

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), Award of the Tribunal
of September 1, 2000 (excerpts)

(...)

II. THE PROBLEM OF JURISDICTION
STEMMING FROM THE FACT THAT CANADA,
THE COUNTRY OF NATIONALITY OF BANRO RESOURCE,
IS NOT A PARTY TO THE ICSID CONVENTION

(...)

[1] “We therefore note that the jurisdiction of the Centre and the Tribunal is subject to two critical dates related to the nationality of the entities involved:

- The two States involved – the host State and the State of which the investor is a national – must both be parties to the ICSID Convention on the date of registration of the request;
- The juridical person party to the dispute must have had the nationality of a Contracting State on the date on which this juridical person and the host State consented to arbitration, that is, according to case law, on the date on which the last of the parties involved gave its consent. No critical date is provided for the giving of the consent of the parties to the dispute.”

(...)

[2] “[T]wo different approaches are possible, according to whether we consider the arbitral proceeding as initiated by Banro American, as it would seem from the procedural appearance, or by its parent company, Banro Resource.

[3] “First approach: based on the apparent procedural situation, Banro American and SAKIMA, as the Congolese subsidiary of Banro American, are considered the Claimants. In this case, the requirement that the investor must, on the date of the request for arbitration, have the nationality of a ‘Contracting State’ is met, since the United States, which signed the ICSID Convention on August 27, 1965 and ratified it on June 10, 1966, has been a party to the Convention since October 14, 1966. From that time, SAKIMA would have been considered, pursuant to Article 25 of the ICSID Convention and the agreement between the parties in Article 35 of the Mining Convention, a U.S. national.

[4] “However, in this case, the problem would lie in the condition pertaining to the consent of the parties... Article 35 [of the Mining Convention] does not contain the consent of Banro American or SAKIMA as a Congolese subsidiary of Banro American. At the same time, the Congolese State consented, under Article 35, to submit to ICSID arbitration disputes involving Banro Resource and its Congolese subsidiary and not disputes involving Banro American and its Congolese subsidiary. As a result, if Banro American and its Congolese subsidiary are to be considered the Claimants, the condition that the Claimant must possess the nationality of a ‘Contracting State’ would be met; however, the condition pertaining to the consent of the parties would no longer be met.

[5] “Even if we admit –that which, as we have demonstrated, has not been established by the case file– that Banro American was an original shareholder of SAKIMA S.A.R.L. and that the transfer of...shares of SAKIMA made for its benefit...by Banro Resource was valid, Banro American could not nonetheless avail itself, on a derived basis, of the consent to ICSID arbitration provided by Banro Resource under Article 35. In order to consider the right of access to ICSID arbitration, available under Article 35, as ‘extended’ or ‘transferred’ to Banro American by applying other provisions of the Mining Convention, it would still be necessary that such right existed first for the benefit of the entity Banro Resource. Such is not the case, given that Banro Resource, a Canadian company, never had, at any time, *jus standi* before ICSID. Having never existed for the benefit of Banro Resource, the right of access to ICSID cannot be viewed as having been ‘extended’ or ‘transferred’ to its affiliate, Banro American.

[6] “The Tribunal is certainly aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect –*ut magis valeat quam pereat*. However, this principle of interpretation should not lead to confer, *a posteriori*, to a provision deprived of its object and purpose a result that goes against its clear and explicit terms. Due to its Canadian nationality, Banro Resource did not have –and does not have– access to ICSID arbitration: the clause under Article 35 is, and has always been, without effect in its regard. Given that it is inapplicable vis-à-vis the beneficiary that it expressly mentions –Banro Resource–, this clause cannot take effect and apply vis-à-vis another entity –Banro American– to which it would have been ‘extended’ or ‘transferred.’

(...)

