Treaty between the Republic of the Congo and the Federal Republic of Germany concerning the promotion and reciprocal protection of investments

The Federal Republic of Germany and the Republic of the Congo, hereinafter referred to as the "Contracting Parties",

Desiring to intensify economic cooperation between the two States,

In order to create favourable conditions for investments of investors of one of the two States in the territory of the other party,

Recognising that the encouragement and mutue contractual and the protection of such investments will stimulate private business initiative and will increase prosperity of both peoples,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Treaty

1. The term "investor" means

a) In respect of the Federal Republic of Germany:

- Any natural person within the meaning of the German Basic Law for the Federal Republic of Germany and nationals of a State Member of the European Union or of the European Economic Area, under the freedom of establishment laid down in article 43 of the Treaty Establishing the European Community, are established in the Federal Republic of Germany;

- Any legal person as well as any other commercial company or corporation or association with or without legal personality, incorporated under the laws of the Federal Republic of Germany or in accordance with the laws of a State Member of the European Union or of the European Economic Area and organized in accordance with the laws of the Federal Republic of Germany, registered in a public register of the Federal Republic of Germany or enjoying as an agency or permanent establishment, by virtue of article 43 in connection with article 48 of the Treaty Establishing the European Community, freedom of establishment in Germany;

which, in the framework of economic activity performed in the territory of the other Contracting Party is an owner, holder or associate of an investment, regardless of whether the activity is or not for a profit;

b) With regard to the Republic of the Congo:

- Any natural person who is a Congolese within the meaning of the Constitution of the Republic of the Congo or is a national of a State Member of the Economic and Monetary Community of Central Africa (CEMAC), which is established in the Republic of the Congo;

- Any legal person or any industrial or services commercial enterprise, or companies, corporations, business associations, economic interest groups and individual companies based in accordance with the law of the Republic of the Congo or of The Economic and Monetary Community of Central Africa (CEMAC) and organized in accordance with the law of the Republic of the Congo or enjoying freedom to establish an agency or establishing a branch or permanent establishment in the Republic of Congo;

which in the framework of economic activity performed in the territory of the other Contracting Party is an owner, holder or associate of an investment, regardless of whether the activity is or not for a profit;

2. The term "investment" includes all types of asset invested directly or indirectly by investors of one of the Contracting

Parties in the territory of the other. Investments include in particular:

a) Ownership of movable and immovable property as well as any other rights in rem, such as mortgages and liens;

b) The rights of participation in companies and other kinds of participation in companies;

c) Claims to money that have been used to establish an economic value or claims relating to performance having an economic value;

d) Intellectual property rights, including copyright and related rights, patents, industrial designs, trade marks, utility models, geographical designations and plant breeders rights;

e) Trade names, business and business secrets, technical processes, as well as know-how and goodwill;

f) The concessions under public law, including concessions for exploration and exploitation of natural resources;

Any alteration of the form in which assets are invested shall not affect their quality of investment. In general, only the indirect investment and portfolio investment made by the investor through a company established in the other Contracting Party, are deemed indirect investment.

3. The term "products" means the amounts paid for a determined period in respect of an investment such as profits, dividends, interests, licence fees or other earnings;

4. The term "territory" means the territory of either Contracting Party, including the exclusive economic zone and the continental shelf where international law allows the contracting party in question / exercise sovereign rights or jurisdiction.

Article 2. Admission, Promotion and Protection of Investments

(1) Each Contracting Party shall promote as far as possible investments by investors of the other Contracting Party in its territory and admit such investments in accordance with its legislation.

(2) In each case, each Contracting Party, shall provide fair and equitable treatment to the investments of investors of the other Contracting Party in its territory and grant them the full protection provided for by this Treaty.

(3) Neither Contracting Party shall in its territory hinder in any way, by means of arbitrary or discriminatory measures, the activities of investors of the other Contracting Party which they carry on in connection with investments, such as, in particular, the administration, maintenance, use, enjoyment or disposal of such investments. Paragraph 3 of Article 7 of this Treaty shall not be affected.

(4) The products of investment and reinvestment in case of the reinvestment of their products, shall enjoy the same protection as the investment.

Article 3. National Treatment and Most-favoured-nation Treatment

(1) Each Contracting Party shall accord in its territory to investments of investors of the other Contracting Party who are owners or are subject to their control, treatment no less favourable than that accorded to investments of its own investors or to those of third States.

(2) Each Contracting Party shall accord to investors in its territory of the other contracting party, as regards their activity in connection with investments, treatment no less favourable than that accorded to its own investors or to those of third States. It shall be regarded as less favourable treatment within the meaning of this article:

1. Any difference in treatment in case of sale restrictions on raw materials and auxiliary materials, energy and fuel or of means of production or operation of any kind;

2. Any difference in treatment in case of restrictions on the sale of products within the country and abroad, as well as

3. Any other measures having a similar effect.

The measures taken for reasons of public order and security shall not be regarded as less favourable treatment within the meaning of this Article.

(3) The treatment granted under the present article shall not extend to the privileges granted by either Contracting Party to investors of third States by virtue of this membership or association, to any existing or future economic union, customs union, common market or a free trade area.

