EMBASSY OF SWITZERLAND IN AUSTRALIA

The Embassy of Switzerland presents its compliments to the Department of External Affairs and has the honour to refer to the exchange of views that has taken place for the purpose of exploring the feasibility of a temporary transfer under Swiss legislation of the registered, or head offices of Swiss juridical persons, partnership firms and singly-owned firms from Switzerland to Australia in the event, and for the duration, of an international crisis. In this respect the relevant Swiss legislation comprises:

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

(b) the Executive Ordinance pertaining to the aforementioned Decree of the Swiss Federal Council (of the 12th of April, 1957).

The Embassy understands that, based on the existing provisions of Australian law, the Australian Government is prepared to accept the Swiss proposal in principle. The Embassy further understands that the following is a correct statement of the present situation on the matter.

1. <u>The Status under Australian Law of Swiss Corporations, Partnership Firms and Singly-Owned Firms.</u>

There is nothing in the laws in force in the Australian Capital Territory or in the States and the other Territories of the Australian Commonwealth that would make it unlawful for a Swiss corporation, partnership firm or singly-owned firm to transfer, without liquidation and reorganization, its registered office for the purpose of Swiss law or its head office temporarily to Australia

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in the event of and for the duration of an international crisis. If already carrying on business in Australia by means of a branch office it could readily convert the branch office into a head office without further difficulty.

As far as corporations in particular are concerned, foreign corporations are recognized in Australia as juridical persons capable of sustaining rights and obligations and of pursuing remedies, and a Swiss corporation that transfers its head office to Australia in the event of an international crisis would retain its corporate status in Australia without reincorporation. The transfer of the head office of a Swiss corporation to Australia may result in the corporation establishing a place of business, or carrying on business within the territory of the Commonwealth of Australia. If it does, the corporation must register under the foreign companies registration provisions of the legislation of the State or Territory where it carried on business or establishes a place of business, within the meaning of the law of that State or Territory (a question that can be determined only on the basis of the facts in each case) and must comply with other requirements of these provisions. For instance, under the provisions requiring copies of balance sheets and annual returns to be filed, the corporation may be required to provide material which it may not be required to produce at the place of its incorporation.

If a corporation carries on business, or establishes a place of business, under a name other than its own full name, it must comply with legislation in the relevant State or Territory, providing for registration of business names. This legislation applies also to partnership firms and singly-owned firms within the meaning of the Swiss decree mentioned in this Note, that carry on business or establish a place of business in the particular State or Territory under a name other than the name of the owner or the partners. A problem in relation to registration (and therefore, carrying on business lawfully) in Australia could arise if the corporate or business name is a name that is not registrable in

Australia because of a specific prohibition under Australian legislation or similarity to a name already registered.

2. The Effect of Australian Enemy Property Legislation on Swiss Juridical Persons, Partnership Firms and Singly-Owned Firms (in this Section referred to as "Firms").

Under the Australian Trading with the Enemy Act of 1939 as amended, and the National Security (Enemy Property) Regulations, the definition "enemy subject" was applied to persons, firms or corporations residing or carrying on business in enemy territory. The term "enemy territory" also included enemy occupied countries. Had Switzerland been occupied by a country with which Australia was at war, Switzerland would have become, for the purposes of such legislation, enemy territory. If, under these circumstances, a Swiss firm in Australia could have demonstrated to the Australian authorities that its business was not carried on for the benefit of "real" or "actual" enemies of Australia, Second World War experience shows that the firm would have been allowed to carry on its business. But dividends, interest or other income due to shareholders inside enemy territory would have been payable to the Controller of Enemy Property. Moreover, the shares held by any enemy shareholder would have been liable to seizure. However, assets of a "friendly" overrun country thus held by the Controller for the purpose of supervision were released after the war for the benefit of the owners.

The new Swiss legislation mentioned at the beginning of this Note, creating the possibility under Swiss law of a temporary transfer of the registered or head office of Swiss firms from Switzerland to a foreign country in the event and for the duration of an international crisis has, however, added a new important element to the basic situation. This legislation provides, indeed, for a sharp separation between a firm having transferred its registered or head office outside Switzerland, and its assets remaining within the country. Though persons staying within the area of Switzerland may act as curators of property left by such a firm on Swiss territory, they will have no authority whatsoever over

the assets outside the territories occupied by enemy forces or in the power of the enemy or of his allies. The powers and authority of such persons are suspended ipso jure as from the date on which the transfer takes effect and as long as these persons cannot exercise their powers and authority at the new registered or head office. The firm will thus be directed and managed by those persons only who can exercise their powers and authority at the new registered or head office. Any influence or coercion by a possible enemy is expressly excluded. Thus, no business could be managed any longer for the benefit or on behalf of enemy subjects.

Taking into account Second World War experience, supplemented by the new scheme of the special Swiss legislation, and assuming that future enemy property legislation will be based on past rules and practice, it therefore appears that, once the Controller of Enemy Property is satisfied that a Swiss firm, having temporarily transferred its registered or head office to Australia, is not acting on behalf or under the control of any enemy, but is on the contrary being managed and controlled bona fide by persons (Swiss or others) who are not enemy, he will abstain from treating such Swiss firms as enemy. To assist the Controller, among others, in reaching a decision as to the treatment of the Swiss firms concerned, information prepared in advance - such as lists of shareholders (name, addresses, etc.,) including the beneficial owners of shares held by nominees, duplicates of records, books, etc., of such firms will of course be essential: such information will be supplied if required through the intermediary of the Swiss authorities.

