

No. 9910

UNITED STATES OF AMERICA
and
MALAWI

**Exchange of notes constituting an agreement relating to
investment guaranties. Blantyre, 1 May and 21 July 1967**

Authentic text : English.

Registered by the United States of America on 1 October 1969.

ÉTATS-UNIS D'AMÉRIQUE
et
MALAWI

**Échange de notes constituant un accord relatif à la
garantie des investissements. Blantyre, 1^{er} mai et
21 juillet 1967**

Texte authentique : anglais.

Entregistré par les États-Unis d'Amérique le 1^{er} octobre 1969.

EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT¹
BETWEEN THE UNITED STATES OF AMERICA AND
MALAWI RELATING TO INVESTMENT GUARANTIES

I

No. 26

The Embassy of the United States of America presents its compliments to the Ministry of External Affairs of the Republic of Malawi and has the honor to refer to recent conversations and correspondence between representatives of the Government of the United States of America and the Government of Malawi relating to investments in Malawi which further the development of the economic resources and productive capacities of Malawi and to guaranties of such investments by the Government of the United States of America. The Embassy has the honor to confirm the following understandings reached as a result of these conversations :

1. When nationals of the Government of the United States of America [the Guaranting Government] propose to invest with the assistance of guaranties issued pursuant to this Agreement in a project or activity within the territorial jurisdiction of the Government of Malawi [the Host Government], the two Governments shall, upon the request of either, consult respecting the nature of the project or activity and its contribution to economic and social development in Malawi.

2. The procedures set forth in this Agreement shall apply only with respect to guaranteed investments in projects or activities approved by the Host Government.

3. If the Guaranting Government makes payment to any investor under a guaranty issued pursuant to the present Agreement, the Host Government shall, subject to the provisions of the following paragraph, recognize the transfer to the Guaranting Government of any currency, credits, assets, or investment on account of which payment under such guaranty is made as well as the succession of the Guaranting Government to any right, title, claim, privilege, or cause of action existing, or which may arise, in connection therewith.

4. To the extent that the laws of the Host Government partially or wholly invalidate the acquisition of any interests in any property within its national territory by the Guaranting Government, the Host Government shall permit such investor

¹ Came into force on 21 July 1967, the date of the note by which the Government of Malawi communicated to the Government of the United States of America that the Agreement had been approved in conformity with its constitutional procedures, in accordance with paragraph 8.

and the Guaranteeing Government to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of the Host Government. The Guaranteeing Government shall assert no greater rights nor lesser obligations than those of the transferring investor under the laws of the Host Government with respect to any assets transferred or succeeded to as contemplated in paragraph 3. The Guaranteeing Government does, however, reserve its rights to assert through the procedure provided in paragraph 6 a claim in its sovereign capacity in the eventuality of a denial of justice or other question of state responsibility as defined in international law.

5. Amounts in the lawful currency of the Host Government and credits thereof acquired by the Guaranteeing Government under such guaranties shall be accorded treatment neither less nor more favorable than that accorded to funds of nationals of the Guaranteeing Government deriving from investment activities like those in which the investor has been engaged, and such amounts and credits shall be freely available to the Guaranteeing Government to meet its expenditures in the national territory of the Host Government.

6. (a) Differences between the two Governments concerning the interpretation of the provisions of this Agreement shall be settled, insofar as possible, through negotiations between the two Governments. If such a difference cannot be resolved within a period of three months following the request for such negotiations, it shall be submitted, at the request of either Government, to an ad hoc arbitral tribunal for settlement in accordance with the applicable principles and rules of public international law. The arbitral tribunal shall be established as follows: Each Government shall appoint one arbitrator; these two arbitrators shall designate a President by common agreement who shall be a citizen of a third State and be appointed by the two Governments. The arbitrators shall be appointed within two months and the President within three months of the date of receipt of either Government's request for arbitration. If the foregoing time limits are not met, either Government may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointment or appointments, and both Governments agree to accept such appointment or appointments. The arbitral tribunal shall decide by majority vote. Its decision shall be binding. Each of the Governments shall pay the expenses of its member and its representation in the proceedings before the arbitral tribunal; the expenses of the President and the other costs shall be paid in equal parts by the two Governments. The arbitral tribunal may adopt other regulations concerning the costs. In all other matters, the arbitral tribunal shall regulate its own procedures.