[7] “A second approach would be to go beyond procedural appearances and to view the actual Claimants in these arbitration proceedings as the parent company of Banro American, namely Banro Resource, with SAKIMA acting in such a case as the Congolese subsidiary of Banro Resource. In other words, ‘the veil’ of the group’s structure would be ‘pierced’ to reveal the parent company as the actual Claimant in this proceeding. This approach, which would have the advantage of allowing the financial reality to prevail over legal structures, would also be consistent with the press releases published on Banro Resource’s website, which describe the measures adopted by the Congolese Government as targeting Banro Resource (August 6, 1998 release), the action taken with respect to the Congolese Government as being taken by managers of Banro Resource (release of October 29, 1998), and the arbitration proceeding instituted by Banro American as being instituted by Banro Resource ‘through its wholly-owned subsidiary of 100% Banro American Resources, Inc.’ (releases of March 16, May 12, and September 29, 1999).

[8] “If the Tribunal adopted this second approach, it would be led to view the condition pertaining to the consent of the parties as having been met, since the consent of Banro Resource would supposedly be expressed in Article 35 of the Mining Convention. However, another condition for jurisdiction of the Centre and the competence of the Tribunal would not be met, namely the requirement that a Claimant, juridical person, have the nationality of a Contracting State, since Canada, the country of nationality of Banro Resource, is not a party to the ICSID Convention. As in the first

approach, the clause of Article 35 would be null and void and deprived of its object and purpose, given that Banro Resource, having the nationality of a State which is not a party to the Washington Convention, has not validly nor effectively subscribed to an ICSID clause.

(...)

[9] “The Tribunal has nevertheless considered that the issue of its jurisdiction in the present dispute cannot be limited to an analysis of the provisions of the Mining Convention. It has asked itself whether the jurisprudence of the ICSID tribunals does not require a certain flexibility regarding the identification of the Claimant for the purpose of determining the jurisdiction of the Tribunal.

[10] “Indeed, ICSID tribunals faced with such an issue have rarely proven to be formalistic. This was the case, in particular, in two situations: when the request was made by a member company of a group of companies while the pertinent instrument expressed the consent of another company of this group; and when, following the transfer of shares, the request came from the transferee company while the consent had been given by the company making the transfer.

(...)

[11] “These few examples demonstrate that in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them.

[12] “It is for this reason that ICSID tribunals are more willing to work their way from the subsidiary to the parent company rather than the other way around. Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an ‘instrumentality.’ The extension of consent to subsidiaries that are not

designated or not yet created, even following a transfer of shares, is less readily accepted.

[13] “In view of the approach adopted by the jurisprudence of ICSID tribunals concerning relationships between companies of the same group, the Tribunal could have addressed the issue of *jus standi* of Banro American in a flexible manner if the issue raised by the present case were limited to the *jus standi* of a subsidiary in the presence of an arbitration clause which concerns the parent company only. But this is not the case. It is not at this level that the issue of the Tribunal’s jurisdiction lies, for the present case raises considerations that go beyond the question of the structure of groups and the relationships among companies within the same group.

(...)

[14] “The problem with which the Tribunal is faced in this case is radically different from the one raised by cases previously submitted to ICSID tribunals. The foregoing cases called into question the relationship among companies of the same group; they raised the question of whether a right assigned by a contractual instrument to one company of a group applied to another company of that group; for example, whether the parent company could claim, before an ICSID tribunal, the benefit of a right conferred by a contractual instrument to a subsidiary, or vice-versa, whether a subsidiary could avail itself of a right before an ICSID tribunal granted by a contractual instrument to its parent company. In this case, it is an entirely different situation, there is much more at stake than the relationships among companies of the same group. What is at stake here, is not the question of relationship among companies of the same group, that is to say a question of private law, but rather a question of international law: the conditions required under the ICSID Convention for a State to be considered as a Contracting State will or will not be fulfilled depending on which company of the group files the request for arbitration. Beyond a literal analysis of the relevant provisions of the ICSID Convention and the Mining Convention, beyond the choice between a realistic and a formalistic approach regarding the jurisdiction of ICSID tribunals, they are considerations that fall within the scope of public international law that take the present case outside the jurisdiction of the Centre and the Tribunal. This latter element requires particular attention on the part of the Tribunal.

