



U.S. National Contact Point
for the
OECD Guidelines for
Multinational Enterprises on
Responsible Business Conduct

FINAL STATEMENT

Specific Instance between

André Amisi Rushingwa, Delvaux Bwisibo Mukunda, and
Raymond Minani Muganira,
and

Gramercy Funds Management LLC

Regarding Events in the Democratic Republic of the
Congo

August 29, 2023

Bureau of Economic and Business Affairs

U.S. Department of State

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Overview of the NCP and Its Role

The OECD Guidelines for Multinational Enterprises (the Guidelines)¹ are voluntary, non-binding recommendations for responsible business conduct in a global context. In the Guidelines, adhering governments, of which there are currently 51, provide guidance to multinational enterprises operating in or from their territories. Adhering governments have committed to a) encouraging their multinational enterprises to follow the Guidelines in their global operations, and b) appointing a National Contact Point (NCP) to assist parties in seeking a consensual resolution to issues that may arise under the Guidelines.

As a part of its function, the U.S. NCP can help to resolve issues related to implementation of the Guidelines, arising from the business conduct of a multinational enterprise in specific instances. Generally, such issues are dealt with by the NCP of the country in which the issues have arisen. The U.S. NCP handles such issues in accordance with procedures described in the U.S. NCP Guide.² Further background on the Specific Instance process and the procedures and policies of the U.S. NCP can be found at the website of the U.S. NCP.³

¹ Available at [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct](#) . This is the current version of the Guidelines, adopted June 9, 2023. A previous version of the Guidelines, adopted in 2011, was applicable when this complaint was submitted.

² “A Guide to the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises,” available at [A Guide to the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises](#).

³ [U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises](#).

Executive Summary

This Final Statement concludes the Specific Instance submitted to the U.S. NCP on January 10, 2021, by André Amisi Rushingwa, Delvaux Bwisibo Mukunda, and Raymond Minani Muganira (collectively, the submitters). The Specific Instance alleged conduct inconsistent with the Guidelines on the part of Gramercy Funds Management LLC (Gramercy), an investment manager headquartered in Greenwich, Connecticut, with respect to actions in the Democratic Republic of the Congo (DRC) of Banro Corporation, a Canadian company that existed until 2018, and its successor Banro Corporation Ltd., a Cayman Islands company incorporated in 2018 (each referred to as Banro).

The U.S. NCP declines to offer mediation to the submitters, principally because Gramercy has divested its ownership interest in the relevant DRC business.

Factual Background

The three submitters are former employees of the former mining company Société Minière et Industrielle du Kivu (SOMINKI), which existed from about 1974 to 1997 and is central to this Specific Instance. The following background information is from public sources.⁴ SOMINKI was established in 1974 or 1976 in the Republic of Zaire, as the DRC was then named, to hold assets of former colonial mining entities, twelve gold mines and 35 tin mines, most or all in the eastern Zaire provinces of North Kivu, South Kivu, and Maniema. In 1995 and/or 1996, Banro, then a Canadian company, acquired 72% of SOMINKI from other private holders; the government of Zaire continued to own the

⁴ Because SOMINKI no longer exists, and Banro and SAKIMA are not parties to this Specific Instance, none of those three companies have had an opportunity to review or correct anything in this Statement about them.

remaining 28%. Meanwhile, in 1996 an armed rebellion arose in eastern Zaire, and in May 1997 it reached the capital and overthrew the government of President Mobutu Sese Seko. In February 1997, during its final months in power, the Mobutu government concluded a tripartite Mining Convention with SOMINKI and Banro. Under it, a new company called Société Aurifère du Kivu et du Maniema (SAKIMA) took over SOMINKI's gold mine assets, Banro owned 93% of SAKIMA, and the Government of Zaire owned the remainder. (Incidentally, when the Mobutu government concluded the Mining Convention, it no longer controlled the territory containing the SOMINKI mines.) In March 1997, SOMINKI was liquidated.⁵

The key allegation in this case is that at the time of SOMINKI's dissolution, thousands of former SOMINKI workers (5,489 is the number stated in the complaint, but the submitters used different numbers elsewhere⁶) were dismissed without receiving severance pay or jobs with the new company, SAKIMA.