(b) Any claim, arising out of investments guaranteed in accordance with this Agreement, against either of the two Governments, which, in the opinion of the other, presents a question of public international law shall, at the request of the Government presenting the claim, be submitted to negotiations. If at the end of three months following the request for negotiations the two Governments have not resolved the claim by mutual agreement, the claim, including the question of

whether it presents a question of public international law, shall be submitted for settlement to an arbitral tribunal selected in accordance with paragraph (a) above. The arbitral tribunal shall base its decision exclusively on the applicable principles and rules of public international law. Only the respective Governments may request the arbitral procedure and participate in it.

7. This Agreement shall continue in force until six months from the date of receipt of a note by which one Government informs the other of an intent no longer to be a party to the Agreement. In such event, the provisions of the Agreement with respect to guaranties issued while the Agreement was in force shall remain in force for the duration of those guaranties, in no case longer than twenty years, after the denunciation of the Agreement.

8. This Agreement shall enter into force on the date of the note by which the Host Government communicates to the Guaranteeing Government that the Agreement has been approved in conformity with the Host Government's constitutional procedures.

Upon receipt of a note from the Ministry of External Affairs indicating that the foregoing provisions are acceptable to the Government of Malawi, the Government of the United States of America will consider that this note and the Ministry's reply thereto constitute an Agreement between the two Governments on this subject, the Agreement to enter into force in accordance with paragraph 8 above.

The Embassy of the United States of America avails itself of this opportunity to renew to the Ministry of External Affairs of the Republic of Malawi the assurances of its highest consideration.

M. P. J.

Embassy of the United States of America
Blantyre, May 1, 1967

II

No. 27

The Embassy of the United States of America presents its compliments to the Ministry of External Affairs of the Republic of Malawi and has the honor to refer to the Embassy's Note No. 26 dated May 1, 1967 proposing that an Investment Guaranty Agreement be concluded between the Government of Malawi and the Government of the United States of America, and other conversations and communications on this subject between our two Governments.

The Embassy wishes to provide further explanation of paragraph 2 of the above mentioned note which provides that the provisions of the Agreement shall apply only with respect to guaranteed projects or activities approved by the Government of Malawi. The Embassy wishes to advise the Government of Malawi that the project approval required in paragraph 2

of the proposed agreement will be under procedures established by the Government of Malawi and the Government of Malawi can request the data it deems necessary before giving its approval to a project.

The Embassy of the United States of America avails itself of this opportunity to renew to the Ministry of External Affairs of the Republic of Malawi the assurances of its highest consideration.

M. P. J.

Embassy of the United States of America
Blantyre, May 1, 1967

III

The Malawi Ministry of External Affairs to the American Embassy

No. 52

The Ministry of External Affairs of the Republic of Malawi presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note No. 26 of the 1st May, 1967, which proposed that the Governments of Malawi and the United States should enter into an Investment Guaranty Agreement in the terms set out therein, and to the Embassy's Note No. 27 of the 1st May, 1967, wherein certain understandings relating to project approval by the Government of Malawi under the proposed Investment Guaranty Agreement were enunciated.

The Ministry is pleased to state that the Investment Guaranty Agreement as proposed in the aforementioned Note 26 of the 1st May, 1967, and as read with the aforementioned Note 27 of the 1st May, 1967, has been approved by and is acceptable to the Government of Malawi. The Ministry wishes to confirm that the Government of Malawi regards the aforementioned Note 26 as read with the aforementioned Note 27, and this reply as an Agreement between the Governments of the United States and Malawi on the subject of Investment Guaranties which, in accordance with paragraph 8 of this Agreement, enters into force as of the date of this reply.

The Ministry of External Affairs of the Republic of Malawi avails itself of this opportunity to renew to the Embassy of the United States of America the assurance of its highest consideration.

(Initialled) [illegible]

[SEAL]

Blantyre, 21st July, 1967