Investments in Dr Congo, Challenges and Prospects

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Abstract

This study on investments in the DRC analyzed the legal framework for investments in the country, the impact of investment reforms since the adoption of the investment code, and the various challenges to be met if investment is to become a real driver of development in the country. The study highlighted the need for appropriate measures to improve the business climate in DR Congo. These involve strengthening administrative and judicial institutions, while taking into account the establishment of a genuine rule of law where anti-values are banished.

Introduction

The advent of globalisation has encouraged the integration of economies. What's more, the distances that once paralysed trade between countries are increasingly being overcome. New ways of financing growth have emerged with the expansion of international financial flows. Today, all developing countries are competing fiercely to attract foreign direct investment (FDI)[1] and the Democratic Republic of Congo is no exception.

The Democratic Republic of Congo (DRC) has gone through a difficult period, characterised by multiple endogenous shocks over the last three decades (wars, armed and ethnic conflicts, political instability)[2] , and is now in desperate need of investment to boost its prosperity and development. Faced with the problem of financing its economic activities from insufficient domestic resources, the country is turning to Foreign Direct Investment (FDI) as a means of underpinning its development and pulling its economy out of the vicious circle of poverty.

It should be remembered that investment is the factor par excellence of economic growth and development, which consists of an increase in economic magnitudes. Economic

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1 *NTANGA NTITA J. and others*, Investissements directs étrangers et croissance économique en république démocratique du congo (RDC), MPRA, 2019, p.2 online at https://mpra.ub.uni-muenchen.de/92910/ consulted on 25 June 2024.

2 The DRC has just emerged from a series of two wars, known as the war of liberation from 26 September 1996 to 17 May 1997 and the war of aggression from 2 August 1998 to 15 May 2002, with the conclusion of the inclusive Global Agreement signed in April 2002 in Sun City, South Africa. See *MUKONDE MUSULAY P,* Droit des affaires en Afrique subsaharienne et économie planétaire, Geneva, Globethics.net- African Law Series, 2015, p.75.

growth itself presupposes major structural changes and corresponding major changes in the country's institutional and social conditions.[3] The DRC has thus embarked on a series of institutional and legal reforms to improve its attractiveness to foreign investors, since foreign direct investment accounts for the bulk of investment in projects approved under the Investment Code.[4]

While the effect of investment is generally considered to be positive on the growth of host countries, particularly through induced technology transfers and job creation, it is more debated and ambiguous on international trade, community development and the environment. It is therefore important to take all these parameters into account in order to form an objective view of investment in the DRC.

This study will analyse the investment context in the DRC since the adoption of the investment code (I), as well as the various challenges to be met if investment is to be a real driver of development in the country (II).

A. Investment Context in the DRC:

Synergy between investment and entrepreneurship is the driving force behind rapid and sustainable economic growth. They lead to an increase in productivity, which in turn encourages new investment. It is this virtuous circle that explains Helmut Schmidt's famous phrase: "Today's investments are tomorrow's profits and the day after tomorrow's jobs". There can be no viable economy without real investment in development.[5]

The DRC has adopted an investment code[6] , the main aim of which is to increase the volume of direct national and foreign investment. It is important to understand the background to this legal reform and its impact on the country's economy since then. With this in mind, we will first analyse a brief history of investment in the DRC (A) before outlining the contours of Congolese investment legislation (B) and finally analysing the impact of investment on the country's economy since the latest reform (C).

I. History of investment and the Congolese economy since independence

Since its independence on 30 June 1960, the DR Congo has faced recurrent political crises, one of the fundamental causes of which was the contestation of the legitimacy of the

3 *J.M. KUMBU Ki NGIMBI,* Législation en matière économique, Kinshasa, I.A.D.H.D., 2023, p. 92.

4 Indeed, the recent report by the National Agency for Investment Promotion (ANAPI) indicates that of the 13.6 billion volume resulting from investment decisions for the period 2019 - 2023, Foreign Direct Investment (FDI) accounted for 72.9% compared with 27.1% for investments by nationals. FDI came mainly from China, the UK, Egypt, Mauritius and India.

