

Benin

Law N°90-002 dated 9th May 1990 relating to the Code of Investments (1990)

Official translation

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The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

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REPUBLIC OF BENIN

PRESIDENCY OF THE REPUBLIC

Law N°90-002 dated 9th May 1990 relating to the Code of Investments

The High Council of the Republic having considered and adopted in its session of 30th April 1990, The President of the Republic enacts the provisions of the law that shall read as follows :

TITLE I: DEFINITIONS AND GENERAL PROVISIONS

Chapter 1 : DEFINITIONS

In accordance with this Law, the following terms shall have the following meanings :

Article 1 : “Enterprise” means any individual or legal entity, or any cooperative body, which exercises in the Republic of Benin a business activity within the primary, secondary or tertiary sectors.

Article 2 : “Extension” means an increase in the production capacity of the Enterprise through the setting up of an independent unit, or through the combination of a new activity with the existing one.

Article 3 : “Value - Added” means the balance between the turnover, all taxes inclusive and input.

Article 4 : “Investment” means the total amount, all taxes inclusive, of any type of fixed assets, origination fees and fixed working capital.

Article 5 : “Duration of the Approval” means the time-frame during which the Enterprise shall be under a preferential treatment.

Article 6 : “Raw materials” means the supplies and equipment intended to be incorporated to manufactured products.

Article 7 : “Equipment and products” means the material elements that the Enterprise acquires from abroad and that it can keep in stock for later use in manufacture.

Article 8 : “Equipment and implements” means the objects and appliances used to process or treat materials, such as industrial equipment and implements, agricultural equipment and implements, fishing gears and appliances, handling equipment, wrapping equipment (wrapping intended for internal use not to be delivered to the customers with its contents) ; repair materials (keys and other implements), rolling stock for commercial purpose.

Article 9 : “Product” means any physical object obtained after an agricultural activity from a fishing and an industrial processing activity.

Chapter 2 : GENERAL PROVISIONS

Article 10 : Except for activities which, on the account of general interest as well as law and order, are prohibited by the law, the exercise of an industrial, agricultural, commercial or artisanal activity is free in the Republic of Benin.

Article 11 : The provisions relating to investments in the Republic of Benin encompass a treatment under the general law, as well as preferential and special treatments.

Preferential treatments which are three (3) in number shall give national and foreign Enterprises customs and fiscal advantages which are as follows :

- Treatment A covering small and medium-scale Enterprises ;
- Treatment B for large-scale Enterprises ;
- Treatment C or tax-flattening out treatment.

The special treatment shall cover artisanal and other Enterprises, the investment amount of which is provided for in article 57.

Article 12 : No Enterprise shall be entitled to be covered by two different treatments for the same activity.

Article 13 : With a view to bringing into play a fair competition, it is guaranteed that State-owned Enterprises, parastatals and private Enterprises shall, in accordance with this Code, be covered by the same rights and shall equally be subjected to the same obligations.

Article 14 : Any Enterprise that is engaged in a commercial, industrial, agricultural, artisanal or service-provision activity shall, whatever the treatment by which it is covered (general law or preferential treatment) benefit from the following guarantees :

- Freedom to trade (choice of suppliers, customers, service-provisions) ;
- Freedom to expatriate personnel and member of their family, to enter, to stay, to move around and to withdraw from the country in compliance with the texts in force ;
- Freedom to manage ;
- Freedom to transfer capitals and namely, profits and dividends duly computerized and freedom to transfer funds acquired by the Enterprises as a result of a transfer or separation by virtue of the legislation in force ;

The assurance that the Government of Benin shall not take any action toward nationalization ;

The assurance that the Government of Benin shall not take any action toward the expropriation of investments made by any Enterprise subject to cases of public utility established under conditions stipulated by the law.

As regards public utility, any action taken against expropriation shall not be discriminatory and shall make provision for a fair, adequate and prior redress, the amount of which shall be worked out according to the ordinary rules and practices of the international law.