In April 2002, Banro and the DRC concluded a further agreement, according to the submitters who provided a purported copy. It includes the following: "BANRO

⁵ The information about SOMINKI in this paragraph is from the following four sources: [Société Minière et Industrielle du Kivu – Wikipedia](#); Canadian NCP, [Final Statement, Banro Corporation and a Group of Former Employees](#) (May 25, 2017); Banro Corporation, [SEC Form 20-F for the year ended December 31, 2016](#) (April 2, 2017); VenmynDeloitte, ["Independent National Instrument 43-101 Technical Report on the Namoya Gold Project, Maniema Province, Democratic Republic of the Congo, Prepared for Namoya Mining SARL \(a subsidiary of Banro Corporation\)"](#) (May 12, 2014).

⁶ In the current Specific Instance, as discussed in the Initial Assessment section below, the submitters provided approximately 2,100 names and signatures (or fingerprints) reportedly of former SOMINKI employees and described the number of dismissal forms that they have as "more than 2,000." In the earlier Canadian Specific Instance, discussed below under "Previous Submission to Other NCPs," the same submitters claimed to represent 4,987 former employees of SOMINKI. While this section is discussing the submitters' allegation, it is noteworthy that, according to the Canadian NCP's 2017 Final Statement, Banro asserted a much lower number: 2,640 original SOMINKI employees, 1,983 of whom were transferred to SAKIMA upon its creation in 1997, leaving 657 former SOMINKI employees who "were terminated in March 1997 due to *force majeure* because of the war," whose "legitimate claim for severance pay" Banro recognized. Canadian NCP, Banro Final Statement, *supra* note 5.

undertakes, as the majority shareholder of SOMINKI in liquidation, to obtain the closing of the liquidation of [SOMINKI] under reserve of recovery by SOMINKI in liquidation of its receivables upon the State, the amount of which will be determined by an ad hoc committee. Furthermore, the parties specify that the various claims, including those of the workers of SOMINKI in liquidation, will be paid with the proceeds of this liquidation.”⁷ The submitters reported receiving no such payment.

In 2009, according to the Canadian NCP and a Banro SEC filing, Banro and the DRC again renegotiated the terms of their relationship. Among other points, Banro committed to contribute, as a “goodwill” gesture, \$200,000 (U.S.) to SOMINKI’s liquidation committee for the purpose of paying final accounts to former SOMINKI employees. (The contribution’s purpose is described more generally in Banro’s SEC filing as “to settle legacy issues with SOMINKI.”)⁸ The submitters stated to the U.S. NCP that they never received any such compensation.

In 2013 (according to Gramercy), Gramercy, which invests in emerging-market securities, made its first of several investments, as a bondholder, in Banro. After Banro’s mines were negatively impacted by war, unrest, multiple epidemics, governance limitations, and other problems that have plagued the eastern DRC, Banro ended up declaring bankruptcy. In March 2018, Banro’s bankruptcy reorganization was approved by an Ontario court, its equity shares (Banro had been listed on the Toronto and New York stock exchanges) were cancelled, and Gramercy’s holding of debt was converted to

⁷ French original: “BANRO s'engage, en tant qu'actionnaire majoritaire de SOMINKI en liquidation, à obtenir la clôture de la liquidation, de cette société sous réserve de recouvrement par SOMINKI en liquidation de ses créances sur l'Etat, dont le montant sera déterminé par une commission ad hoc. Par ailleurs, les parties précisent que les différentes créances, y compris celles des travailleurs de la SOMINKI en liquidation, seront payées avec le produit de cette liquidation.”

⁸ Canadian NCP, Banro Final Statement, *supra* note 5; Banro 2006 SEC filing 20-F, *supra* note 5.

a significant minority equity ownership share.⁹ Banro also redomiciled from Canada, becoming a Cayman Islands company.

In January 2023, Banro sold the shares of its subsidiaries that held all the DRC mining assets to an unrelated company. Following that transaction, Gramercy no longer has any ownership interest or participation in the DRC mines.

Substance of the Specific Instance, and Response

On January 10, 2021, the submitters submitted a Specific Instance to the U.S. NCP alleging conduct by Gramercy inconsistent with Chapters I (Concepts and Principles), II (General Principles), IV (Human Rights), and V (Employment and Industrial Relations) of the Guidelines. The submission was accompanied by supporting documentation (much of it in French), and the submitters continued to provide additional documentation throughout the process. After communications with the submitters, the U.S. NCP provided the submission to Gramercy on May 11, 2022, providing supporting documentation on May 24, and additional documentation later as received. On July 29, 2022, Gramercy responded, taking the position that the Specific Instance should not be accepted for further examination. The submitters sent follow-up communications on August 2, August 31, and September 19, as did Gramercy on August 26 and September 14. On September 29, 2022, Gramercy wrote that it had no further response.