5 *ANAPI*, SYNTHÈSE DU RAPPORT SUR LES STATISTIQUES DES PROJETS AGRÉÉS AU CODE DES INVESTISSEMENTS 2019-2023, p.2 online at https://investindrc.cd/fr/IMG/pdf/anapi_synthese_du_rapport_sur_les_statistiques_des_projets_agrees_au_code_des_investissements_2019_-_2023_063257.pdf consulted on 27 June 2024.

6 This is Law No. 004/2002 of 21 February 2002 on the Investment Code.

institutions and their leaders. This contestation took on particular significance with the wars that tore the country apart from 1996 to 2003. With a view to finding appropriate solutions to this chronic crisis, the Constitution of 18 February 2006 was promulgated following the global and inclusive agreement signed in Pretoria on 17 December 2002.[7]

The major developments in the Congolese economy can be broadly divided into four periods:

- **1959 to 1973**: This period was characterised by moderate growth and inflation. The economic recovery efforts undertaken between the end of 1967 and the end of 1973 boosted economic growth. They coincided with a favourable international environment driven by the rise in copper prices, which led to a surge in investment in the sector. These two factors contributed to the positive results recorded during this period, characterised by real GDP growth of 2.7% and an average annual rise in the general price level of 27%.
- **1974-1996**: This period was characterised by a steady decline in the Zairian economy and in the population's standard of living. Internal imbalances were caused by the deterioration of basic infrastructure, the obsolescence of production equipment and machinery, a lack of capital and the weakness of both the institutional apparatus and the human resources needed for the administrative and financial management of the country. Certain economic policy decisions, in particular over-ambitious projects and Zairianisation (nationalisation) measures, exacerbated these imbalances.[8] The period also saw the culmination of institutional instability (more than 12 governments in the space of 10 years) and, above all, social and economic unrest, notably hyperinflation, the looting of production and marketing facilities in 1991 and 1993, and the breakdown in bilateral and multilateral cooperation.
- **After May 1997-2001**: This was the period of deflation and hyperinflation. In May 1997, the Alliance des Forces Démocratiques de Libération, led by President Laurent Désiré Kabila, seized power and ousted the regime of Marshal Mobutu. The economy was characterised by deflation during this period.

  In August 1998, the Congolese economy suffered another drastic fall, characterised by hyperinflation, which lasted until the mid-2000s, following the outbreak of the war imposed on the DRC by its neighbours. Throughout this period, the problem of restoring public finances was characterised by failure, and relations with traditional partners such as the World Bank and the International Monetary Fund were conflictual.
- **2002-2019** : Resumption of growth and inflation under control. This period was characterised by the resumption of multilateral and bilateral cooperation, the application of restrictive short-term economic policies and first-generation structural reforms (partner-

7 *ANAPI*, Contexte historique, on https://www.investindrc.cd/fr/Context-historique consulted on 27 June 2024.

8 *F. Goossens*, Rôle des SADA dans la Sécurité Alimentaire de Kinshasa, FAO, 1997, online at https://www.fao.org/4/AA039F/aa039f00.htm#Contents consulted on 29 June 2024.

ship in the mining sector, one-stop shop at the Port of MATADI, implementation of the expenditure chain, etc.).[9]

It should be emphasised that, following the advent of the global health crisis caused by the Covid-19 pandemic, the Congolese economy has been affected in the same way as other countries around the world, and short-term measures are gradually being taken to curb the effects of the crisis and enable businesses to survive.

- **2019-2022**: steady growth. The number of approved projects rose from 62 in 2019 to 116 in 2022, an increase of 87%. Also, during this period, projects by companies approved under the Investment Code injected around USD 4.6 billion into the Congolese economy and created 17,524 direct jobs for nationals.[10] However, efforts must continue to create an increasingly favourable environment for investment, in order to further stimulate economic growth and create more jobs.