TITLE II: PREFERENTIAL TREATMENT

Chapter I : COMMON PROVISIONS

Section 1 : SCOPE

Article 15 : Any of the preferential treatments stipulated in the above-mentioned Article 11 shall be applied to any newly created Enterprise of all sectors, which presents interest or a specific relevance to the attainment of the objectives of the National Plan of Social and Economic Development, and which does not operate under any of the categories here-below :

- 1- Activities consisting in purchase and resale without processing ;
- 2- Activities of repackaging, cutting, coiling and or wrapping of finished or semi-finished products and any other activities which do not entail any finished or processed materials in accordance with the customs nomenclature ;

3- Activities which have a particularly harmful effect on the environment and on the health of the populations.

On the proposal of the Minister in charge of National Planning, this list can be modified by a Decree with reference to the needs and requirements of the economic and social development.

Article 16 : The preferential treatment shall also be granted to Enterprises formerly established in Benin, as a result of an expansion of their activities, provided that such an expansion does not, however, fall within any one of the areas of activities referred to in Article 15 and that it shall meet the investment criteria of the required treatment. In the event of an expansion, the treatment granted shall only apply to that expansion,

Article 17 : Should there be a co-existence of activities enjoying a preferential treatment and other activities governed by the ordinary law (as in the expansion case of an approved activity), the former ones should compulsorily form a self-liquidating entity endowed with a separate accounts which makes possible to see clearly their results from those of the Enterprise as a whole.

Article 18 : To be approved for a preferential treatment, the business thus established shall, barring the conditions laid down in Article 15, contribute to a large extent to :

- Implementing the policy of regional Development through the setting up of business activities in the economically less developed areas ;
- Creating job ;
- Improving and rehabilitating the balance of trade and of payments ;
- Upgrading local resources.

Section II : DURATION OF THE APPROVAL

Article 19 : The time-frame of the approval shall extend to :

- A gestation period during which the investment program should be implemented.
- A period of operation corresponding to the stage of production or operation.

Article 20 : The gestation period shall begin from the enforcement date of the approval and extend to a time-frame not to exceed thirty (30) months whatever the treatment. The final completion of the program shall be established by joint Directive of the Minister of National Planning, Chairman of the Technical Commission on Investments and of the Minister of Industry, Chairman of the Investment Auditing Board.

Article 21 : The period of operation shall come into force from the date of signature of the joint Directive establishing the end of the implementation of the investment program ;

The time-frame of the operation period shall be set for all the treatments as follows :

- Five (5) years for investments made in Zone 1 ;
- Seven (7) years for investments made in Zone 2 ;
- Nine (9) years for investments made in Zone 3.

Article 22 : The implementation of the Investment program within a shorter time-frame not to exceed 30 months as provided for in Article 20 shall imply for the persons enjoying such treatments an extension of the time limit equal to the number of months remaining to reach the deadline. Such a bonus shall complement the duration of the operation period as specified in Article 21. Should the time-frame extend beyond the deadline specified for the setting up, the additional number of months shall be deducted from the period of operation. In such a process of deduction, only the number of days over 14 shall be taken into account for a full month.

Article 23 : In pursuance of the provisions of Article 21, the Territory of Benin is divided into three (3) zones called zone 1, 2, 3, which shall be described by an implementing decree of this Law.

Chapter II : PROCEDURE FOR GRANTING PREFERENTIAL TREATMENTS

Article 24 : Any application introduced by an Enterprise for a preferential treatment should be addressed to the Ministry of National Planning.

Article 25 : Any application for approval should indicate whichever of the preferential treatment is applied for. The application should be supported on the one hand, by a complete schedule of twenty (20) copies containing legal, technical, economic and financial information which shall be specified by Decision of the Minister of National Planning and, on the other hand, by a prior setting up license issued by the Minister responsible for the proposed business.

Article 26 : Approval for a preferential treatment shall be given by the Government on the proposal of the Minister of National Planning and after the opinion of the Technical Commission on Investments stipulated in chapter III below.

Article 27 : Notification of the approval or rejection of the application should be made to the applicant within a maximum period of two (2) months from the date the complete file is submitted.

Article 28 : The decree of approval shall :

- 1)- Set forth the purpose, the localization of the project, the time-frame for its completion as well as the duration of the approved period of operation ;
- 2)- Describe the activities for which the treatment is accorded, the nature and the quantities of items to be exonerated ;
- 3)- Specify the nature and the duration of the advantages granted ;
- 4)- Outline the obligations incumbent on the enterprise mainly in terms of the implementation of its programs of investments, production, employment and vocational training, the pursuit of its economic, commercial and social objectives ;
- 5)- Make provision for the special requirements for the arbitration referred to in Article 74 below.

