

AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF MOROCCO AND THE GOVERNMENT OF THE REPUBLIC OF THE CONGO ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

THE GOVERNMENT OF THE KINGDOM OF MOROCCO

and

THE GOVERNMENT OF THE REPUBLIC OF CONGO, hereinafter referred to as the "Contracting Parties";

DESIRING to strengthen their economic cooperation by creating favourable conditions for the realisation of investments by investors from one of the Contracting Parties in the territory of the other Contracting Party;

CONSIDERING the beneficial influence which this Agreement may have in improving business contacts and strengthening confidence in the field of investment ;

RECOGNIZING the need to encourage and protect foreign investment with a view to promoting the economic prosperity of both Contracting Parties ;

CONVINCED that the objectives of this Agreement must be achieved without prejudice to the rights of the Contracting Parties to regulate in the public interest and without undermining measures to promote sustainable development and inclusive growth ;

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

For the purposes of this Agreement :

1. "Investment" means an enterprise constituted, organized or operated in good faith by an investor of a Party in the territory of the other Party in accordance with its laws and regulations and which contributes to the sustainable development of the latter Party and has the characteristics of an investment such as the commitment of capital or other resources, the expectation of gain or profit, the taking of risk and a certain duration. An enterprise has the following assets:

(a) movable and immovable property, as well as all property rights such as mortgages, pledges, guarantees, or any other similar right in accordance with the laws;

b) shares, stocks, and all other forms of participation in the capital of enterprises;

c) obligations;

d) monetary claims or any other claim having an economic value directly related to an investment,

For the purposes of this Agreement and for greater certainty, investment does not include :

(i) debt securities issued by a Contracting Party or lent to a Contracting Party or to a public undertaking ;

(ii) portfolio investments ;

(iii) debt claims with a maturity of less than three years ;

(iv) bank letters of credit ;

(v) monetary claims arising solely from commercial contracts for the sale of goods and services ;

(vi) the extension of credit relating to a commercial transaction, such as trade finance;

(e) intellectual property rights, as defined in Multilateral Agreements concluded under the auspices of the World Intellectual Property Organization, and to which both Contracting Parties are Parties, including copyrights, trademarks, franchises, industrial designs, patents, technical processes, trade names and any other industrial property rights;

(f) concessions under public law granted by law or by contract, including concessions for the purpose of exploring, cultivating, extracting or exploiting natural resources located in the territorial areas under the jurisdiction of the Contracting Party concerned.

No change in the legal form in which the assets and capital have been invested or reinvested shall affect their character as investments, provided that such change does not conflict with the provisions of this Agreement and with the laws and regulations in force in the Contracting Party in whose territory the investment is made.

Such investments shall be made in accordance with the laws and regulations in force of the Contracting Party in whose territory the investment is made.

2. The term "investor" means any natural or legal person of a Contracting Party which invests in the territory of the other Contracting Party :

(a) The term "natural person" means a person having the nationality of a Contracting Party in accordance with its laws; provided, however, that a natural person who has dual nationality shall be deemed to be exclusively a citizen of the State whose nationality is dominant and effective;

(b) the term "legal person" means any entity which is established or constituted in accordance with the laws and regulations of a Contracting Party, carries on an economic activity within the scope of this Agreement and is effectively controlled, directly or indirectly, by nationals of that Contracting Party. For greater certainty, a legal person which has its registered office in the territory of a Contracting Party, its activities must have a real and continuous link with the economy of that Contracting Party.

A Contracting Party may refuse to grant the benefits of this Agreement to an investment which is owned or controlled by persons having the nationality of a State which has no diplomatic relations with that Contracting Party in whose territory the investment is made.

3. The term "income" refers to the amounts earned on an investment, including, but not limited to, profits, interest, dividends and license fees.

4, the term "territory" means :

(a) for the Kingdom of Morocco: the territory of the Kingdom of Morocco, including any maritime area beyond the territorial waters of the Kingdom of Morocco which has been or may hereafter be designated by the legislation of the Kingdom of Morocco, in accordance with its domestic law, as an area within which the rights of the Kingdom of Morocco with respect to the seabed and subsoil and natural resources may be exercised in accordance with the United Nations Convention on the Law of the Sea.

b) for the Republic of the Congo: the territory means the land territory, internal waters and territorial waters as well as the exclusive economic zone and the continental shelf extending beyond the limit of its territorial waters and over which the Republic of the Congo exercises or may exercise, in accordance with international law, sovereign rights and jurisdiction,

5. "Freely convertible currency" means the currency which is widely used to make payments for international transactions and widely traded in the principal international exchange markets.

Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party who make investments in its territory and shall admit such investments in accordance with its laws and regulations.

The extension, modification or transformation of an initial investment made in accordance with the laws and regulations in force in the host country shall be regarded as a new investment within the meaning of this Agreement.

2. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment by the latter in accordance with international law and the provisions of this Agreement and shall enjoy full protection and security.

Neither Contracting Party shall hinder by unjustified, arbitrary, abusive or discriminatory measures the management, maintenance, use, enjoyment or disposal in its territory of investments made by investors of the other Contracting Party.

The income from the investment, if reinvested in accordance with the laws and regulations of the Contracting Party in whose territory the investment is located, shall enjoy the same protection as the initial investment.

3. Nothing in this Agreement shall be construed so as to prevent a Contracting Party from taking measures which it considers necessary for reasons of security or for the maintenance of public order or the protection of public health, financial stability or the environment, provided that such measures are not applied in a discriminatory, abusive or unjustified manner.

Article 3. Treatment of Investments

1. Each Contracting Party shall accord in its territory to investments of the other Contracting Party treatment no less favourable than that which it accords, in like circumstances, to investments of its own investors or to investments of investors of the most-favoured-nation, whichever treatment is the most favourable to the investor concerned.

Each Contracting Party shall accord in its territory to investors of the other Contracting Party, in respect of activities related to their investments, treatment no less favourable than that which it accords in like circumstances to its own investors or to investors of the most-favoured-nation, whichever is the more favourable to the investor concerned.

2. Notwithstanding paragraph 1 above, most-favoured-nation treatment shall not apply with respect to the right of an investor to submit a dispute arising under this Agreement to any dispute settlement procedure other than that provided for in this Agreement.

3. The most-favoured-nation treatment referred to in paragraph (1) above shall not apply to preferences and advantages which a Contracting Party accords to investors of a third country by virtue of its existing or future participation in or association with a free trade area, an economic, monetary or customs union, a common market or other forms of regional economic organization or similar international agreement or under a convention for the avoidance of double taxation for tax purposes or any other tax convention.

Article 4. Expropriation and Compensation

1. Measures of nationalisation, expropriation or any other measure having the effect of dispossession (hereinafter referred to as expropriation) which may be taken by the authorities of one of the Contracting Parties against investments made by investors from the other Contracting Party shall not be discriminatory or motivated by reasons other than those of public interest. Expropriation measures must be carried out in accordance with the legal procedure.

2. The Contracting Party which has taken such measures shall, without undue delay, pay the rightful owner compensation in an amount corresponding to the fair market value of the expropriated investment on the day before the expropriation measures are taken or made public, whichever occurs first.

3. Arrangements for the determination and payment of compensation shall be made in a prompt, adequate and effective manner not later than at the time of expropriation. In the event of late payment, the compensation shall bear interest at market rates from the date on which it is due until the date of payment. The compensation shall be effectively realizable and freely transferable and in freely convertible currency.

4. The expropriated investor shall have the right, under the laws and regulations of the expropriating Contracting Party, to a prompt review of his case by the courts or any other competent authority of that Contracting Party, including the evaluation of the investment and the payment of compensation, in accordance with the principles set forth in this Article.

Article 5. Compensation for Losses

1. Investors of one of the Contracting Parties whose investments in the territory of the other Contracting Party suffer damage or loss as a result of war or any other armed conflict, revolution, state of national emergency, revolt, insurrection or any other similar event, shall be accorded by the latter Party non-discriminatory treatment at least equal to that accorded to its own investors or to investors of the most favoured nation in respect of restitution, compensation, indemnification or other relief, whichever is the more favourable. The corresponding payments shall be transferable without undue delay, in freely convertible currency.

2. Without prejudice to the provisions of paragraph 1 of this Article, investors of a Contracting Party, in one of the situations mentioned in that paragraph, who suffer losses in the territory of the other Contracting Party as a result of :

(a) the requisition of their property by the authorities of the latter Contracting Party,

(b) the destruction of their property by the authorities of the latter Contracting Party, without such destruction being caused by combat action or required by the necessity of the situation, shall receive fair and adequate compensation for the losses incurred during the requisition or resulting from the destruction of their property. Such payments shall be freely transferable without undue delay in freely convertible currency.

