a firm with share capital, to release or cease treating as enemy assets any shares owned by "technical" enemies, i.e. by persons who were enemies under the Canadian law in question but who were not considered by the Custodian to be "real" enemies. However, it was made clear to the Swiss delegation and fully understood by them that no commitment could be given in this respect. In this connection it was recognized that information - such as lists of shareholders, giving full particulars (names, addresses, etc) and duplicates of records, of books etc. of such firms, prepared in advance by the Swiss, would be very useful to the Canadian Custodian, among others, in reaching a decision as to the treatment of the Swiss firms concerned.

3. Taxation

The Swiss delegation were informed by the Canadian taxation authorities of the provisions of the Canadian Income Tax Act and it was explained that Swiss corporations which transferred their registered or head offices to Canada and established their management and control in Canada would be considered as resident in Canada and subject to tax on their income from all sources. Such corporations would be entitled to the benefit of the double taxation conventions entered into by Canada with other countries during their residence in Canada. There is no special tax charged on the corporation or its shareholders on the occasion of the removal of its registered or head office from Canada.

4. Immigration

The existing requirements under Canadian immigration legislation were explained to the Swiss delegation.

In reply to questions raised by the Swiss it was suggested that certain preparations, including the periodic revalidation of visas (in order to keep their holders ready for immediate travel) might be made with a view to expediting the entry into Canada of personnel (and their immediate families) in connection with the transfer of Swiss firms. If, moreover, a sudden emergency were to prevent the completion of the usual immigration formalities it was felt that Canadian immigration officials would, consistent with any wartime measures then in effect, give all possible sympathetic consideration to such persons.

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In addition to the plenary meetings, supplementary talks between the Swiss and officials of the various Canadian departments concerned were held. The results of these talks were in some instances embodied in separate documents which represent the informal but expert opinions of individual Canadian officials.

It was agreed that the matters discussed were subject to further study on both sides and that reports would be made to both Governments on the outcome of the talks. Further exchange of views could be held later at the suggestion of either Government.

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October 8, 1959.

It would appear that there is no law of Canada or of a province that would prevent a corporation from migrating to Canada in the sense that the management would come to Canada and function here.

It is a rule of international law, recognized in Canada, that foreign corporations are recognized in Canada as artificial personalities capable of sustaining rights and obligations and of pursuing remedies. Accordingly, it would appear that the corporate status of a Swiss corporation transferring its head office to Canada would continue to be recognized in Canada without re-incorporation and that its constitution would continue to be governed by the recognized laws of the incorporating jurisdiction. Of course, if the activities of such a corporation in Canada constitute a carrying on of the business of the corporation it would be necessary to obtain a licence under relevant provincial legislation dealing with foreign corporations, and it would also be necessary to comply with any provincial or federal laws pertaining to the carrying on of such a business. Whether a company is carrying on a business in Canada within the meaning of any law in relation thereto, can be determined only on the basis of the facts of a particular case.

Similar considerations would seem to apply in the case of partnerships except that registration under legislation concerning foreign companies might not be necessary, but in its place the provisions of local partnership Acts would need to be considered.

It would seem that a foreign company already carrying on business in Canada by means of a branch office could readily convert the branch office into a head office without further difficulty.

It should be borne in mind that the question whether any acts of management done in Canada would be valid under the law of Switzerland or elsewhere is not governed in any way by Canadian law.

Beilage 4.

Summary of discussions between the Swiss delegation and representatives of the Secretary of State Department, including the Custodian's Office, October 9, 1959.

Consideration was given to the Decree of the Swiss Federal Council of April 12, 1957, amended July 4, 1958, also to the Executive Ordinance of April 12, 1957, of the Swiss Federal Council. Explanations were given by the Swiss delegation as to the scheme embodied in the said Decree and Executive Ordinance and as to the contemplated procedure thereunder for the transfer to Canada and other countries of the registered offices or head offices of Swiss companies, juridic persons, partnerships, firms, etc., in the event of an emergency in Switzerland.

On the other hand, reference was made to the Canadian regulations respecting trading with the enemy and to the practice and procedure of the Custodian of Enemy Property thereunder, as well as to Canadian company law.

The Swiss delegation explained that the intention of the new Swiss legislative scheme embodied in the said Decree and Ordinance was to ensure that the legal entities, juridic persons, partnerships, firms, etc., above referred to, could be allowed, in the event of an emergency in Switzerland, to transfer their registered offices or head offices and their management to other countries, including Canada, while at the same time remaining governed by the Swiss law in force immediately prior to the transfer. They also expressed their hope that Canadian law relative to trading with the enemy might allow the Canadian Custodian to release their assets to such Swiss legal entities and firms, should Canadian law at the relevant time vest such assets in the Canadian Custodian, or to cease treating such Swiss entities and firms as enemies under Canadian law, once the Canadian Custodian was satisfied that the said legal entities and firms were not controlled by real enemies. Furthermore, the Swiss delegation expressed the hope that as far as Swiss companies were concerned the Canadian Custodian could and would also release, or cease to treat as enemy assets, once he was satisfied as above stated, such shares in those companies as he was of opinion were owned by technical enemies, i.e., for instance, by admittedly Swiss interests, thus trusting to the managers of the company (appointed or empowered to act under the said scheme) to administer the company efficiently so that there would be no depreciation of the Custodian's interest in any shares that might be owned by real enemies.

The Swiss delegation pointed out article 14 of the Swiss Decree of April 12, 1957, which contains provisions designed to protect the interests of shareholders not represented in Canada during the period of such an emergency.