Article 29 : The Chairman of the Investment Auditing Board shall be given by the approved enterprise notification of the completion of the investment program, The date of the completion shall be the subject of a decision of the Chairman of the Investment Auditing Board and that of the Chairman of the Technical Commission on Investments which shall primarily check that the unit is actually ready to commence production or operation.

Article 30 : The directive establishing that the investment program has been completed should specify the time-frame of the business covered by a preferential treatment and its effective date.

Chapter III : TECHNICAL COMMISSION ON INVESTMENTS (CTI)

Article 31 : The Technical Commission on Investments shall ;

- 1- Review and appraise application files introduced for the granting of preferential treatments provided under this Code and give reasoned opinions on such applications ;
- 2- Propose that approval be withdrawn in accordance with the provisions of Article 70 below;
- 3- Give reasoned opinion on applications for reimbursement of contributions to the National Funds of Investments introduced by any Enterprise based in the Republic of Benin.

Article 32 : The composition and mode of operation of the Technical Commission on Investments shall be specified in the implementing Decree of this Law.

Chapter IV : LIABILITIES OF PERSONS BENEFITING FROM A PREFERENTIAL TREATMENT

Article 33 : Any Enterprise which applies for any of the three treatments referred to in Article 11 of this Law shall undertake to :

- Generate from its activities at least 50% of added value ;
- Allocate at least 60% of the wage bill to nationals ;
- Comply with national or international standards applicable to goods and services which are the purpose of its activity ;
- Preserve ecological conditions, especially the environment ;
- Keep regularly the accounts in accordance with the provisions of the National Accounting System ;
- Abide strictly by the agreed programs of investments and of activities.

Article 34 : Any Enterprise to which a preferential treatment is applied shall be bound to :

- 1- Go through various audits carried out by administrative services in accordance with the regulations in force ;
- 2- Promptly provide, in case the agreed programs of investments and of activities should undergo substantial modifications, a reasoned report to the Directorate of National Planning, the Directorate of Industry and to the Supervisory Ministry thereof,
- 3- Send every year to the Directorate of Labor in accordance with the existing legislation, a nominative statement of the employees of the Enterprise, indicating their qualification and wages as well as a progress report on vocational training program.
- 4- Send every year to the Directorate of Industry, the Directorate of Tax and the National Institute of Statistics and Economic Analysis (INSAE) within a period not exceeding four (4) months after the end of the fiscal year, the following documents and vouchers :
 - A Report on the implementation of setting-up works and the progress made as regards programs of investment, equipment, employment and the vocational training program ;

- A copy of the balance-sheet, the characteristic management balances, the accounts entry table, the redemption tables and the statement of deposit accounts.

5- Send a monthly report to the National Institute of Statistics and Economic Analysis (INSAE) information related to production, manpower, consumption of raw materials, imports, exports as well as any other information as may be requested by the said Institute.

Article 35 : The use of foreign manpower by any Enterprise enjoying a preferential treatment shall be subjected to the legislation in force in this respect.

Article 36 : At the end of the period covered by the preferential treatment, the approved Enterprise shall carry on its activities for at least five (5) years in order not to be under the penalty of refunding to the Government of Benin the advantages obtained during the time-frame of the approval.

Chapter V: VARIOUS TREATMENTS AND RELATED ADVANTAGES

Section 1 : TREATMENT “A” OR TREATMENT FOR SMALL AND MEDIUM-SCALE ENTERPRISES

Article 37 : Treatment “A” is meant for encouraging the development of national or foreign small and medium-scale Enterprises, whose activities could contribute to the economic and social development of the country and promote joint ventures.