The three submitters asserted that, as a significant minority owner of Banro, Gramercy had responsibilities to the former SOMINKI employees. They requested that Gramercy

⁹ Gramercy and Banro's other "most significant creditor[]" were "anticipated to collectively hold over 74 percent" of equity shares in the reorganized Banro. *Banro Corporation (Re)*, Endorsement Order, Ontario Superior Court, 2018 ONSC 2064 (March 29, 2018)

should “influence” Banro to apply good practices and DRC laws with respect to the liquidation of SOMINKI. They did not state more specifically, either in their submissions or when asked by the U.S. NCP, what remedy they sought.

Responding in 2022, Gramercy stated that it “take[s] environmental, social, and governance matters seriously.” As evidence that Gramercy had no involvement with the events giving rise to this claim, it noted that they occurred in 1997, a year before Gramercy was founded. Gramercy reported that it had consistently lost money on its investment in Banro, “and is actively seeking to exit that investment.” As noted above, it accomplished that objective a few months later.

Previous Submission to Other NCPs

NCPs have addressed this situation in a previous Specific Instance from the same submitters handled by the Canadian NCP. On February 26, 2016, five former SOMINKI employees, including all three submitters of this case, submitted a Specific Instance against Banro to the NCPs of Belgium, Canada, France, and the United States. After consultation, those NCPs concluded that the Canadian NCP should handle it, given that Banro was a Canadian multinational and that the allegations were about its activities in the DRC, a country that is not an adherent to the Guidelines and therefore does not have an NCP. The complaint alleged that 4,987 former employees of SOMINKI were terminated in the 1997 transfer of mining assets from SOMINKI to SAKIMA, that the former employees did not receive required severance pay or other benefits, and that Banro (as majority owner of both SOMINKI and SAKIMA) had responsibility to pay those benefits. The Canadian NCP, in its Final Statement of May 25, 2017 stated that “[t]wenty years after the dissolution of the SOMINKI, the liquidation has not yet been completed.”

The Canadian NCP concluded “that offering a facilitated dialogue solely between the notifiers and Banro would not contribute to the direct resolution of the liquidation of the SOMINKI given the absence of other key players in the liquidation process, in particular the DRC government, the liquidation committee, the Ad-hoc Commission, representatives of the ex-workers and possibly other actors.” The Canadian NCP made requests and recommendations to Banro, including that it seek to “engage with DRC government officials, in good faith, to promote a timely reactivation of the SOMINKI liquidation process with a view to working with all implicated parties to complete a reconciliation and closure process as soon as possible.” The NCP recommended that this process “focus on facilitating an expedited cash payment of the long outstanding ex-employees’ final accounts.”¹⁰

The Canadian NCP also stated its intention to issue a follow-up statement, including Banro’s responses to its requests. Its follow-up statement, issued March 21, 2019, indicated with disappointment the lack of cooperation from Banro as reflected in the lack of response to the Canadian NCP’s repeated requests, and noted that Banro no longer had meaningful economic ties to Canada after its 2018 bankruptcy and change of domicile to the Cayman Islands.¹¹

Initial Assessment

The initial assessment does not determine whether or not a company has acted consistently with the Guidelines, but rather is a process to determine whether the issues raised merit further examination. In its initial assessment, the U.S. NCP determined that

¹⁰ Canadian NCP, Banro Final Statement, *supra* note 5.

¹¹ Canadian NCP, [Follow Up Statement, Banro Corporation and group of former employees](#) (March 21, 2019)

the issues raised by the submitters do not merit further examination under the Guidelines, and thus decided not to accept the Specific Instance. The U.S. NCP made this decision based on the Guidelines, and considering the OECD's guidance on initial assessments.¹² In particular, according to the Commentary on Implementation Procedures, an initial assessment involves determining "whether the issue is *bona fide* and relevant to the implementation of the Guidelines," taking into account the following criteria:¹³

a. The identity of the party concerned and its interest in the matter.

The U.S. NCP is satisfied that Messrs. Amisi Rushingwa, Bwisibo Mukunda, and Minani Muganira have provided sufficient information regarding their interest in the issues raised. They state that they are former employees of SOMINKI. As support, they provided signed end-of-service documents ("Attestation de fin de service"), on SOMINKI letterhead and with 1997 dates, for several persons including the three submitters. They told us that they have "more than 2,000 like this," all reportedly stating termination dates in July 1997.