3. <u>Taxation.</u>

According to the relevant provisions of the income tax legislation of the Commonwealth, Swiss corporations which, on transferring their registered or head offices to Australia, carry on business in Australia and have either their central management and control in Australia or their voting power controlled by shareholders who are residents of Australia would be considered as residents of Australia.

They would be subject to tax on their income from Australian sources, on all dividends wherever derived (subject to rebate of Australian primary tax and, in the case of a private company liable to tax on undistributed income, to a credit for taxes paid in the country of source) and on interest and royalties derived in the United Kingdom and taxed there at reduced rates in accordance with the Agreement on Double Taxation between Australia and the United Kingdom (subject to credit for the United Kingdom tax), but not on other items of income from abroad provided they were taxed in the country of source. While being residents of Australia, such corporations would be entitled to the benefits of the double taxation conventions entered into by Australia with other countries. There is no special tax on corporations or their shareholders when removing their registered or head offices from Australia.

Dividends and interest paid by corporations, being residents of Australia, to non-resident shareholders and lenders would be charged to Commonwealth income tax by way of withholding tax.

4. Immigration.

In connection with the temporary transfer of the registered or head office of Swiss juridical persons, partnership firms and singly-owned firms (in this section referred to as "firms") to Australia, the entry, in due time and for the duration of the transfer, of a restricted number of leading staff members of such firms to Australia should also be foreseen. It is therefore understood 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 Australia of such personnel (and their immediate families). In order to avoid any misuse of this facility, requests for visas will be thoroughly revieved by the Swiss authorities before being forwarded to the Australian authorities through the intermediary of the Swiss Embassy in Canberra. If, moreover, a sudden emergency were to prevent the completion of the usual immigration formalities,

the Australian Immigration authorities would be willing, consistent with any wartime measures then in effect, to give all possible sympathetic consideration to such persons.

The Embassy of Switzerland would be grateful if the Department of External Affairs would kindly confirm that this note represents a correct statement of the present situation.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of External Affairs the assurances of its highest consideration.

Canberra, 23rd October, 1968.

1490/5/1/1

The Department of External Affairs presents its compliments to the Embassy of Switzerland and has the honour to acknowledge receipt of the Embassy's Note of today's date regarding the temporary transfer under Swiss legislation of the registered or head offices of Swiss juridical persons, partnership firms and singly-owned firms from Switzerland to Australia in the event, and for the duration, of an international crisis.

The Department confirms that, subject to the following comments, the Embassy's Note is a correct statement of the present situation. The Department would add, however, that these comments are based on the existing provisions of Australian law and that the situation could alter should there be a change in the relevant Australian law.

With regard to corporations in particular, a Swiss corporation that transfers its head office to Australia in the event of an international crisis would retain its corporate status in Australia without reincorporation as long as it retains that status under the law that Australian courts, in the application of their conflict of laws rules, regard as the proper law affecting the corporate status, powers and the constitution of the Swiss corporation. Under these rules as at present applicable in Australia, the proper law to be applied in ascertaining what are

the legal consequences of the creation, constitution and powers of a corporation is in principle the law of the state under whose jurisdiction it was created. However, the Australian rules of private international law would have to be observed. (Examples of the rules referred to here are those applied in Bank of Ethiopia v National Bank of Egypt and Liguori (1937) Ch.513, Lorentzen v Lydden & Co. Ltd. (1942) 2 K.B. 202, and Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2) (1966) 3 W.L.R. 125).

The position outlined in the Embassy's Note under reference and in the preceding paragraphs of this Note is the position under existing law. It is possible, however, that legislative action could be initiated either in the Commonwealth Parliament or in State and Territory legislatures (in the latter case, if this were agreed to by State Governments) to permit action to be taken at the appropriate time to safeguard the position of Swiss corporations that had transferred their offices to Australia. The extent and details of such legislation would be a matter of agreement between the Swiss and Australian Governments, but legislation that might be considered could provide generally that corporations incorporated in a country declared by the Governor-General (or the Governor, in the case of State legislation) to be a country to which the legislation applied should, if they had established an office in Australia, be regarded, until the declaration is revoked by the Governor-General (Governor), for all purposes of State and Territory law as having been incorporated

in the Australian Capital Territory. The effect of this would be, subject to the Australian Capital Territory legislation making suitable provision for the adaptation of that legislation to the Swiss corporations in such circumstances, that for the currency of the declaration (which could cover a period of emergency) the status, constitution and powers of a Swiss corporation that had transferred its head office to Australia would be governed by Australian Capital Territory law, and no foreign power occupying Switzerland could assume control of the corporation's assets or operations in Australia. The legislation would need to provide specifically for various matters, such as the application of the provisions of Australian law as to memoranda and articles of association and it might not be possible to apply the legislation to 'public juridical persons' within the meaning of the Swiss decree mentioned in the Embassy's Note. Once the declaration was revoked, the position would revert to that described in the Embassy's Note.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of Switzerland the assurances of its highest consideration.

DEPARTMENT OF EXTERNAL AFFAIRS

CANBERRA, A.C.T.

23rd October, 1968.