(4) The treatment granted under the present Article shall not extend to advantages accorded by a Contracting Party to investors of third States by virtue of a convention for the avoidance of double taxation in respect of taxes on income and on capital or any other agreement in the area of taxation.

(5) This Article shall oblige any Contracting Party to extend to resident investors in the territory of the other Contracting Party the benefit of the advantages, tax exemptions and reductions which, in accordance with its tax legislation were accorded to resident investors in its own territory.

(6) The Contracting Parties shall afford sympathetic consideration, within the framework of their national legislation, to the applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to the relevant workers from one of the Contracting Parties who wish, in connection with an investment, enter into the territory of the other Contracting Party and stay in order to engage in a remunerated activity. Where necessary, applications for work permits shall also be considered sympathetically.

(7) Notwithstanding any bilateral or plurilateral agreements which are binding upon both Contracting Parties, investors of the Contracting Parties may choose one means of transport for the international carriage of persons or property direct investment in connection with an investment within the meaning of this Treaty. In this regard, transport undertakings of the Contracting Parties shall not be subject to discriminatory treatment.

Article 4. Compensation for Expropriation

(1) Investments of investors of either Contracting Party shall enjoy in the territory of the other Contracting Party full protection and security.

(2) Investments of investors of one Contracting Party shall not be subject in the territory of the other Contracting Party, directly or indirectly, to expropriation, nationalization or other measures which are equivalent to expropriation or nationalisation, except for reasons of public purpose and against compensation. The compensation shall correspond to the market value of the expropriated investment immediately before the date of expropriation, nationalization or any other measures, actual or imminent, was made public. Compensation shall be paid without delay and include, until the date of payment, interests calculated at the usual banking rate; it shall be effectively realizable and freely transferable. At the latest by the time of nationalization or expropriation, of the execution of the other measure, adequate arrangements must be made for the determination and payment of the compensation. The legality of expropriation, nationalization or other measures and the amount of compensation shall be verified by legal proceedings.

(3) Investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, a state of national emergency or riot in the territory of the other Contracting Party, shall be accorded by the latter, as regards restitution, indemnities, compensation or other benefits, a treatment which is no less favourable than that accorded to its own investors. Such payments shall be freely transferable.

(4) With respect to the matters governed by the provisions of this article, investors of one Contracting Party shall enjoy in the territory of the other of the most-favoured-nation treatment.

Article 5. Free Transfer

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with an investment, including:

1. Capital and additional amounts intended to increase or maintain the investment;

2. Products;

3. Payments for the repayment of loans;

4. Proceeds from the liquidation or partial or total disposal of the investment;

5. The compensation referred to in article 4 of this Treaty.

(2) The transfers referred to in paragraphs 2 and 3 of article 4 of this Article or article 6 of this Treaty shall be made without delay at the market on the date of transfer. It shall be considered to have been made without delay any transfer which normally takes place within the period necessary for the observance of transfer formalities. The period shall begin on the date of the submission of the application thereof, in the event that such application is necessary, or the date of the notification of the transfer and shall in no case exceed two months.

(3) If the market rate referred to in Paragraph 2 cannot be determined, the rate applicable shall be cross the rate of exchange rate applied by the International Monetary Fund on the date of payment for conversions of the currencies in Special Drawing Rights.

(4) The rights granted under this article shall not prevent any of the Contracting Parties to fulfil in good faith the obligations deriving from its membership to an economic and monetary union.

Article 6. Subrogation

If one of the Contracting Parties, by virtue of a guarantee given in respect of an investment in the territory of the other Contracting Party makes payment to its own investors, the other Contracting Party, without prejudice to the rights of the first Contracting Party under Article 8 of this Treaty, shall recognize the transmission by virtue of the law or contract, of any rights or claims from such investors to the first Contracting Party. In addition, the other Contracting Party shall recognize the subrogation in favour of the first Contracting Party in all those rights and claims (transmitted claims) that the first Contracting Party shall be permitted to engage in the same measure as Its predecessor. As far as transfer payments under the transmitted claims, the provisions Paragraphs 2 and 3 of Article 4 and article 5 of this Treaty shall apply mutatis mutandis.

Article 7. Other Provisions

(1) If it results from the legislation of a Contracting Party or from obligations under international law, if they currently exist or will be established in the future between the Contracting Parties outside this Treaty, a regulation takes precedence over this Treaty to the extent that it is more favourable.

(2) Each Contracting Party shall comply with any other obligation which has assumed with regard to investments of investors in its territory of the other Contracting Party.

(3) With regard to the taxation of income and wealth, agreements in force between the Federal Republic of Germany and the Republic of the Congo for the avoidance of double taxation in respect of taxes on income and on capital shall be applied.

(4) Nothing in this Treaty shall affect what is provided for in international treaties on the rights of intellectual and industrial property in force at the time of signature of this Treaty.

Article 8. Settlement of Disputes between the Contracting Parties

(1) Disputes between the contracting parties relating to the interpretation or application of this agreement should, as far as possible, be settled by the Governments of the two Contracting Parties.

