

No. 24681

FEDERAL REPUBLIC OF GERMANY
and
BENIN

Treaty concerning the promotion and reciprocal protection of capital investment (with protocol, exchange of letters of 29 June 1978 and exchange of notes of 5 August and 10 October 1983). Signed at Cotonou on 29 June 1978

Authentic texts: German and French.

Registered by the Federal Republic of Germany on 14 April 1987.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE
et
BÉNIN

Traité relatif à l'encouragement et à la protection mutuelle des investissements de capitaux (avec protocole, échange de lettres du 29 juin 1978 et échange de notes en date des 5 août et 10 octobre 1983). Signé à Cotonou le 29 juin 1978

Textes authentiques : allemand et français.

Enregistré par la République fédérale d'Allemagne le 14 avril 1987

EXCHANGE OF NOTES — ÉCHANGE DE NOTES

I

BOTSCHAFT DER BUNDESREPUBLIK DEUTSCHLAND
COTONOU*Verbalnote*

Die Botschaft der Bundesrepublik beehrt sich, dem Ministerium für Auswärtige Angelegenheiten und Zusammenarbeit der Volksrepublik Benin unter Bezugnahme auf ihre eigene Note Nr. 29/81 Wi 413.35 vom 30. Januar 1981 und die Note des Ministeriums Nr. 627 MAEC/DGM/DE/03 vom 30. Juni 1981 sowie auf den Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen folgendes mitzuteilen:

Eine eingehende Prüfung durch die deutschen Behörden hat ergeben, daß der Vertrag nicht ratifiziert werden kann, da es noch nicht gelungen ist, den widersprüchlichen Text im vierten Satz der Ziffer 4 (zu Artikel 4) des Vertragsprotokolls richtigzustellen.

Die Regierung der Bundesrepublik schlägt vor, die betreffende Stelle folgendermaßen abzufassen:

„In jedem Fall wird jedoch der folgende Transfer gewährleistet:

- aa) der Transfer von Erträgen in Höhe von jährlich 20% der Nettogewinne;
- bb) im Fall der Liquidation der Transfer von jährlich 20% des Liquidationsnettoerlöses.“

Die Botschaft der Bundesrepublik Deutschland wäre dem Ministerium dankbar, wenn es den Inhalt dieser Verbalnote dadurch bestätigen würde, daß es den Wortlaut der Ziffer 4 (zu Artikel 4) in der angegebenen Form wiederholt.

Diese Note und die Antwortnote werden somit eine verbindliche Auslegung des besagten Vertrags bilden und eine Ratifizierung in der Bundesrepublik Deutschland ermöglichen.

Die Botschaft der Bundesrepublik Deutschland dankt dem Ministerium für Auswärtige Angelegenheiten und Zusammenarbeit der Volksrepublik Benin für sein Entgegenkommen und benutzt diesen Anlaß, es erneut ihrer ausgezeichneten Hochachtung zu versichern.

Cotonou, den 5. August 1983

An das Ministerium für Auswärtige Angelegenheiten
und Zusammenarbeit
Cotonou

[TRANSLATION — TRADUCTION]

TREATY¹ BETWEEN THE FEDERAL REPUBLIC OF GERMANY
AND THE REPUBLIC OF BENIN CONCERNING THE PROMO-
TION AND RECIPROCAL PROTECTION OF CAPITAL IN-
VESTMENT

The Federal Republic of Germany and the Republic of Benin,

Desiring to enhance economic co-operation between the two States,

Seeking to create favourable conditions for capital investment by nationals or companies of either State in the territory of the other State, and

Recognizing that encouragement and contractual protection of such investments are likely to stimulate private economic initiative and to increase the prosperity of both nations,

Have agreed as follows:

Article 1. Each Contracting Party shall, so far as possible, promote capital investment in its territory by nationals or companies of the other Contracting Party and shall permit such investment in accordance with its legislation. It shall, in all cases, accord just and equitable treatment to such investment.

Article 2. 1. Neither Contracting Party shall, in its territory, subject investments owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments of its own nationals or companies or to investments of nationals or companies of third States.

2. Neither Contracting Party shall, in its territory, subject nationals or companies of the other Contracting Party, as regards activities in connection with investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of third States.

3. The treatment so accorded shall not extend to benefits granted by a Contracting Party to its own nationals or companies or the nationals and companies of third countries in fulfilment of its obligations arising from membership of, or association with, a monetary union, a customs union, a common market or a free-trade zone.

Article 3. 1. Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party, in accordance with the principles of international law.