They also provided 202 pages which contain lists of approximately 2,100 names and signatures (or fingerprints), purportedly of former SOMINKI employees consenting to representation by the five submitters of the Canadian Specific Instance in a proceeding

¹² OECD, [Guide for National \[Contact\] Points on the Initial Assessment of Specific Instances](#) (2019)

¹³ These initial assessment criteria are from the 2011 version of the OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (2011 version), para. 25. The 2023 version of the Guidelines revised the criteria; see Commentaries on the Implementation Procedures (2023 version), para. 33. We apply the 2011 criteria here, in part because the U.S. NCP Procedures, on our website, still quote that version.

against the Canadian Banro company (and agreeing to what appears essentially to be a 25% contingency fee on any recovery).

b. Whether the issue is material and substantiated

The fundamental issue in this specific instance, alleged non-payment of severance pay to several thousand workers during a reorganization, is sufficiently substantiated in that the submitters have provided information indicating that their allegations are at least plausible, which is sufficient to satisfy the “not . . . unnecessarily onerous” standard required for this prong of an initial assessment.¹⁴

Regarding whether this issue is “material,” it could raise issues relevant to the Guidelines. A significant question is raised, however, because the allegation concerns events from 1997, when the OECD Guidelines did not include one of the two substantive chapters relied on by the submitters, the human rights chapter. Because the divestment issue discussed below makes this question moot, for present purposes the U.S. NCP will set aside the potential issue of which version or versions of the Guidelines is applicable to this complaint.

c. Whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance

The Guidelines state two different bases and levels of corporate responsibility, for companies “causing or contributing to” an adverse impact, and for companies that did

¹⁴ OECD, [Guide for National \[Contact\] Points on the Initial Assessment of Specific Instances](#), (2019) at p.7.

not contribute but are “directly linked” to an adverse impact “by a business relationship.”¹⁵

It appears that Gramercy did not cause or contribute to the alleged adverse impact, which arises from the 1997 dissolution of SOMINKI. In fact, Gramercy did not even exist in 1997. So, any responsibility on Gramercy’s part must arise from its business relationship with Banro and the DRC mining businesses. Gramercy had a business relationship through its investment (initially as debt, later as equity) in Banro from 2013 to January 2023, when Banro disposed of its interest in the DRC mining businesses. Gramercy appears no longer to have a business relationship linking it to the alleged harm.

Where, as appears to be the case here, a company’s connection to the impact is solely through a business relationship, termination of the relationship ends the company’s possibility of “using leverage . . . to influence the entity causing the adverse impact to prevent, mitigate or remediate that impact,” as the Guidelines recommend that it do.¹⁶ This reason mandates a conclusion that this case does not merit further examination.

d. The relevance of applicable law and procedures, including court rulings

Aside from the Canadian Specific Instance, we are not aware of any parallel proceedings on this issue, so this factor is not relevant.

¹⁵ OECD Guidelines, *supra* note 1, Ch. II, paras. A. 12-13; Ch. IV, paras. 2-3. Though the difference is irrelevant here, an alternative characterization counts three levels of responsibility rather than two, treating “causing” and “contributing to” separately.

¹⁶ *Id.*, Ch. II, Commentary para. 23.

e. How similar issues have been, or are being, treated in other domestic or international proceedings.

In its review of the previous version of this specific instance, the Canadian NCP concluded that “the question of the liquidation of the SOMINKI merits further examination, including the question of the payment of the final accounts of the ex-employees.” In its follow-up report, however, the Canadian NCP concluded that “the NCP is disappointed with the lack of cooperation demonstrated by [Banro] during this follow up process, as reflected in the lack of response to the NCP's requests and/or the repeatedly missed deadlines, despite efforts from the NCP.” Based on these conclusions, the previous NCP proceeding would not weigh against further action.

f. Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

Because of the January 2023 divestment and Gramercy’s apparent lack of leverage with respect to the new owner of the DRC mines, the U.S. NCP concludes that consideration of this Specific Instance is unlikely to result in a positive outcome, and thus would not contribute to the purposes and effectiveness of the Guidelines.

For the reasons stated above, the U.S. NCP determined in its initial assessment that it should not accept the Specific Instance.

In this case, there will be no Initial Assessment document separate from this Final Statement, even though the U.S. NCP’s procedures and some previous practice suggest that there may be two separate documents. This Final Statement fills the role of both documents – it describes the initial assessment, in addition to concluding the Specific Instance.

Resolution

Because of its decision not to offer mediation, the U.S. NCP brings this Specific Instance to a close with this Final Statement. We would like to thank all parties for their participation.

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