II. Congolese investment legislation

Since 2002, the DRC has embarked on a process of economic recovery, following the period of political instability that almost collapsed the country's economy in 1996. In the area of investment, Law No. 004/2002 of 21 February 2002 on the Investment Code was adopted in February 2002. Its purpose is to set out the conditions, advantages and general rules applicable to direct national and foreign investment in the Democratic Republic of Congo.[11]

In order to attract investors, this law established the Agence Nationale pour la Promotion des Investissements (ANAPI)[12] , a public body whose mission is to work to improve the business climate and promote public and private investment in the Democratic Republic of Congo, receiving and analysing investment projects to be approved under the Investment Code, as well as investment projects governed by specific laws, deciding on the approval of those covered by the Investment Code and issuing technical opinions on the others. As part of its remit, ANAPI is required to collect and analyse data on investments made in the country.[13]

This investment code applies to the whole of the D.R. Congo in terms of territory, in terms of national and foreign direct investment, and in terms of time until it is repealed by law. This law institutes a single regime, namely the general regime, and includes special

9 *ANAPI*, Situation économique et sociale de la RDC, online at https://www.investindrc.cd/en/Situation-economique-et-sociale-de-la-RDC consulted on 27 June 2024.

10 *ANAPI*, SYNTHÈSE DU RAPPORT SUR LES STATISTIQUES DES PROJETS AGRÉÉS AU CODE DES INVESTISSEMENTS 2019-2023, p.3.

11 Article 1 of Law No. 004/2002 of 21 February 2002 on the Investment Code.

12 Article 4 of Law No. 004/2002 of 21 February 2002 on the Investment Code establishes ANAPI and places it under the authority of the Ministry of Planning.

13 *ANAPI*, SYNTHÈSE DU RAPPORT SUR LES STATISTIQUES DES PROJETS AGRÉÉS AU CODE DES INVESTISSEMENTS 2019-2023, p.2.

provisions applicable to public utility investments as well as to small and medium-sized enterprises and small and medium-sized industries. The general regime is the set of incentives contained in the law.

1. Procedure for admission to the Code's general scheme (Articles 5 and 6)

Any Investor wishing to benefit from the advantages provided for by this law must submit an application for approval, in one copy, to the National Agency for Investment Promotion (ANAPI)[14] , which is a single body responsible for receiving, examining and approving investment projects and for promoting investments both within the country and abroad.

Any investor wishing to benefit from the advantages provided for in the code must submit an application for approval, which will be examined by ANAPI's technical department and approved or rejected by the supervisory board of the same body.

Approval of the project is sanctioned by an interministerial order of the said project between the Ministers responsible for Planning and Finance, within a period not exceeding 30 working days from the date of submission of the file. If no response is received by the end of this period, approval is deemed to have been granted. In this case, the competent authorities are required to issue the approval decree within seven clear days, the receipt of submission serving as proof.

In the event of refusal, reasons must be given for the decision and must show that the application does not comply with the conditions required by Article 8 of the Code.

2. Benefits linked to the general regime

Investments approved under the general regime of the code benefit from advantages for a period of 3 years when they are made in economic region A (city of Kinshasa), 4 years in economic region B (Bas Congo, Lubumbashi, Likasi and Kolwezi), 5 years in economic region C made up of the other regions. There are two types of advantage: customs and tax.

a. Customs benefits

Approved companies benefit from total exemption from import duties and taxes, excluding the 5% administrative fee, for machinery, tools and new equipment as well as spare parts from 1ère endowed with no more than 10% of the CIF (Cost, Insurance and Freight) value of the said equipment. Second-hand heavy machinery, ships and aircraft are admitted duty-free.[15]

Exemption from import duties and taxes can only be granted if one of the following conditions is met:

14 Article 5 of Law No. 004/2002 of 21 February 2002 on the Investment Code.

15 Idem, Article 10.

- the goods in question cannot be manufactured in the Democratic Republic of Congo;
- the price of the domestic product, before tax and delivered to the company, is more than 10% higher than the price of the identical imported product.

b. Tax benefits

Profits from approved new investments are fully exempt from professional income tax under Title IV of Ordinance-Law no. 69-009 of 10 February 1969, as amended to date.[16]

Investments in socio-economic infrastructure, such as schools, hospitals, sports facilities and roads, carried out in addition to approved projects are depreciated using the declining balance method.[17]

There is also the exemption from proportional duty provided for in Article 13 of the Decree of 27 February 1887 on commercial companies when setting up and increasing the share capital of Limited Liability Companies (Article 14); the exemption from tax on the surface area of land concessions and built-up properties (Article 15) and many others.

