INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Afriland First Group SA and others

Claimants

and

Democratic Republic of the Congo
Respondent

ICSID Case No. ARB/23/38

DECISION ON THE BIFURCATED ISSUE

Members of the Tribunal
Prof. Juan Fernández-Armesto, President of the Tribunal
Mr. Henri C. Alvarez KC, Arbitrator
Mr. Alexis Mourre, Arbitrator

Secretary of the Tribunal
Dr. Laura Bergamini

Assistant to the Tribunal
Ms. Francisca Seara Cardoso

Date of dispatch to the Parties: 16 July 2025

REPRESENTATION OF THE PARTIES

Representing Afriland First Group SA, Afriland First Bank SA, Joseph Toubi, and Paul Kammogne Fokam:

Ms. Abby Cohen Smutny
Mr. Darryl S. Lew
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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

1997 Constitutional Decree	*Décret-Loi Constitutionnel* No. 0003 of 27 May 1997
2010 Decree	Prime Minister's Decree No. 10/16 of 22 April 2010, cancelling all *contra legem* exemptions and reliefs in tax and customs matters
2012 Decree	Prime Minister's Decree No. 12/046 of 1 November 2012, implementing the Investment Code
ACB	Association of Congolese Banks
Amco Asia	*Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983
ANAPI	*Agence Nationale pour la Promotion des Investissements*
Arbitral Tribunal or **Tribunal**	Arbitral tribunal constituted on 26 January 2024 and composed of Prof. Juan Fernández-Armesto (President), Mr. Henri Alvarez KC and Mr. Alexis Mourre.
Bank	Afriland First Bank Congo Démocratique SA
Banking Law	Law No. 003/2002 of 2 February 2002, relating to the activities and supervision of credit institutions
Bifurcated Issue	Respondent's objection to the Tribunal's jurisdiction related to the validity of the Interministerial Order
C PHB	Claimants' Post Hearing Brief submitted on 22 January 2025
CBC	Central Bank of Congo
Claimant 1 or **Afriland First Group**	Afriland First Group SA, a company incorporated under the laws of Switzerland, which currently holds 77.066% of the Bank

Claimant 2 or **Afriland First Bank**	Afriland First Bank SA, a company incorporated under the laws of Cameroon, which currently holds 12.824% of the Bank
Claimant 3 or **Mr. Toubi**	Mr. Joseph Toubi, a national of Cameroon, who currently owns 1.761% of the Bank
Claimant 4 or **Dr. Fokam**	Dr. Paul Kammogne Fokam, a national of Cameroon, who currently owns 4% of the Bank
Claimants	Afriland First Group SA, Afriland First Bank SA, Mr. Joseph Toubi and Dr. Paul Kammogne Fokam
Counter-Memorial on Jurisdiction	Claimants' Counter-Memorial on Jurisdiction submitted on 14 August 2024
Draft Law	Draft law on incentives for investment in credit institutions and microfinance drafted by the DRC Government which was ultimately abandoned
Feasibility Study	Feasibility study dated January 2005, submitted by the Bank to the CBC
First Session	First session held with the Parties on 27 March 2024 by videoconference
General Regime or *Régime Général*	General regime of the Investment Code, which includes all legal provisions contained in that law
Goffaux ER I	First legal opinion of Prof. Patrick Goffaux
Goffaux ER II	Second legal opinion of Prof. Patrick Goffaux
Goffaux's Answers	Prof. Patrick Goffaux's answers to the Tribunal's questions
Hearing	The hearing on the Bifurcated Issue held through Zoom on 19 and 20 November 2024
ICSID Arbitration Rules	ICSID Arbitration Rules in force as of 1 July 2022

ICSID Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966
ICSID Institution Rules	ICSID Institution Rules in force as of 1 July 2022
ICSID or **Centre**	International Centre for Settlement of Investment Disputes
Interministerial Order or **Order**	Interministerial Order No. 092/CAB/MIN/PLAN/2005 and No. 111 CAB/MIN/FIN/2005 of 18 July 2005, approving the investment project of the company Afriland First Bank Congo Démocratique SA
Investment Code or **Code**	Law No. 004/2002 of 21 February 2002
Investors in Non-Preferential Sectors	Investors in sectors *non prioritaires* established in Article 3 of the Investment Code
Investors of the *Régime Général*	Investors engaging legal activities within the sectors deemed *prioritaires* in the DRC
Investors with Tax and Customs Advantages	Investors who have successfully submitted a *Demande d'Admission* under Article 5 of the Investment Code and obtained tax and customs advantages
Kumbu ER I	First legal opinion of Prof. Jean-Michel Kumbu
Kumbu ER II	Second legal opinion of Prof. Jean-Michel Kumbu
Kumbu's Answers	Prof. Jean-Michel Kumbu's answers to the Tribunal's questions
Lahoud	*Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014
Memorial on Jurisdiction	Respondent's Memorial on Jurisdictional Objection submitted on 3 July 2024
Nkanka WS	Witness statement of Mr. Pascal Nkanka Bokanga dated 18 September 2024

P(p).	Page(s)
Para(s)	Paragraph(s)
Parties	Claimants and Respondent
PO	Procedural Order
R PHB	Respondent's Post Hearing Brief submitted on 22 January 2025
Rejoinder on Jurisdiction	Claimants' Rejoinder on Jurisdiction submitted on 25 October 2024
Reply on Jurisdiction	Respondent's Reply on Jurisdictional Objection submitted on 18 September 2024
Request for Admission or *Demande d' Admission*	Request for admission to the General Regime of the Investment Code as well as several specific advantages, submitted to the ANAPI on 3 February 2005
Request for Bifurcation	Request for Bifurcation submitted by Respondent on 9 May 2024
Respondent or **DRC**	Democratic Republic of the Congo
Restructuring Regime	Decree-Law No. 065 of 4 May 1998
RfA	Request for Arbitration submitted by Claimants against the Democratic Republic of the Congo on 8 August 2023
Société Resort	*Société Resort Company Invest Abidjan, Stanilas Citirici, and Gérard Bot v. Republic of Côte d'Ivoire*, ICSID Case No. ARB/16/11, Decision on Jurisdiction, 1 August 2017
SPP	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992
Tr., Day [x], p. [x], l. [x] ([Speaker(s)])	Hearing transcript in English

Tr.-FR, Day [x], p. [x], l. [x] ([Speaker(s)])	Hearing transcript in French

I. INTRODUCTION

1. On 8 August 2023, the International Centre for Settlement of Investment Disputes ["**ICSID**" or "**Centre**"] received a request for arbitration ["**RfA**"] submitted by Afriland First Group SA, Afriland First Bank SA, Mr. Joseph Toubi, and Dr. Paul Kammogne Fokam ["**Claimants**"], as supplemented by letter of 16 August 2023, against the Democratic Republic of the Congo ["**DRC**" or "**Respondent**"].

2. The RfA was made pursuant to Article 10 of the Interministerial Order No. 092/CAB/MIN/PLAN/2005 and No. 111 CAB/MIN/FIN/2005 of 18 July 2005 approving the investment project of the company Afriland First Bank Congo Démocratique SA ["**Interministerial Order**" or "**Order**"][1] as well as Article 38 of the Law No. 004/2002 of 21 February 2002 ["**Investment Code**" or "**Code**"][2], and pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and the ICSID Institution Rules in force as of 1 July 2022 ["**ICSID Institution Rules**"].

3. On 28 August 2023, the Secretary-General of ICSID registered the RfA, pursuant to Article 36 of the ICSID Convention and ICSID Institution Rules 6 and 7[3].

4. The Tribunal was constituted on 26 January 2024[4]. The Tribunal is composed of three members:

Prof. Juan Fernández-Armesto
President – national of Spain
Appointed by agreement of the Parties on 26 January 2024
Armesto Dispute Resolution
General Pardiñas, 102
28006 Madrid, Spain
Email: jfa@armestodr.com

Mr. Henri C. Alvarez KC
Co-Arbitrator – national of Canada
Appointed by Claimants on 6 November 2023
Vancouver Arbitration Chambers
34424 Rockridge Place
Mission, B.C., V2V 7N3, Canada

[1] **Exhibit C-001-FR**, Interministerial Order No. 092/CAB/MIN/PLAN/2005 and No. 111/CAB/MIN/FIN/2005 Approving the Investment Project Agreement of the Company Afriland First Bank Congo Démocratique "First Bank CD", dated 18 July 2005 ["**Interministerial Order**"].
[2] **Exhibit C-002-FR**, Law No. 004/2002, dated 21 February 2002 ["**Investment Code**"].
[3] ICSID's letter of 28 August 2023.
[4] ICSID's letter of 26 January 2024.

Email: halvarez@alvarezarbitration.com

Mr. Alexis Mourre
Co-Arbitrator – national of France
Appointed by Respondent on 6 November 2023
Mourre Chessa Le Lay Arbitration
52, rue La Boétie 3e étage
75008 Paris, France
Email: amourre@mcl-arbitration.com

1. THE PARTIES

A. Claimants

5. Claimants are shareholders in the company Afriland First Bank Congo Démocratique SA [the "**Bank**"][5], a financial institution operating in the Democratic Republic of the Congo since 2005:

- Afriland First Group SA ["**Afriland First Group**" or "**Claimant 1**"] is a company incorporated under the laws of Switzerland and the major shareholder in a group of financial institutions operating in multiple jurisdictions globally, principally in Africa. Afriland First Group currently owns 77.066% of the Bank[6]. Afriland First Group's business address is:

  7 route des Falaises
  2000 Neuchâtel
  Switzerland

- Afriland First Bank SA ["**Afriland First Bank**" or "**Claimant 2**"] is a company incorporated under the laws of Cameroon, which currently owns 12.824% of the Bank[7]. Afriland First Bank's business address is:

  1063 Place de l'Indépendance
  11834 Yaoundé
  Cameroon

- Mr. Joseph Toubi ["**Mr. Toubi**" or "**Claimant 3**"] is a national of Cameroon and currently owns 1.761% of the Bank[8]. He is the former Chairman of the Board of Directors of the Bank.

[5] The remaining shares of the Bank are owned by Mr. Nsungani N'Landu (0.968%), Mrs. Wivine N'Landu (0.600%), Mr. Louis Handou (0.800%), Mr. Souaïbou Abary (1.032%) and Mr. Patrick Kafindo Zongwe (0.948%); they are not claimants in this arbitration (**Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021).
[6] RfA, para. 6; **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021.
[7] RfA, para. 6; **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021.
[8] RfA, para. 6; **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021.

- Dr. Paul Kammogne Fokam ["**Dr. Fokam**" or "**Claimant 4**"] is a national of Cameroon and currently owns 4% of the Bank[9].

6. Claimants Afriland First Group, Afriland First Bank, Mr. Toubi and Dr. Kammogne shall be jointly referred to as "**Claimants**".

B. Respondent

7. Respondent is the Democratic Republic of the Congo [already referred to as "**DRC**" or "**Respondent**"], a sovereign State.

* * *

8. Claimants and Respondent will be jointly referred to as the "**Parties**". Parties' representatives and their addresses are listed above on page (i).

2. THE DISPUTE

9. The present dispute revolves around Afriland First Bank Congo Démocratique SA's [already referred to as the "Bank"] banking operations in the DRC since 2005.

10. In the present bifurcated phase, the Parties' discussion focuses on a specific jurisdictional question related to the validity of the Interministerial Order. Respondent argues, *inter alia*, that the Tribunal lacks jurisdiction to hear the dispute, because the alleged basis for its jurisdiction – the Interministerial Order – was effective only for a limited period of time and was, in any case, cancelled before this arbitration commenced. Claimants, in turn, contend that the Order was not cancelled and that only the tax and customs benefits granted in such Order were time-limited, but not the guarantees provided therein, including access to international arbitration. Therefore, Claimants aver that Respondent's objection is baseless.

11. In this decision, the Tribunal exclusively addresses the bifurcated issue raised by the Respondent, in line with the Parties' agreement that the Tribunal should focus solely on this matter during this phase of the proceeding.

[9] RfA, para. 6; **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021.

II. PROCEDURAL HISTORY

1. REQUEST FOR ARBITRATION

12. As noted above, on 8 August 2023 the Centre received Claimants' RfA against the DRC, together with Exhibits C-001 through C-015.

13. On 11 August 2023, the Centre requested additional information from Claimants[10]. By letter of 16 August 2023[11], Claimants responded to the questions posed by the Centre.

14. On 28 August 2023, the Secretary-General of ICSID registered the RfA, pursuant to Article 36 of the ICSID Convention and ICSID Institution Rules 6 and 7[12].

2. CONSTITUTION OF THE ARBITRAL TRIBUNAL

15. On 28 August 2023, the Secretary-General of ICSID further invited the Parties to inform the Centre of any agreed provisions as to the number of arbitrators and the method of their appointment and asked the Parties to constitute the Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention[13]. On 27 September 2023, the Centre reminded the Parties of the rules regarding the number of arbitrators and method of their appointment[14].

16. By letter of 6 October 2023, Respondent informed the Centre that the Parties had agreed on a method for constituting the Tribunal[15]. Accordingly, the Tribunal should consist of three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the Parties.

17. On 6 November 2023, Claimants appointed Mr. Henri C. Alvarez KC, a national of Canada, as an arbitrator in this case[16]. On 8 November 2023, the Centre informed the Parties that Mr. Alvarez accepted his appointment and transmitted them his declaration of independence and impartiality and his *curriculum vitae*[17].

18. Also on 6 November 2023, Respondent appointed Mr. Alexis Mourre, a national of France, as an arbitrator in this case[18]. On 8 November 2023, the Centre informed

[10] ICSID's letter of 11 August 2023.
[11] Claimants' letter of 16 August 2023.
[12] ICSID's letter of 28 August 2023.
[13] ICSID's letter of 28 August 2023.
[14] ICSID's letter of 27 September 2023.
[15] Respondent's email of 6 October 2023; Claimants' email of 6 October 2023.
[16] Claimants' letter of 6 November 2023.
[17] ICSID's letter of 8 November 2023.
[18] Respondent's letter of 6 November 2023.

the Parties that Mr. Mourre accepted his appointment and transmitted to the Parties his declaration of independence and impartiality and his *curriculum vitae*[19].

19. On 23 January 2024, the Parties informed the Centre that they had agreed to appoint Prof. Juan Fernández-Armesto, a national of Spain, as President of the Tribunal[20]. Prof. Fernández-Armesto accepted the appointment by letter of 26 January 2024 and attached his declaration of independence and impartiality and his *curriculum vitae*[21].

20. On 26 January 2024, the Secretary-General, in accordance with Rule 21(1) of the ICSID Arbitration Rules in force as of 1 July 2022 ["**ICSID Arbitration Rules**"], notified the Parties that each of the three arbitrators had accepted his appointment and that the Tribunal was therefore deemed to have been constituted on that date[22]. Dr. Laura Bergamini, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

3. FIRST SESSION AND PROCEDURAL ORDER NOS. 1 AND 2

21. By correspondence of 31 January 2024, the Tribunal asked the Parties to confirm their availability for a first session to be held by videoconference, and to confirm whether it could be held in English, without prejudice to the Parties' positions on the language(s) of the proceedings[23]. The Parties confirmed their availability for the first session, and their agreement to hold it in English, by emails of 1 and 6 February 2024[24].

22. By letter of 12 March 2024, the Tribunal circulated draft Procedural Order ["**PO**"] No. 1 and draft PO No. 2, in preparation for the first session[25]. The President of the Tribunal also proposed the appointment of Ms. Francisca Seara Cardoso as Assistant to the Tribunal. Ms. Cardoso's declaration of independence and impartiality was circulated to the Parties on the same day, together with her *curriculum vitae*[26].

23. On 25 March 2024, the Parties submitted their comments to draft PO No. 1, but not to draft PO No. 2, saying that they were ready to address the relevant issues at the first session[27].

[19] ICSID's letter of 8 November 2023.
[20] ICSID's letter of 24 January 2024.
[21] ICSID's letter of 26 January 2024.
[22] ICSID's letter of 26 January 2024.
[23] ICSID's email of 31 January 2024.
[24] Respondent's email of 1 February 2024; Claimants' email of 6 February 2024.
[25] ICSID's letter of 12 March 2024.
[26] ICSID's letter of 12 March 2024.
[27] Claimants' email of 25 March 2024; Respondent's email of 25 March 2024.

24. On 26 March 2024, the Tribunal circulated an agenda for the first session[28].

25. In accordance with ICSID Arbitration Rule 29(3), the Tribunal held a first session with the Parties on 27 March 2024 by videoconference [the "**First Session**"]. At the First Session, the Parties discussed, *inter alia*, the draft POs Nos. 1 and 2, the schedule for the preliminary phase and the Parties' views on transparency and confidentiality matters, and they agreed upon several matters including the application of the 2022 ICSID Arbitration Rules[29].

26. On 28 March 2024, Respondent confirmed its agreement for the award to be accompanied by a certified translation from English to French rather than issued simultaneously in two equally valid versions[30].

27. On 5 April 2024, taking into account the proposals discussed at the First Session, the Arbitral Tribunal issued revised drafts of POs Nos. 1 and 2[31].

28. On 11 April 2024, absent any comment from the Parties, the Tribunal issued the final version of **PO No. 1**, concerning the main procedural matters for the management of this case. PO No. 1 provided, *inter alia*, that:

- The Arbitration Rules in effect from 1 July 2022 apply to the proceedings;
- English and French are the procedural languages;
- Washington D.C. is the place of proceedings; and
- Ms. Francisca Seara Cardoso would serve as Assistant to the Tribunal.

29. Annex A to PO No. 1 sets out the Procedural Calendar for the preliminary phase of this arbitration, which covers the exchanges leading up to a potential decision by the Tribunal on Respondent's request for bifurcation.

30. On the same date, the Tribunal issued the final version of **PO No. 2** on transparency and confidentiality.

4. BIFURCATION OF THE PROCEEDINGS

31. On 9 May 2024, Respondent submitted a request to bifurcate one objection to jurisdiction and to address it as a preliminary matter ["**Request for Bifurcation**"], together with:

- Exhibit R-1; and

[28] ICSID's email of 26 March 2024.
[29] Procedural Order No. 1, dated 11 April 2024, p. 5.
[30] Respondent's email of 28 March 2024.
[31] ICSID's email of 5 April 2024.

- Legal authorities RLA-001 through RLA-010.

32. On 24 May 2024, the Parties informed the Tribunal that they agreed to bifurcate the proceedings to address Respondent's objection in a preliminary phase related to the validity of the Interministerial Order ["**Bifurcated Issue**"]. Nonetheless, the Parties were unable to reach an agreement on all of the steps of the bifurcated phase and, therefore, each Party sent the Tribunal its own proposal[32].

33. On 28 May 2024, the Tribunal endorsed the dates for the submission of the Respondent's Memorial on the Bifurcated Issue and the Claimant's Counter-Memorial, as agreed by the Parties. It also provided potential dates for a remote hearing on the Bifurcated Issue and invited the Parties to confer on the remaining steps in the bifurcated phase[33]. On 6 June 2024, the Parties submitted a joint proposed timetable[34] and, on the following day, the Tribunal confirmed its agreement with the proposal[35]. The Tribunal further invited the Parties to confirm their availability for a pre-hearing conference[36], which they did on 10 June 2024[37]. Thereafter, the Tribunal issued a revised Procedural Calendar[38].

34. Further to numerous exchanges between the Parties and the Tribunal, on 7 June 2024, the Tribunal took note of the Parties' agreement to hold the hearing on the Bifurcated Issue remotely on Tuesday, 19 November 2024, with Wednesday, 20 November 2024, held in reserve[39]. In accordance with the Tribunal's proposal, the hearing was held remotely [the "**Hearing**"].

35. On 26 June 2024, the Parties informed the Tribunal of their agreement to modify the dates for the submission of the Respondent's Memorial on the Bifurcated Issue until 3 July 2024, and the Claimants' Counter-Memorial until 14 August 2024[40].

36. On the same day, following the Parties' agreement, the Tribunal issued a revised Procedural Calendar[41].

5. BIFURCATED PHASE

37. On 3 July 2024, Respondent filed its Memorial on Jurisdictional Objection ["**Memorial on Jurisdiction**"], together with:

- Exhibits R-002 through R-015;

[32] Respondent's email of 24 May 2024; Claimants' email of 24 May 2024.
[33] ICSID's email of 28 May 2024.
[34] Claimants' email of 6 June 2024; Respondent's email of 6 June 2024.
[35] ICSID's email of 7 June 2024.
[36] ICSID's email of 7 June 2024.
[37] Respondent's email of 10 June 2024; Claimants' email of 10 June 2024.
[38] ICSID's email of 11 June 2024.
[39] ICSID'S email of 7 June 2024.
[40] Respondent's email of 26 June 2024; Claimants' email of 26 June 2024.
[41] ICSID's email of 26 June 2024.

- Legal authorities RLA-011 through RLA-018; and
- The first legal opinion of Professor Jean-Michel Kumbu ["**Kumbu ER I**"][42].

38. On 14 August 2024, Claimants filed their Counter-Memorial on Jurisdiction ["**Counter-Memorial on Jurisdiction**"], together with:

- Exhibits C-016 through C-068;
- Legal authorities CLA-001 through CLA-028; and
- The legal opinion of Professor Patrick Goffaux ["**Goffaux ER I**"].