[15] “One of the main objectives of the mechanisms instituted by the Washington Convention was to put an end to international tension and crises, leading sometimes to the use of force, generated in the past by the diplomatic protection accorded to an investor by the State of which it was a national. Conversely, the investor never enjoyed the assurance of being able to benefit from the protection of its Government, since, as a rule, diplomatic protection is accorded at the discretion of the Government; the extent to which an investor benefited or did not benefit from the protection of its Government depended on the political situation and political relations between the two Governments. The Washington Convention introduced mechanisms to remedy this dual drawback that bring the private investor face to face with the host State and which avoid political confrontation between the host State and the State of which the investor is a national. In other words, if direct arbitration between the host State and the investor is one of the main features of the ICSID system, the exclusion of the possibility of diplomatic protection is the inevitable consequence of this. In the case of State parties to the ICSID Convention, no longer can an investment dispute between the nationals of one in the territory of the other give rise to the exercise of diplomatic protection, a process that runs the risk of souring inter-State relations. In other words, once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor’s home State no longer has the right to grant the investor diplomatic protection.

[16] “This objective of taking disputes between host States and foreign private investors out of the political and diplomatic realm in order to submit them to legal settlement mechanisms was emphasized several times during the course of the *travaux préparatoires* of the Washington Convention:

Once an investor had been given the right to direct access to a foreign State, he should not have the right to seek the protection of his own State, and his State should not have the right to intervene on his behalf. The purpose...was to remove disputes from the realm of diplomacy and bring them back to the realm of law.¹

¹ *History of the ICSID Convention*, vol. II, p. 273.

The Convention would...offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.²

The Chairman...explained that one of the purposes of the Convention was to remove disputes from the atmosphere of inter-State relations...³

[17] “This ‘depoliticization’ of relations arising from overseas private investment is expressed in Article 27 of the ICSID Convention... Only in instances where the host State does not comply with the award can the State of which the investor is a national take diplomatic action with respect to the host State and bring back the dispute to an inter-State level...

[18] “The provisions of Article 27 are addressed to the State parties to the Convention, who agree thereby to refrain from exercising diplomatic protection in favor of their nationals. States which are not parties to the Convention are not under any obligation in this regard and may freely intervene on behalf of their nationals. In this case, Canada gave diplomatic protection on behalf of its national, Banro Resource, a company organized and existing under the laws of Canada, however Canada is not a party to the ICSID Convention. The United States, on the other hand, did not have the right to intervene diplomatically in favor of its national, Banro American, a Delaware company. ...[T]he Claimants mention the steps of the American authorities before the Congolese Government, but what is apparent from the letter is that such steps either came from Senators, and not from the Federal Government, or that they did not pertain to the present case. As a result, it appears that the United States did not intervene diplomatically in favor of Banro American. If they had, they would have violated Article 27 of the ICSID Convention and would have committed an unlawful act under international law, however, such act would not affect the jurisdiction of this Tribunal.

[19] “The fact that Article 27 is not addressed to the investor but to the State parties to the ICSID Convention is explained by the fact that diplo-

² *Ibid.*, p. 464.

³ *Ibid.*, p. 527.

matic protection is a prerogative of the State and not a right of the injured party. It does not mean that the investor has complete freedom of action. By virtue of the principle of customary international law expressed in Article 31 of the Vienna Convention on the Law of Treaties, a clause of a treaty shall be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ It is for this reason, as noted by Schreuer, that Article 27 should be read in view of Article 26, which constitutes its actual context and according to which the consent to ICSID arbitration ‘shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.’⁴ Regarding the purpose and aim of the ICSID Convention, they are to exclude diplomatic protection, along with its political drawbacks, for the benefit of arbitration channels. As the same author writes, ‘[a] choice between ICSID arbitration and diplomatic protection appears to be contrary to at least some of the avowed purposes of Article 27.’⁵ If the investor does not have the choice between the two channels, even less so does he have the right to resort to one or the other, whether simultaneously, or successively. Therefore since the ICSID Convention has as its purpose and aim to protect the host State from diplomatic intervention on the part of the national State of the investor and to ‘depoliticize’ investment relations, it would go against this aim and purpose to expose the host State to, at the same time, both diplomatic pressure and an arbitration claim.