It should also be noted that certain conditions must be met to benefit from the general scheme.

c. Conditions for admission to the general regime

Investors are eligible for the General regime of this law under the following conditions[18] :

- Be an economic entity under Congolese law;
- For a minimum amount equivalent to USD 200,000;
- Undertake to comply with environmental protection and nature conservation regulations;
- Undertake to train national staff in specialised technical functions and in management and responsibility;
- Guarantee a rate of added value equal to or greater than 35%.

3. Special benefits linked to special sectors

Certain sectors receive special treatment in the DRC because of their importance for investment. Each of these sectors has its own investment regime, as well as its own tax and customs regime: mining and hydrocarbons, banking, insurance and reinsurance, the arms industry and security services. For an investment in one of these sectors, the specific tax and customs regimes that apply are defined in the relevant legislation.

Investment agreements relating to hydrocarbons must be approved by an order of the President of the DRC in order to guarantee their validity and effectiveness. This express

16 Article 13 of the Investment Code.

17 Idem, article 14.

18 Idem, article 8.

reference to the investment agreement for the applicable tax and customs regimes means that such an agreement may contain derogations from the general tax and customs regime, and that these derogations prevail in the event of a conflict between the two.[19]

For mining activities, in accordance with Article 219 of the Mining Code, the tax and customs regimes that apply to mining activities in the DRC are those set out in the Mining Code, to the exclusion of any other present or future form of taxation. The holder of a mining right in the DRC is therefore subject to the tax, customs and non-tax revenue regime defined in this Title for all mining activities carried out on national territory.[20]

The Mining Code lists the various taxes, duties and fees, and the Mining Code and various administrative acts determine the applicable rates and fees. The Mining Code does not refer to a tax and/or customs regime defined in a mining agreement.

There is no reference in the Mining Code to a tax and/or customs regime provided for in a mining agreement, which means that, unlike the current Hydrocarbons Code, there is no derogation from the applicable tax and customs regime.

4. Settlement of disputes

Disputes arising from the interpretation or application of the provisions of this Act or the Inter-ministerial Order provided for in Title III of this Act may be referred to arbitration in accordance with the procedure set out in Articles 159 to 174 of the Congolese Code of Civil Procedure.[21]

Any dispute between an investor and the Democratic Republic of Congo relating to an investment contract or agreement (an investment authorisation granted by the competent authority, or any violation of the investor's and/or the investment's rights granted or created by the Investment Code) shall be settled amicably by negotiation.

If the parties fail to reach an amicable settlement of their dispute within a period of 3 months from the first written notification requesting the commencement of such negotiations, the dispute shall be settled, at the request of the injured party, in accordance with an arbitration procedure under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), ratified by the Democratic Republic of the Congo on 29 April 1970.[22]

It is important to remember that the Democratic Republic of Congo joined OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) on 13 July 2012. This modern African business law came into force in the DRC on 12 September 2012. As we all know, the main features of OHADA law are the simplification of business procedures

19 *CLIFFORD CHANCE*, Doing business in the Democratic Republic of Congo, June 2013, p. 7.

20 *G. SAKATA M. TAWAB*, Code minier expliqué: analyse systématique et croisée avec le règlement minier, Louvain-la-Neuve, Academia, 2022, p.269.

21 Article 37 of the Investment Code.

22 Idem, article 38.

and greater legal and judicial certainty for investors thanks to the various mechanisms it provides. Among other things, the DRC recognises arbitration by the Common Court of Justice and Arbitration (CCJA) as an additional means of settling disputes in matters covered by this regional law.

The DRC has carried out a number of legal and institutional reforms to make the country more attractive to foreign direct investment, but there are still a number of challenges to be met in terms of good governance and the social responsibility of companies operating in the country. Investment in the DRC can only truly lead to sustainable development when these challenges are fully met.

B. Investment Challenges and Possible Solutions

I. Challenges related to security and good governance

Good governance is fundamental to boosting investment in the DRC. Alongside this, security (political and legal) are also key factors that can help to sell a good image of the country internationally and reassure investors.

However, administrative red tape and the relatively poor quality of infrastructure are an illustration of the recurring limitations in terms of good governance.[23] There is also a certain lack of transparency in the granting of approvals under the general investment code regime, as well as corruption, which remains the main obstacle to the prosperity of the country's economy.