39. On 18 September 2024, Respondent submitted its Reply on Jurisdictional Objection ["**Reply on Jurisdiction**"], together with:

- Exhibits R-016 through R-029;
- Legal authorities RLA-019 through RLA-024;
- The witness statement of Mr. Pascal Nkanka Bokanga ["**Nkanka WS**"]; and
- The second legal opinion of Professor Jean-Michel Kumbu ["**Kumbu ER II**"].

40. On 25 October 2024, Claimants filed their Rejoinder on Jurisdiction ["**Rejoinder on Jurisdiction**"], together with:

- Exhibits C-069 through C-084[43];
- Legal authorities CLA-029 through CLA-040; and
- The second legal opinion of Professor Patrick Goffaux ["**Goffaux ER II**"].

[42] On 17 July 2024, Respondent submitted an updated version of Kumbu ER I, including Prof. Kumbu's *curriculum vitae* as Annex A.
[43] Claimants also resubmitted Exhibits C-022 and C-024.

6. HEARING ON THE BIFURCATED ISSUE

Pre-Hearing arrangements

41. On 3 September 2024, the Tribunal invited the Parties to confirm the language of the pre-hearing conference and the deadline for the identification of witnesses/experts[44].

42. On 9 and 10 September 2024, the Parties confirmed that they agreed to hold the pre-hearing conference call in English only, without prejudice to the Parties' positions on the language(s) of the Hearing pursuant to paragraph 12.7 of PO No. 1, and to notify the individuals called for cross-examination by 29 October 2024[45]. Thereafter, the Tribunal circulated a revised Procedural Calendar[46].

43. On 3 October 2024, the Tribunal circulated a draft PO No. 3, inviting the Parties to liaise to reach an agreement on the organization of the Hearing, including its schedule[47].

44. On 23 October 2024, the Parties submitted their joint comments on the draft PO No. 3, advising the Tribunal of their common position on the Hearing's schedule and organization[48]. Considering the Parties' agreement on all matters addressed in draft PO No. 3, the Tribunal considered that it was not necessary to hold the pre-hearing conference scheduled to take place on 31 October 2024. The pre-hearing conference was therefore vacated[49].

45. On 29 October 2024, the Parties identified the individuals that they intended to cross-examine at the Hearing[50].

46. On 7 November 2024, the Tribunal issued **PO No. 3** on the organization of the Hearing, based on the Parties' comments and agreements[51].

Hearing on the Bifurcated Issue

47. The Hearing on the Bifurcated Issue was held remotely through Zoom on 19 and 20 November 2024. The following individuals attended the Hearing:

Tribunal	
Prof. Juan Fernández-Armesto	President
Mr. Henri C. Alvarez KC	Arbitrator

[44] ICSID's email of 3 September 2024.
[45] Claimants' email of 9 September 2024; Respondent's email of 10 September 2024.
[46] ICSID's email of 10 September 2024.
[47] ICSID's email of 3 October 2024.
[48] Respondent's email of 23 October 2024; Claimants' email of 23 October 2024.
[49] ICSID's email of 28 October 2024.
[50] Respondent's letter of 29 October 2024; Claimants' email of 29 October 2024.
[51] ICSID's email of 7 November 2024.

Mr. Alexis Mourre	Arbitrator
ICSID Secretariat	
Dr. Laura Bergamini	Secretary of the Tribunal
Ms. Marine Chepda	ICSID Secretariat
Assistant to the Tribunal	
Ms. Francisca Seara Cardoso	Armesto Dispute Resolution
For Claimants	
Counsel	
Ms. Abby Cohen Smutny	White & Case
Mr. Sven Volkmer	White & Case
Mr. Darryl S. Lew	White & Case
Mr. Francis Lévesque	White & Case
Ms. Katherine Krudys	White & Case
Party Representative	
Mr. Jean-Paul Kamdem	Vice President of Afriland First Group
Expert	
Prof. Patrick Goffaux	Université libre de Bruxelles
For Respondent	
Counsel	
Mr. Richard Lorenzo	Hogan Lovells
Ms. Melissa Ordonez	Hogan Lovells
Ms. Catherine Bratic	Hogan Lovells
Mr. Lucas Aubry	Hogan Lovells
Ms. Eloise Villaz	Hogan Lovells
Ms. Nady Mayifuila	Mayifuila Esquire
Party Representatives	
Mr. Etienne Utshudi Lutula	Respondent's representative
Mr. Papy Kabangu Kabangu	Respondent's representative
Mr. Ephraïm Mpanda Kasendwe	Respondent's representative
Mr. Pascal Nkanka Bokanga	Respondent's representative
Mr. Valentin Claude Ramazani	Respondent's representative
Mr. Péres Mikwa Ihengalani	Respondent's representative
Mr. L'Or Matsanga Nkosi	Respondent's representative
Expert	
Prof. Jean-Michel Kumbu	Université de Kinshasa
Court Reporter	
Ms. Dawn Larson	Larson Reporting, Inc.
Ms. Christine Rouxel-Merchet	Hearing Report

Ms. Catherine Le Madic	Hearing Report
Ms. Traci Mertens	
Ms. Margaret Larnier	
Interpreters	
Ms. Sarah Rossi	
Ms. Gabrielle Baudry	
Ms. Chistine Victorin	
Technical Support Staff	
Mr. Mike Young	Sparq technician
Mr. Logan Everage	IT, White & Case
Mr. Godfrey Griffith	IT, White & Case
Mr. Paul Lauwerys	IT, White & Case
Ms. Barbara Senzeyi	IT, White & Case
Mr. Amir Ashour	Observer joining as a learning opportunity, White & Case
Ms. Mélody Rey	Trainee, White & Case
Ms. Marta Urra	IT, Hogan Lovells
Mr. Raoul Pottier	IT, Hogan Lovells
Mr. David Karsenty	IT, Hogan Lovells

48. The following experts were duly examined by counsel to the Parties during the Hearing:

- Professor Jean-Michel Kumbu: legal expert appointed by Respondent; Professor of Law at the *Université de Kinshasa* (DRC) and the Würzburg University (Germany), specialized in international economic law and investment protection in the DRC[52]; and

- Professor Patrick Goffaux: legal expert appointed by Claimants; Professor in Administrative Law and Advance Administrative Law at the *Université Libre de Bruxelles* (ULB)[53].

49. The Parties produced demonstrative exhibits H-001 to H-004 at the Hearing:

- **H-001**: Respondent's Opening Statement;

- **H-002**: Claimants' Opening Statement;

- **H-003**: Presentation of Professor Jean-Michel Kumbu; and

- **H-004**: Presentation of Professor Patrick Goffaux.

[52] **Exhibit H-003-FR**, Presentation of Professor Jean-Michel Kumbu, p. 1.
[53] **Exhibit H-004-FR**, Presentation of Professor Patrick Goffaux, p. 2.

50. The Hearing was recorded and transcribed, and the Parties and the Tribunal were provided with the video recording and the Hearing transcript at the conclusion of the Hearing.

7. POST-HEARING DEVELOPMENTS

51. On 27 November 2024, the Tribunal issued **PO No. 4** on post-Hearing issues, which was updated on 10 December 2024, setting the agreed-upon deadlines for the Parties to review the Hearing transcripts, submit their Post-Hearing Briefs and submit their statements of costs. PO No. 4 also included several questions from the Tribunal to the Parties and their experts.

52. The Parties transmitted jointly revised transcripts in English and French on 12 December 2024 ["**Tr.**" and "**Tr.-FR**"].

53. On 20 December 2024, the experts addressed the questions raised by the Tribunal, pursuant to paragraph 9 of PO No. 4 ["**Goffaux's Answers**" and "**Kumbu's Answers**"].

54. The Parties simultaneously submitted their Post-Hearing Briefs on 22 January 2025, addressing the Tribunal's questions and the experts' answers to those questions [the Tribunal shall refer to Claimants' Post-Hearing Brief as "**C PHB**" and to Respondents' as "**R PHB**"].

55. The Parties simultaneously submitted their statements of costs on 20 February 2025.

III. REQUESTS FOR RELIEF[54]

1. RESPONDENT'S REQUEST FOR RELIEF

56. Respondent requests the Tribunal to[55]:

> "• Decline jurisdiction in the present proceedings;
>
> • Order Claimants to pay all costs in connection with these arbitration proceedings, including Respondent's legal fees, expert fees, administrative fees and the fees and expenses of the Tribunal, together with pre-award and post-award interest on the amount so ordered;
>
> • Award such other and further relief as the Tribunal, in its discretion, considers appropriate".

2. CLAIMANTS' REQUEST FOR RELIEF

57. Claimants request that the Tribunal[56]:

> "a. reject Respondent's jurisdictional objections;
>
> b. in accordance with ICSID Arbitration Rules 50-52 order Respondent to pay all costs in connection with this phase of the arbitration, including Claimants' legal fees and expenses, including expert fees, the fees and expenses of the Tribunal and of the Tribunal's assistant, the administrative charges and direct costs of the Centre; and
>
> c. order the proceedings to continue to the merits phase".

58. Furthermore, Claimants seek an interim award of costs, as expressly contemplated in ICSID Arbitration Rule 52(3)[57].

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[54] This request for relief applies to this bifurcated phase. Claimants' request for relief in their RfA is: "Reserving their rights to supplement or otherwise amend their claims and the relief requested in connection therewith, Claimants request an award granting them the following relief: a) a declaration that Respondent has breached the Interministerial Order, the Investment Code, provisions of the African Charter on Human and Peoples' Rights, and customary international law; b) compensation to Claimants for all material and moral losses and damages they sustained, the nature and amount of which to be developed and quantified in these proceedings; c) compensation to Claimants for all costs incurred by them in connection with these proceedings, including without limitation the fees and expenses of the Tribunal, the administrative charges, costs, and fees of the Centre, as well as attorneys' fees and expenses and those of Claimants' experts and consultants; d) pre-award and post-award compound interest until the date of Respondent's full and final satisfaction of the award; and e) such further or other relief as the Tribunal may deem just and proper" (RfA, para. 73).

[55] Memorial on Jurisdiction, para. 73; Reply on Jurisdiction, para. 115; R PHB, para. 79.

[56] Counter-Memorial on Jurisdiction, para. 116; Rejoinder on Jurisdiction, para. 95.

[57] Rejoinder on Jurisdiction, para. 8.

IV. BIFURCATED OBJECTION

59. In the current bifurcated phase, the Parties' discussion focuses on the validity of the Interministerial Order – the basis for the Tribunal's jurisdiction. Respondent argues that the Tribunal should decline jurisdiction over the entirety of Claimants' claims due to Claimants' failure to accept Respondent's offer to arbitrate before the Interministerial Order's expiration and/or cancellation. Claimants, in turn, contend that they accepted Respondent's offer to arbitrate on time, and in any event, that the guarantees of legal security in the Interministerial Order did not expire and that the 2010 Decree did not have the effect of abrogating the Interministerial Order.

60. Before taking its decision (**4.**), the Tribunal will start by summarising the relevant factual background (**1.**) and the position of the Parties (**2.** and **3.**).

1. FACTUAL BACKGROUND

A. The DRC's constitutional regime

61. The DRC's constitutional regime has seen frequent modifications.

62. After gaining independence in 1960, the DRC enacted a set of fundamental laws that would serve as a provisional Constitution and which in 1964 were replaced by the so-called "Luluabourg" Constitution, establishing the First Republic[58].

63. A year later, President Mobutu rose to power, and in 1967 he enacted a new Constitution, creating the Second Republic[59]. In the following years, the 1967 Constitution was repeatedly amended through constitutional acts or decrees[60]. The most significant constitutional change by far occurred in 1997, at the end of the First Congo War (1996-1997), when Laurent-Désiré Kabila took over the presidency and issued the 1997 Constitutional Decree ["**1997 Constitutional Decree**"][61]. The 1997 Constitutional Decree bestowed the President with both legislative and executive authority[62].

64. A year later, the Second Congo War broke out (1998-2003).

65. As the Second Congo War raged on, in 2000 President Kabila amended the 1997 Constitutional Decree and established the transition parliament[63]. However, just a

[58] Kumbu's Answers, para. 10(a).
[59] Kumbu's Answers, para. 10(b).
[60] Kumbu's Answers, para. 10(c).
[61] Kumbu's Answers, para. 10(d); Goffaux's Answers, para. 2.
[62] **Exhibit C-078-FR**, Constitutional Law Decree No. 003 on the Organization and Exercise of Power in the Democratic Republic of the Congo, dated 27 May 1997 ["**1997 Constitutional Decree**"], Article 5.
[63] **Exhibit C-079-FR**, Constitutional Law Decree No. 003 on the Organization and Exercise of Power in the Democratic Republic of the Congo (updated), dated 1 July 2000, Articles 9-10.

year later, President Laurent-Désiré Kabila was assassinated, and Joseph Kabila ascended to the presidency[64].

66. The Second Congo War concluded in 2003, and the DRC once again drastically modified its constitutional regime, enacting the Transitional Constitution, which conferred legislative power to the National Assembly, while executive authority remained with the President and the Government[65].

B. The regulation of the banking sector in the DRC

67. At the end of the First Congo War, the Congolese financial industry was severely affected, with most of the DRC's private banks struggling to continue operating. Within this context, on 4 May 1998 the DRC adopted the Decree-Law No. 065, which established a special regime for the restructuring of its banking sector ["**Restructuring Regime**"][66].

68. Pursuant to the Restructuring Regime, existing banks and financial institutions could submit a restructuring plan to the Central Bank of the Congo ["**CBC**"][67], with approved banks and institutions benefitting from substantial tax incentives and exemptions during the restructuring period[68].

69. Almost four years later, on 2 February 2002, as the Second Congo War was drawing to an end, the DRC promulgated Law No. 003/2002 [the "**Banking Law**"], to foster the modernization of the banking sector and ensure that appropriate prudential supervision systems were set in place[69]. The Banking Law, which was recently amended in 2022[70], constitutes the main regulatory instrument applicable to banks and other credit institutions in the DRC, setting out the procedures to obtain a banking license, the circumstances that can lead to its withdrawal, and the general rules governing banks and credit institutions. The Banking Law does not offer investment incentives[71].

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[64] Goffaux's Answers, para. 2.
[65] Kumbu's Answers, para. 10(e); **Exhibit C-020-FR**, Transitional Constitution, dated 5 April 2003, Title IV, Chapter I, Sections I and II, Articles 64, 97.
[66] **Exhibit R-002-FR**, Decree-Law No. 065 promulgating a special regime for the restructuration of banks and financial institutions, dated 4 May 1998 ["**Restructuring Regime**"], Article 2 ("*Au sens du présent Décret-Loi, est considéré régime spécial de restructuration, l'ensemble des mesures et dispositions visant à modifier la structure et le mode de fonctionnement d'une banque on d'une Institution financière en vue du rétablissement de son équilibre*").
[67] **Exhibit R-002-FR**, Restructuring Regime, Article 3.
[68] **Exhibit R-002-FR**, Restructuring Regime, Article 10.
[69] **Exhibit R-003-FR**, Law No. 003/2002 relating to the activities and supervision of credit institutions, dated 2 February 2002 ["**Banking Law**"], *Exposé des Motifs*.
[70] **Exhibit R-006-FR**, Law No. 22/069 relating to the activities and supervision of credit institutions, dated 27 December 2022.
[71] **Exhibit R-003-FR**, Banking Law.

C. The Investment Code

70. In parallel to the adoption of the Banking Law, the DRC also enacted Law No. 004/2002[72], creating the DRC's Investment Code. The purpose of this law, which was subject to an implementation decree approved 10 years later ["**2012 Decree**"][73], was to promote foreign direct investment in sectors considered to be "*prioritaires et déterminants pour la reconstruction, la relance et la stabilisation de la croissance de l'économie congolaise*"[74].

71. Article 3 lists the sectors which are excluded from the Code's scope, and the banking sector is one of them. The Code further states that "[l]*es investissements dans ces secteurs sont régis par des lois particulières* […]". Nevertheless, the Code requires investors in these excluded sectors to submit a copy of their investment file to the *Agence Nationale pour la Promotion des Investissements* ["**ANAPI**"][75], the DRC's agency responsible for promoting and monitoring foreign investment.

72. The Investment Code sets out the terms under which direct investments in the DRC are to be carried out, and the advantages to be granted to protected investments, including[76]:

- Tax and customs exemptions (Titles III and IV);
- General investment guarantees, including protection against unlawful expropriations (Title V); and
- Dispute resolution provisions (Title IX).

Dispute resolution

73. The Investment Code creates two mechanisms for the adjudication of disputes:

74. (i) Under Article 38 disputes between an "*investisseur*" and the DRC relating to[77]:

- an investment contract;
- an investment authorization; or
- any violation of the investor's and or the investment's rights granted or created by the Investment Code, other laws, or international treaties to which the DRC is a party

[72] **Exhibit C-002-FR**, Investment Code.
[73] **Exhibit C-018-FR**, Prime Minister's Decree No. 12/046 on implementing measures of the Investment Code, dated 1 November 2012 ["**2012 Decree**"].
[74] **Exhibit C-002-FR**, Investment Code, *Exposé des motifs*.
[75] **Exhibit C-002-FR**, Investment Code, Article 3 *in fine*.
[76] **Exhibit C-002-FR**, Investment Code, Article 1.
[77] **Exhibit C-002-FR**, Investment Code, Article 38.

can be brought, at the choice of the investor, to either ICSID arbitration (including under the ICSID Additional Facility Rules), or ICC arbitration.

75. (ii) Alternatively, Article 37 provides for adjudication of disputes through domestic arbitration in the DRC. This alternative is logically reserved to disputes which may arise between the Congolese enterprise which carries out the investment project and the DRC – in this purely Congolese environment, domestic arbitration may be the more efficient solution.

D. The Draft Law

76. At the time the Investment Code was adopted, the DRC's Government began drafting a specific law to promote investment in credit institutions and microfinance [the "**Draft Law**"], offering tax and customs exemptions, investment guarantees and ICSID or ICC arbitration as a mean to settle potential disputes. However, the adoption of the Draft Law was ultimately abandoned[78].

E. The Bank's investment and operations in the DRC

77. Afriland First Bank (Claimant 2) was first established in the Republic of Cameroon in the 1980s[79]. With the support of the Afriland First Group, Afriland First Bank grew to become a financial institution present in multiple jurisdictions across the African continent.

78. In 2005, Afriland First Bank decided to invest in the DRC through a newly established Congolese subsidiary, Afriland First Bank Congo Démocratique S.A. [already referred to as the "Bank"], and applied to the CBC to be granted a banking license[80]. As part of this process, the Bank submitted a feasibility study [the "**Feasibility Study**"], providing information on, *inter alia*, the investment climate, the risks that had been identified, the investment project, the commercial strategy and financial projections[81].

79. Upon review of the Bank's application, the Governor of the CBC wrote to the DRC's Ministry of Economy, suggesting that the license should be granted[82], which

[78] **Exhibit R-005-FR**, Draft Law on incentives for investment in the credit institutions and microfinance sector of 2002 ["**Draft Law**"]. See **Exhibit R-007-FR**, Letter from the Association of Congolese Banks ["**ACB**"] to the Prime Minister, dated 23 April 2010, p. 2 ("[…] 3. *le projet de loi portant régime incitatif en matière d'investissements dans les secteurs des établissements de crédit et des institutions de micro finance présenté par la Banque Centrale du Congo se trouve sur la table du Gouvernement depuis 2003*").
[79] **Exhibit C-005-FR**, Afriland First Bank SA Certificate of Incorporation.
[80] **Exhibit R-008-FR**, Letter from Afriland to the Central Bank of the Congo ["**CBC**"], dated 3 February 2005.
[81] **Exhibit R-011-FR**, Feasibility Study and Admission Request for the creation of Afriland First Bank Congo Démocratique (First Bank CD), dated January 2005 ["**Feasibility Study**"].
[82] **Exhibit R-009-FR**, Letter from the CBC to the Ministry of Economy, dated 3 March 2005.

led the President of the DRC to issue Decree No. 05/032 authorizing the creation of the Bank[83].

80. The Bank was thus established in May 2005. Among the initial shareholders were Afriland First Bank, Mr. Joseph Toubi and Dr. Paul Kammogne Fokam[84]. Afriland First Group (Claimant 1) submits to have progressively acquired, starting four years later, nearly 80% of the Bank, becoming its largest shareholder[85].

Request to the ANAPI

81. Three months before, on 3 February 2005, in parallel to requesting the banking license from the CBC, Mr. Joseph Toubi, the Chairman of the Bank's Board of Directors, also submitted a request to the ANAPI, seeking approval under the general regime of the Investment Code ["**General Regime**" or *"**Régime Général**"*][86], plus the granting of certain specific advantages [together the "**Request for Admission**" or "***Demande d'Admission***" (also referred to by the Code as *demande d'agrément*)][87].

Interministerial Order

82. Afriland's *Demande d'Admission* was considered by the ANAPI, and on 18 July 2005 it was approved by the Ministries of Finance and Planning through the issuance of the Interministerial Order No. 092/CAB/MIN/PLAN/2005 and No. 111 CAB/MIN/FIN/2005 [already referred to as the "Interministerial Order"][88].

83. Article 1 of the Interministerial Order provides that:

> "*Le projet d'investissement présenté par la Société Afriland First Bank Congo Démocratique « First Bank CD » est agréé au bénéfice des avantages du régime général unique du Code des Investissements*" [Emphasis added].