Article 38 : Shall be considered as a small and medium-scale Enterprise which could be approved for treatment “A” in compliance with this Code, any Enterprise which, besides the criteria set forth in Articles 15 and 18, satisfies the following cumulative conditions :

- 1- Have a trade register or in case of a cooperative, comply with the legislation in force as regards the formation of cooperatives ;
- 2- Have a program of investment, whose amount shall oscillate from twenty (20) million to five hundred (500) million CFA francs ;
- 3- Plan the employment of at least five (5) permanent wage-earners of Benin nationality ;
- 4- Keep on a regular basis accounts which shall be consistent with the National Accounting System irrespective of the current turnover.

Article 39 : Treatment “A” shall enable to enjoy the following advantages :

1 - During the period investments are carried out, exemption from import duties and taxes, except for highway maintenance tax and statistics tax, on :

- machineries, equipment and implements specifically intended for production or operation in respect of the approved program ;
- Spare parts specific to the equipment imported within the limit of an amount equal to 15% of the CIF value of equipment.

2 - During the period of operation and for a time-frame equal to that stated in above-mentioned Article 21 :

- Exemption from business profit taxes.
- Exemption from export duties and taxes applicable to products that are processed, manufactured, and exported by the Enterprise.

Section 2 : TREATMENT “B” OR TREATMENT FOR LARGE-SCALE ENTERPRISE

Article 40 : Treatment “B” or treatment for large-scale Enterprises shall be meant for the promotion of national or foreign Enterprises willing to contribute to the economic and social development of the Republic of Benin through their investments.

Article 41 : Shall be approved for treatment “B” any Enterprise which, besides the criteria set forth in abovementioned Articles 15 and 18, could make an investment over five hundred (500) million CFA francs and below three (3) million CFA francs.

Article 42 : Any Enterprise which has the benefit of such a treatment should generate at least twenty (20) permanent employments for Benin nationals,

Article 43 : Approval for treatment “B” shall imply the following advantages :

1 - During the period in which the investments are carried out :

- Exemption from import duties and taxes, except for highway maintenance tax and the statistics tax on :
- Machineries, equipment and implements, specifically intended to be used for production and operation in respect of the approved program,
- Spare parts which are specific to equipment imported within the limit of an amount equal to 15% of the CIF value of equipment.

2 - During the period of operation :

- Exemption from import duties and taxes applicable to the products that are processed, manufactured and exported by the Enterprise.
- Exemption from Business Profit Taxes.

Section 3 : TREATMENT “C” OR TAX STABILISATION TREATMENT

Article 44 : The treatment for fiscal stabilization is intended to encourage very large-scale enterprises which have concluded an investment totaling over three (3) billion CFA francs.

Article 45 : Treatment “C” shall entitle to benefit from advantages accorded for treatment “B” and for a time-frame similar to the one granted for treatment “B”.

Article 46 : Provisions of the above-mentioned Articles 42 and 43 shall also be applied to Enterprises enjoying treatment “C”.

Article 47 : Any Enterprise approved for treatment “C” shall benefit from tax stabilization as regards the rate and the mode of determination of the tax basis for Business Profit Taxes during the entire time-frame of the approval,

Chapter VI : MISCELLANEOUS PROVISIONS

Article 48 : Enterprises approved for any one of the treatments specified in the above-mentioned Article 11 and which upgrade local resources shall benefit from the following special advantages :

- Exemption from incorporation duties in the process of formation ;
- Exemption from license fees during the first five (5) years of operation.

Article 49 : To enforce the provisions of this law, there shall not be any duty-free admission for building materials, office equipment, domestic electrical appliances and materials, special utility cars, air-conditioning equipment except for central air-conditioning materials, petroleum products apart from lubricants, fuel oil, gas-oil used as raw materials and bituminous products.

Article 50 : Operations carried out by any Enterprise under preferential treatment and which would not fall directly in line with activities above-listed in the Approval Decree shall remain subject to provisions of the fiscal law and of the ordinary Law.

Article 51 : Machineries, equipment, implements, spare parts and raw materials imported within the framework of the approval can be transferred or lent free of charge or subject to payment only with the joint and prior authorization of the Minister of National Planning and the Minister of Finance.

Any transfer, if authorised, shall imply the payment of duties from which such goods have been exempted and which shall be computed on their value established in accordance with the customs regulation and rate applied on the day the statement will be submitted.

Article 52 : The benefit to enjoy, a preferential treatment as accorded to any Enterprise in accordance with the provisions of this Code shall not be transferable.