2. Investments by nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be expropriated except for reasons of public policy and against compensation. Such compensation shall be equal to the market value of the investment expropriated, in the form of liquid resources, freely transferable and paid without delay. Adequate arrangements shall be made, at or prior to the time of the expropriation, for determining and

¹ Came into force on 18 July 1985, i.e., one month after the exchange of the instruments of ratification, which took place at Bonn on 18 June 1985, in accordance with article 13 (1) and (2).

paying such compensation. The legality of any such expropriation and the amount of the compensation shall be subject to review by the ordinary courts.

3. Nationals or companies of either Contracting Party whose investments suffer losses as a result of war or other armed conflict, revolution, a state of national emergency or an insurrection in the territory of the other Contracting Party shall be accorded by the latter Party treatment no less favourable, as regards restitution, indemnification compensation, or other reparation, than that which the latter Party accords to its own nationals or companies. All such payments shall be freely transferable.

4. In all matters governed by this article, nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party.

Article 4. Either Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party free transfer of the capital, of the returns therefrom and, in the event of liquidation, of the proceeds from such liquidation.

Article 5. If either Contracting Party makes payment to any of its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under article 10, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such national or company to the former Contracting Party as well as the subrogation of the former Contracting Party to any such right or claim, which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to be made to the Contracting Party concerned by virtue of such assignment, article 3, paragraphs 2 and 3, and article 4 shall apply *mutatis mutandis*.

Article 6. 1. Unless the Parties shall have otherwise arranged with the approval of the competent authorities of the Contracting Party in whose territory the investment is situated, transfers of funds under article 3, paragraph 2 or 3, article 4, or article 5 shall be effected without delay and at the rate of exchange for current transactions prevailing on the day of transfer.

2. The rate of exchange applicable for current transactions shall be based on the par value agreed with the International Monetary Fund and shall lie within the margins above or below parity admitted under article IV, section 3, 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 either Contracting Party, the official rate fixed by such Contracting Party for its currency in relation to the United States 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 investment is situated shall admit a rate of exchange that is fair and equitable.

Article 7. 1. If from the legislation of either Contracting Party or from international obligations existing at present or established hereafter between the Contracting Parties in addition to the present Treaty, a regulation emerges, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the

present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.

2. Either Contracting Party shall fulfil any obligation it may have entered into with regard to investments in its territory made by nationals or companies of the other Contracting Party.

Article 8. 1. The term “investment” shall comprise every kind of asset, and more particularly, though not exclusively,

- (a) Movable and immovable property and any other property rights, such as mortgages, liens and similar rights;
- (b) Shares and other kinds of interests in companies;
- (c) Claims to money or to any performance having an economic value;
- (d) Copyrights, industrial copyrights, technical processes, trade names and good will;
- (e) Concessions under public law, including exploration and exploitation concessions.

Any alteration of the forms in which assets are invested shall not affect their status as investments.

2. The term “returns” means the amounts derived from an investment as profits or interest for a specific period.

3. The term “nationals” means:

- (a) In respect of the Federal Republic of Germany: Germans within the meaning of the Basic Law of the Federal Republic of Germany;
- (b) In respect of the People’s Republic of Benin: Beninese within the meaning of the Beninese Nationality Code.

4. The term “companies” means:

- (a) In respect of the Federal Republic of Germany: any juridical person or any commercial or other company or association, with or without legal personality, having its seat in the territory of the Federal Republic of Germany and validly constituted under the law, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not it operates for profit;
- (b) In respect of the People’s Republic of Benin: companies under civil law, commercial companies, associations registered with the administrative authorities or those whose public utility is recognized, provided they have their seat in the national territory and have been established on the basis of a contract, through which two or more persons have agreed on a joint enterprise with the aim of sharing whatever profits may result therefrom, or with an aim different from the sharing of profits.

Article 9. This Treaty shall also apply to investments which nationals or companies of either Contracting Party, acting in accordance with the legislation of the other Contracting Party, have made in the territory of that other party prior to the entry into force of this Treaty. This provision shall not affect the Agreement of 27 February 1953 on German External Debts.

Article 10. (1) Disputes concerning the interpretation or application of this Treaty 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) The arbitral tribunal shall be constituted in each individual case as follows: each Contracting Party shall appoint one member and these two members shall then agree upon a national of a third State as the chairman, to be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months and the chairman within three months from the date on which one Contracting Party notifies the other of its desire to submit the dispute to an arbitral tribunal.

(4) If the time limits specified in paragraph 3 have not been observed, either Contracting Party may, in the absence of any other 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 prevented from discharging the said function, the Vice-President shall make the appointments. If the Vice-President is a national of either Contracting Party, or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall make the 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 of the tribunal and of its representation in the arbitral proceedings; the cost of the chairman and the remaining costs shall be shared equally by the Contracting Parties. The arbitral tribunal can decide to apportion the costs differently. In all other respects the arbitral tribunal shall determine its own procedure.