84. The investment project was described as the acquisition of equipment and other materials to implement a bank in Kinshasa and the opening of subsidiaries across the country[89]. To this end, the Bank was granted certain tax and customs

[83] **Exhibit R-010-FR**, Decree No. 05/032 authorising the creation of Afriland First Bank CD, dated 13 May 2005.
[84] **Exhibit C-001-FR**, Interministerial Order, Article 2(a).
[85] **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021; R PHB, para. 78; C PHB, para. 78.
[86] **Exhibit C-002-FR**, Article 2(a) defines the General Regime as "All legal provisions contained in this law" ("*Régime Général: L'ensemble des dispositions légales contenues dans la présente loi*").
[87] **Exhibit C-069-FR**, Letter from Afriland First Bank CD to ANAPI, dated 3 February 2005 ["**Request for Admission**"]. The Investment Code refers to the alternate terms "*demande d'agrément*" or "*demande d'admission*". See **Exhibit C-002-FR**, Investment Code, Articles 5, 6 and 38.
[88] **Exhibit C-001-FR**, Interministerial Order.
[89] **Exhibit C-001-FR**, Interministerial Order, Article 2(b).

exemptions[90] and it also received certain investment guarantees, including national treatment, fair and equitable treatment and protection against expropriation[91].

85. Finally, the Interministerial Order established that any investment disputes between the Bank and the DRC would be adjudicated in accordance with Article 38 of the Investment Code – the provision which provides for ICSID or ICC arbitration at the option of the investor[92].

F. Cancellation of benefits granted to the banking sector

86. By 2010 the economic environment within the DRC had markedly improved. Against this backdrop, on 22 April 2010, the DRC's Prime Minister adopted Decree No. 10/16 [the "**2010 Decree**"], cancelling all *contra legem* exemptions and reliefs in tax and customs matters. The 2010 Decree was published in the DRC's Official Journal on 1 June 2010[93].

87. The 2010 Decree has only two provisions[94]:

> "*Article 1er : Sont annulés tous les actes réglementaires et autres instructions administratives octroyant, en violation des lois en vigueur, quelles qu'en soient les motivations, des exonérations et allégements en matière d'impôts, taxes, redevances et autres dus au trésor public*.
>
> *Article 2 : Les Ministres des Finances, du Budget, du Plan et des Mines sont chargés, chacun en ce qui le concerne, de l'application du présent Décret qui entre en vigueur à la date de sa signature*".

88. Given the large number of interministerial orders that had been granted, the DRC decided to cancel them through a general measure rather than individual acts[95].

89. Following the publication of the 2010 Decree, the president of the Association of Congolese Banks ["**ACB**"][96], who had previously lobbied to halt the cancellation of the benefits granted to the banking sector[97], wrote to the Governor of the CBC and to the President of the National Assembly to push for a new law to encourage investment in the banking sector[98]. In its correspondence, the ACB noted that although banks were excluded from the Investment Code, the DRC had nonetheless

[90] **Exhibit C-001-FR**, Interministerial Order, Article 4.
[91] **Exhibit C-001-FR**, Interministerial Order, Article 7.
[92] **Exhibit C-001-FR**, Interministerial Order, Article 10.
[93] **Exhibit R-001-FR**, Decree No. 10/16, dated 22 April 2010 ["**2010 Decree**"].
[94] **Exhibit R-001-FR**, 2010 Decree.
[95] **Nkanka WS**, para. 14.
[96] By definition, the Bank is a member of the ACB. See **Exhibit R-003-FR**, Banking Law, Article 86.
[97] **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010.
[98] **Exhibit R-013-FR**, Letter from the ACB to the Governor of the CBC, dated 22 June 2010; **Exhibit R-014-FR**, Letter from the ACB to the President of the DRC National Assembly, dated 28 June 2010.

granted them benefits under it, in the expectation of a specific investment law for the banking sector, which had not yet been enacted[99].

90. A specific investment law for the banking sector has yet to be enacted.

G. Commencement of the dispute

91. In July 2023, the Board of Directors of Afriland First Group (Claimant 1) and Afriland First Bank (Claimant 2) adopted resolutions approving the initiation of an ICSID arbitration against Respondent[100]. Less than a month later, on 8 August 2023, Claimants submitted their RfA, alleging unlawful measures by the DRC, most of which occurred between June 2021 and January 2023[101].

2. RESPONDENT'S POSITION

92. Respondent avers that the benefits granted by the Interministerial Order were cancelled by the 2010 Decree and were, in any case, originally designed to expire in 2012 (**A.**), and that Claimants did not purport to accept the DRC's offer to arbitrate until before such offer was withdrawn (**B.**). Furthermore, Respondent contends that Afriland First Group (Claimant 1) did not consent to arbitrate (**C.**).

A. The offer to arbitrate contained in the Interministerial Order was withdrawn or expired

93. The DRC does not contest that the Interministerial Order contained an offer to arbitrate disputes. It submits, however, that the Interministerial Order was withdrawn and ceased to be in effect in 2010 as a consequence of the 2010 Decree (**a.**) and, in any case, the benefits of the Interministerial Order were originally designed to expire in 2012 (**b.**)[102].

a. The Interministerial Order was cancelled by the 2010 Decree

94. Respondent contends that the 2010 Decree resulted in the termination of all "regulatory acts and administrative instructions" (including the Interministerial Order) granting tax and customs benefits to banks in violation "of Congolese law" (including the Investment Code)[103].

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[99] **Exhibit R-013-FR**, Letter from the ACB to the Governor of the CBC, dated 22 June 2010; **Exhibit R-014-FR**, Letter from the ACB to the President of the DRC Parliament, dated 28 June 2010.
[100] **Exhibit C-009-ENG**, Board Resolution of Afriland First Group SA, dated 13 July 2023; **Exhibit C-011-ENG**, Board Resolution of Afriland First Bank SA, dated 13 July 2023.
[101] RfA, paras. 4, 59; **Exhibit C-008-FR**, Letter from Majority Shareholders to the President of the DRC, the Prime Minister, and the Minister of State, Minister of Justice and Keeper of the Seals, dated 9 January 2023.
[102] R PHB, para. 13.
[103] **Exhibit R-001-FR**, 2010 Decree, Article 1; Memorial on Jurisdiction, paras. 51-52; Reply on Jurisdiction, para. 47; R PHB, para. 19.

95. First, Respondent argues that the Interministerial Order qualifies as a "regulatory act", because it amended the scope of the Investment Code, so that it could apply to a bank – thus, its scope far exceeded that of a simple individual act. As such, the Interministerial Order was expressly cancelled by the 2010 Decree[104]. In any case, Respondent submits that the Government's intention was to annul all *contra legem* instruments, such as the Interministerial Order[105].

96. Second, Respondent submits that the Interministerial Order was illegal, as it contradicted a higher norm: it extended the benefits of the Investment Code to the Bank even though the banking sector was expressly excluded from the scope of the Investment Code, and was governed by a separate regime, the Banking Law[106]. Concerning the illegality of the Order:

- *One*, Respondent adduces that the Ministers of Finance and Planning – who adopted the Interministerial Order – could not rely on any alleged "residual competence" or theory of "exceptional circumstances" to issue a regulatory act contrary to a higher norm in the DRC's hierarchy of norms[107];

- *Two*, Respondent highlights that Claimants have expressly recognized the exclusion of the banking sector from the Investment Code[108];

- *Three*, Respondent notes that Claimants have changed their position by arguing that the Interministerial Order did not modify the Investment Code's provisions; instead, now they argue that it was "modelled" on the Investment Code to create a "freestanding investment protection regime"[109]; and

- *Four*, Respondent rejects Professor Goffaux's reliance on the Draft Law to argue that the DRC intended to grant investment incentives in the banking sector and, consequently, the Order was legal; the very fact that a Draft Law existed confirms that only a law could grant such incentives[110].

97. Third, the DRC could validly terminate the Interministerial Order with *ex nunc* effects, considering[111]:

[104] Reply on Jurisdiction, paras. 64-66; R PHB, paras. 38-39; **Kumbu ER II**, paras. 17-18.
[105] Reply on Jurisdiction, paras. 71-72; R PHB, paras. 19-20, 33-36; **Nkanka WS**, paras. 9-10, 14.
[106] Memorial on Jurisdiction, para. 51; Reply on Jurisdiction, paras. 48, 49-63; R PHB, paras. 14, 20; **Kumbu ER I**, paras. 31-32, 40-41. See also Tr., Day 1, p. 32, l. 11 to p. 33, l. 18 (Lorenzo).
[107] Reply on Jurisdiction, paras. 51-60; R PHB, paras. 22-23, 27-32.
[108] R PHB, para. 15; referring to Goffaux's Answers, para. 40; Tr., Day 1, p. 88, ll. 1-2 (Cohen Smutny).
[109] R PHB, paras. 16, 21; referring to Tr., Day 1, p. 137, ll. 13-18, p. 138, ll. 5-22 (Cohen Smutny). See also Kumbu's Answers, paras. 44-45.
[110] R PHB, para. 24. See also Kumbu's Answers, para. 22.
[111] Reply on Jurisdiction, paras. 67-70; R PHB, paras. 37-38, 40, 43.

- its illegality; and

- as a consequence, the fact that it did not create any specific right in favor of the Bank but only recognized such right.

98. Respondent further adds that under the DRC's administrative law, irregular acts – both regulatory and individual – can be cancelled at any time with *ex nunc* effects[112].

99. Fourth, Respondent says that the 2010 Decree produced *erga omnes* effects as of the date of its adoption and subsequent publication in the DRC's Official Journal, making it enforceable against all relevant parties[113].

100. Fifth, the 2010 Decree was countersigned by the Ministers of Finance and Planning, which, under Article 2 of the same Decree, were not required to take any further action for it to take effect[114].

101. Sixth, Respondent contends that the 2010 Decree terminated the Interministerial Order in its entirety (*i.e.*, including the provisions concerning the tax and customs exemptions, investment protections and dispute resolution), as it sought the annulment of "all administrative acts" granting *contra legem* benefits, and not only of the "provisions" of acts granting such benefits[115].

102. Seventh, Article 40 of the Investment Code, qualified by Claimants as a "stabilization provision" of the guarantees and advantages granted under the Code, is inapplicable here. The Bank is excluded from the Code's scope, and as such, it only benefited from the advantages or guarantees derived from the Interministerial Order[116].

103. Lastly, after the 2010 Decree, Claimants ceased to receive benefits under the Interministerial Order and never raised any objections, confirming their awareness that the Interministerial Order had been cancelled[117]. Respondent further points out that the ACB's – the national association of banks – statements requesting a moratorium on the 2010 Decree application prove that all DRC banks contemporaneously understood that the 2010 Decree was effective[118].

[112] Reply on Jurisdiction, para. 67; R PHB, paras. 40-41.
[113] Reply on Jurisdiction, paras. 76-79; R PHB, para. 45.
[114] Reply on Jurisdiction, paras. 76-79; R PHB, paras. 42-43; Tr., Day 1, p. 65, ll. 10-14 (Bratic).
[115] Reply on Jurisdiction, paras. 80-82; R PHB, paras. 19, 46.
[116] Reply on Jurisdiction, para. 73.
[117] R PHB, para. 45; Tr., Day 1, p. 66, ll. 7-16 (Bratic). See also Tr., Day 1, p. 140, l. 2 to p. 141, l. 19 (Lorenzo).
[118] R PHB, para. 47; **Exhibit R-013-FR**, Letter from the ACB to the Governor of the CBC, dated 22 June 2010; **Exhibit H-001-ENG**, Respondent's Opening Statement, slide 40.

b. The benefits granted in the Interministerial Order were originally designed to expire in 2012

104. In any event, Respondent argues that the benefits granted in the Interministerial Order were limited in time and were set to expire, at the latest, in 2012[119].

105. First, this time limitation is consistent with the objective of the derogations, granted in the aftermath of the Congo Civil Wars, with the purpose of temporarily fostering investment in the DRC's banking sector[120]. Respondent refers to Articles 2, 4 and 4(b) of the Interministerial Order to illustrate its position[121]:

- Article 2 refers to an initial investment plan to set up the Bank's offices, and the planned turnover of the Bank for the first five years;

- Article 4 often included the wording "during the approval period" with regards to fiscal advantages; and

- Article 4(b) specifies the exonerations that were valid until 2008 for Economic Region A, until 2011 for Economic Region B, and until 2012 for Economic Region C.

106. Second, Respondent asserts that such time limitation covers not only tax and customs benefits, but also any investment guarantees contained in the Interministerial Order – including, particularly, the dispute resolution provision[122].

107. Third, Respondent contends that Article 9 of the Investment Code defies Claimants' position that the investment guarantees provided in the Order will "survive *infinitum*"[123]. Article 9 is contained within Title III, which regulates the General Regime, and establishes time limitations of three to five years for the protections provided under the Investment Code within that regime[124]. Therefore, even assuming that Claimants were covered under the General Regime via the Interministerial Order, the protections would still have expired pursuant to Article 9 of the Investment Code[125].

108. Fourth, Respondent contends that the Interministerial Order's time limitation aligns with the distinction made in the Code between *agréé* and *non-agréé* investors[126]. In Respondent's submission[127]:

[119] Memorial on Jurisdiction, para. 50; Reply on Jurisdiction, paras. 83, 88; R PHB, para. 49.
[120] Memorial on Jurisdiction, para. 50; Reply on Jurisdiction, paras. 86-87; R PHB, para. 49.
[121] Memorial on Jurisdiction, para. 33; Reply on Jurisdiction, para. 83; R PHB, para. 49.
[122] Reply on Jurisdiction, paras. 84-85.
[123] Tr., Day 1, p. 23, l. 19 to p. 24, l. 3 (Lorenzo).
[124] Tr., Day 1, p. 23, l. 19 to p. 24, l. 16 (Lorenzo).
[125] Tr., Day 1, p. 24, ll. 4-16 (Lorenzo).
[126] R PHB, para. 50.
[127] R PHB, para. 50. See also Kumbu's Answers, paras. 24-30, 70.

- An *agréé* investor enjoys tax advantages and any other investment guarantees granted in an interministerial order during the approval period; the *agréé* investor also enjoys the investment guarantees set forth in Articles 23-30 and 37-38 of the Code; while

- A *non-agréé* investor only enjoys the investment guarantees set forth in Articles 23-30 and 37-38 of the Code.

109. Once the approval period expires, the *agréé* investor will revert to the same status as a *non-agréé* investor and only benefit from the investment guarantees outlined in Articles 23-30 and 37-38 of the Investment Code[128].

110. For Respondent, however, the Bank's case is different, since it is not a covered investor under the Investment Code (the banking sector being excluded) and it does not directly enjoy the investment guarantees provided therein. As such, the investment guarantees offered in the Interministerial Order were subject to the Order's time limitation[129].

111. Fifth, Article 5 of the Interministerial Order also confirms that the benefits are time-limited, as it requires the Bank, while it remains under the Code's regime, to periodically report data to the ANAPI[130].

B. Claimants only accepted the DRC's offer to arbitrate in 2023, when it had already been withdrawn or expired

112. According to Respondent, while a State may consent to ICSID arbitration through an offer made in national legislation (*e.g.*, in Article 38 of the Investment Code), such offer is only perfected when the investor accepts it in writing[131] while it remains available, that is, before the State's consent is withdrawn through legislative amendments or annulments or has expired[132].

113. In the present case, Claimants should have accepted the DRC's offer to arbitrate before the Interministerial Order (which contained the DRC's offer to arbitrate) was withdrawn in April 2010 through the enactment of the 2010 Decree[133]. Claimants have failed to prove this requirement.

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[128] R PHB, para. 51; Kumbu's Answers, paras. 27, 35-36. See also Tr.-FR, Day 2, p. 8, ll. 28-30 (Kumbu).
[129] R PHB, paras. 52-54; Kumbu's Answers, paras. 29, 49, 79.
[130] Kumbu's Answers, para. 50.
[131] Memorial on Jurisdiction, paras. 58-59; R PHB, para. 62.
[132] Memorial on Jurisdiction, para. 61; R PHB, para. 60; citing to **Exhibit RLA-015-ENG**, *XII Settling Investment Disputes*, Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, Principles of International Investment Law, Oxford University Press, 3rd Edition, 2022, Chapter "*7. Consent to investment arbitration*", pp. 360–378, at p. 360; **Exhibit RLA-018-ENG**, *Ruby Roz Agricol LLP v. Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, dated 1 August 2012, para. 156.
[133] R PHB, para. 55.

114. First, there is no evidence that Claimants accepted an offer to arbitrate in February 2005, when they submitted their *Demande d'Admission* to the ANAPI. Neither this request, nor any contemporaneous document, mentions that the Bank is consenting to arbitration, much less to ICSID arbitration[134].

115. Second, Respondent adds that consent to ICSID arbitration could not have been perfected in 2005, unless Claimants had already chosen between the two available forum options, ICSID or ICC. Such a choice is not reflected in Claimants' contemporaneous Request for Admission[135].

116. Third, Respondent says that Claimants' present position that the Bank accepted the offer to arbitrate on 3 February 2005 is logically inconsistent: there was no offer to arbitrate that Claimants could have accepted, as the Interministerial Order was issued nearly six months later[136]. Only after the Interministerial Order was issued on 18 July 2005 did an offer to arbitrate become available to the Bank, which it could accept by a separate act[137]. Therefore, Claimants' argument that the Interministerial Order "perfected" the arbitration agreement is unsupported by evidence[138].

117. Fourth, Respondent avers that Claimants only consented to arbitration in their RfA of 8 August 2023. This is confirmed by paragraph 24 of the RfA and the contemporaneous board resolutions of Afriland First Group and Afriland First Bank, which state that the "Company hereby consents to submit the Dispute to arbitration before ICSID […]"[139]. If Claimants believed their consent was formalized in 2005, they would have clearly expressed this in both the board resolutions and their RfA[140]. By that time, the Interministerial Order had long been terminated by the 2010 Decree and, therefore, there was no standing offer to arbitrate that Claimants could possibly accept[141].

118. Respondent adds that Claimants altered their position on when consent was formed – initially asserting that it was in August 2023 with the RfA but later claiming it was in 2005 – only after Respondent challenged jurisdiction[142]. Moreover, Respondent notes that Claimants first stated they could not locate the Request for Admission from February 2005. However, when they eventually found it in October

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[134] Reply on Jurisdiction, paras. 97-100; R PHB, paras. 63, 65; Tr., Day 1, p. 46, ll. 6-14 (Bratic).
[135] R PHB, para. 65.
[136] R PHB, paras. 64, 67; Tr., Day 1, p. 21, ll. 14-21 (Lorenzo), p. 43, l. 17 to p. 44, l. 5 (Bratic); **Exhibit H-001-ENG**, Respondent's Opening Statement, slide 50.
[137] R PHB, para. 67.
[138] R PHB, para. 68.
[139] **Exhibit C-009-ENG**, Board Resolution of Afriland First Group SA, dated 13 July 2023, para. 1; **Exhibit C-011-ENG**, Board Resolution of Afriland First Bank SA, dated 13 July 2023, para. 1.
[140] R PHB, paras. 57-58; Tr., Day 1, p. 13, l. 1 to p. 16, l. 6 (Lorenzo); **Exhibit H-001-ENG**, Respondent's Opening Statement, slide 3.
[141] Memorial on Jurisdiction, paras. 69, 71-72; Reply on Jurisdiction, para. 96; R PHB, para. 59.
[142] R PHB, paras. 5-7; Tr., Day 1, p. 16, ll. 7-16 (Lorenzo); **Exhibit H-001-ENG**, Respondent's Opening Statement, slides 4-7.

2024, it turned out to be a one-page document with no reference to ICSID arbitration[143].

119. Finally, Respondent refers to existing case law and contends that the conclusions reached in *Société Resort v. Côte d'Ivoire* ["***Société Resort***"] (an award in which the tribunal concluded that consent was formed with the submission of the request for admission) are not applicable to this case for the following reasons[144]:

- In *Société Resort* the State's offer to arbitrate was formalized in the Ivorian investment code;
- The wording of Article 38 of the DRC's Investment Code provides for ICC or ICSID arbitration, contrary to the Ivory Coast's code, which only provides for ICSID arbitration; and
- The Ivorian investment code does not provide the possibility to the investor to consent to ICSID arbitration by a "separate act".

C. Afriland First Group did not consent to arbitrate

120. Even if Claimants were able to show that the Bank's shareholders consented to ICSID arbitration in February 2005 (*quod non*), Claimants have, in any case, failed to meet their burden of proving that the Afriland First Group (Claimant 1) has actually consented to arbitrate.

121. First, it is undisputed that Afriland First Group was not among the initial shareholders of the Bank back in 2005, when the Interministerial Order was enacted. Afriland First Group only became a shareholder in 2009, following an internal reorganization of the Afriland group[145].