(2) If a dispute cannot be settled in this way, it shall be submitted to an arbitral tribunal, at the request of either of the Contracting Parties.

(3) The arbitral tribunal shall be constituted ad hoc; each Contracting Party shall appoint one member and these two members shall agree to select as President a national of a third State who shall be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months and the Chairman within three months after the date on which either Contracting Party has notified the other that it intends to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph 3 above have not been observed and in the absence of any other agreement, either Contracting Party may 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 to perform this task, the Vice-President should make the necessary appointments. If the Vice-President is also a national of either Contracting Party or if he is also prevented to perform this task, the member of the Court next in seniority who is not a national of either Contracting Party should make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. These decisions shall be binding. Each Contracting Party shall bear the costs of its own arbitrator and its representation in the proceedings before the arbitral tribunal; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The arbitral tribunal may fix a different regulation concerning costs. Otherwise, the arbitral tribunal shall draw up its own rules of procedure.

Article 9. Settlement of Disputes between a Contracting Party and an Investor of Another Contracting Party

(1) Investment and disputes which may arise between one of the Contracting Parties and an investor of the other Contracting Party should, as far as possible, be settled amicably between the parties to the dispute. For the purpose of encouraging an amicable settlement, the parties to the dispute shall also be given an opportunity to initiate, by mutual agreement, conciliation proceedings in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 18 March 1965.

(2) If the dispute cannot be settled within six months from the date on which either party to the dispute has been raised, it shall be submitted for arbitration at the request of the investor of the other Contracting Party. Hereby, both Contracting Parties declare that they shall accord full and irrevocably consent that the dispute shall be submitted, at the choice of the investor:

1. To an arbitration under the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID), provided that both parties are Contracting Parties to this Convention; or

2. if the personal and objective conditions do not allow recourse to the procedure provided for in number 1 above, to an arbitration under the International Centre for Settlement of Investment Disputes under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID), on the basis of the rules of the "Additional Facility for the administration of proceedings by the Secretariat of the Centre", provided that at least one of the Contracting Parties is a party to the Convention referred to in No 1, or

3. To a sole arbitrator or an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on United Nations Commission on International Trade Law (UNCITRAL) applicable at the time of the opening of the procedure, or

4. To an arbitral tribunal established under the Arbitration Rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or

5. To any other dispute settlement agreement concluded between the parties to the dispute.

(3) The arbitral award shall be binding and may not be the subject of complaints or remedies other than those provided for by the Convention or the applicable Arbitration Rules which are the basis of the arbitration procedure chosen by the investor. The arbitral award shall be executed by the Contracting Parties as a national judgment having the force of res judicata.

(4) At the request of either party to the dispute, the arbitration proceedings under this article shall be made within a State that is a party to the United Nations Convention on 10 June 1958 for the Recognition and Enforcement of Foreign Arbitral Awards.

(5) During arbitration proceedings or of the execution of an arbitral award, the Contracting Party party shall raise no exception to the dispute based on the fact that the investor of the other Contracting Party has been partially or fully compensated by insurance.

Article 10. Scope of Application

This Treaty shall also apply to investments by investors of either Contracting Party, in accordance with the legislation of one Contracting Party effected within the territory of that Party prior to the entry into force of this Treaty.

This Treaty shall not apply to claims or disputes in connection with investments which have been submitted to arbitration or judicial proceedings before its entry into force. These disputes and claims will continue to be treated in accordance with the provisions of the Treaty of 13 September 1965 between the Federal Republic of Germany and the Republic of the Congo concerning the promotion and reciprocal protection of investments.

Article 11. Relations between the Contracting Parties

The application of this treaty does not depend on the existence of diplomatic or consular relations between the two Contracting Parties.

Article 12. Registration

Immediately after the entry into force of this Treaty, the Contracting Party that has signed will ensure the registration of the

Treaty with the United Nations Secretariat pursuant to Article 102 of the Charter of the United Nations. As soon as the United Nations Secretariat confirmed registration, the other Contracting Party shall be informed by the communication of registration number.

Article 13. Entry Into Force, Duration and Termination

(1) This Treaty shall be ratified; the exchange of instruments of ratification will take place as soon as possible.

(2) This Treaty shall enter into force on the first day of the second month following the exchange of instruments of ratification. It shall remain in force for a period of ten years and thereafter shall be extended for an indefinite period unless one of the Contracting Parties denounces it in writing through diplomatic channels by giving notice of twelve (12) months before its expiration. At the end of the period of ten years, this treaty may be denounced at any time with 12 months notice.

(3) In respect of investments made prior to the date of termination of this Agreement, the provisions of articles 1 to 12 shall continue to apply for a period of twenty years from that date.

(4) Upon the entry into force of this Treaty, the Treaty of 13 September 1965 between the Federal Republic of Germany and the Republic of the Congo concerning the Reciprocal Promotion and Protection of Investments shall cease to have effect, without prejudice to the provisions of article 10 of this Treaty.

Done at Berlin, on 22 November 2010, in two copies in the German and French languages, both texts being equally authentic.

For the Republic of the Congo

For the Federal Republic of Germany