

CASES

Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo (ICSID Case No. ARB/98/7)

Introductory Note

The award rendered in this case on September 1, 2000 declined jurisdiction by a majority of the members of the Arbitral Tribunal; a dissenting opinion is attached to the award. The proceedings were instituted on August 27, 1998 by Banro American Resources, Inc. (Banro American), a company registered in the State of Delaware, against the Democratic Republic of the Congo (DRC). Banro American is a wholly-owned subsidiary of Banro Resource Corporation (Banro Resource), a company registered in the Province of Ontario. The dispute concerned the alleged expropriation by the DRC of the assets of Banro American's subsidiary established and existing under the laws of the DRC, the Société Aurifère et Industrielle du Kivu et du Maniema S.A.R.L. (Sakima), in violation of a mining convention between the DRC, on the one hand, and Banro Resource and the Société Minière et Industrielle du Kivu, S.A.R.L. (Sominki), on the other (the Mining Convention).

Sominki had originally entered into a mining convention with the DRC for the exploration and development of mining rights in the provinces of Kivu and Maniema. When the mining convention was due to expire, Sominki, Banro Resource and the DRC entered into a new convention, the Mining Convention, transferring to Sakima the mining concessions. The Mining Convention contains an ICSID arbitration clause for disputes between the parties arising out of the Mining Convention.

In July 1998, the Congolese Government repealed the decrees which had approved the Mining Convention and the creation of Sakima due to

alleged irregularities in the dissolution of Sominki and the creation of Sakima. In August 1998, Banro Resource transferred its Sakima shares to Banro American, which thereby became the majority shareholder. Banro American brought before ICSID a request for arbitration against the DRC. Sakima joined as a requesting party in the proceeding and the request was registered by the Acting Secretary-General of ICSID on October 28, 1998.

Pursuant to the provisions of the Mining Convention, each side appointed an arbitrator. The claimants appointed Mr. Carveth Geach, a South African national, and the respondent appointed Mr. Alioune Diagne, a Senegalese national. The parties having failed to agree on the President of the Arbitral Tribunal, the Acting Chairman of the ICSID Administrative Council appointed Professor Prosper Weil, a French national, as the third and presiding arbitrator.

Even before the constitution of the Tribunal, the DRC raised objections to jurisdiction. At the first session, the Tribunal decided to suspend the proceeding on the merits in accordance with ICSID Arbitration Rule 41 and granted time periods for the parties to submit briefs on the objections to jurisdiction. The Tribunal also submitted a list of questions to the parties related to the historical background of the companies involved and their mutual relations.

The award was rendered in English and French. Article 48(5) of the ICSID Convention provides that the Centre shall not publish an award without the consent of the parties concerned. Rule 48(4) of the ICSID Arbitration Rules, however, permits ICSID to include in its publications excerpts of the legal rules applied by the Tribunal. The following are extracts of the legal rules applied by the Tribunal in this case.