122. Second, any transfer of consent to arbitrate requires express approval by the State, something which did not occur in the present case:

- *One*, if Afriland First Group intended to benefit from the Interministerial Order, it should have obtained approval from the ANAPI, the authority in charge of investments[146]; yet it did not;

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[143] R PHB, paras. 5-7, 65.
[144] Reply on Jurisdiction, para. 98; R PHB, para. 66; Tr. Day 1, p. 46, l. 15 to p. 50, l. 9; **Exhibit CLA-019-ENG**, *Société Resort Company Invest Abidjan, Stanilas Citerici, and Gérard Bot v. Republic of Côte d'Ivoire*, ICSID Case No. ARB/16/11, Decision on Jurisdiction, 1 August 2017 ["***Société Resort***"].
[145] Reply on Jurisdiction, para. 104; R PHB, paras. 70, 77.
[146] R PHB, paras. 74-76; referring to **Exhibit CLA-011-ENG**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 ["***Amco Asia***"], para. 31; **Exhibit CLA-021-ENG**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 ["***SPP***"], paras. 138-144; **Exhibit**

- *Two*, Claimants have also failed to show that the CBC approved the transfer of the shares to Afriland First Group[147]; and it is, in any case, irrelevant that the CBC was aware of the transfer of shares, considering that it was not the appropriate authority to approve the transfer of the alleged right to arbitrate[148].

123. Third, Article 40 of the 2012 Decree provides guidance by establishing that when a new majority shareholder injects fresh capital and modifies and substantially modernizes the approved investment project, the resulting company is considered a different one and must submit a new request for admission[149]. Respondent argues that under the Code, new shareholders are only considered investors if they intend to put "in place a new capacity" or to increase "the capacity of production of goods or services". However, Claimants have failed to establish that the transfer of shares was more than simply an internal reorganization[150].

124. Lastly, Respondent rejects Claimants' argument that Afriland First Group qualifies as a "direct investor" under Article 2 of the Investment Code, since the Code does not apply to banks[151].

* * *

125. In sum, Respondent submits that Claimants bear the burden of establishing this Tribunal's jurisdiction[152]. In Respondent's position, Claimants have failed to meet this burden:

- The Interministerial Order has been repealed by the 2010 Decree and was, in any case, designed to expire in 2012;

- Claimants have not proven that they accepted the DRC's offer to arbitrate before such offer was withdrawn; and

- In any case, Claimants have not shown that Afriland First Group consented to ICSID arbitration.

126. In view of the above, Respondent submits that the Tribunal should decline jurisdiction over Claimants' claims.

CLA-028-ENG, *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 1 July 1973, pp. 26-27 as reported in Pierre Lalive, The First 'World Bank': Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, BRITISH YEARBOOK OF INTERNATIONAL LAW 51, 123 (1980), pdf pp. 26-27.

[147] Reply on Jurisdiction, paras. 105-114; R PHB, paras. 74-77; citing to **Exhibit CLA-011-ENG**, *Amco Asia*, para. 31; and **Exhibit CLA-021-ENG**, *SPP*, paras. 138-144.

[148] R PHB, para. 77.

[149] R PHB, fn. 96.

[150] R PHB, para. 74.

[151] R PHB, paras. 72, 75.

[152] Reply on Jurisdiction, paras. 4, 43.

3. CLAIMANTS' POSITION

127. In Claimants' position, they validly accepted the DRC's offer to arbitrate before it was allegedly withdrawn (**A.**). Claimants further argue that the Interministerial Order was not cancelled by the 2010 Decree, nor was it designed to expire by 2012 (**B.**). Finally, Claimants contend that jurisdiction is also established for Claimant 1, Afriland First Group (**C.**).

A. Claimants validly accepted the DRC's offer to arbitrate before it was allegedly withdrawn

128. Claimants submit that the DRC issued the Interministerial Order applying the Investment Code through analogy, and that they validly accepted the DRC's offer on two occasions: first, through their Request for Admission, and subsequently, through their RfA.

129. First, Claimants' starting point is that the Interministerial Order grants the Bank investment benefits that are "analogous" or "modelled" to those contemplated in Articles 23-30 of the Investment Code[153]. Accordingly, the source of the rights and obligations established in the Interministerial Order is the Order itself, not the Code[154]. Claimants note that this analogy can also be seen by the fact that[155]:

- When the Bank submitted its Request for Admission, it followed the procedure established in Articles 4 to 7 of the Investment Code for requesting tax and customs advantages; and

- The Interministerial Order's terms align with the content specified for *arrêtés interministériels* in Article 7 of the Investment Code.

130. Further, Claimants' expert considers that the Feasibility Study and a letter from the ACB to the DRC's Government prove that the DRC applied the terms of the Investment Code "by analogy"[156].

131. Second, Claimants recall that Article 38 of the Investment Code recognizes two possible methods of consent by the investor, either through the[157]

- "request for admission to the regime of the [Investment Code]"; or

- "subsequently by a separate act".

[153] C PHB, paras. 9, 33, 48-49; Tr.-FR, Day 2, p. 36, ll. 6-25 (Goffaux); Goffaux's Answers, paras. 29, 40-43.
[154] C PHB, paras. 33, 48.
[155] C PHB, paras. 7-9.
[156] Goffaux's Answers, para. 43; referring to **Exhibit R-011-FR**, Feasibility Study; **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010.
[157] Counter-Memorial on Jurisdiction, para. 38.

132. Third, Claimants' main argument (which they clarified in the course of the Hearing)[158] is that their consent was formalized in the Request for Admission, which they submitted on 3 February 2005[159]. This Request for Admission to the General Regime of the Investment Code (a Regime which in Article 38 includes the right to access ICSID arbitration[160]), is all that is needed to establish their consent to ICSID arbitration, there being no necessity to expressly refer to ICSID arbitration, since that possibility is already embodied in Article 38 (*i.e.*, a request for admission includes a request to ICSID arbitration)[161].

133. During the Hearing, Claimants explained that the formula for consent, in this case, is unconventional: the investor submitted a Request for Admission to the *Régime Général*, which included access to ICSID arbitration. Once the DRC accepted the Request through the Interministerial Order, the arbitration agreement was formed[162].

134. This conclusion is supported, *inter alia*[163], by the tribunal's decision in *Société Resort* which, pointing to the Ivorian investment code, found that a request for admission to the regime is by itself sufficient to establish consent to ICSID arbitration[164]. Likewise, learned commentators agree that consent to arbitration is perfected when the investment is admitted to the benefits of the law, "even if the application does not specifically mention the settlement of disputes"[165] [Emphasis omitted].

135. Fourth, the ICSID arbitration agreement also applies then to cases where a State has a claim against the investor. In Claimants' view, Article 5 of the Interministerial Order confirms that investors can be potentially exposed to sanctions, including the payment of taxes from which the investor may have been exempted[166].

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[158] Tr., Day 1, p. 109, l. 6 to p. 110, l. 8, p. 128, l. 13 to p. 130, l. 18 (Cohen Smutny).
[159] **Exhibit C-069-FR**, Request for Admission.
[160] **Exhibit C-002-FR**, Investment Code, Article 2(a) defines the General Regime as "All legal provisions contained in this law" (Claimants' translation of the French original).
[161] Counter-Memorial on Jurisdiction, paras. 54-55, 59; Rejoinder on Jurisdiction, para. 37.
[162] C PHB, para. 25; Tr., Day 1, p. 109, l. 6 to p. 110, l. 8, p. 128, l. 13 to p. 130, l. 18 (Cohen Smutny).
[163] Counter-Memorial on Jurisdiction, para. 63; citing to **Exhibit CLA-020-FR**, *ABCI Investments Limited v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, para. 120; **Exhibit CLA-001-ENG**, *Československá Obchodní Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 44; **Exhibit CLA-013-ENG**, *SPP*, para. 101.
[164] Counter-Memorial on Jurisdiction, paras. 61-62; Rejoinder on Jurisdiction, paras. 38-39; citing to **Exhibit CLA-019-ENG**, S*ociété Resort*, paras. 149-151.
[165] Counter-Memorial on Jurisdiction, para. 64; citing to **Exhibit CLA-025-ENG**, Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws*, *Bilateral Investment Treaties and Multilateral Instruments on Investment*, 2 ICSID Review Foreign Investment Law Journal 12 (1997), pp. 317-318; **Exhibit CLA-026-ENG**, Christoph Schreuer, *Consent to Arbitration*, UNCTAD COURSE ON DISPUTE SETTLEMENT (2003), International Centre for the Settlement of Investment Disputes, Module 2.3, p. 14.
[166] Rejoinder on Jurisdiction, para. 41; C PHB, fn. 53.

136. Fifth, Claimants add that in their RfA dated 8 August 2023 they again consented to ICSID arbitration – a possibility permitted by Article 38 of the Investment Code, which contemplates that consent to ICSID arbitration can be given not only in the Request for Admission but also in a later "separate act"[167].

137. Claimants explain that the RfA was not the first instance of consent. While the contemporaneous board resolutions of Afriland First Group and Afriland First Bank provided the necessary corporate authorizations to submit a particular dispute to arbitration, this does not amount to the necessary consent to form an agreement to submit covered disputes to ICSID arbitration pursuant to Article 38 of the Investment Code – which was given through the *Demande d'Admission*[168].

B. The Interministerial Order was not cancelled by the 2010 Decree, nor did it expire

138. Claimants' primary argument is that the 2010 Decree did not cancel the Interministerial Order (**a.**). Claimants also argue that the Interministerial Order was not designed to expire by 2012 (**b.**).

a. The 2010 Decree did not cancel the Interministerial Order

139. Claimants contend that the 2010 Decree did not abrogate the Interministerial Order. Claimants advance the following reasons to support their position:

140. First, it is not disputed that the 2010 Decree applies only to regulatory acts (and administrative instructions) that were adopted in violation of Congolese law[169]. It follows that the 2010 Decree does not apply to the Interministerial Order[170]:

- *One*, the Interministerial Order is not a regulatory act;
    - as it did not create general and impersonal legal rules, which is the hallmark of regulatory acts[171];
    - as it did not change the legal framework for the banking sector in general; and
    - as it was not published in the DRC's Official Journal;

[167] Counter-Memorial on Jurisdiction, paras. 52-53; Rejoinder on Jurisdiction, para. 42.
[168] Rejoinder on Jurisdiction, para. 42.
[169] **Exhibit R-001-FR**, 2010 Decree, Article 1 ("All the regulatory acts and administrative instructions which grant, in breach of the laws currently in force, and whatever the reason, exoneration and relief measures regarding taxes, levies, royalties, and other rights due to the public treasury, are cancelled") (Respondent's translation of the French original).
[170] Counter-Memorial on Jurisdiction, paras. 76-92; Rejoinder on Jurisdiction, paras. 59-68; C PHB, paras. 21, 70.
[171] **Kumbu ER II**, para. 14; **Goffaux ER II**, paras. 53-57.

the Interministerial Order merely approved a specific investment project and granted certain benefits and protections that applied solely to that project[172].

- *Two*, the Interministerial Order was issued lawfully by the Ministers of Finance and Planning: under the DRC's 2003 Transitional Constitution[173], all areas of competence not expressly reserved for the legislative branch fall within the scope of the executive's residual powers[174]; furthermore, the executive could act based on the doctrine of exceptional circumstances, which recognizes its authority to derogate from statutory rules where exceptional circumstances are in place (such as the ones present in the aftermath of the Second Congo War)[175].

- *Three,* according to Professor Goffaux, the existence of the Draft Law for the banking sector – offering the same investment incentives as the Investment Code – proves that the DRC intended to offer such benefits to banks and other similar entities; however, given the country's situation at the time, the Transitional Government instead adopted a "practical solution" and in the Interministerial Order granted guarantees that were analogous to those established in the Investment Code[176].

141. Second, as a matter of Congolese law, the 2010 Decree could not abrogate the Interministerial Order:

- *One*, an unlawful administrative act can only be withdrawn by its author or the author's hierarchical superior; in this case, the Interministerial Order could have been withdrawn by the Ministers of Finance and Planning as the authors, but it could not have been withdrawn by an act of the Prime Minister alone, as he was not the hierarchical superior to the other Ministers[177].

- *Two*, while Congolese law permits unlawful administrative acts to be withdrawn, this is only possible within a limited period (three-months), which in this case had expired long before the 2010 Decree; therefore, even assuming that the Interministerial Order was illegal (*quod non*), the rights created by such Order became acquired rights upon the expiry of the three-month period[178].

[172] Counter-Memorial on Jurisdiction, paras. 78-80; Rejoinder on Jurisdiction, paras. 61-64.
[173] **Exhibit C-020-FR**, Transitional Constitution, dated 5 April 2003, Article 36.
[174] Counter-Memorial on Jurisdiction, para. 87; Rejoinder on Jurisdiction, paras. 65-67.
[175] Counter-Memorial on Jurisdiction, para. 88; Rejoinder on Jurisdiction, paras. 65, 68.
[176] Tr.-FR, Day 2, p. 35, l. 27 to p. 36, l. 25 (Goffaux). See also Goffaux's Answers, paras. 40-43.
[177] Counter-Memorial on Jurisdiction, paras. 96, 102; **Goffaux ER I**, paras. 157-162.
[178] Counter-Memorial on Jurisdiction, para. 103; Rejoinder on Jurisdiction, paras. 75-76; C PHB, paras. 19, 54-62, 74-76.

- *Three*, Article 40 of the Investment Code makes it clear that the 2010 Decree could not have the effect of invalidating the Interministerial Order; once an investment project is admitted to the regime of the Investment Code, no subsequent law or regulation can restrict the advantages or protections granted to it[179].

142. Third, Article 2 of the 2010 Decree specifically contemplated that it would be implemented by the competent Ministers[180]. However, contrary to Respondent's assertion, the countersignature of the 2010 Decree by the respective Ministers – although necessary to validate the Prime Minister's act – is not in itself an act of implementation[181]. Accordingly, if the 2010 Decree were to apply to the Interministerial Order (*quod non*), the relevant Ministers would have been required to implement the 2010 Decree by withdrawing or abrogating the Interministerial Order through an act of the same nature (*e.g.*, another interministerial order), and to notify such act to the Bank – however, no such measure was taken[182].

143. Fourth, publication in the DRC's Official Journal is only a proper form of notice for regulatory acts, not for individual acts[183].

144. Fifth, even if the 2010 Decree applied to the Interministerial Order (*quod non*), it would have cancelled only the tax and customs benefits, but not the investment protections granted by the Interministerial Order in Articles 1, 7 and 10[184].

145. Sixth, there is no evidence that the Bank ceased receiving fiscal advantages following the 2010 Decree[185]. Furthermore, contrary to Respondent's assertion, the letter written by the ACB does not demonstrate that the banks acknowledged the effects of the 2010 Decree, but rather that the association was lobbying against the 2010 Decree and seeking a moratorium on its implementation[186].

146. Lastly, Claimants argue that under the principles of international law and the DRC's law, even if the Interministerial Order were deemed illegal, the DRC is estopped from invoking its own illegality to unilaterally withdraw the benefits on which Claimants reasonably relied when making their investment[187].

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[179] Counter-Memorial on Jurisdiction, para. 104; Rejoinder on Jurisdiction, para. 78.
[180] **Exhibit R-001-FR**, 2010 Decree, Article 2 ("The Ministers of Finances, of the Budget, of the Plan and of Mines are tasked, each one as far as it is applicable to them, of the application of this Decree which enters into force at the date of its signature") (Respondent's translation of the French original).
[181] Counter-Memorial on Jurisdiction, paras. 94-95; Rejoinder on Jurisdiction, paras. 70-72.
[182] Counter-Memorial on Jurisdiction, paras. 96-98; Rejoinder on Jurisdiction, paras. 72-74; C PHB, paras. 17-18.
[183] Rejoinder on Jurisdiction, paras. 73-74; Tr., Day 1, p. 91, ll. 16-21 (Cohen Smutny); C PHB, para. 17.
[184] Counter-Memorial on Jurisdiction, paras. 106-109; Rejoinder on Jurisdiction, paras. 79-81; C PHB, paras. 16, 21.
[185] C PHB, para. 20; Tr., Day 1, p. 75, ll. 1-14 (Cohen Smutny).
[186] C PHB, para. 20.
[187] C PHB, paras. 21-22, 77; Tr., Day 1, p. 96, l. 17 to p. 98, l. 3 (Cohen Smutny); **Exhibit H-002-ENG**, Claimants' Opening Statement, slides 56-57.

b. The Interministerial Order did not expire

147. Claimants assert that, while there may be certain orders granting tax advantages which are time-limited, this does not support the conclusion that the Interministerial Order itself, which provides guarantees of legal security in addition to time-bound tax benefits, is or must be time-limited[188]:

148. First, while Articles 2(b)[189] and 4(b)[190] of the Interministerial Order do specify a time-limit, neither of these sub-sections says that the Interministerial Order is "limited in time" or that it would "expire in 2012". Likewise, no other provision of the Interministerial Order includes a time limitation. On the contrary, it is clear on the face of Articles 1, 7 and 10 (which incorporate Respondent's consent to ICSID arbitration) that these provisions are not time-limited[191]. Therefore, Respondent cannot apply by extension a time limitation stated in certain provisions, as it goes against the principle *exceptio est strictae interpretationis*[192].

149. Second, Claimants' interpretation is consistent with the Investment Code, which distinguishes between[193]:

- Investment guarantees and access to international arbitration, which are available to all investors covered by the Code and which are not time-limited ("*garanties*" under Title V and IX); and

- Specific tax or customs advantages for defined periods of time for investments that are approved for such benefits ("*avantages y afférents*" referred in Article 9 of the Code).

[188] Rejoinder on Jurisdiction, para. 54; C PHB, para. 14.
[189] Which sets out estimated investment costs and revenues of the Bank's investment project during the first five years.
[190] Which specifies certain fiscal advantages and the limited time periods during which they will be applicable.
[191] Counter-Memorial on Jurisdiction, paras. 40-41; C PHB, paras. 11-12, 50-52.
[192] Counter-Memorial on Jurisdiction, para. 50; Rejoinder on Jurisdiction, para. 80; C PHB, para. 13; **Goffaux ER I**, paras. 64-67; **Goffaux ER II**, paras. 29-30, 101.
[193] Counter-Memorial on Jurisdiction, paras. 42-46; Rejoinder on Jurisdiction, para. 56; C PHB, paras. 13-14, 39-45; Goffaux's Answers, paras. 24-27, 34-35, 44-47, 62-64.

150. This distinction was stressed by the tribunal in *Lahoud v. DRC* ["***Lahoud***"][194], and it is also reiterated in the 2012 Decree[195] providing guidance on the application of the Investment Code[196].

151. Third, Claimants reject Professor Kumbu's assertion that the Bank's obligation to submit periodic reports to the ANAPI under Article 5 of the Interministerial Order proves the expiration of the legal security guarantees[197]. For Claimants, this "reporting" obligation only applies while the Bank enjoys the tax advantages[198].

152. Lastly, Claimants submit that, in any event, under the principles of international law, Claimants could not reasonably have understood that the ICSID arbitration agreement had expired[199].

153. In sum, Claimants say that the Interministerial Order contains several provisions relating to fiscal advantages that are time-limited and other provisions relating to guarantees of legal security, in particular Articles 7 and 10, that are not time-limited. These two types of provisions are separable, as many investors benefit from the general guarantees of legal security provided by the Investment Code, and only some investors benefit from the tax advantages contained in Titles III and IV[200].

C. The ICSID arbitration agreement also covers Afriland First Group

154. Claimants submit that the Interministerial Order embodies an agreement to submit disputes to ICSID arbitration that covers not only the original shareholders of the Bank, as reflected in Article 2(a) of the Interministerial Order – notably, Afriland First Bank (Claimant 2), Mr. Toubi (Claimant 3), and Dr. Fokam (Claimant 4) – but also Afriland First Group (Claimant 1), which became a shareholder in 2009 and is currently the majority shareholder of the Bank[201].

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[194] **Exhibit CLA-009-FR**, *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014 ["***Lahoud***"], paras. 390-392.
[195] **Exhibit C-018-FR**, 2012 Decree, Article 3 ("Without prejudice to the general guarantees provided for in Title V of the Investment Code, the National Agency for the Promotion of Investments (ANAPI) provides its services to all national and foreign investors engaging in lawful activities in the Democratic Republic of Congo, whether or not they are approved under the general regime of the Investment Code. The customs, fiscal, and parafiscal advantages provided for in Titles III and IV of the Investment Code are only granted to projects approved by the National Agency for the Promotion of Investments (ANAPI) under the general regime of the Investment Code") (Claimants' translation of the French original).
[196] Counter-Memorial on Jurisdiction, paras. 47-48; Rejoinder on Jurisdiction, para. 56.
[197] C PHB, para. 53.
[198] C PHB, para. 53.
[199] C PHB, para. 15.
[200] Counter-Memorial on Jurisdiction, para. 44; C PHB, paras. 50, 52.
[201] **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021.

155. First, all shareholders of the Bank were well known and necessarily approved by the CBC, as required by Congolese banking regulations[202].

156. Second, Article 38 of the Investment Code applies to disputes between an investor and the DRC. Article 10 of the Interministerial Order, in turn, simply incorporates Article 38 of the Investment Code. The protections and guarantees set forth in the Interministerial Order and by reference in the Investment Code, including access to ICSID arbitration, extend to all Claimants, each of which meets the definition of investor set forth in Article 2 of the Investment Code[203].