The representatives of the Secretary of State Department expressed the view that, as far as Canadian company law was concerned,

there did not appear to be any legal objection to the carrying out in Canada of the scheme embodied in the said Swiss Decree and Ordinance, subject, of course, to compliance with any Canadian federal or provincial legal requirements, such as obtaining licences for carrying on certain activities, etc.; that as far as the existing Canadian law relative to trading with the enemy was concerned, assuming that this law would still be the same at the relevant time, the Swiss companies and firms in question, presumably being persons or bodies of persons constituted or incorporated within or under the laws of Switzerland, would be enemies under and for the purposes of this Canadian law, should Switzerland be occupied by an enemy or be proscribed territory. In this connection, reference was made to section 1 (d) (v) of the Revised Regulations Respecting Trading with the Enemy (1943), which are a schedule to the Trading with the Enemy (Transitional Powers) Act, chapter 24 of the Statutes of 1947, (11 Geo.VI). Account was taken of the fact that, under the said new Swiss scheme, the said Swiss legal entities, firms, etc., would continue to be governed by Swiss law after the transfer of their registered or head offices and management to Canada. It was more specifically pointed out in this connection that they would be enemies under the said provisions by the mere fact of being constituted or incorporated within or under the law of Switzerland and irrespective of whether or not they were carrying on business within Switzerland (assuming Switzerland to be then occupied by the enemy or to be proscribed territory) or whether they were acting as agents or otherwise on behalf of an enemy or under the control of an enemy.

However, the representatives of the Secretary of State Department thought that once the Canadian Custodian had satisfied himself that a Swiss company, legal entity, firm, etc., was not acting on behalf or under the control of an enemy, but was on the contrary being managed and controlled bona fide by persons (Swiss or others) who were not real enemies, it might well be thought possible and in order for the Canadian Custodian to cease treating the Swiss company, legal entity, firm, etc., as an enemy; also, in the case of a company or corporation with share capital, to release or cease treating as enemy assets any shares owned by technical enemies, i.e. by persons who were enemies under the Canadian law in question, but were not considered by the Custodian to be real enemies. On the other hand, it was made abundently clear to the Swiss delegation and fully understood by them that no committment could be given in this respect. In this latter connection, the representatives of the Secretary of State Department explained that the reasons why no committment could be given by them were that they did not know and they had no way of knowing what the Canadian law would be at the future relevant time, that assuming that the law would remain unchanged they could not give a committment as to the policy to be followed by the Canadian government in the future under such law and, finally, they could not give any interpretation or committment that would be binding even on the present government unless the matter was submitted to it.

Information was adduced by the Swiss delegation to the effect that steps had already started being taken by Swiss companies, legal entities and firms, in co-operation with the Swiss governmental authorities concerned (e.g. through registration with the federal Registrar of Commerce), to implement the scheme or plan embodied in the said Swiss Decree and Ordinance. In this latter connection, the Swiss delegation mentioned more particularly that extensive work had already been done by some Swiss firms in the way of drawing up lists of shareholders giving full particulars (names, addresses, etc.), of providing for duplication and preservation of records, etc., in anticipation of an emergency. It was recognized that information of this type might turn out to be very useful both to the Canadian Custodian, the Swiss companies and firms in question and, possibly, the Swiss authorities.

Taxation.

The Swiss delegation explained that under the emergency legislation, Swiss corporations, partnerships, firms, etc. transferring their registered or head offices thereunder remain subject to Swiss taxes on income and capital. For this reason the Swiss delegation expressed the hope that the levying of Canadian taxes in the case of Swiss corporations, partnerships, firms, etc. moving to Canada could be restricted to the income which they derive from Canadian sources. The Swiss delegation pointed out that the United Kingdom had followed this principle during World War II (See a List of Extra-Statutory Wartime concessions given in the Administration of Inland Revenue Duties, Cmd. 6559, London 1944, page 3). The Swiss delegation further hoped that no particular Canadian tax would be charged in the case of a Swiss corporation, partnership, firm, etc., removing the registered or head office from Canada.

The Canadian taxation authorities explained that Swiss corporations, transferring their registered or head office to Canada under the above-mentioned emergency legislation and establishing management and control in Canada, would be considered as resident in Canada. Such corporations would be subject to Canadian tax on their worldwide income as provided in the Canadian tax law.

There is a provision in the Canadian Income Tax Act which exempts from tax dividends received by a resident Canadian corporation from a subsidiary that is a non-resident corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belongs to the receiving corporation.

On the taxation of partnerships, the Canadian authorities explained that income tax is imposed on the share of the profits to which each of the partners is entitled, whether he receives it or not. The partners are taxed as individuals so that if a partner is resident in Canada he will pay tax on his world income and if a partner is not resident in Canada, he will pay tax to Canada on his share of the profits enjoyed from the business carried on in Canada.

At present, Canadian tax on a Swiss corporation, partnership, firm, etc. transferring the registered or head office to Canada and thereby becoming resident in Canada for Canadian tax purposes is not restricted to income from Canadian sources.

The Canadian taxation authorities felt that Swiss corporations, partnerships, firms, etc. becoming resident in Canada for Canadian tax purposes would be entitled to benefit from the double taxation conventions entered into by Canada with other countries.

The Canadian taxation authorities explained that a Swiss corporation, partnership, firm, etc. removing its registered or head office from Canada is not considered to be winding up, discontinuing or reorganizing its business for Canadian tax purposes. No special tax in the nature of an undistributed profits tax is charged on such corporations, partnerships, firms, etc., nor is there any special tax incidence on the shareholders, partners, etc. of such Swiss corporations, partnerships, firms, etc. as a result of their removing their registered or head offices from Canada.

The explanations given by the Canadian taxation authorities were based on the provisions of the Canadian Income Tax Act in force at the time when the conversations took place. It was pointed out that it is customary for amendments to be passed by the Canadian Parliament every year as a result of the budget requirements. Changes in the tax laws require the passage of a bill through the Canadian Parliament.