Article 6. Transfers

1. Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall guarantee to such investors, after the fulfilment of tax obligations, the free transfer in convertible currency and without undue delay of payments relating to such investments, and in particular :

(a) the initial capital or additional amounts to maintain or increase the investment;

(b) profits, dividends, interest, license fees and other current income;

(b) profits, dividends, interest, licence fees and other current income; and (c) sums required to repay loans relating to the investment;

(d) proceeds from the sale or winding-up of all or part of the investment;

(e) compensation due under Articles 4 and 5;

(f) salaries and other remuneration due to nationals of a Contracting Party who have been authorised to work in the territory of the other Contracting Party in respect of an investment;

(g) payments arising from a dispute settlement in accordance with Article 9.

2. The transfers referred to in paragraph (1) above shall be made at the exchange rate applicable on the date of the transfer and in accordance with the exchange regulations in force in the territory of the Contracting Party where the investment was made.

3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay or prevent a transfer, through the equitable, non-discriminatory and good faith application of measures ensuring investors' compliance with the host Contracting Party's national legislation and relating to

(a) Payment of fees and charges ;

(b) Bankruptcy, insolvency or other judicial proceedings to protect the rights of creditors ;

(c) Criminal or penal offences; and

(d) ensuring compliance with orders or judgments relating to court proceedings.

4. Each Contracting Party may, on a non-discriminatory basis, adopt or maintain measures concerning the free transfer of capital:

(a) where its balance of payments is in serious financial difficulties or is threatened with serious financial difficulties;

(b) in the case of exceptional circumstances in which capital movements cause or threaten to cause serious difficulties for macro-economic management, in particular monetary and exchange rate policies;

5. The measures referred to in paragraph 3 of this Article shall :

(a) not exceed those necessary to deal with the circumstances set out in paragraph 3 of this Article ;

(b) be applied for a limited period of time and be eliminated as soon as conditions permit;

(c) be communicated immediately to the other Contracting Party.

6. The guarantees provided for in this Article shall be at least equal to those granted to most-favoured-nation investors in similar situations.

Article 7. Subrogation

1. If a Contracting Party or the body designated by it (hereinafter referred to as "the Insurer") makes a payment to its own investors under a guarantee or contract of insurance against non-commercial risks in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the subrogation of the Insurer in all rights and claims arising out of such investment, and shall recognize that the Insurer is entitled to exercise such rights and to assert claims to the same extent as the original investor.
2. Such subrogation shall enable the insurer to be the direct beneficiary of any payment for indemnification or other compensation to which the investor may be entitled.
3. Any dispute between a Contracting Party and the insurer of an investment of the other Contracting Party shall be settled in accordance with the provisions of Article 9 of this Agreement.

Article 8. Applicable Rules

Where a matter relating to investments is governed both by this Agreement and by the national legislation of one of the Contracting Parties, investors of the other Contracting Party may avail themselves of the provisions which are most favourable to them.

Article 9. Settlement of Investment Disputes

1. Any investment dispute between an investor of a Contracting Party and the other Contracting Party concerning an obligation of that Contracting Party under this Agreement shall be notified in writing to the Contracting Party in whose territory the investment is made. The dispute shall be settled, as far as possible, amicably by consultations and negotiations between the parties to the dispute.
 2. If no solution has been found within six (6) months of the date of the request for settlement, the dispute shall be submitted, at the choice of the investor, to the Contracting Party in whose territory the investment is made,
 - (a) the competent court of the Contracting Party in whose territory the investment was made;
 - (b) international arbitration, under the conditions described in paragraph (3) below;
 - (c) if the investor opts for resolution of the dispute in the national courts of the Party where the investment is located, and if no decision is rendered within twelve (12) months, the investor may withdraw from the national proceeding and submit the dispute to one of the international arbitration procedures provided for above, while notifying the national court of such decision.
 3. In case of recourse to international arbitration, the dispute may be submitted to one of the arbitration bodies designated below, at the choice of the investor:
 - (a) the International Centre for Settlement of Investment Disputes (I.C.S.I.D.), established by the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", opened for signature in Washington, D.C., on 18 March 1965; or
 - (b) has an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
- In the event that the investor elects to submit the dispute to arbitration in accordance with subparagraphs (a) and (b) of this paragraph, such election shall be irrevocable for the investor.
4. No Contracting Party, party to a dispute, may object at any stage of the arbitration proceedings or the enforcement of an arbitral award on the ground that the investor, the adverse party to the dispute, has received compensation covering all or part of its losses under an insurance policy.
 5. The arbitral tribunal shall decide on the basis of the national law of the Contracting Party, party to the dispute, in whose territory the investment is located, including rules relating to conflict of laws, the provisions of this Agreement, and the principles of international law.
 6. Arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to enforce such awards in accordance with its national law.