157. This interpretation is consistent with the conclusions of other ICSID tribunals that had to interpret, in analogous circumstances, the scope of arbitration agreements and which parties may invoke them[204]. For instance, the *Amco Asia v. Indonesia* ["***Amco Asia***"] tribunal considered the question of whether a shareholder that acquired shares in the local subsidiary after the State had entered into the ICSID arbitration agreement could also invoke the ICSID arbitration agreement, and found that the right acquired by the initial shareholder to invoke the arbitration clause is "attached to its investment, represented by its shares in [the local subsidiary] and may be transferred with those shares" to the new shareholder[205].

158. Third, an acquirer of shares is not required to submit a separate request for admission to the investment benefits, as long as it qualifies as an investor under Article 2 of the Investment Code, which includes direct shareholders[206]. Moreover, the Interministerial Order does not provide that a new shareholder must submit a separate request for admission to benefit "as an investor in the covered investment"[207].

* * *

159. In sum, Claimants submit that it is Respondent who bears the burden of establishing the basis for its objection to this Tribunal's jurisdiction, according to ICSID

[202] Counter-Memorial on Jurisdiction, para. 66; Rejoinder on Jurisdiction, para. 51; citing to **Exhibit C-019-FR**, Instruction No. 18 of the CBC (Amendment No. 3), dated 4 July 2023, Article 4. See also Tr., Day 1, p. 118, ll. 5-13 (Cohen Smutny); **Exhibit H-002-ENG**, Claimants' Opening Statement, slide 53; referring to **Exhibit C-070-FR**, Letter from the CBC to Afriland First Group, dated 3 February 2017.
[203] Rejoinder on Jurisdiction, para. 44; C PHB, paras. 26-27.
[204] Counter-Memorial on Jurisdiction, paras. 72-74; Rejoinder on Jurisdiction, para. 47; citing to **Exhibit CLA-011-ENG**, *Amco Asia*, paras. 10, 24, 30; **Exhibit CLA-028-ENG**, *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 1 July 1973 (as reported in Pierre Lalive, The First 'World Bank': Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, BRITISH YEARBOOK OF INTERNATIONAL LAW 51, 123 (1980), p. 149; **Exhibit CLA-021-ENG**, *SPP*, paras. 134-144; **Exhibit CLA-022-ENG**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983, p. 17.
[205] **Exhibit CLA-011-ENG**, *Amco Asia*, para. 31.
[206] C PHB, para. 79.
[207] C PHB, para. 80.

Arbitration Rule 36(2)[208]. Be that as it may, Claimants affirm that this Tribunal has jurisdiction to adjudicate the dispute:

- Claimants allege that they consented to ICSID arbitration through the 2005 *Demande d'Admission* to the General Regime of the Investment Code, and that, once the DRC had also expressed its consent by issuing the Interministerial Order, such consent could not be validly withdrawn;

- Claimants have shown that the Interministerial Order was not cancelled by the 2010 Decree, nor was it designed to expire in 2012; as the 2010 Decree did not abrogate the Interministerial Order, Claimants' consent to ICSID arbitration expressed in the 2023 RfA was also valid and effective; and

- Claimants finally say that Afriland First Group, as a direct shareholder of the Bank, also benefits from the Interministerial Order.

160. In view of the above, Claimants assert that this Tribunal's jurisdiction is established for all the Claimants, in accordance with Article 25 of the ICSID Convention.

4. ANALYSIS OF THE ARBITRAL TRIBUNAL

161. Respondent does not dispute that the Interministerial Order, through its cross-reference to Article 38 of the Investment Code, formalized the DRC's consent to ICSID arbitration in favor of the Bank[209]. But the DRC argues that, before the Bank accepted the offer to arbitrate, the 2010 Decree annulled it, and that consequently no consent was ever locked[210]. Subsidiarily, Respondent says that the investment guarantees granted in the Interministerial Order were time-limited and had lapsed by the time Claimants filed their RfA[211]. Finally, Respondent submits that in any case, one of the Claimants, Afriland First Group, who had not been identified in the Interministerial Order, did not consent to ICSID arbitration[212].

162. Claimants, in turn, argue that they consented to arbitration when submitting their Request for Admission, and that Respondent accepted their offer by issuing the Interministerial Order, before such Order was allegedly annulled by the 2010 Decree[213]. As regards Respondent's subsidiary argument, Claimants say that the benefits granted in the Interministerial Order were not annulled by the 2010 Decree

[208] Rejoinder on Jurisdiction, paras. 20-22; citing to **Exhibit CLA-029-ENG**, *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, para. 321; **Exhibit CLA-030-ENG**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Final Award, 20 December 2023, para. 353; **Exhibit CLA-031-ENG**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.11; **Exhibit CLA-032-ENG**, *Fraport v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 299.
[209] R PHB, paras. 12, 63.
[210] Memorial on Jurisdiction, para. 51; Reply on Jurisdiction, para. 47; R PHB, para. 13.
[211] Memorial on Jurisdiction, para. 50; Reply on Jurisdiction, para. 88; R PHB, para. 13.
[212] Reply on Jurisdiction, para. 104; R PHB, paras. 72-78.
[213] Counter-Memorial on Jurisdiction, paras. 54-55; C PHB, paras. 3, 25.

and were not designed to expire[214]. Finally, Claimants argue that the ICSID arbitration agreement also covers Afriland First Group[215].

163. The summary of the Parties' positions shows that the adjudication of the dispute hinges on two main questions:

164. (i) The first is whether the Bank, by filing its *Demande d'Admission* before the ANAPI on 3 February 2005, extended an offer, on its own behalf and on behalf of its shareholders, to resolve potential disputes through ICSID arbitration, and whether the RDC accepted that offer before the Interministerial Order was revoked by the 2010 Decree or before the benefits allegedly expired in 2012 (**4.2.**).

165. If the answer is yes, then consent to ICSID arbitration was locked in 2005 and under Article 25(2) of the ICSID Convention, such consent became unilaterally irrevocable. Consequently, the Tribunal has jurisdiction and the question of whether the 2010 Decree cancelled the Interministerial Order becomes moot.

166. (ii) If the answer to the previous questions leads to the conclusion that the Tribunal has jurisdiction, there is a second issue to be adjudicated: whether the Bank's consent also covers Afriland First Group (**4.3.**).

167. Before delving into these discussions, it is necessary to provide a short summary of the content of the Investment Code – the Congolese law which provides investors with the possibility to have their investment disputes adjudicated through ICC or ICSID arbitration (**4.1.**).

4.1 THE INVESTMENT CODE

168. As the Second Congo War was drawing to an end, the DRC's transition parliament adopted the 2002 Investment Code to promote investments in sectors deemed crucial for the reconstruction, recovery and stabilization of the DRC's economy. The preamble of the Investment Code confirms that[216]:

> "[…] *l'esprit nouveau de ce Code sera non seulement un Code incitatif et compétitif, mais aussi et surtout un code qui incite les investisseurs dans des domaines du* (sic) *secteurs-clés déclarés par le Gouvernement en vue de lui permettre d'atteindre les objectifs de son programme de développement*.
>
> […] *une attention particulière sera accordée à certains secteurs jugés prioritaires et déterminants pour la reconstruction, la relance et la stabilisation de la croissance de l'économie congolaise*" [Emphasis added].

[214] Counter-Memorial on Jurisdiction, paras. 5, 76-109; Rejoinder on Jurisdiction, paras. 3, 52-78, 79; C PHB, paras. 16-23.
[215] Counter-Memorial on Jurisdiction, paras. 66-74; Rejoinder on Jurisdiction, paras. 6, 43-51; C PHB, paras. 26-27.
[216] **Exhibit C-002-FR**, Investment Code, Recitals.

Types of investors

169. Article 1 of the Investment Code reads as follows:

> "*La présente loi a pour objet de fixer les conditions, les avantages ainsi que les règles générales applicables aux investissements directs, nationaux, et étrangers, réalisés en République Démocratique du Congo dans les secteurs qui ne sont pas expressément réservés à l'État par la loi, et qui ne sont pas exclus par la liste négative figurant à l'article 3 de la présente loi*.
>
> *Tous les investisseurs nationaux et étrangers exerçant une activité licite, agréés ou non, bénéficient de l'ensemble des garanties générales découlant de la présente loi à l'exception des avantages douaniers, fiscaux et parafiscaux prévus aux Titre 111 et IV ci-dessous, qui sont réservés aux Investisseurs agréés selon la procédure prévue par la présente loi*" [Emphasis added].

170. Pursuant to Article 1, the Investment Code recognizes three types of foreign or domestic investors:

- Investors who benefit from the "*ensemble des garanties générales*" ["**Investors of the *Régime Général***"];
- Investors who must be approved to benefit from special tax and customs advantages ["**Investors with Tax and Customs Advantages**"]; and
- Investors who are excluded from the Code because they invest in sectors which are deemed "*non prioritaires*", as established in Article 3 ["**Investors in Non-Preferential Sectors**"].

171. Each of these categories will be examined in more detail in the next paragraphs.

A. Investors of the *Régime Général*

172. Article 2(a) of the Code provides a very wide definition of the *Régime Général*, saying that it is "[l]*'ensemble des dispositions légales contenues dans la présente loi*". *Régime Général* is thus the general framework of rules contained in the Code[217]. While Title III of the Investment Code – which only provides tax and custom exemptions – is titled "*Du Régime Général*", the definition provided in Article 2 prevails, as titles serve solely to structure the Investment Code and facilitate its comprehension[218].

173. Any investor in the DRC, whether national or foreign, automatically qualifies as an Investor of the *Régime Général*, provided that it exercises a legal activity[219], that it

[217] **Exhibit C-002-FR**, Investment Code, Article 2.
[218] **Exhibit C-002-FR**, Investment Code, Article 2.
[219] **Exhibit C-002-FR**, Investment Code, Article 1.

sets up "*une entité economique de droit congolais*", that it invests at least USD 200.000, that it undertakes to respect the environment and to train Congolese personnel and that it guarantees "*un taux de valeur ajoutée*" of at least 35%[220].

174. By qualifying as an Investor of the *Régime Général*, investors are bestowed *ex lege* with two important benefits:

- They enjoy the investment guarantees provided for in Articles 23 to 30 (Title V) of the Investment Code[221]; and

- They have access to international arbitration as provided in Article 38 (Title IX) of the Investment Code[222].

175. Article 38 offers to all Investors of the *Régime Général* the choice between ICC or ICSID arbitration as possible *fora* to solve disputes between investors and the DRC:

> "*Tout différend entre un investisseur et la République Démocratique du Congo relatif à :*
>
> *- un contrat ou accord d'investissement ;*
>
> *- une autorisation d'investissement octroyée par l'autorité compétente, ou toute violation des droits de l'investisseur et/ ou de l'investissement attribués ou crées par le Code des investissements ou par d'autres lois nationales ou par les Traités et Conventions Internationaux auxquels la République Démocratique du Congo a adhéré est réglé dans la mesure du possible, à l'amiable par voie de négociations.*
>
> *Si les parties ne parviennent pas à un règlement à l'amiable de leur différend dans un délai de 3 mois à compter de la première notification écrite demandant l'engagement de telles négociations, le différend sera réglé, à la requête de la partie lésée, conformément à une procédure d'arbitrage découlant :*
>
> *- de la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et Ressortissants d'autres Etats, (Convention CIRDI), ratifiée par la République Démocratique du Congo le 29 avril 1970 ou*
>
> *- des dispositions des Règlements du Mécanisme supplémentaire, si l'investisseur ne remplit pas les conditions de nationalité stipulées à l'article 25 de la Convention CIRDI;*
>
> *- du Règlement d'arbitrage de la Chambre de Commerce Internationale de Paris*" [Emphasis added].

[220] **Exhibit C-002-FR**, Investment Code, Article 8.
[221] **Exhibit C-002-FR**, Investment Code, Articles 23-30.
[222] **Exhibit C-002-FR**, Investment Code, Article 38.

B. Investors with Tax and Customs Advantages

176. An Investor of the *Régime Général* can additionally become an Investor with Tax and Customs Advantages if:

- In its *demande d'admission* (also referred to in the Code as *demande d'agrément*[223]) before the ANAPI it requests specific tax and customs advantages[224];
- The ANAPI reviews and approves the *demande d'admission*[225]; and
- The Ministers of Planning and Finance issue an *arrêté interministériel* formally approving the *demande d'admission*[226] and determining the nature and time limitation of the tax and customs advantages granted[227].

177. Therefore, Investors with Tax and Customs Advantages enjoy a double regime[228]:

- As Investors of the *Régime Général*, they are entitled to investment guarantees and access to international arbitration, which are not time-limited; and
- Additionally, they obtain specific tax and customs advantages as defined in an *arrêté interministériel,* which are time-limited.

178. Upon expiration of the tax and customs advantages, the Investor with Tax and Customs Advantages reverts to the status of a simple Investor of the *Régime Général*[229].

[223] For example, **Exhibit C-002-FR**, Investment Code, Articles 5 ("*demande d'agrément*") and 38 ("*demande d'admission*").
[224] **Exhibit C-002-FR**, Investment Code, Articles 1 ("[…] *avantages douaniers, fiscaux et parafiscaux prévus aux Titre III et IV ci-dessous, qui sont réservés aux Investisseurs agréés selon la procédure prévue par la présente loi*") and 5 ("*Tout Investisseur, souhaitant bénéficier des avantages prévus par la présente loi, est tenu de déposer un dossier de demande d'agrément en un exemplaire, auprès de l'ANAPI. Ce dossier doit être présenté conformément au modèle repris à l'annexe de la présente Loi*").
[225] **Exhibit C-002-FR**, Investment Code, Article 6 ("*La demande d'agrément est examinée par l'ANAPI qui la transmet aux Ministres ayant le Plan et les Finances dans leurs attributions pour approbation par l'Arrêté Interministériel*").
[226] **Exhibit C-002-FR**, Investment Code, Articles 6 and 7.
[227] **Exhibit C-002-FR**, Investment Code, Article 7 ("*L'Arrêté Interministériel d'agrément doit préciser* : […] - *la nature et la durée des avantages accordés et leurs modalités d'applications ;* […]").
[228] **Exhibit C-002-FR**, Investment Code, Article 1.
[229] Kumbu's Answers, para. 27.

C. Investors in Non-Preferential Sectors

179. Although the Investment Code is a general law, there are certain sectors which are not subject to its regulation. These sectors are considered *non prioritaires*[230] and are defined in Article 3[231]:

> "*Les dispositions de la présente loi ne s'appliquent pas aux secteurs suivants :*
>
> *- Mines et hydrocarbures ;*
>
> *- Banques ;* […]
>
> *Les investissements dans ces secteurs sont régis par des lois particulières.* […]" [Emphasis added].

180. The banking sector is thus excluded from the general application of the Investment Code, and investments in this sector are governed by the Banking Law, an act that does not provide any investment guarantees or access to international arbitration[232]. At the time when the Investment Code was enacted, the DRC was discussing a specific investment law for the banking sector[233]. The Draft Law included investment guarantees, access to international arbitration, and tax and custom advantages[234]. The DRC, however, never enacted the Draft Law[235].

181. There is, however, one aspect in which the Investment Code does apply to investors in the banking sector: pursuant to Article 3 banking investors are also required to submit their *demande d'admission* – in the form of a *dossier d'investissment* – to the ANAPI[236]:

> "*Nonobstant les dispositions particulières qui régissent chacun de ces secteurs d'activités, tout investisseur est tenu de déposer un exemplaire de son dossier d'investissement à l'ANAPI*" [Emphasis added].

182. Accordingly, Investors in Non-Preferential Sectors, such as investors in the banking sector are excluded from the scope of the Investment Code, but still obliged to file a *demande d'admission* before the ANAPI, which it is not intended to bestow any advantage to the investor (the *demande d'admission* will be discussed in section 4.2.B.).

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[230] **Exhibit C-002-FR,** Investment Code, Article 1.
[231] **Exhibit C-002-FR,** Investment Code, Article 3.
[232] **Exhibit R-003-FR**, Banking Law.
[233] **Exhibit R-005-FR**, Draft Law.
[234] **Exhibit R-005-FR**, Draft Law, Articles 5-8, 28-35, 44.
[235] **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010, p. 2.
[236] **Exhibit C-002-FR,** Investment Code, Article 3.

D. Conclusion

183. In sum, the Investment Code recognizes:

- Investors of the *Régime Général*, who invest in sectors deemed *prioritaires* under the Investment Code and, upon filing of a *demande d'admission* with the ANAPI, enjoy investment guarantees and the right to access international arbitration, without the need of an *arrêté interministériel*;

- Investors with Tax and Customs Advantages, who are Investors of the *Régime Général* that have requested and been awarded certain tax and customs advantages, for a limited period and by way of an *arrêté interministériel*; they also enjoy investment guarantees and access to international arbitration both during the time period when they enjoy tax and customs advantages and also thereafter; and

- Investors in Non-Preferential Sectors, who invest in sectors deemed *non-prioritaires* in the DRC, a concept which includes banks, and are governed by specific laws; however, like other investors, they are still required to submit their *demande d'admission* to the ANAPI.

4.2 HAS THE BANK CONSENTED TO ICSID ARBITRATION IN ITS *DEMANDE D'ADMISSION*?

184. Having summarized the legal regime foreseen by the Investment Code, the Tribunal will now address the first question: whether the Bank, when it filed its *Demande d'Admission*, in 2005, already consented to ICSID arbitration?

185. The underlying facts are not disputed.

186. When in 2005 Claimants took the decision to invest in the Congolese banking sector, they faced a difficulty: under the Investment Code, they were considered as Investors in Non-Preferential Sectors, who must submit a *demande d'admission* before the ANAPI, but who are not entitled to any tax and customs advantages, nor to the investment guarantees and access to international arbitration foreseen in the Investment Code. The Banking Law, which provided the general regulation for the banking sector, did not provide any incentive for prospective investors.

187. The Congolese authorities were at that time perfectly aware that there was a legal vacuum in the Congolese legislation, and that investments in the banking sector were being denied the advantages proffered to other sectors. To fill this gap, in 2002 the DRC's Government began discussing a specific law on incentives for investment in credit institutions and microfinance, the Draft Law, which would have

offered tax and customs exemptions, investment guarantees and access to ICSID or ICC arbitration[237].

188. The Draft Law, however, was never adopted[238].

189. While the Draft Law was being discussed, the Congolese authorities adopted an alternative strategy[239]: if a prospective investor in the banking sector submitted a *demande d'admission* requesting tax and custom advantages, investment guarantees and access to international arbitration, and the Congolese authorities thought that the project merited protection, they took the decision to apply the Investment Code by analogy. In these cases, the Ministers of Planning and Finance issued an interministerial order, modelled on the requirements provided for in the Investment Code, which proffered to the banking investors certain tax and custom advantages, certain investment guarantees, and the right to access international arbitration, on lines similar to those established in the Investment Code.

190. This is precisely what happened in the present case: the Bank submitted its *Demande d'Admission* to ANAPI on 3 February 2005[240], and five months thereafter, on 18 July 2005, the Ministers of Planning and Finance issued the Interministerial Order, which granted the Bank certain tax and customs advantages, which were to expire in 2012, plus certain specific investment guarantees (similar but not identical to those provided for in the Investment Code), plus the right to access ICC or ICSID arbitration, by including a cross-reference to Article 38 of the Investment Code[241].

191. Against this factual backdrop, Claimants submit that it was in 2005 when the Bank and the DRC locked consent to submit investment disputes to ICSID arbitration[242], while the DRC submits that the Claimants only consented to ICSID arbitration in

[237] Article 44 of the Draft Law closely mirrored Article 38 of the Investment Code, both offering access to ICSID and ICC arbitration (**Exhibit R-005-FR**, Draft Law, Article 44).
[238] **Exhibit R-005-FR**, Draft Law. See **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010, p. 2 ("[…] 3. *le projet de loi portant régime incitatif en matière d'investissements dans les secteurs des établissements de crédit et des institutions de micro finance présenté par la Banque Centrale du Congo se trouve sur la table du Gouvernement depuis 2003*").
[239] **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010, p. 3 ("*Ce qui revient à dire que le code des investissements reconnait également aux investissements dans le secteur bancaire la possibilité de bénéficier de l'appui du gouvernement en termes d'avantages fiscaux, douaniers et parafiscaux. Toutefois, pour obtenir cet appui, le demandeur doit agir conformément à la loi incitative spécifique à ce secteur. Etant donné que cette loi n'est pas encore prise et que ce vide juridique ne peut pas justifier le refus de recevoir et d'examiner les dossiers des investissements présentés par les banques, le gouvernement a, à juste titre, levé l'option de faire application du code des investissements à ce secteur, compte tenu de son importance dans la relance de l'économie, en exigeant dans chaque cas l'avis préalable de Ia Banque Centrale du Congo et ce, en attendant la mise en place d'un régime incitatif aux investissements dans ledit secteur*").
[240] **Exhibit C-069-FR**, Request for Admission.
[241] **Exhibit C-001-FR**, Interministerial Order.
[242] C PHB, para. 25; Tr., Day 1, p. 109, l. 6 to p. 110, l. 8, p. 128, l. 13 to p. 130, l. 18 (Cohen Smutny).

2023, when they filed their RfA, after the DRC had already withdrawn its offer or such offer had expired[243].

