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Canada's National Contact Point's Final Statement - Banro Corporation and a Former Employee

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Summary

1. A Request for Review (RfR) was submitted to the Canadian National Contact Point (NCP) on 8 August, 2017 by Kaombe Ngandu Marcel, a former employee (the "Notifier") of Twangiza Mining S.A., a subsidiary of Banro Corporation ("Banro" or the "Company"), regarding his termination of employment from the Twangiza mine in the Democratic Republic of Congo (DRC). The Notifier alleges that his dismissal is in violation of the Concepts and Principles, General Policies, Employment and Industrial Relations and Environment chapters of the OECD Guidelines.

2. The NCP is a dialogue facilitation mechanism to help parties resolve issues around the implementation of the [OECD Guidelines for Multinational Enterprises](#). The Canadian NCP followed the procedures prescribed in the Procedural Guidance to the OECD Guidelines (section C, page 72 of the 2011 edition) and the [NCP Procedures Guide](#). A summary of the NCP process is included in the Annex.

3. As per its procedures, the NCP conducted an initial assessment and reviewed all the documentation submitted by the Notifier and the Company. The NCP did not find that the issues raised in the RfR would benefit from an intervention from the NCP in the form of facilitated dialogue or mediation. The NCP rationale is explained below in the section on the NCP Initial Assessment.

4. The NCP thanks the parties for their good collaboration with the NCP during this process. The NCP makes the following recommendations and closes this specific instance.

NCP Recommendations

5. The NCP recommends that Banro endorse and implement the [OECD Guidelines for Multinational Enterprises](#) as part of its corporate social responsibility policy framework, and implement them throughout its various activities and operations.

6. The NCP recommends that Banro endorse and implement the [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#).

The Request for Review and the Parties

7. The Request for Review was submitted by Mr. Marcel Ngandu Kaombe, a former employee of the Banro owned Twangiza mine and resident of Bukavu, in the Democratic Republic of Congo (DRC).

8. Banro Corporation is a Canadian mining company headquartered in Toronto, Ontario. The Twangiza mine is one of Banro's two gold mine projects in the South Kivu Province of the DRC.

9. The Notifier alleges wrongful termination of his contract for taking company property in the form of 3,000-litre drums of waste engine oil for his private use without appropriate authorization. The Notifier testified in a company disciplinary committee hearing on June 13, 2017, that he had been misinformed and was led to believe the used oil was to be disposed of. The Notifier was accompanied by a representative of his union at the hearing. The disciplinary commission, which met on the same day, concluded by consensus that the Notifier was guilty of theft and recommended a temporary suspension. The Director General decided to terminate his contract on the basis of theft of company property which constitutes a breach of the employee's contractual obligations and constitutes gross misconduct under Article 74, section (c) of the Congolese Labour Code and can lead to contract termination. The Notifier has informed the NCP that his efforts to appeal the company's decision have proven futile so far.

10. The Notifier alleges his dismissal constitutes non-observance of the Concepts and Principles, General Policies, and Employment and Industrial Relations chapters of the OECD Guidelines as his human rights were

breached through unfair termination of employment, and is seeking US\$250,000.00 (two hundred and fifty thousand US dollars) in compensation for physical and emotional damages caused by Banro's actions.

11. The Notifier requests the NCP's good offices through facilitated dialogue or mediation with the Company.

Key Timelines

12. The following provides the main milestones of the NCP process:

- 8 August 2017 - NCP receives the RfR from the Notifier
- 11 August 2017 - NCP Secretariat acknowledges receipt of the RfR
- 8 September 2017 - NCP contacts Notifier to explain the process and seek consent for transmitting documents to the Company
- 11 September 2017 - NCP contacts Senior Vice President, Commercial and DRC Affairs of Banro
- 14 September 2017 - Notifier provides written consent to share documents with Banro
- 14 September 2017 - NCP Chair sends letter to Banro with RfR documents
- 29 September 2017 - NCP receives Company's submission in response to the RfR
- 29 September 2017 - NCP follow up with Banro for clarification on submission
- 15 October 2017 - NCP contacts Banro to seek clarification around its submission and obtain consent to share response with Notifier
- 18 October 2017 - NCP contacts Notifier to verify actions taken prior to submitting RfR
- 23 October 2017 - Notifier responds to NCP questions
- 9 November 2017 - Banro gives verbal consent to share documents with Notifier.
- 23 November 2017 - NCP concludes its initial assessment and informs Notifier of its decision.
- 24 November 2017 - NCP informs Company of its decision.
- 12 December 2017 and 6 February 2018: NCP informs Notifier of delays due to the NCP peer review
- 20 March 2018: Draft Final Statement shared with parties for comment

The Company's Position

13. The Company, in its response to the NCP, shared the report of the disciplinary committee hearing on Mr. Kaombe's termination, as well as a copy of the employee's contract. The Company expressed their displeasure with Mr. Kaombe's decision to involve the Canadian NCP considering the availability of alternative appeal options in the DRC for matters of employment.