Article 10. Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through diplomatic channels.

Failing this, the dispute shall be referred to an ad hoc Joint Committee composed of the representatives of the Contracting Parties, which shall meet without delay at the request of the Contracting Party which has acted with the greatest diligence.

2. If the ad hoc Joint Committee cannot settle the dispute within six (6) months of the start of negotiations, it shall be submitted to an arbitration tribunal at the request of one of the Contracting Parties.

3. The said tribunal shall be constituted as follows: each Contracting Party shall appoint one arbitrator, and the two arbitrators shall together appoint a third arbitrator, who shall be a national of a third State, as Chairman of the tribunal.

The arbitrators shall be appointed within two (02) months, the President within three (03) months from the date on which one of the Contracting Parties has notified the other Contracting Party of its intention to submit the dispute to an arbitration tribunal.

If the time limits laid down in paragraph (3) above have not been observed, either Contracting Party shall invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice possesses the nationality of one of the Contracting Parties, or if he is prevented from holding that office, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President is a national of one of the Contracting Parties or if he is prevented from holding office, the senior member of the International Court of Justice who is not a national of any of the Contracting Parties shall be invited to make the necessary appointments.

5. The arbitral tribunal shall rule on the basis of the provisions of this Agreement and the rules and principles of International Law. The decision of the tribunal shall be adopted by a simple majority of votes. It shall be final and binding on the Contracting Parties. Each Contracting Party shall implement this decision in accordance with its laws and regulations.

6. The Tribunal shall lay down its own rules of procedure.

7. Each Contracting Party shall bear the costs of its arbitrator and of his representation in the arbitration proceedings. The costs relating to the Chairman and other costs shall be borne equally by the Contracting Parties.

Article 11. Consultations

Each Contracting Party shall, at the request of the other Contracting Party, promptly agree to hold consultations concerning the interpretation or application of this Agreement.

Article 12. Application

This Agreement shall apply to investments made before and after its entry into force by investors of one of the Contracting Parties in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. However, this Agreement shall not apply to disputes which may arise before its entry into force.

Article 13. Entry Into Force, Validity and Expiry

1. The present Agreement shall be subject to ratification and shall enter into force 30 days after the date of receipt of the last of the two notifications relating to the completion by the two Contracting Parties of the constitutional procedures in their respective countries.

It shall remain in force for a period of five (05) years. Unless one of the Contracting Parties denounces it at least six (06) months before the expiry of its period of validity, it shall be tacitly renewed for a further period of five (05) years on each occasion, each Contracting Party reserving the right to denounce it by written notification at least six (06) months before the date of expiry of the current period of validity.

2. This Agreement may be amended by mutual consent of both Contracting Parties. If such consent is not given, the Contracting Party which has requested the amendment shall have the right to denounce this Agreement unilaterally. In this case, the Agreement shall be considered terminated. Amendments to this Agreement shall enter into force in accordance with the procedure required for the entry into force of this Agreement provided for in paragraph 1 of this Article.

3. Investments made prior to the date of expiry of this Agreement shall remain subject to it for a period of five (05) years from the date of such expiry.

IN WITNESS WHEREOF, the undersigned representatives, being duly authorized by their respective Governments, have signed this Agreement.

Done at Brazzaville on 30 April 2018, in two originals, in the Arabic and French languages, both texts being authentic.

For the Government of the Kingdom of Morocco

Mr Mohamed BOUSAID

Minister for the Economy and Finance

For the Government of the Republic of the Congo

Jean-Claude GAKOSSO

Minister of Foreign Affairs, Cooperation and Congolese Abroad