192. The Tribunal agrees with Claimants: consent to ICSID arbitration was indeed locked in 2005. The following reasons support the Tribunal's findings:

A. Consent to ICSID arbitration under the Investment Code

193. The specific provision of the Investment Code which provides Investors of the *Régime Général* (including Investors with Tax and Customs Advantages) with the right to access international arbitration, in order to solve investment disputes with the DRC, is the first paragraph of Article 38, which additionally grants investors the possibility of choosing between two types of international arbitration *fora* (arbitration under the ICC rules or alternatively under those of ICSID, including the Additional Facility Rules)[244]:

> "*Tout différend entre un investisseur et la République Démocratique du Congo relatif à :*
>
> *- un contrat ou accord d'investissement ;*
>
> *- une autorisation d'investissement octroyée par l'autorité compétente, ou toute violation des droits de l'investisseur et / ou de l'investissement attribués ou crées par le Code des investissements ou par d'autres lois nationales ou par les Traités et Conventions Internationaux auxquels la République Démocratique du Congo a adhéré est réglé dans la mesure du possible, à l'amiable par voie de négociations.*
>
> *Si les parties ne parviennent pas à un règlement à l'amiable de leur différend dans un délai de 3 mois à compter de la première notification écrite demandant l'engagement de telles négociations, le différend sera réglé, à la requête de la partie lésée, conformément à une procédure d'arbitrage découlant :*
>
> *- de la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et Ressortissants d'autres Etats, (Convention CIRDI), ratifiée par la République Démocratique du Congo le 29 avril 1970 ou*
>
> *- des dispositions des Règlements du Mécanisme supplémentaire, si l'investisseur ne remplit pas les conditions de nationalité stipulées à l'article 25 de la Convention CIRDI;*
>
> *- du Règlement d'arbitrage de la Chambre de Commerce Internationale de Paris*" [Emphasis added].

[243] R PHB, paras. 57-58; Tr., Day 1, p. 13, l. 1 to p. 16, l. 6 (Lorenzo).
[244] **Exhibit C-002-FR**, Investment Code, Article 38.

The second paragraph of Article 38

194. If the Investor of the *Régime Général* opts for ICSID arbitration, the second paragraph of Article 38 of the Investment Code provides specific rules regarding the parties' consent[245]:

> "*Le consentement des parties à la compétence du CIRDI ou du Mécanisme Supplémentaire, selon le cas, requis par les instruments les régissant, est constitué en ce qui concerne la République Démocratique du Congo par le présent article et en ce qui concerne l'investisseur par sa demande d'admission au régime de la présente loi ou ultérieurement par acte séparé*" [Emphasis added].

195. Under this significant provision, the DRC, by enacting the Investment Code, extended a general offer to resolve through ICSID arbitration disputes concerning investors and investments covered by the Code, contingent upon the investor's consent to this alternative. Note that the DRC's consent is general and anticipatory: by enacting the Investment Code, the DRC agrees to ICSID arbitration, before the investor has actually made the investment, any dispute has arisen, and the investor has made its choice to select ICSID arbitration.

196. Article 38 of the Investment Code then foresees two ways for investors to accept the DRC's anticipatory offer to submit to ICSID arbitration:

- Normally, the investor's consent to ICSID arbitration "*est constitué*" by the *demande d'admission*, which the investor is obliged to file with ANAPI before carrying out the investment; and

- Subsidiarily, the investor can also consent to ICSID arbitration "*ultérieurement"* by an "*acte séparé*", such as by filing a request for arbitration under the ICSID Convention.

197. The scope of disputes subject to arbitration in Article 38 is broad. It does not limit arbitrable disputes to claims raised by the investor but appears to include counterclaims by the State. Therefore, the investor's consent to ICSID arbitration, anticipated to be given in the *demande d'admission,* is also in the DRC's interest. As Claimants have convincingly explained, the Investment Code includes an obligation for the investors to repay all outstanding taxes and penalties, if the DRC withdraws the interministerial order, because of a breach by the domestic enterprise which carries out the project of its commitments undertaken under the Code or other legal provision[246]. The perfected ICSID arbitration agreement would thus give standing to the DRC to claim against the investors, demanding the repayment of taxes and penalties[247].

[245] **Exhibit C-002-FR**, Investment Code, Article 38.
[246] **Exhibit C-002-FR**, Investment Code, Articles 34 and 36.
[247] C PHB, fn. 53.

198. The solution adopted by the Investment Code of the DRC for the formalization of consent to ICSID arbitration (the State's consent being contained in a municipal law, and the investor's consent by an application to be included in a certain regime) is not unique. As explained by Professor Schreuer[248]:

> "The investor may express its acceptance in a variety of ways other than instituting proceedings. These include an investment agreement with the host State, a simple communication to the host State that consent to ICSID's jurisdiction in accordance with the legislation is accepted, a statement contained in an application for an investment licence or a mere application if under the law in question the successful applicant automatically gets specified benefits including access to ICSID.
>
> The investor's acceptance of consent can be given only to the extent of the offer made in the legislation. But it is entirely possible for the investor's acceptance to be narrower than the offer and to extend only to certain matters or only to a particular investment operation" [Emphasis added].

B. The consent by the Bank and its shareholders

199. Claimants submit that, when the Bank filed its *Demande d'Admission* with the ANAPI in 2005, they consented to have any investment dispute adjudicated through ICSID arbitration[249].

200. The Tribunal concurs.

201. On 3 February 2005 the Bank submitted its *Demande d'Admission* before the ANAPI, to which it attached the Feasibility Study[250]. The Bank's letter opens with this declaration[251]:

> "*Nous venons respectueusement auprès de votre haute personnalité, solliciter l'agrément au Régime Général de l'ANAPI, ainsi que des avantages spécifiques inhérents à la contribution significative que notre banque entend apporter à l'émergence d'une classe d'entrepreneurs africains en RD Congo*" [Emphasis added].

202. The Bank's primary request was thus admittance to the *Régime Général* of the Investment Code. Admittance to the *Régime Général* implied the consideration as

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[248] **Exhibit CLA-026-ENG**, Christoph Schreuer, *Consent to Arbitration*, UNCTAD COURSE ON DISPUTE SETTLEMENT (2003), International Centre for the Settlement of Investment Disputes, Module 2.3, p. 14. See also **Exhibit CLA-027-ENG**, Christopher Dugan, Don Wallace, Noah Rubins and Borzu Sabahi, INVESTOR-STATE ARBITRATION (extracts), 2008, pp. 222, 231.
[249] Tr., Day 1, p. 109, l. 6 to p. 110, l. 8, p. 128, l. 13 to p. 130, l. 18 (Cohen Smutny); Counter-Memorial on Jurisdiction, paras. 52-53; Rejoinder on Jurisdiction, para. 42.
[250] Based on the evidence on the record, it seems that the same Feasibility Study was submitted to the CBC and the ANAPI. The Parties have not submitted a different *étude de faisabilité*. **Exhibit C-069-FR**, Request for Admission; **Exhibit R-008-FR**, Letter from Afriland to the CBC, dated 3 February 2005.
[251] **Exhibit C-069-FR**, Request for Admission.

Investor of the *Regime Général*, entitled to investment guarantees and access to ICC and ICSID arbitration.

203. Although the application was formally made in the Bank's own name, it was also acting on behalf of its shareholders; this is shown in the Feasibility Study, in which the Bank specifically requests "*garantie de non-exploitation et de non-nationalisation pour les actionnaires*" [Emphasis added][252]. The request implied that the shareholders, as investors, would become subject to the legal regime provided for in the Investment Code[253]:

    - They would benefit from the investment advantages and access to international arbitration; but

    - They would also become liable, under Article 36.2 of the Investment Code, for the Bank's outstanding taxes and penalties, if, once granted, the *agrément* was withdrawn by the Congolese authorities[254].

204. Was the Bank's request in conformity with the Investment Code?

205. *Prima facie* the answer must be in the negative, because the Code in its Article 3 excludes investments in the banking sectors as *non-prioritaires* and considers banking investors as Investors in Non-Preferential Sectors, not entitled to any advantage.

206. Notwithstanding this *prima facie* reading, the Bank asked the ANAPI to be admitted as an Investor of the *Régime Général,* entitled to advantages. The Bank submitted various arguments to support its claim; it argued that:

    - Under Article 3 of the Investment Code the banking sector was meant to be regulated in a specific law;

    - A temporary legal vacuum existed until such specific law was enacted[255]; and

    - In the meantime, the Bank considered itself eligible, in accordance with the Investment Code, to request from the ANAPI certain substantive investment protections, such as full protection and security, free transfer

[252] **Exhibit R-011-FR**, Feasibility Study, p. 43.
[253] Counter-Memorial on Jurisdiction, para. 69.
[254] Rejoinder on Jurisdiction, para. 41; C PHB, fn. 53.
[255] **Exhibit R-011-FR**, Feasibility Study, p. 17 ("*Au total, les forces et les faiblesses du Congo Démocratique se résument ainsi :* […] *Faiblesses* […] *Le Code des investissements exclut le secteur financier des secteurs à privilégier du point de vue fiscal et aucun texte spécifique en matière d'incitations n'est prévu pour le secteur financier. Ceci est néanmoins atténué par le fait que les banques sont éligibles au régime de l'ANAPI*").

of funds and non-expropriation[256], plus certain tax and customs advantages[257].

207. For the present purposes, whether the Bank's reading of the Investment Code was correct or not is irrelevant, because the Interministerial Order eventually adopted a different solution: it created a *sui generis* legal regime, bestowing upon the Bank and its shareholders investment benefits analogous to those contemplated in Articles 23-30 of the Investment Code and incorporating Article 38 by cross-reference (see section 4.2.C.a. *infra*).

208. What is relevant is that, when the Bank filed its *Demande d'Admission,* requesting admittance to the *Régime Général,* it was demanding access to international arbitration foreseen in the *Régime Général*, and through this request it was implicitly expressing its consent to have investment disputes with the DRC adjudicated under the two paragraphs of Article 38 of the Investment Code:

- The first paragraph which permits protected investors to choose between ICC and ICSID arbitration; and

- The second paragraph, clarifying that the consent to ICSID arbitration "*est constitué*" by the *demande d'admission*, which the investor is obliged to file with the ANAPI before carrying out the investment.

209. In sum: by submitting its *Demande d'Admission* to the *Régime Général* under the Investment Code, the Bank, acting on behalf of its shareholders, was already providing the consent foreseen in the second paragraph of Article 38 of such law. The *Demande d'Admission* thus formalized the Bank's and its shareholders' consent to ICSID arbitration.

210. (Note that the *Demande d'Admission* does not formalize the Bank's consent to ICC arbitration, because the second paragraph of Article 38, which permits that a *demande d'admission* be considered as consent, only applies to ICSID arbitration, not to ICC arbitration — to accept ICC arbitration, an investor must make a separate declaration of consent)[258].

C. The consent by the DRC

211. The Tribunal has already stated that the Bank's *Demande d'Admission* faced a legal hurdle: under Article 3 of the Investment Code, investors in the banking sector were

[256] **Exhibit R-011-FR**, Feasibility Study, p. 43 ("[…] *Plus spécifiquement, nous sollicitons du gouvernement de la République de la RDC de pouvoir jouir des avantages suivants* : […] *Liberté d'acquisition et de transfert de devises pour paiements d'emprunts étrangers* ; […] *Liberté de transferts et de conversion des fonds avec to siège social* ; […] *Bénéfice de la protection des autorités pour les problèmes de sécurité en cas de besoin* ; […] *Garantie de non-expropriation et de non-nationalisation pour les actionnaires ; et liberté de transfert des capitaux et bénéfices*").
[257] **Exhibit R-011-FR**, Feasibility Study, p. 14.
[258] **Exhibit C-002-FR**, Investment Code, Article 38.

considered Investors in Non-Preferential Sectors and not Investors of the *Régime Général,* and consequently not entitled to the advantages requested by the Bank[259].

a. The Interministerial Order

212. The Congolese authorities, interested in promoting investments in the banking sector, found a solution to the legal impasse: upon a positive review by the ANAPI, on 18 July 2005 the Ministers of Finance and Planning signed and issued an *arrêté interministériel* [previously defined as the "Interministerial Order"], the legal instrument foreseen in Article 6 of the Investment Code.

213. The Interministerial Order approved the Bank's *Demande d'Admission,* granting access to the *Régime Général* of the Investment Code, as the Bank had requested[260]:

> "[Preamble] *Considérant que la Société Afriland First Bank Congo Démocratique « First Bank CD » a présenté à l'Agence Nationale pour la Promotion des Investissements, un projet pour son agrément au régime général unique du Code des Investissements ;*
>
> […]
>
> [Article 1] *Le projet d'investissement présenté par la Société Afriland First Bank Congo Démocratique « First Bank CD » est agréé au bénéfice des avantages du régime général unique du Code des Investissements*" [Emphasis added and bold omitted].

214. The Interministerial Order was not a unique measure: other banks also submitted *demandes d'admission* under the Investment Code and were also admitted into a *sui generis* regime created through *arrêtes interministériels*[261] — as proved by subsequent correspondence exchanged between the ACB and the Prime Minister, the Governor of the CBC and the DRC National Assembly[262], and by the witness statement of Mr. Nkanka, the *Inspecteur Général des Finances* in the Ministry of Finance of the DRC:

> "*Quand le Ministère des Finances rendit son rapport listant les exonérations qui avaient été accordées, nous nous sommes rendus* (sic) *compte que nous faisions face à un nombre élevé d'instruments, de sorte qu'il aurait été compliqué de les annuler individuellement*" [Emphasis added][263].

[259] **Exhibit C-002-FR**, Investment Code, Article 3.
[260] **Exhibit C-001-FR**, Interministerial Order, Preamble and Article 1.
[261] **Nkanka WS**, paras. 14-15. See also Goffaux's Answers, paras. 40-43.
[262] **Exhibit R-007-FR**, Letter from the ACB to the Prime Minister, dated 23 April 2010, p. 2 ("[…] *l'admission des projets du secteur bancaire au bénéfice du code des investissements se justifie par l'absence de législation incitative spécifique applicable à ce secteur*"). See also **Exhibit R-013-FR**, Letter from the ACB to the Governor of the CBC, dated 22 June 2010; **Exhibit R-014-FR**, Letter from the ACB to the President of the DRC Parliament, dated 28 June 2010.
[263] **Nkanka WS**, para. 14.

215. Professor Goffaux has justified the issuance of the Interministerial Order in light of the broader context of reconstruction, instability and transition that the DRC was experiencing at the time[264]. This context is hinted at in the preamble of the Interministerial Order, when the text acknowledges that the act is adopted "[v]*u la nécessité et l'urgence*"[265].

216. The remaining content of the Interministerial Order grants the Bank investment guarantees (**b.**) and access to international arbitration (**c.**) on terms analogous to those contemplated in Articles 23-30 of the Investment Code.

b. Investment guarantees

217. Article 7 of the Interministerial Order grants the Bank and its shareholders certain investment guarantees (which are similar, but not identical to those offered in the Investment Code)[266]:

> "*L'Etat Congolais garantit à la Société Afriland First Bank Congo Démocratique « First Bank CD » ainsi admise au bénéfice des avantages du Code des Investissements :*
>
> *- Le droit pour les personnes physiques ou morales étrangères, de recevoir le même traitement que les personnes physiques ou morales de nationalité congolaise, sous réserve de réciprocité ;*
>
> *- Le droit de recevoir de la part de la République Démocratique du Congo un traitement juste et équitable, conformément aux principes du droit international. La République Démocratique du Congo veillera à ce que ce droit ne soit entravé, ni en droit, ni en fait ;*
>
> *- La propriété individuelle ou collective acquise par la Société Afriland First Bank Congo Démocratique « First Bank CD ». Ainsi, la Société Afriland First Bank Congo Démocratique « First Bank CD » ne pourra, directement ou indirectement, dans sa totalité ou en partie, être nationalisée ou expropriée par une nouvelle loi et/ou une décision de l'autorité locale ayant le même effet, excepté pour des motifs d'utilité publique et moyennant le paiement d'une juste et équitable indemnité basée sur la valeur du marché de l'actif nationalisé ou exproprié, établie contradictoirement ;*
>
> *- La liberté de transfert à l'étranger des revenus provenant des opérations liées à l'investissement réalisé conformément à la règlementation de change ;*
>
> *- La liberté de transfert à l'étranger des dividendes ainsi que des revenus générés par les dividendes réinvestis dans l'entreprise.*
>
> *- La liberté de transfert des* royalties*, du principal, des intérêts et des charges connexes à payer par une entreprise congolaise admise au régime général*

[264] Tr.-FR, Day 2, p. 35, l. 27 to p. 36, l. 25 (Goffaux); Goffaux's Answers, paras. 40-43.
[265] **Exhibit C-001-FR**, Interministerial Order, Preamble.
[266] **Exhibit C-001-FR**, Interministerial Order, Article 7.

> *unique du Code au titre du service de la dette contactée à l'étranger en vue du financement complémentaire de l'investissement.*
>
> *- La liberté de transfert de toute indemnité d'expropriation due à un étranger, telle que stipulée à 1'article 27 du Code des Investissements*" [Emphasis added and bold omitted].

c. Access to international arbitration

218. Article 10 of the Interministerial Order provides the Bank and its investors with access to international arbitration to adjudicate investment disputes with the DRC, deriving from the investment guarantees formalized in Article 7; and it does so by incorporating through a cross-reference to the dispute resolution procedures established in Article 38 of the Investment Code[267]:

> "*Les litiges pouvant survenir à l'occasion de l'interprétation ou de l'application du présent Arrêté seront réglés conformément aux dispositions des articles 37 et 38 du Code des Investissements*".

219. The first paragraph of Article 38 of the Investment Code (the full text of the provision can be found in section 4.1.A. above), which became a part of the Interministerial Order, provides that investment disputes between an investor and the DRC, if not amicably solved after a three-month cooling-off period, can be adjudicated, at the "*partie lesée*"'s option by ICSID (including Additional Facility) or ICC arbitration.

220. In its second paragraph, Article 38 adds that consent to ICSID arbitration "*est constitué en ce qui concerne la République Démocratique du Congo par le présent article*" and as regards the investor "*par sa demande d'admission au régime de la présente loi*" (a provision which has been explained in section 4.2.A. above).

221. The Interministerial Order thus confirms that the DRC initially extended a general offer to resolve before ICSID disputes concerning investors and investments covered by the Code by enacting the Investment Code, and gave its consent to extend this regime to the Claimants with the issuance of the Interministerial Order. In turn, the investor's consent is derived from filing the *Demande d'Admission*.

222. In sum: the Interministerial Order, by incorporating through a cross-reference Article 38 of the Investment Code, clarified:

- That the DRC gave its standing offer to ICSID arbitration through the enactment of Article 38 of the Investment Code;

[267] **Exhibit C-001-FR,** Interministerial Order, Article 10.

- That the Bank believed that filing a *demande d'admission* and obtaining an interministerial order would result in its admission to the General Regime and grant of specific tax and custom advantages;

- That the Bank's consent (on its own behalf and on that of its shareholders) to ICSID arbitration was given in its *Demande d'Admission* when it requested access to the *Régime Général;*

- Since the Investment Code does not apply to banks, the DRC's consent to ICSID arbitration was perfected by ANAPI's approval and the issuance of the Interministerial Order, which incorporated Article 38 of the Investment Code through a cross-reference; and consequently,

- That the Bank and its shareholders are entitled to have their investment disputes with the DRC adjudicated through international arbitration, with the right to choose between ICC and ICSID arbitration.

D. The 2010 Decree

223. Five years after publication of the Interministerial Order, the DRC issued the 2010 Decree, annulling all "*actes réglementaires et autres instructions administratives*" which had granted "*exonérations et allègements en matière d'impôts, taxes, redevances et autres dus au trésor public*"[268], in contravention of the law:

> "*Article 1er :Sont annulés tous les actes réglementaires et autres instructions administratives octroyant, en violation des lois en vigueur, quelles qu'en soient les motivations, des exonérations et allégements en matière d'impôts, taxes, redevances et autres dus au trésor public.*
>
> *Article 2 :Les Ministres des Finances, du Budget, du Plan et des Mines sont chargés, chacun en ce qui le concerne, de l'application du présent Décret qui entre en vigueur à la date de sa signature*" [Emphasis added].

224. The Parties have discussed whether the scope of the "*actes réglementaires et autres* instructions *administratives*" which the 2010 Decree orders to be annulled, included or not *arrêtés interministériels*, such as the Interministerial Order.

225. The discussion is moot: the Tribunal has already established that consent to ICSID arbitration between the DRC and the Bank was locked when the DRC issued its Interministerial Order on 18 July 2005, confirming the applicability of Article 38 of the Investment Code to the Bank's investment.

226. From that date on, consent became irrevocable.

227. This conclusion is supported by Article 25 of the ICSID Convention:

[268] **Exhibit R-001-FR**, 2010 Decree, Article 1; **Nkanka WS**, para. 14.

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally" [Emphasis added].

228. Under this rule "any legal dispute arising directly out of an investment" can be adjudicated by ICSID arbitration, provided that the State and the investor "consent in writing to submit to the Centre". Once consent has been locked, there is an express prohibition for any "party [to] withdraw its consent unilaterally".

229. The irrevocability applies, even if the State subsequently purports to annul the administrative act or repeal the municipal legislation which had formalized its consent. This is confirmed by Professor Schreuer[269]:

> "Consent will be perfected only upon the acceptance of the offer and the time of consent triggers a number of legal consequences under the Convention. The most important of these is that consent becomes irrevocable. Therefore, once the investor has accepted consent based on legislation, the agreement on consent will stay in effect even if the legislation is repealed" [Emphasis added].