The NCP's Initial Assessment

14. It is worth recalling that an NCP initial assessment is not a determination of whether or not the corporate behavior or actions in question were consistent with observance of the OECD Guidelines, although the NCP can make such a determination at its discretion during an NCP process. The initial assessment is an indication of whether the NCP considers that an NCP-led dialogue between parties could be useful to resolve disputes related to the issues raised.

15. As per NCP procedures, the NCP reviewed all the information presented in the submission from Mr. Kaombe, the information submitted by the Company, and conducted an initial assessment using the criteria listed in the NCP Procedures Guide and the Guidelines' Procedural Guidance as follows:

- the identity of the party concerned and its interest in the matter;
- whether the issues are material and substantiated;
- whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
- the relevance of applicable law and procedures, including court rulings;
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

16. As per NCP procedures, in order to operate with full transparency, the NCP's goal is to share, among the parties, the information received from both parties. The procedures also indicate, however, that in order to facilitate the resolution of the issues raised, the NCP can take appropriate steps to protect sensitive business and other information. Thus, to be able to balance transparency and confidentiality, the NCP procedures require seeking the party's agreement to share some or all of the information that it may provide to the NCP, with the other party. Both parties consented to the NCP sharing all submissions with the other party.

NCP Conclusions

17. While the NCP determined the termination of employment of the Notifier to be material to the Guidelines through its initial assessment, the NCP has not received a substantiation regarding the allegedly wrongful termination. Further, the Notifier did admit to committing the offense he was accused of by the Company, namely having taken company property outside of the company's site without authorization and for his personal use.

18. An established process internal to the Company regarding disciplinary procedures was followed and documented. It consisted in a disciplinary hearing and a disciplinary commission which met on June 13, 2017, followed by a decision by the Director General of Twangiza. The NCP does not see how an NCP - led process could resolve the concerns raised by the Notifier and bring additional benefits to the parties.

19. Based on the above, the NCP has decided not to offer mediation to the parties in this case.

20. The NCP notes that the Notifier indicated having received no response to his appeal from the Company. The NCP invites the Notifier to reiterate the letter sent to the Director General of Twangiza and send a copy to the Inspector General of Labour and Social Welfare and the Urban Inspector of Labour and Social Welfare. Other local recourses could also be explored.

21. The NCP, by this final statement, considers this specific instance closed.

Annex: OECD Guidelines and the NCP Process

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct (human rights, labour, environment, disclosure, corruption...) in a global context consistent with applicable laws and internationally recognized standards.

National Contact Points (NCPs) are a voluntary, non-judicial dialogue facilitation mechanism. Established through countries' adherence to the OECD Investment Declaration, they are mandated to: (a) promote the adoption of the OECD Guidelines for Multinational Enterprises on responsible business conduct by companies, as guiding principles in their day-to-day operations, and (b) facilitate dialogue between companies and affected parties, when specific issues related to a company's operations fall within the scope of the Guidelines. The process to be followed by the Canadian NCP in dealing with issues that arise relating to the implementation of the Guidelines in specific cases is prescribed in the Procedural Guidance to the OECD Guidelines (section C, page 72 of the 2011 edition) and further explained in the Canadian NCP Procedures Guide.

Following the receipt of a request for review, the NCP conducts an initial assessment to review the issues raised. In doing so and in determining whether to offer its good offices to the parties in the form of mediation or facilitated dialogue, the NCP takes into account a number of factors, as outlined in paragraph 25, page 83 of the 2011 edition of the Guidelines.

If the NCP establishes that a facilitated dialogue could potentially address the issues raised, the NCP can offer to the company and those making the claim to participate in a facilitated dialogue or a mediation on a voluntary and good faith basis. The objective of a dialogue is for parties to establish a better understanding of the issues and identify a path forward and/or solutions to the concerns identified in the submission to the NCP. The Canadian NCP is not required by the OECD to render a finding of "breach" to the Guidelines, but it can do so, at its sole and entire discretion. It is not the role of the Canadian NCP to provide the remedy. The NCP offers a neutral forum for a facilitated dialogue or mediation, for parties to find solutions together, when there is reason to believe that such dialogue can help parties find mutually agreeable solutions, while advancing the implementation of the OECD Guidelines by companies.

Whether the NCP offers its good offices to the parties or not, and whether there is any agreement or not between the parties, the Procedures require the NCP to make the results of its proceedings publicly available by publishing a final statement on its web site.

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