Article 53 : Approval for a preferential treatment shall neither be renewable nor extended. When the period of approval expires, the Enterprise shall lose its preferential status to fall within the scope of the provisions of the ordinary Law.

Article 54 : No legislative or statutory ruling, coming into effect after the date of the approval, shall be deemed to constitute an implied decision rejecting or limiting the provisions of the preferential treatment accorded to the Enterprise.

Article 55 : Any enterprise approved for a treatment shall be entitled to benefit from any provision that is more advantageous and which might be taken under the fiscal and customs legislation.

Article 56 : No preferential treatment shall allow any Enterprise to be exempted from taxes, charges and contributions apart from those directly stipulated by the law.

TITLE III : SPECIAL TREATMENT

Article 57 : Enterprises falling under the following categories shall be covered by the provisions of special treatment :

- Service-providing Enterprises belonging to the sectors of Health, Education and Public Works, the investment amount of which shall be at least equal to twenty (20) million CFA francs ;

- Enterprises engaged in any of the other activities stipulated in Article 15, the investment amount of which shall range between five (5) and twenty (20) million CFA francs.

Article 58 : Enterprises referred to in the above-mentioned Article 57 shall enjoy from their establishment a reduction of 75% in import duties and taxes, barring highway maintenance tax and statistical tax, on :

- Machineries, equipment and implements meant for production or operation ;
- Spares parts specific to such equipment imported within the limit of an amount equal to 15% of the CIF value of the equipment.

Article 59 : Machineries, equipment and implements, spare parts, raw materials and packaging except those stipulated

in Article 58 as well as taxes overdue, shall fall under the general law during the period of approval.

Article 60 : Provisions of the above-mentioned Articles shall apply subject to a request filed to the Minister of National Planning and a commitment to keep a regular account in compliance with the provisions of the National Accounting system.

Article 61 : Such a request shall be reviewed by the Technical Commission on Investments (CTI). On the proposal of this Commission, a joint Directive of the Minister of National Planning and the Minister of Finance shall ascertain that such provisions may be applied to the Enterprise.

Article 62 : The request referred to in Article 60 shall include :

- Description of the manufacturing process of the goods or the upgrading mode for Enterprises engaged in processing;
- Nature, origin and quantity of raw materials required during the period covered by the approval ;
- Complete nomenclature of machineries, equipment, implements and spare parts, required for the setting-up exercise ;
- The number of life-long jobs ;
- One (1) copy of the Enterprise incorporation in the Trade Register.

TITLE IV : AUDITING SANCTIONS

Chapter I : THE INVESTMENT AUDITING BOARD (CCI)

Article 63 : In pursuance of the provisions of this Code, an Investment Auditing Board (CCI) shall be established.

Article 64 : The investment auditing board shall :

1- Check, on its own initiative or at the request of the Chairman of the Technical Commission on Investments (CTI), the performances of Enterprises benefiting from a preferential treatment of the Code of Investments, especially the consistence of their performances with the approved programs ;

2 - Establish the compliance or non-compliance of commitments made by beneficiaries of a preferential treatment, make to the Chairman of the Technical Commission on Investment (CTI) proposal for the withdrawal of this approval in case of non-compliance with the said commitments. Investigations carried out by the Investment Auditing Board (CCI) shall, especially, be related to :

- The program of Investments ;
- Creation of employments and vocational training ;
- Production ;
- Regular book-keeping ;
- Compliance with, namely, the fiscal, parafiscal, customs and health législation.

3 - Establish the completion of approved programs of investments ;

4 - Initiate an audit of investments actually made by any Enterprise applying for the reimbursement of its contribution to the National Investment Funds (FNI).

Article 65 : Any professional authority requested in this respect shall be compelled to provide the Board with all appropriate information and assistance in connection with such an audit.

Article 66 : The composition and procedure of the Investments Auditing Board shall be ascertained by an Implementing Decree of this Law.