230. In sum: the scope and effects of the 2010 Decree are irrelevant. By 2005, the Bank and the DRC had both consented to ICSID arbitration, and once consent had been locked, Article 25 of the Convention prohibits that such consent be withdrawn through any mean, including through the enactment of municipal legislation or the annulment of administrative acts. The 2010 Decree is incapable of undoing the Parties' prior perfected consent to have investment disputes adjudicated through ICSID arbitration.

E. Respondent's counterarguments

231. Respondent submits several counterarguments, to support its case that the DRC's consent to ICSID arbitration, embodied in the Interministerial Order, was withdrawn or expired before the occurrence of the impugned measures; the Tribunal will analyze and dismiss these arguments in the following sections.

a. The benefits granted in the Interministerial Order were originally designed to expire in 2012

232. Respondent argues that the benefits granted in the Interministerial Order were limited in time and were set to expire, at the latest, in 2012[270]; such time limitation

[269] **Exhibit CLA-026-ENG**, Christoph Schreuer, *Consent to Arbitration*, UNCTAD COURSE ON DISPUTE SETTLEMENT (2003), International Centre for the Settlement of Investment Disputes, Module 2.3, p. 14.
[270] Memorial on Jurisdiction, para. 50; Reply on Jurisdiction, paras. 83, 88; R PHB, para. 49.

covers not only tax and customs benefits, but also any investment guarantees – including, particularly, the dispute resolution provision[271].

233. The Tribunal disagrees.

Time limits in the Investment Code

234. Article 9 of the Investment Code imposes certain time limits, which run from three to five years to tax and custom advantages; these entitlements consequently terminate when the relevant time-period has lapsed.

235. The regulation, however, differs as regards Investors of the *Régime Général*: the Code does not include any rule establishing time limits to the investment guarantees and to the right to access to international arbitration proffered to these investors. In the absence of such specific provision, both experts on Congolese law, Professor Kumbu and Professor Goffaux, agree that no such restriction exists and that Investors of the *Régime Général* enjoy these benefits as long as they own the investment[272].

Time limits in the Interministerial Order

236. The Interministerial Order follows the same approach as the Investment Code.

237. The tax advantages proffered to the Bank under Article 4(b) are subject to the same time limits of between three and five years foreseen in the Investment Code, while Article 7 (which establishes the investment guarantees) and Article 10 (which through a cross-reference to Article 38 of the Investment Code grants the investors the right to access ICSID arbitration) are not subject to any time limits. It appears that the Interministerial Order also does not impose any time limits on the custom advantages it grants.

238. The necessary consequence is that the same solution adopted under the Investment Code is also to be extended to the Interministerial Order: when a law states that certain rights are subject to time limitations, but omits the statement with regard to other rights, these other rights cannot be deemed to be affected by the time limitations. As Claimants rightly say, a time limitation stated only in certain provisions cannot be extended to other situations, which are silent in this regard, as to do otherwise would breach the principle *exceptio est strictae interpretationis*[273].

b. Claimants did not expressly state their consent to investment arbitration

239. Respondent also says that there is no evidence that Claimants accepted an offer to arbitrate in February 2005, when they submitted their request to the ANAPI. Neither

[271] Reply on Jurisdiction, paras. 84-88.
[272] Kumbu's Answers, para. 27; Goffaux's Answers, para. 21.
[273] Counter-Memorial on Jurisdiction, para. 50; Rejoinder on Jurisdiction, para. 80; C PHB, para. 13; **Goffaux ER I**, paras. 64-67; **Goffaux ER II**, paras. 29-30, 101.

the Request for Admission, nor any contemporaneous document, mentions that the Bank is consenting to arbitration[274].

240. The Tribunal does not share the DRC's position.

241. Neither the Investment Code (nor the Interministerial Order) requires that investors, when they submit their *demande d'admission*, include a specific declaration stating that they are accepting the State's offer of ICSID arbitration. The second paragraph of Article 38 of the Investment Code (which is incorporated by reference into the Interministerial Order) simply says that the consent to ICSID arbitration "*est constitué en ce qui concerne l'investisseur par sa demande d'admission au régime de la présente loi*"[275].

242. "*Est constitué*" can be translated as "is constituted", meaning "is formed" or "is made"[276].The use of this verb and of the preposition "*par*" (*i.e.*, "by") underline that no further requirement, beyond submitting the *demande d'admission*, is necessary for an investor to consent to ICSID arbitration. Article 38 only requires, for the investor to express its consent, that the *demande d'admission* be filed – it does not impose any additional formal requirements.

243. The Parties have referred to the decision on jurisdiction in *Société Resort*[277], where the tribunal dismissed the respondent's jurisdictional objection, concluding that the investor was not required to expressly state in the *demande d'agrément* its consent to ICSID arbitration. The tribunal in that case found that the ICSID arbitration agreement had been perfected once the national authority approved the *demande d'admission,* even in the absence of an express reference to such alternative[278].

244. Although the facts and wording of the key provisions differ, the general thrust of the decision in *Société Resort* supports the Tribunal's findings in this case. The *Société Resort* tribunal considered that, since the Ivorian investment code did not expressly require the investor to state its consent to ICSID arbitration, once the State had approved the *demande d'agrément* it would be unfair to deny the investor access to international arbitration[279].

245. In this case, the Tribunal has reached an analogous decision: neither the Investment Code of the DRC nor the Interministerial Order require an express reference to ICSID, and thus, once the Interministerial Order has approved the *Demande d'Admission*, it would be unfair to deny the investor access to ICSID arbitration.

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[274] Reply on Jurisdiction, paras. 97-102; R PHB, paras. 63, 65; Tr., Day 1, p. 46, ll. 6-14 (Bratic).
[275] **Exhibit C-002-FR**, Investment Code, Article 38.
[276] See Cambridge Dictionary "constitute", available at https://dictionary.cambridge.org/dictionary/english/constitute.
[277] **Exhibit CLA-019-ENG**, S*ociété Resort*.
[278] **Exhibit CLA-019-ENG**, S*ociété Resort*, paras. 137-157.
[279] **Exhibit CLA-019-ENG**, S*ociété Resort*, para. 157.

c. Claimants did not choose between ICC and ICSID arbitration

246. Respondent adds that consent to ICSID arbitration could not have been perfected in 2005, unless Claimants had already chosen between the two available forum options, ICSID or ICC – and no such choice is reflected in the *Demande d'Admission*[280].

247. The Tribunal differs.

248. The second paragraph of Article 38 is only applicable to ICSID arbitration – not to ICC arbitration. Since access to international arbitration via the *demande d'admission* is only available for ICSID arbitration, investors submitting a *demande d'admission* are not required to explicitly choose between ICC and ICSID arbitration – the *demande d'admission* only opens the door to ICSID arbitration, not to ICC arbitration.

d. There was no offer to arbitrate which Claimants could have accepted

249. Respondent further submits that Claimants' present position, that the Bank accepted the offer to arbitrate on 3 February 2005, is logically inconsistent: there was no offer to arbitrate that Claimants could have accepted, as the Interministerial Order was issued nearly six months later[281]. Only after the Interministerial Order was issued on 18 July 2005 did an offer to arbitrate become available to the Bank[282].

250. The Tribunal does not share Respondent's argument: the facts prove otherwise.

251. When the Bank submitted the *Demande d'Admission*, it did so under the assumption that it was eligible to be considered as an Investor of the *Régime Général* and thus its main request was admittance to the *Régime Général* – a legal regime which included the second paragraph of Article 38 of the Investment Code, a provision which mandates that[283]

> "[…] *le consentement des parties à la compétence du CIRDI* […] *est constitué* […] *en ce qui concerne l'investisseur par sa demande d'admission au régime de la présente loi* […]".

252. The necessary consequence is that when the Bank submitted its *Demande d'Admission* it was aware (or it must be deemed to have been aware, since the investor's knowledge of basic principles of municipal law can be assumed) that under Congolese law such *demande d'admission* was equivalent to a declaration of consent to ICSID arbitration.

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[280] R PHB, para. 65.
[281] R PHB, paras. 64, 67; Tr., Day 1, p. 21, ll. 14-21 (Lorenzo), p. 43, l. 17 to p. 44, l. 5 (Bratic); **Exhibit H-001-ENG**, Respondent's Opening Statement, slide 50.
[282] R PHB, para. 67.
[283] **Exhibit C-002-FR**, Investment Code, Article 38.

e. Claimants' RfA and board resolutions

253. Respondent finally avers that Claimants only consented to arbitration in their RfA of 8 August 2023. This is confirmed by paragraph 24 of the RfA and the contemporaneous board resolutions of Afriland First Group and Afriland First Bank, which state that the "[c]ompany hereby consents to submit the Dispute to arbitration before ICSID". If Claimants believed their consent had been formalized in 2005, they would have clearly expressed this in both the board resolutions and their RfA[284]. By that time, the Interministerial Order had long been terminated by the 2010 Decree and, therefore, there was no standing offer to arbitrate that Claimants could possibly accept[285].

254. Respondent adds that Claimants altered their position on when consent was formed – initially asserting that it was in August 2023 with the RfA but later claiming it was in 2005 – only after Respondent challenged jurisdiction[286].

255. The Tribunal again disagrees with Respondent's argument.

(i) The RfA

256. In their RfA, Claimants describe their consent to ICSID arbitration in the following manner[287]:

> "[…] each hereby consent to submit the dispute as set forth in this Request to ICSID arbitration and have taken all necessary internal actions to authorize this Request".

257. This phrase does not refer to Claimants' general consent to ICSID arbitration, but rather to the decision to submit this specific dispute to ICSID arbitration, by adopting the appropriate corporate resolutions. Again, this drafting does not preclude the argument that the Bank's general consent to ICSID arbitration, with regard to future disputes, was already given in its *Demande d'Admission.*

(ii) The board resolutions

258. In July 2023, both Afriland First Bank SA (Claimant 2) and Afriland First Group (Claimant 1) – main shareholders of the Bank – adopted a board resolution authorizing the commencement of these arbitration proceedings, to adjudicate a defined "Dispute", and the designation of counsel[288]:

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[284] R PHB, paras. 8, 57-58; Tr., Day 1, p. 13, l. 1 to p. 16, l. 6 (Lorenzo); **Exhibit H-001-ENG**, Respondent's Opening Statement, slide 3.
[285] Memorial on Jurisdiction, paras. 69-71; Reply on Jurisdiction, para. 96; R PHB, para. 59.
[286] R PHB, paras. 5-7; Tr., Day 1, p. 16, ll. 7-16 (Lorenzo); **Exhibit H-001-ENG**, Respondent's Opening Statement, slides 4-7.
[287] RfA, para. 24.
[288] **Exhibit C-009-ENG**, Board Resolution of Afriland First Group SA, dated 13 July 2023; **Exhibit C-011-ENG**, Board Resolution of Afriland First Bank SA, dated 13 July 2023.

> "The Company hereby consents to submit the Dispute to arbitration before ICSID and to carry out all such consequent or subsequent legal proceedings and all actions as may be necessary, appropriate, or desirable to defend and assert the rights and interests of the Company in such proceedings.
>
> The Company appoints White & Case LLP, residing at 701 Thirteenth Street NW, Washington, DC 20005, United States of America as its counsel to initiate ICSID arbitration and to represent the Company's interests in relation to the Dispute and to act on behalf of the Company in all aspects of the arbitration proceedings before the ICSID and in any consequent or subsequent legal proceedings and all actions as may be necessary or desirable to defend and assert the rights and interests of the Company against the DRC" [Emphasis added].

259. The consent given in the resolutions, in accordance with its very wording, only refers to the defined "Dispute": Claimants agree that this specific "Dispute" can be adjudicated by ICSID arbitration, and they designate counsel to represent them in the proceedings. The statement is compatible with the argument that in its *Demande d'Admission* in 2005, the Bank already had given a general consent, authorizing that future investment disputes with the DRC be adjudicated through ICSID arbitrations.

4.3 DOES THE BANK'S CONSENT ALSO COVER AFRILAND FIRST GROUP?

260. Having found that the answer to the first question is affirmative (the Bank, acting also on behalf of Claimants, consented to ICSID arbitration in its *Demande d'Admission*, and the ICSID arbitration agreement was perfected upon the DRC's issuance of the Interministerial Order), the Tribunal must now turn to the second question: whether the Bank's consent also covers the Bank's main shareholder, Afriland First Group, which starting in 2009 acquired almost 80% of the Bank's shares?

A. Analysis of the Arbitral Tribunal

261. Respondent contends that Afriland First Group was not among the original shareholders of the Bank when the Interministerial Order was issued[289], that the DRC never approved the transfer of the benefits granted therein[290] and that Afriland First Group does not qualify as investor and lacks standing[291].

262. Claimants, in turn, argue that the ICSID arbitration agreement extends to all of the Bank's shareholders, which qualify as investors under Article 2 of the Investment Code, without the need to submit a separate request for admission or to obtain any authorization from the ANAPI[292].

[289] Reply on Jurisdiction, para. 104; R PHB, para. 70.
[290] Reply on Jurisdiction, paras. 105-114; R PHB, paras. 74-77.
[291] R PHB, para. 74.
[292] C PHB, para. 79.

263. The Tribunal, for the reasons which will be explained in the following sections, agrees with Claimants.

264. The Tribunal has already established (see section 4.2.B. above) that when the Bank submitted the *Demande d'Admission* before the ANAPI, although the application was formally made in the Bank's own name, it was also acting on behalf of its shareholders, which, as investors,

- Would benefit from the investment advantages and access to international arbitration; and

- Would also become liable, under Article 36.2 of the Investment Code, for the Bank's outstanding taxes and penalties, if, once granted, the *agrément* was withdrawn by the Congolese authorities.

265. The question which the Tribunal must now establish is whether the shareholders which benefit from the investment guarantees and from standing in the ICSID arbitration only include the historic shareholders at the time when the Interministerial Order was issued, or whether the concept of *Investisseur* or Investor also includes subsequent shareholders, which acquired the shares at a later stage (as is the case of Afriland First Group).

266. To answer this question, the Tribunal will first summarize the relevant facts surrounding Afriland First Group's acquisitions of shares in the Bank (**a.**), followed by the regulatory background (**b.**), leading to an analysis of the proper interpretation of Article 2 of the Investment Code (**c.**).

a. Afriland First Group's acquisitions of shares in the Bank

267. As mentioned above, on 3 February 2005, the Bank applied for a banking license to the CBC. The Feasibility Study accompanying the application presented the Bank's shareholder structure[293]:

> "*La géographie du capital est la suivante (compte tenu de l'accord de principe des Autorités de tutelle) est la suivante* (sic) *:*

ACTIONNAIRE	*PART DE CAPITAL*[294]	*MONTANT US$*
Afriland First Bank	*50 %*	*1 000 000*

[293] **Exhibit R-008-FR**, Letter from Afriland to the CBC, dated 3 February 2005; **Exhibit R-011-FR**, Feasibility Study, p. 18.
[294] The Tribunal notes that 6% is missing from the total reflected in the Feasibility Study.

Privés Congo Démocratique	*5%*	*100 000*
SBF Finances	*24%*	*480 000*
Cenainvest S.A.	*15%*	*300 000*"

[Emphasis added].

268. On the same day, the Bank submitted its *Demande d'Admission,* attaching its Feasibility Study, to the ANAPI[295].

269. On 18 July 2005, the Ministers of Finance and Planning issued the Interministerial Order. Afriland First Group (Claimant 1) was not one of the "*associés*" mentioned in Article 2(a) of the Interministerial Order, because at that time it did not own any shares in the Bank[296].

(i) First acquisition by Afriland First Group

270. Four years thereafter, at an unspecified date in the year 2009, Afriland First Group acquired a 27.8% participation in the Bank. This is proven by the report of the Bank's statutory auditor as of 31 December 2009[297]:

> "*Le capital de la banque est de FC 6.793.438.299 (USD 10 millions) représenté par 10.000 actions souscrites mais non entièrement libérées :*

Actionnariat	*Nombre d'actions*	*%*	*Valeurs en USD*	*C/V en KFC*
Afriland First Bank	*3 702*	*37,0*	*3 702 000*	*2 513 572*
Afriland First Group	*2 779*	*27,8*	*2 779 000*	*1 888 576*
SBF Finances SA	*1 530*	*15,3*	*1 530 000*	*1 039 396*

[295] **Exhibit C-069-FR**, Request for Admission.
[296] **Exhibit C-001-FR**, Interministerial Order, Article 2(a).
[297] **Exhibit C-015-FR**, Excerpt of Report of the Statutory Auditor (Price Waterhouse Coopers) on Afriland First Bank CD Financial Statements as of 31 December 2009, dated 31 March 2010, para. 10.

Cenainvest SA	*1 400*	*14,0*	*1 400 000*	*951 081*
Autres actionnaires	*589*	*5,9*	*589 000*	*400 813*

271. Under Article 55 of the Banking Law, a copy of this report was to be shared with the CBC[298]:

> "*Les commissaires aux comptes soumettent annuellement à l'Assemblée Générale des actionnaires un rapport sur les comptes annuels de l'Etablissement de Crédit conformément aux normes professionnelles en la matière. Une copie de ce rapport est communiquée à la Banque Centrale*" [Emphasis added].

272. According to Claimants – a point not contested by Respondent – under the Congolese regulation, any transfer of shares must be approved by the CBC[299]. The legal basis for this obligation seems to be Article 29 of the Banking Law, which provides as follows[300]:

> "*Sont subordonnées à l'autorisation préalable de la Banque Centrale:* […]
>
> *c) toute opération de prise de participation, d'échange des titres ou toute autre opération qui aurait pour effet de concentrer directement ou indirectement au bénéfice d'une même personne physique ou morale 20% au moins des droits de vote d'un Établissement de Crédit ;* […]
>
> *L'autorisation est accordée dans les quatre-vingt-dix jours de la date mentionnée sur l'avis de réception délivré par la Banque Centrale. L'absence de décision à l'expiration de ce délai vaut autorisation*" [Emphasis added].

273. Under this provision, any share transaction involving more than 20% of the voting rights of a Congolese bank requires the approval of the CBC, and such approval can be deemed tacitly granted, if more than 90 days have passed without any reaction from the CBC.

274. The Parties have not submitted evidence that the CBC expressly approved the transfer of the shares, but there is circumstantial evidence that would show that the CBC gave the tacit consent foreseen in Article 29 of the Banking Law. Claimants have submitted an official communication sent by the CBC to Afriland First Group

[298] **Exhibit R-003-FR**, Banking Law, Article 55.
[299] Counter-Memorial on Jurisdiction, para. 66; Reply on Jurisdiction, paras. 105-109.
[300] **Exhibit R-003-FR**, Banking Law, Article 29. Claimants have referred to **Exhibit C-019-FR**, Instruction No. 18 of the CBC (Amendment No. 3), dated 4 July 2023, Article 4 to support their assertion that all shareholders of the Bank were necessarily approved by the CBC (Counter-Memorial on Jurisdiction, para. 66, fn. 109). However, the amendment of such "*instruction*" is dated of 2023, and therefore, cannot be applicable to the facts in 2009. The amendment which was applicable in 2009 is not on the file. In any case, the relevant provision is the Banking Law, not the CBC Instruction.

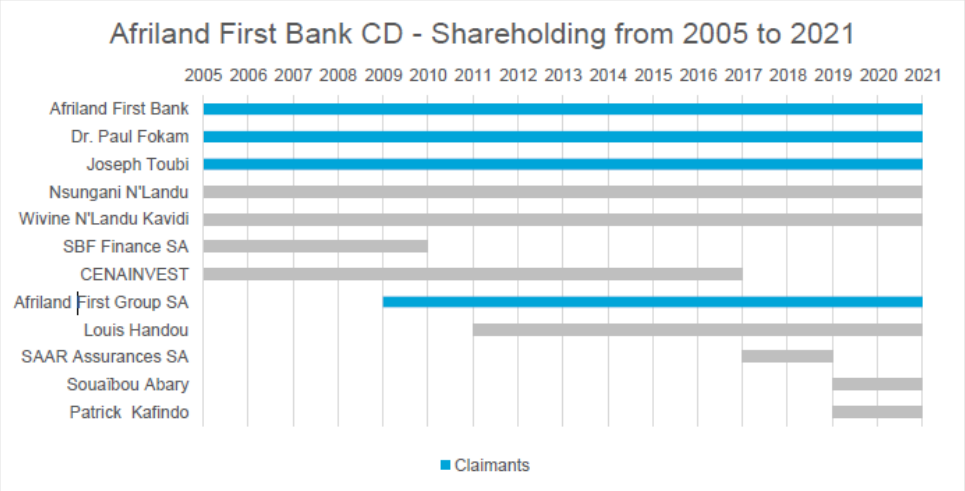
in February 2017, acknowledging that Afriland First Group was the "*actionnaires de référence*" of the Bank[301]:

> "*J'accuse bonne réception de votre lettre réf. : 03/AFG/J112017 du 02 février 2017 par laquelle vous m'informez de l'intérêt de Afriland First Group SA, actionnaire de référence de Afriland First Bank RDC, à reprendre le potentiel utile de la Fibank RDC dans le cadre du processus de résolution de la crise engagé*" [Emphasis added].