[20] “It is clear from the *travaux préparatoires* of the Convention that the prohibition from seeking at the same time or successively diplomatic protection and ICSID arbitration applies equally to the investor as much as to the State, and that Article 27 of the ICSID Convention, read in the context of Article 26, and in light of the purpose and aim of the ICSID Convention, ought to be interpreted as foreclosing the investor from using a plurality of channels. This is also confirmed in the Report of the Executive Directors of the World Bank on the Convention.

(...)

⁴ Schreuer, Commentary on Article 27 of the ICSID Convention, *ICSID Review—FILJ*, vol. 12, 1997, p. 206-207, para. 5 ‘Art. 27...must be seen in the context of the exclusive remedy rule of Art. 26.’

⁵ Schreuer, *op. cit.* supra note 5, para. 28.

[21] “The exclusion of diplomatic protection is, we note, inherent in the system, of which it constitutes an essential element, and we thus understand that it precludes derogation by the parties. By consenting to ICSID arbitration, the host State knows that it will be protected from diplomatic intervention on the part of the State of which the investor is a national. Conversely, the State of which the investor is a national, by becoming a party to the ICSID Convention, knows that an investor who is a national and has consented to ICSID arbitration at the time of the investment in another Contracting State cannot seek assistance, and if such a request is made, it cannot grant it. Any method of combining diplomatic protection with ICSID arbitration is precluded. This principle is rigorously imposed by the logic of the system. Not only would the arbitration process run the risk of being hampered by current diplomatic *démarches*, but this would go against the essence of the ICSID system by leaving the host State open to arbitration proceedings initiated by a foreign investor and diplomatic pressure by the State of which this investor is a national.

[22] “Furthermore, this is not the only effect of the status (or the absence thereof) of a State party to the ICSID Convention. Article 54(1) of this Convention states:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

Therefore, depending on whether or not a State is a party to the ICSID Convention, its obligations with regard to the enforcement of awards are radically different.

[23] “The legal consequences linked to whether or not a State is a party to the ICSID Convention are, as can be noted, of cardinal importance, and it is after weighing the consequences that a Government makes the decision to accede to the ICSID Convention or to remain outside the system. Since Canada opted not to become a party to the Convention, it is free to provide diplomatic protection to its nationals who invest overseas; similarly, it can be subject to diplomatic intervention by the State of which a foreign investor is a national. The Banro Group, however, was not free to submit to the Democratic Republic of the Congo both diplomatic intervention on the part

of the Canadian Government, availing itself of the nationality of its parent company, Banro Resource, and an arbitration proceeding before an ICSID tribunal by availing itself of the American nationality of one of its subsidiaries, Banro American.

(...)

[24] “The problem that the Tribunal has to face in the present case is not a choice between a flexible and realistic attitude or a formalistic and rigid attitude with respect to private law relationships between companies of the same group. The problem before the Tribunal involves considerations of international public policy and is governed by public international law. The Tribunal cannot allow the requirements of nationality imposed by the Washington Convention to be neutralized by investors who are seeking to avail themselves, depending on their own interests at a given point in time, simultaneously or successively, of both diplomatic protection and ICSID arbitration, by playing on the fact that one of the companies of the group does not have the nationality of a Contracting State party to the Convention, and can therefore benefit from diplomatic protection by its home State, while another subsidiary of the group possesses the nationality of a Contracting State to the Convention and therefore has standing before an ICSID tribunal.

[25] “The Tribunal is fully aware of the need for a judicial regulation of the relationships arising out of foreign private investments. It is thus, with reluctance, that the Tribunal declared that it had no competence. It felt, however, that it was essential to maintain the fundamental consensual characteristic of the ICSID mechanism conferred by the Washington Convention, with regard to the host State, the foreign investor or the State of which the investor is a national. The ICSID mechanisms will be all the more efficient and effective if the conditions to their applications provided by the relevant texts are better respected. It goes without saying that if these conditions were to be met in the future, the ICSID mechanisms would be available to the parties to decide on their points of discord.”

(...)

III. DECISION

[26] “1. As a result of the foregoing, the Arbitral Tribunal hereby decides by a majority of the votes that it does not have jurisdiction to render a decision on the request...”