As far as political security is concerned, it should be noted that the ongoing armed conflicts in the eastern part of the country are weakening the business climate and making the country less attractive to many investors. Legal certainty is limited by the existence of several parallel laws governing the same sector of activity.

In the mining sector, for example, the parallel existence of different types of legal texts governing the environment in the Congo, adopted after the entry into force of the Mining Code, can be observed. This poses significant practical problems, dividing opinion as to the solution to be envisaged for their coordination and application. This is particularly the case with the 2011 Environment Act, which deals with the issue of environmental impact assessment in parallel with the Mining Code.

This situation has given rise to confusion in practice: mining operators, basing themselves on the principle of restricted jurisdiction enshrined in Article 16 of the Mining Code, maintain that only the Mining Environment Protection Directorate (DPEM) within the Ministry of Mines is authorised to oversee the environmental assessment of their activities,

23 African Development Bank Group, *Private Investment Environment in the Democratic Republic of Congo*, 2012, p.11 online at https://www.afdb.org/sites/default/files/documents/projects-and-operations/republique_democratique_du_congo_-_environnement_de_linvestissement_prive.pdf consulted on 29 June 2024.

and not the departments of the Ministry with responsibility for the environment[24] , even though they are authorised to do so by Law no. 11/009 of 9 July 2011 on the fundamental principles relating to environmental protection. In addition to these multiple problems, there are also the challenges associated with the social responsibility of companies operating in the country.

II. Corporate Social Responsibility challenges

It should be remembered that the investment code includes among the conditions to be met in order to benefit from the general regime, a commitment to comply with regulations on environmental protection and nature conservation. This commitment is set out in a number of texts relating to the investment sector, such as the Mining Code, which is one of the most important legal instruments for investment in the DRC, given that the mining sector alone accounts for the bulk of foreign direct investment in the country.

Looking at this sector, we can see that there are many challenges to be met in terms of social responsibility. The Mining Code stipulates that the holder of mining rights is obliged to contribute to the definition and implementation of socio-economic and industrial development projects for local communities affected by the project's activities, on the basis of specifications for improving the living conditions of these communities.[25] It also stipulates that the licensee will be liable for any direct or indirect contamination of water, soil or the atmosphere that causes damage to humans, fauna or flora.[26]

However, reports from certain NGOs testify to violations of the rights of local communities following certain mining investments, and this under the guilty silence of the government. Many people are being forced to leave their homes and farmland to make way for the expansion of large-scale industrial mining projects.[27]

These evictions are often carried out by mining operators who have little regard for the rights of the populations concerned and just as little respect for national laws designed to limit forced evictions linked to the mining sector. It should also be noted that these same mining projects often have a disastrous impact on water and land, which are polluted as a result of the dumping of toxic waste in the natural environment, as extractive technologies are often polluting.

24 *C. KABEYA KALAMBAY*, L'articulation entre le droit minier et le droit de l'environnement en droit congolais, doctoral thesis in Law, Université Laval, under the supervision of Prof. Christophe Krolik, Québec, 2022, p28. Unpublished.

25 Article 285 sexies of the Mining Code.

26 Article 285 ter of the Mining Code.

27 *AMNESTY INTERNATIONAL*, Powering change or business as usual? Forced evictions at industrial cobalt and copper mines in the Democratic Republic of Congo, 2023, p.6.

C. Prospects for a Healthier Business Climate

Investment in the DRC is a key factor in reviving its economy. Over the past three years, investment trends have been fairly positive, especially in the mining sector, with the exploitation of cobalt, the preferred mineral for supporting the world's energy transition. However, if the DRC is to reap the full benefits of its investments, it needs to adopt a responsible policy capable of creating an investment-friendly environment.

ANAPI, the Government's secular arm for improving the business climate and promoting investment, will in turn have to make additional efforts, within the scope of its prerogatives, to work towards improving the business environment, promoting the country's positive image and promoting investment opportunities to make the Democratic Republic of Congo an attractive place to invest.

As the existing investment legislation is sufficiently extensive to regulate the sector, the government must ensure that standards are applied rigorously and impartially, while also strengthening its judicial system and putting in place new strategies to eradicate corruption and red tape. This will involve specialising judges and other players involved in the out-of-court settlement of disputes (mediators, arbitrators, etc.).