Chapter II : SANCTIONS

Article 67 : Any deflection of goods imported under this Code of Investments from its privileged destination shall ;

a)- Stand out as a failure of the approved Enterprise to meet its obligations ; and it shall be punished according to the provisions of Article 68 here-below ;

b)- Constitute a customs offence which shall be punished in accordance with the provisions of the Customs Law ;

Article 68 : In the event of a non fulfilment of any of such obligations prescribed in the above-referred Articles 33, 34, 35 as duly established by the Investment Auditing Board (CCI), the Enterprise shall be liable for, a fiscal penalty the amount of which shall be set forth in the Implementing Decree of this Code.

Article 69 : The purpose of the proceeds of the penalties levied in accordance with the provisions of the above referred Article 68 shall be specified by the Implementing Decree of this Code.

Article 70 : In the event of a serious or repeated violation of, or in the event of a non-implementation of the investment program established after the gestation period has elapsed, the approved Enterprise might lose the benefit to a preferential treatment according to the following procedure :

1)- The Chairman of the Technical Commission on Investments (CTI) shall formally require the Enterprise to take necessary actions to comply with the provisions of this Law as regards commitments ;

2)- If, within a period of thirty (30) days from the receipt of the service of notice, the Enterprise does not react or comply, the Chairman of the Technical Commission on Investments (CTI) shall, on the basis of a report to the Chairman of the Investment Auditing Board (CCI), suggest to the Government the withdrawal of the approval.

Article 71 : The decision of withdrawal shall be delivered by Decree.

Article 72 : In the event of a withdrawal of the benefit of a preferential treatment, the revoked Enterprise shall be compelled to pay back to the Government of Benin the value or the equivalent value of the advantages it would have obtained during the approval time-frame to which will be applied the ordinary discount rate of the Central Bank of the West African States (BCEAO).

TITLE V : SETTLEMENT OF DISPUTES

Article 73 : Any dispute arising between the Customs and Tax Authorities, and the approved Enterprise, from the enactment of the provisions of Articles 39, 43, 46, and 58 of the Code of Investments shall be settled by a Committee made up with representatives of the Ministers of National Planning, of Finance, of Industry and of Justice.

Such a Committee shall be chaired by the Minister of National Planning.

Article 74 : The settlement of disputes related to the authenticity, interpretation or enforcement of the Approval Decree and the possible computation of fiscal fines due to the ignorance or the breach of liabilities shall be subject to one of the following arbitration procedures :

1 - The arbitration board shall consist of :

- The appointment of an arbitrator by either party ;
- The appointment of a third arbitrator by the first two arbitrators.

If one of the parties should fail to appoint an arbitrator within sixty (60) days after the other party has given notice for the appointment of an arbitrator, and if the two arbitrators should fail to agree on the appointment of the umpire within thirty (30) days after the date of the appointment of the second arbitrator, such second arbitrator or the Umpire shall, as appropriate, be appointed by a highly qualified Authority at the instance of the earliest petitioner. Such an Authority shall be:

- a) The President of the People's Central Court of the Republic of Benin, should only the interests of Benin be in dispute or should the parties agree thereto ;
- b) The President of the Permanent Court of Arbitration of the HAGUE, if the dispute should arise between the Government of Benin and foreign interests.

All award, rendered by a majority of arbitrators who determine their own procedure, shall constitute the award of the Arbitral Tribunal and shall be final and binding upon both parties.

2)- The right to apply to the International Centre for the Settlement of Investment Disputes, established by the Convention of the International Bank for Reconstruction and Development (IBRD) dated 18th March 1965.

TITLE VI : INTERIM PROVISIONS

Article 75 : The guarantees and advantages granted to some Enterprises under Ordinance N° 72-1 of 8th January 1972 and the Law N° 82-005 of 20th May 1982 relating to Code of Investments shall remain vested interests until the end of the time-frame specified by their approval instruments.

Article 76 : Decrees passed during the Cabinet meeting shall, as appropriate, set forth the implementing provisions of this Law.

Article 77 : This Law which shall repeal all the previous provisions, as they shall have otherwise provided, especially the Law N°82-005 of 20th May 1982 relating to the Code of Investments and its Implementing decree, shall be published in the Government Gazette and be enforced as a Law of the Government.

Done in Cotonou, 30th April 1990

Signed :

The President of the Republic, Head of State

Mathieu KEREKOU

The Prime Minister, Head of Government

Nicéphore SOGLO

Minister of National Planning and Statistics

Paul DOSSOU

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