Article 11. The provisions of this Treaty shall remain in force even in the event of disputes between the Contracting Parties, without prejudice to the right to take such interim measures as are permitted under the general rules of international law. Such measures shall be rescinded not later than the date of actual ending of the dispute, irrespective of whether or not diplomatic relations have been re-established.

Article 12. With the exception of the provisions of paragraph 7 of the Protocol relating to air navigation, this Treaty shall also apply to *Land Berlin*, unless the Government of the Federal Republic of Germany declares otherwise to the Government of the People's Republic of Benin within three months of the entry into force of this Treaty.

Article 13. 1. This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

2. This Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for 10 years and shall thereafter remain in force indefinitely unless it is terminated by either Contracting Party upon one year's written notice. On expiry of the period of 10 years, the Treaty may be denounced at any time but shall remain in force for a further year after denunciation.

3. In respect of investments made prior to the date of termination of this Treaty, articles 1 to 12 shall continue to apply for 15 years from the date of termination of the Treaty.

DONE at Cotonou on 29 June 1978, in duplicate in German and French, both texts being equally authentic.

For the Federal Republic of Germany:

HANS-JOACHIM HELDT

ALWIN BRÜCK

For the People's Republic of Benin:

MICHEL ALLADAYE

PROTOCOL

On signing the Treaty concerning the promotion and reciprocal protection of capital investment concluded between the Federal Republic of Germany and the People's Republic of Benin, the undersigned plenipotentiaries have agreed also on the following arrangements, which shall be regarded as an integral part of the Treaty:

(1) *Ad article 1*

Investments made in accordance with the legislation of either Contracting Party within the area of application of that Party's legal system by nationals or companies of the other Contracting Party shall enjoy the full protection of this Treaty.

In so far as an acceptance procedure is necessary for the investment, the investment shall enjoy such protection from the date of acceptance.

(2) *Ad article 2*

(a) The following shall more particularly, though not exclusively, be deemed to be activities within the meaning of article 2, paragraph 2: the management, application, use and enjoyment of an investment. The following shall, in particular, be deemed to be "less favourable" treatment within the meaning of article 2, paragraph 2: restrictions on the purchase of raw and auxiliary materials, energy, and fuel and means of production or operation of any kind, and any impediment to the sale of products on domestic or foreign markets, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed to be "less favourable" treatment within the meaning of article 2.

(b) Arrangements which the Beninese Government may conclude with German nationals or companies, in connection with the admission of investments by the latter on special conditions that may affect the structure of this capital, its alienation or partial alienation, the field of activity of the enterprise, the reinvestment of its returns, the vocational training and the employment of Beninese nationals shall not preclude the provisions of the Treaty.

Where there is agreement on conditions of this kind the provisions of article 2 shall not apply in this regard. Such conditions shall be effective only if the measures of derogation have been specified and fixed in detail in the instrument of admission or, if such instrument is not required prior to contribution of the investment, in a special written arrangement concluded with the nationals or the companies of the other Contracting Party.

(c) Article 2, paragraph 2, shall not apply to entry, sojourn and activity as an employee.

(3) *Ad article 3*

The provisions of article 3, paragraph 2, shall apply also to the transfer of an investment to public ownership, to the subjection of an investment to public control, or to similar interventions by public authorities. Expropriation shall mean the withdrawal or limitation of any right of ownership which alone or together with other rights constitutes a capital investment.

(4) *Ad article 4*

(a) Notwithstanding article 4 each Contracting Party may reserve the right to limit the free transfer of returns and proceeds from liquidation, to the extent required by its balance of payments. For this purpose each Contracting Party may, in the instrument of admission or, should such an instrument not be required, in a special written agreement, impose upon nationals and companies of the other Contracting Party limitations on free transfer, prior to contribution of the capital investment. Each Contracting Party shall make use of such limitations only in individual cases and to the extent required by its balance of payments. In all cases, however, the following transfer shall at least be guaranteed:

(aa) The annual transfer of returns up to a maximum of 20 per cent of the net profits;

(bb) In the case of liquidation, the annual transfer of 20 per cent of the net proceeds of liquidation.

“Liquidation” within the meaning of article 4 shall be deemed to include any alienation effected for the purpose of completely or partly giving up the investment concerned.

Furthermore, in the event that nationals or companies of the other Contracting Party do not effect the partial or total transfer of these amounts within one year, guarantees must be provided that the outstanding amounts may be transferred in the course of the following year.