(ii) Further acquisitions by Afriland First Group

275. At some point in time Afriland First Group carried out further acquisitions of shares in the Bank.

276. At the request of the Tribunal, Claimants have provided the following (very simplified) graph reflecting the Bank's shareholder's structure evolution from 2005 to 2021, which however does not provide precise acquisition dates[302]:



277. The result of these acquisitions was that, as of 31 July 2021, the Bank's shareholder structure was as follows (in accordance with a certificate issued by its "*Directeur Général Adjoint*")[303]:

- Afriland First Group (Claimant 1): 77.066%;
- Afriland First Bank SA (Claimant 2): 12.824%;
- Mr. Joseph Toubi (Claimant 3): 1.761%;

[301] **Exhibit C-070-FR**, Letter from the CBC to Afriland First Group, dated 3 February 2017.
[302] C PHB, para. 78.
[303] **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders, dated 31 July 2021. See also RfA, para. 6; C PHB, para. 78.

- Dr. Paul Kammogne Fokam (Claimant 4): 4%; and

- Other shareholders: 4.348%.

278. There is no further information in the file regarding the precise circumstances in which Afriland First Group increased its participation from 27.8% to 77.066%. During the same period, the participation of Afriland First Bank SA (Claimant 2), was reduced from 37% to 12.824%.

* * *

279. Summing up: there is evidence in the file proving that:

- At some unspecified date in 2009 Afriland First Group took a 27,8% participation in the Bank;

- Under Congolese law the acquisition of more than 20% of the voting rights in a Congolese bank required express or tacit approval of the CBC; and

- In 2017 the CBC in a letter addressed to Afriland First Group acknowledged that Afriland First Group was the "*actionnaire de référence*" of the Bank.

280. Claimants have also submitted a certificate issued by an officer of the Bank, not challenged by Respondent, that as of 31 July 2021 Afriland First Group had reached a participation of 77.066% in the shareholding of the Bank.

b. Regulatory background

281. Article 2 of the Interministerial Order describes the investment project, and it includes a list of the contemporaneous shareholders of the Bank[304]:

> "*Les principales composantes dudit projet se présentent comme suit :* […]
>
> - *Noms des associés, leur nationalité et participation au capital social :*
>
> • *AFRILAND FIRST BANK : 50 % d'actions*
>
> • *CENTRAL AFRICA INVESTMENT CORPORATION : 15 % d'actions*
>
> • *SBF FINANCE SA : 24 % d'actions*
>
> • *Dr. PAUL KAMMONE FOKAM : 4 % d'actions*
>
> • *Mr. JOSEPH TOUBI : 1 % d'actions*

[304] **Exhibit C-001-FR,** Interministerial Order, Article 2.

> • *Mr. NSUNGANI NLANDU : 5 % d'actions*
>
> • *Mme WIVINE N'LANDU KAVIDI : 1 % d'actions*" [Emphasis added].

282. Note that Article 2 defines the "investment project", and in order to do so it provides the names of the shareholders, which the Order describes as "*associés*" – not as "*investisseurs*".

283. Article 10 of the Interministerial Order then incorporates, by way of cross-reference, Article 38 of the Investment Code (the full text has been reproduced in section 4.2.A. above).

284. In the relevant part, Article 38 provides[305]:

> "*Tout différend entre un investisseur et la République Démocratique du Congo relatif à :* […]" [Emphasis added].

285. In accordance with its wording, Article 38 benefits "*investisseur*[s]": every investment dispute between "*un investisseur*" and the DRC can be adjudicated by international arbitration, and every "*investisseur*" has standing to bring such a claim.

286. Article 2 of the Investment Code in turn defines *investisseur direct* and *investisseur étranger direct*[306]:

> "*d) Investisseur direct : Toute personne physique ou morale, publique ou privée effectuant un investissement direct en République Démocratique du Congo.*
>
> *e) Investisseur étranger direct : Toute personne physique n'ayant pas la nationalité congolaise ou ayant la nationalité congolaise et résidant à l'étranger et toute personne morale publique ou privée ayant son siège social en dehors du territoire congolais, et effectuant un investissement direct en République Démocratique du Congo*" [Emphasis added].

287. The legal definitions of investor and of foreign investor are analogous: they refer to "[t]*oute personne physique ou morale* […] *effectuant un investissement direct en République Démocratique du Congo*".

288. There is no discussion that this broad definition clearly covers all contemporaneous investors, who held shares in the domestic enterprise, at the time when the Interministerial Order was issued. This implies that the shareholders of the Bank at that time, named in Article 2 of the Interministerial Order, have standing to act as claimants in the present arbitration (this conclusion covers Afriland First Bank [Claimant 2], Mr. Toubi [Claimant 3] and Dr. Fokam [Claimant 4]).

[305] **Exhibit C-002-FR**, Investment Code, Article 38.
[306] **Exhibit C-002-FR**, Investment Code, Article 2.

289. The doubts only affect Afriland First Group (Claimant 1), a Swiss corporation which was not a contemporaneous shareholder when the Interministerial Order was issued, which consequently is not named in its Article 2, but which, starting in 2009, acquired a controlling shareholding in the Bank[307].

c. The proper interpretation of Article 2 of the Investment Code

290. Can Afriland First Group be considered as an *investisseur direct* under Article 2 of the Investment Code, who in turn enjoys access to investment arbitration under Article 38?

291. The question is not directly addressed in the wording of the Investment Code (nor of the Interministerial Order). But both a literal and a good faith interpretation of the rule, read in context with the totality of the regulation, support the conclusion that when from time to time the shareholders of the Bank change, the new shareholders qualify as "*investisseurs*" and enjoy standing under Article 38 of the Investment Code.

292. (i) From a literal point of view, the wording of Article 2 of the Investment Code does not indicate that the legislator wished to limit the scope of the definition. To the contrary, the use of the verb "*effectuant*" in the present tense seems to denote an intent not to restrict the concept to the original investors; and the reference to "*toute personne*" reinforces the DRC's intent to have a broad definition of investor.

293. (ii) The regulatory context leads to the same conclusion.

294. When the Bank made its application for admittance to the "*Régime Général*" it was also acting on behalf of its shareholders, as shown in the attached Feasibility Study, in which the Bank specifically requested "*garantie de non exploitation et de non nationalisation pour les actionnaires*" [Emphasis added][308].

295. The Interministerial Order reflected this fact when in its Article 7 it defined the investment guarantees afforded to the Bank's investment project. These investment guarantees clearly benefit its shareholders:

- The national treatment standard is guaranteed only to foreign persons[309];

[307] C PHB, para. 78; **Exhibit C-004-FR**, Afriland First Bank CD List of Shareholders.
[308] **Exhibit R-011-FR**, Feasibility Study, p. 1.
[309] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*Le droit pour les personnes physiques ou morales étrangères, de recevoir le même traitement que les personnes physiques ou morales de nationalité congolaise, sous réserve de réciprocité*").

- The fair and equitable treatment standard is subject to the principles of international law and the drafting does not restrict the scope of beneficiaries to the Bank[310];

- The guarantee against expropriation of the totality of the assets of the Bank can only benefit its shareholders[311]; and

- The free transfer of funds[312], dividends[313], royalties, interests[314] and compensation for expropriation abroad[315] also can only operate in favor of the shareholders.

296. Neither the Investment Code nor the Interministerial Order provide any reason why these guarantees should only benefit the original shareholders, while subsequent shareholders of the Bank should be deprived of this protection.

297. (iii) Finally, a good faith interpretation further demonstrates that subsequent "*investisseurs*" are not to be excluded. Neither Article 2 of the Investment Code, nor Article 38 of the same law, nor Article 10 of the Interministerial Order distinguish between historic investors and subsequent investors, who acquired the investment at a later stage. In the law, there is only one category of investors, and all investors have standing to file an ICSID arbitration. *Ubi lex non distinguit, nec nos distinguere debemus*.

* * *

298. In sum: when Article 38 of the Investment Code – incorporated into the Interministerial Order through the cross-reference contained in Article 10 – refers to "[t]*out différend entre un investisseur et la République Démocratique du Congo*", the term "*investisseur*" encompasses any legal or physical person owning shares in the Bank, both at the time when the Interministerial Order was issued (as is the case

[310] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*Le droit de recevoir de la part de la République Démocratique du Congo un traitement juste et équitable, conformément aux principes du droit international*").
[311] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("[…] *la Société Afriland First Bank Congo Démocratique « First Bank CD » ne pourra, directement ou indirectement, dans sa totalité ou en partie, être nationalisée ou expropriée* […]" [Bold omitted].
[312] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*La liberté de transfert à l'étranger des revenus provenant des opérations liées à l'investissement réalisé conformément à la règlementation de change*").
[313] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*La liberté de transfert à l'étranger des dividendes ainsi que des revenus générés par les dividendes réinvestis dans l'entreprise*").
[314] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*La liberté de transfert des royalties, du principal, des intérêts et des charges connexes à payer par une entreprise congolaise admise au régime général unique du Code au titre du service de la dette contactée à l'étranger en vue du financement complémentaire de l'investissement*").
[315] **Exhibit C-001-FR**, Interministerial Order, Article 7 ("*La liberté de transfert de toute indemnité d'expropriation due à un étranger, telle que stipulée à 1'article 27 du Code des Investissements*").

of Claimants 2, 3 and 4), and also any subsequent investor, like Afriland First Group (Claimant 1), which acquired shares at a later stage.

B. Respondent's counterarguments

299. Respondent submits a number of counterarguments, which the Tribunal will analyze and dismiss in the following sections:

a. Article 40 of the 2012 Decree

300. Respondent draws the Tribunal's attention to Article 40 of the 2012 Decree, which implemented the Investment Code and which, in Respondent's submission, excludes subsequent shareholders as investors, except if they have made a significant capital contribution to the domestic enterprise[316].

301. The proposed application of this 2012 Decree faces a preliminary obstacle: the first acquisition of the Bank's shares by Afriland First Group occurred in 2009, and the 2012 Decree was promulgated three years thereafter. Therefore, the 2012 Decree was not applicable to Afriland Frist Group's first acquisition *ratione temporis*.

302. But even if the Tribunal were to apply the 2012 Decree retroactively, its Article 40 does not address *quod est decidendum*[317]:

> "*Lorsqu'une entreprise dont le projet d'investissement est agréé aux avantages du Code des Investissements est rachetée ou acquise par une nouvelle entreprise différente de l'entreprise agréée et apportant réellement des capitaux frais, cette nouvelle entreprise est de plein droit subrogée aux droits et obligations de l'ancienne entreprise découlant de l'agrément. Les avantages ainsi accordés à l'entreprise initiale sont d'office transférés tels quels à la nouvelle entreprise.*
>
> *En cas d'introduction, dans une entreprise dont le projet d'investissement a été agréé aux avantages du Code des investissements, d'un ou de plusieurs associés ou actionnaires détenant la majorité du capital social, apportant réellement des capitaux frais et modifiant ou modernisant substantiellement le projet d'investissement agréé, l'entreprise en résultant considérée comme différente de l'ancienne, a le droit de faire agréer son nouveau projet aux avantages du Code des Investissements*".

303. The first paragraph of Article 40 refers to a very specific situation:

- A new shareholder acquires the domestic enterprise carrying out the investment project; and

[316] R PHB, fn. 96.
[317] **Exhibit C-018-FR**, 2012 Decree.

- The new shareholder contributes fresh capital to the domestic enterprise, which is thus transformed.

In such a case, the advantages granted to the existing domestic enterprise are automatically transferred to the new enterprise.

304. The second paragraph regulates the situation where:

- A new shareholder is introduced into the domestic enterprise; and
- This shareholder contributes fresh capital and significantly modifies or modernizes the enterprise.

Under this factual situation, the modified domestic enterprise is considered different from the old one, and a new *demande d'admission* is required.

305. In the present case, what has happened is a reorganization in the shareholding of the domestic enterprise, and as a consequence thereof the original main shareholder (Afriland First Bank from Cameroon)[318] has been substituted by another group company (Afriland First Group from Switzerland). These facts simply do not fit within the regulatory scope of Article 40 of the 2012 Decree.

306. In sum: Article 40 of the 2012 Decree cannot be applied retroactively to a 2009 transfer of share capital.

307. But even if such retroactive application is accepted (*quod non*), the rule refers to situations where a new shareholder partially or totally acquires the domestic enterprise, contributes capital and significantly modifies the project – something which has not occurred in the present case. What is relevant is that Article 38 of the Investment Code allows ICSID arbitration for "[t]*out différend entre un investisseur et la République Démocratique du Congo*"[319]. And the Tribunal has already found that Afriland First Group qualifies as an "*investisseur*".

b. Governmental approval

308. Respondent also argues that any transfer of consent to arbitrate requires express approval by the State, something which did not occur in the present case: if Afriland First Group intended to benefit from the Interministerial Order, it should have obtained approval from the ANAPI, the authority in charge of investments; yet it did not[320].

309. The Tribunal does not share Respondent's argument.

[318] **Exhibit C-001-FR**, Interministerial Order, Article 2.
[319] **Exhibit C-002-FR**, Investment Code, Article 2.
[320] R PHB, paras. 74-75.

310. Under the second paragraph of Article 38 of the Investment Code (incorporated via Article 10 of the Interministerial Order) the DRC made an offer to submit investment disputes to ICSID arbitration. The Tribunal has already established (in the preceding section) that this offer benefits not only the original shareholders of the Bank, but also its subsequent shareholders.

311. Article 38 of the Investment Code does not require that the acquisition by subsequent shareholders be approved by the ANAPI. There is also no provision in the Investment Code or the Interministerial Order which requires new shareholders to submit a new *demande d'admission* or to obtain a transfer authorization. Respondent has not referred to any provision establishing otherwise and recognizes that the Investment Code is silent in this regard[321]. It is not for the Tribunal to impose on the investor additional jurisdictional requirements, where the municipal law clearly fails to introduce them.

The authorization by the CBC

312. Respondent adds a further argument: it says that Claimants have failed to show that the CBC, the banking supervisory authority, approved the transfer of the shares to Afriland First Group[322]. Claimants counter that Afriland First Group's status as reference shareholder of the Bank was known and accepted by the competent DRC authority, here the CBC, since 2009[323].

313. Under Article 29 of the Banking Law, the acquisition of more than 20% of the voting rights in a Congolese bank required the authorization of the CBC – an authorization which could be granted explicitly or tacitly, by not responding within a period of 90 days[324]. The file is silent regarding the modality of authorization adopted by the CBC – but it is a proven fact that by 2017 the CBC acknowledged Afriland First Group's status as "*actionnaire de référence*" of the Bank[325].

314. For the question under discussion, whether Afriland First Group has standing to submit an ICSID arbitration against the DRC, the discussion in any case is moot. The DRC's consent to extend to the Claimants the protections provided under Article 38, is not conditioned upon the acquiring shareholder obtaining any administrative authorization either from the ANAPI or from any other Congolese governmental agency.

[321] R PHB, fn. 96.
[322] Reply on Jurisdiction, paras. 108-114; R PHB, paras. 74-77.
[323] Tr., Day 1, p. 117, l. 4 to p. 118, l. 13 (Cohen Smutny).
[324] **Exhibit R-003-FR**, Banking Law, Article 29.
[325] **Exhibit C-070-FR**, Letter from the CBC to Afriland First Group, dated 3 February 2017.

c. Afriland First Group as a direct investor

315. Lastly, Respondent rejects Claimants' argument that Afriland First Group qualifies as a "direct investor" under Article 2 of the Investment Code, since the Code does not apply to banks[326].

316. The Tribunal again does not share Respondent's argument.

317. The relevant factor is not that the Code does not apply to banks – a conclusion which is undisputed. What is relevant is that the Interministerial Order includes by reference Article 38 of the Investment Code, which thus forms part of the Interministerial Order, and that Article 38 permits that any investment dispute between an "*investisseur*" and the DRC be solved via arbitration. And in order to clarify the meaning of the term "*investisseur*" in Article 38 of the Investment Code, it is necessary to make reference to the definition contained in Article 2 of that law.

C. Case law

318. The Tribunal's conclusion is in line with the decisions of other tribunals in analogous circumstances, which based on considerations of good faith, interpreted the scope of arbitration agreements widely to also include shareholders.

Amco Asia

319. In the *Amco Asia* case, Indonesia had approved a local company PT Amco as an investment and agreed that disputes could be submitted to ICSID arbitration; the tribunal concluded that the arbitration agreement must be interpreted as extending to Amco Asia as a shareholder in the local company, and also that[327]:

> "the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in PTAmco, and may be transferred with those shares […]".

320. The tribunal considered that the ICSID arbitration agreement extended to new shareholders, even though they were not named in the initial investment approval and even though the State's approval of the later share transfer said nothing about ICSID arbitration. It is clear the tribunal considered that the ICSID arbitration agreement was intended to apply to shareholders, and that as long as the claimant's status was as an approved shareholder, it could invoke the arbitration agreement[328].

321. The *Amco Asia* tribunal added that[329]:

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[326] R PHB, paras. 72, 75.
[327] **Exhibit CLA-011-ENG**, *Amco Asia*, para. 31.
[328] **Exhibit CLA-011-ENG**, *Amco Asia*, paras. 31-32.
[329] **Exhibit CLA-011-ENG**, *Amco Asia*, para. 31.

> "To be sure, for such a transfer to be effective, the government of the host country must approve it, which approval has as its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision".

322. In the present case, the Investment Code does not require that the acquisition by subsequent shareholders be approved by the ANAPI, or that new shareholders submit a new *demande d'admission* or obtain a transfer authorization. The only requirement under Article 29 of the Banking Law is that acquisitions of more than 20% of the voting rights in a Congolese bank must be authorized by the CBC – an authorization which could be granted explicitly or tacitly, by not responding within a period of 90 days[330]. The file is silent regarding the modality of authorization adopted by the CBC – but it is a proven fact that by 2017 the CBC acknowledged Afriland First Group's status as "*actionnaire de référence*" of the Bank[331].

SPP v. Egypt ["***SPP***"]

323. In the *SPP* case, the tribunal held that SPP(ME) qualified as an investor under the Egyptian investment law. Accordingly, it could invoke the ICSID arbitration agreement, even though only its parent company, SPP, had been approved by Egypt as the investor[332].

324. Egypt argued that SPP(ME) did not qualify as an investor because the *Autorité Générale des Investissements* (GIA) had never expressly approved the extension or the transfer of SPP's (the parent company) investment authorization to SPP(ME). Consequently, in Egypt's view, SPP(ME) was not an approved investor under Egyptian law and therefore could not invoke the rights offered therein[333].

325. However, based on the evidence in the record, the tribunal found that the Egyptian investment agency was aware that SPP(ME) was the entity making the investment and performing the investor's obligations under the relevant agreements[334]:

> "Thus, the evidence shows that the GIA knew that it was SPP(ME) who was in fact making the investment and performing the investor's other obligations under the relevant agreements, and that the GIA, acting pursuant to Law No. 43, approved the joint venture between SPP(ME) and EGOTH that was formed to implement the project. In these circumstances, SPP(ME) must be deemed an investor entitled to the protections of Law No. 43".

326. The tribunal relied on a governmental decree issued by the Egyptian Ministry of Economy authorizing the joint venture between the Egyptian state tourism entity

[330] **Exhibit R-003-FR**, Banking Law, Article 29.
[331] **Exhibit C-070-FR**, Letter from the CBC to Afriland First Group, dated 3 February 2017.
[332] **Exhibit CLA-021-ENG**, *SPP*, paras. 133-144.
[333] **Exhibit CLA-021-ENG**, *SPP*, paras. 133-134.
[334] **Exhibit CLA-021-ENG**, *SPP*, para. 144.

(EGOTH) and SPP, together with other corporate documents such as the joint venture's articles of incorporation and by-laws, which reflected SPP(ME)'s participation. Those documents, which required the GIA's approval showed that the authorities dealt with SPP(ME) as the investor. As a result, the tribunal inferred that the GIA was both aware and approved SPP(ME) as an investor[335].

327. As in *SPP*, based on the evidence on the record mentioned above, it is possible to infer that the Congolese authorities (*i.e.*, the CBC) were aware of and consented to Afriland First Group as the controlling shareholder of the Bank.

[335] **Exhibit CLA-021-ENG**, *SPP*, paras. 138-143.

V. DECISION

328. For the reasons set forth in the preceding paragraphs, the Tribunal decides as follows:

1. REJECTS the Bifurcated Jurisdictional Objection;

2. DECLARES that Afriland First Group SA has standing to act as a Claimant in the present proceedings;

3. ORDERS the continuation of the proceedings as between Afriland First Group SA, Afriland First Bank SA, Mr. Joseph Toubi, and Dr. Paul Kammogne Fokam and the Democratic Republic of the Congo;

4. POSTPONES any other decision, including on costs.

329. All Decisions have been adopted unanimously, except for Decision 2, which has been approved by majority of the members of the Tribunal.

[signature]

Mr. Henri C. Alvarez KC
Arbitrator

Date: 16 July 2025

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

	[signature]
Mr. Alexis Mourre Arbitrator	Mr. Henri C. Alvarez KC Arbitrator
Date:	Date: 15 July 2025

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

Mr. Alexis Mourre
Arbitrator

Date:

Mr. Henri C. Alvarez KC
Arbitrator

Date:

[signature]

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: 15 July 2025