It is important to note that peace and security remain a major asset for improving the business climate in the DRC. Aware of the delays caused by the political instability and repeated wars that have plunged the country into indescribable institutional chaos, the DRC must make a strong commitment to the definitive establishment of lasting peace to guarantee the protection of foreign and national investments. The chapter of seizing power by force of arms must now be buried so that it never resurfaces.

Conclusion

The DRC is a country that remains at the centre of attention in the world in general and in Central Africa in particular, due to its strong geological, human and geographical potential. However, the country has gone through periods of political and institutional instability that have not failed to affect its economy (wars, armed and ethnic conflicts, political instability).

In a bid to catch up and regain the confidence of investors on the international stage, the country has introduced a number of legal and institutional reforms aimed at improving the business climate. These include the promulgation of the Investment Code, the Mining Code and the creation of the National Agency for Investment Promotion (ANAPI).

These numerous reforms have led to changes in the procedure for admission to the general regime, the tax and customs regime for foreign direct investment, dispute settlement methods, etc. However, over time they have been faced with a number of challenges relating to good governance and corporate social responsibility.

Appropriate measures are therefore needed to improve the business climate in DR Congo. These include strengthening administrative and judicial institutions, while taking into account the establishment of a true democracy where wars and other conflicts cannot re-emerge. Finally, the rule of law must be more than just a slogan, but a tangible reality capable of reassuring both domestic and foreign investors that the DRC is their preferred business destination.

Bibliography

A. Legal Instruments

1. Law No. 004/2002 of 21 February 2002 on the Investment Code
2. Law n°007/2002 of 11 July 2002 on the Mining Code as amended and supplemented by Law n°18/001 of 09 March 2018.

B. Books and Articles

1. *KUMBU Ki NGIMBI J-M*, Législation en matière économique, Kinshasa, I.A.D.H.D., 2023
2. *SAKATA M. TAWAB Garry*, Code minier expliqué : analyse systématique et croisée avec le règlement minier, Louvain-la-Neuve, Academia, 2022
3. *KABEYA KALAMBAY Christian*, L'articulation entre le droit minier et le droit de l'environnement en droit congolais*,* doctoral thesis in law, Université Laval, under the supervision of Prof. Christophe Krolik, Quebec, 2022.
4. *MUKONDE MUSULAY P*, Droit des affaires en Afrique subsaharienne et économie planétaire, Geneva, Globethics.net- African Law Series, 2015
5. *NTANGA NTITA J. and others*, Investissements directs étrangers et croissance économique en république démocratique du congo (RDC), MPRA, 2019, p.2 online at https://mpra.ub.uni-muenchen.de/92910/
6. *ANAPI,* Historical background, on https://www.investindrc.cd/fr/Context-historique
7. *ANAPI*, Situation économique et sociale de la RDC, online at https://www.investindrc.cd/en/Situation-economique-et-sociale-de-la-RDC
8. *GOOSSENS Frans*, Rôle des SADA dans la Sécurité Alimentaire de Kinshasa, FAO, 1997, online at https://www.fao.org/4/AA039F/aa039f00.htm#Contents
9. *CLIFFORD CHANCE*, Doing business in the Democratic Republic of Congo, June 2013, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/06/doing_business_in_the_democratic_republic_of_congo.pdf
10. *African Development Bank Group,* Private Investment Environment in the Democratic Republic of Congo, 2012, p.11 https://www.afdb.org/sites/default/files/documents/projects-and-operations/republique_democratique_du_congo_-_environnement_de_linvestissement_prive.pdf

C. Other Documents

1. *ANAPI*, SYNTHÈSE DU RAPPORT SUR LES STATISTIQUES DES PROJETS AGRÉÉS AU CODE DES INVESTISSEMENTS, online at https://investindrc.cd/fr/IMG/pdf/anapi_synthese_du_rapport_sur_les_statistiques_des_projets_agrees_au_code_des_investissements_2019_-_2023_063257.pdf
2. *AMNESTY INTERNATIONAL*, Powering change or business as usual? Forced evictions at industrial cobalt and copper mines in the Democratic Republic of Congo, 2023, p.6.