(5) *Ad article 6*

A transfer shall be deemed to have been made “without delay” within the meaning of article 6, paragraph 1, when made within the period normally required for the completion of transfer formalities. The period shall run from the day on which the relevant application is submitted and shall in no case exceed two months.

(6) *Ad Article 8*

(a) Returns from an investment, as well as returns from reinvested returns, shall enjoy the same protection as the original investment.

(b) Without prejudice to any other method of determining nationality, any person in possession of a national passport issued by the appropriate authorities of either Contracting Party shall be deemed to be a national of that Party.

(7) With regard to the transport of goods or passengers in connection with the investment of capital, neither Contracting Party shall exclude or impede transport enterprises of the other Contracting Party and each shall grant any transport permits required.

This provision shall apply to the transport of:

- (a) Goods directly intended for capital investment within the meaning of this Treaty or those purchased in the territory of a Contracting Party or a third State by or on behalf of an enterprise in which funds are invested within the meaning of this Treaty;
- (b) Persons travelling for the purpose of undertaking capital investment.

DONE at Cotonou on 29 June 1978, in duplicate, in the German and French languages, both texts being equally authentic.

For the Federal Republic of Germany:

HANS-JOACHIM HELDT

ALWIN BRÜCK

For the People's Republic of Benin:

MICHEL ALLADAYE

EXCHANGE OF LETTERS

I

THE CHAIRMAN OF THE DELEGATION OF THE PEOPLE'S REPUBLIC OF BENIN

Cotonou, 29 June 1978

Sir,

In order to facilitate operations and promote the development of investments by German nationals or companies, the People's Republic of Benin will grant the necessary permits to German nationals who, in connection with investments by German nationals or companies, desire to enter and stay in the People's Republic of Benin and to engage in an occupation there as employees, unless precluded for reasons of public order, security, health or morality.

Accept, Sir, etc.

MICHEL ALLADAYE

Chairman of the German Delegation

II

THE CHAIRMAN OF THE GERMAN DELEGATION

Cotonou, 29 June 1978

Sir,

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

[*See letter I*]

Accept, Sir, etc.

HANS-JOACHIM HELDT

Chairman of the Delegation of the People's Republic
of Benin

EXCHANGE OF NOTES

I

THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY
COTONOU

Note verbale

The Embassy of the Federal Republic of Germany has the honour, with reference to its own note No. 29/81 Wi 413.35 of 30 January 1981 and to note No. 627 MAEC/DGM/DE/03, of 30 June 1981 from the Ministry of Foreign Affairs and Co-operation of the People's Republic of Benin as well as to the Treaty concerning the promotion and reciprocal protection of capital investment, to inform the Ministry of the following: a thorough examination by the German authorities has revealed that the Treaty cannot be ratified, as efforts to rectify the contradictory text in the fourth sentence of paragraph 4 (*ad* article 4) of the Protocol of the Treaty have so far been unsuccessful.

The Government of the Federal Republic proposes that the passage in question be phrased as follows:

"In every case, however, the following transfer shall be ensured:

“(aa) The annual transfer of returns to an amount of 20 per cent of the net profits;

“(bb) In the case of liquidation the annual transfer of 20 per cent of the net proceeds of liquidation.”

The Embassy of the Federal Republic of Germany would be grateful to the Ministry if it would confirm the content of this note verbale, by repeating the text of paragraph 4 (*ad* article 4) as quoted.

This note and the note of reply shall therefore constitute a binding interpretation of the said Treaty and shall make possible its ratification in the Federal Republic of Germany.

The Embassy of the Federal Republic of Germany thanks the Ministry of Foreign Affairs and Co-operation of the People's Republic of Benin for its compliance and takes this opportunity, etc.

Cotonou, 5 August 1983

Ministry of Foreign Affairs and Co-operation
Cotonou

II

PEOPLE'S REPUBLIC OF BENIN MINISTRY OF FOREIGN AFFAIRS AND CO-OPERATION

The Ministry of Foreign Affairs and Co-operation of the People's Republic of Benin has the honour, with reference to its notes verbales No. 149/83 of 5 August 1983 and No. 184/83 of 21 September 1983, and to the minutes of the Germano-Beninese intergovernmental negotiations of 1 to 5 December 1980 at Cotonou, to inform the Embassy of the Federal Republic of Germany that it agrees to the text of the fourth sentence of paragraph 4 (*ad* article 4), as indicated in its note verbale 149/83 of 5 August 1983, which shall read as follows:

[*See note I*]

The Ministry of Foreign Affairs and Co-operation of the People's Republic of Benin thanks the Embassy of the Federal Republic of Germany for its kind co-operation and takes this opportunity, etc.

Cotonou, 10 October 1983

Embassy of the Federal Republic of Germany
Cotonou
