

Final Statement of the Canadian National Contact Point - Banro Corporation and a Group of Former Employees

May 25, 2017

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Summary

On February 26, 2016, a request for review was submitted to the Canadian National Contact Point (the “NCP”), on the OECD Guidelines for Multinational Enterprises (the “Guidelines”) by a group of five (5) former employees (“the Notifiers”) of the Société Minière et Industrielle du Kivu (SOMINKI) in liquidation, located in Kalima (South Kivu) in the Democratic Republic of Congo (DRC), alleging conduct in the DRC by Banro Corporation (“Banro” or “the Company”) inconsistent with the Guidelines.

The NCP assesses Requests for Review (RfR) from Notifiers according to the [Canadian NCP Procedures Guide](#) and the [OECD Guidelines Procedural Guidance](#). The NCP process is a voluntary, non-judicial grievance mechanism whereby the NCP can offer to facilitate a dialogue or offer mediation between the company and those filing the complaint if it is thought that it can make a positive contribution to resolving the issues raised in relation to the Guidelines. Typically, the objective of an NCP-sponsored dialogue or mediation is for parties to identify a path forward or solutions to the issues raised in a request for review. Details on the NCP process for handling specific instances can be found in the Annex.

In accordance with its procedures, the NCP conducted an initial assessment and concluded that the issue of the liquidation of SOMINKI’s assets raised in the Request for Review is unresolved. The NCP has also concluded that, in the absence of the participation at the table of other key actors in the liquidation process, such as the DRC government, an offer of dialogue solely between Banro and the notifiers would not establish the necessary accountabilities to facilitate the critical decision making needed to resolve the liquidation of the SOMINKI and the payment of the ex-workers’ final accounts. The NCP believes, however, that there is value in requesting follow-up actions aimed at moving forward with resolution of the issues at hand and therefore the NCP makes requests and a recommendation to the Company which are included below.

The NCP recognizes the long-standing and difficult situation in which the ex-workers of the SOMINKI find themselves.

The NCP would like to thank Banro and the Notifiers for their positive and open collaboration throughout the NCP process, for responding to questions and requests from the NCP and for allowing the NCP to share with the other party all the supporting documentation and correspondence they provided. The NCP is encouraged by indications from Banro, provided

during consultations on the draft Final Statements that it is committed to meeting the requests of the NCP.

NCP Requests and Recommendation

The NCP requests that Banro:

1. Make all efforts possible 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. It is recommended that this process focus on facilitating an expedited cash payment of the long outstanding ex-employees' final accounts:
2. Provide a written update to the NCP by **8 September, 2017** addressing what steps the Company has taken to address the NCP request 1) above regarding the re-activation of the SOMINKI liquidation process; and
3. Provide a 2nd written update to the NCP by **8 December, 2017** regarding any outcomes achieved as a result of the implementation of the request regarding the SOMINKI liquidation process.

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

The NCP would like to issue a follow-up statement to this Final Statement approximately twelve (12) months following the publication of this Final Statement, and would prefer to do so with new information from the Parties. In preparing its follow-up report, the NCP will take into account the company's responses to the requests noted above. The NCP can also make recommendations pertaining to the provision of trade advocacy support services by the Government of Canada, should constructive engagement with the NCP falter.

Parties to the Specific Instance

The Request for Review was submitted by five (5) ex-employees of the Société Minière et Industrielle du Kivu (SOMINKI SARL), a mining company located in Kalima in the Province of South Kivu in the DRC, registered in the former country of Zaire, and now in liquidation. The five former employees are Mr. Athanase Kyanga Wasso, Ms. Jeanne Kabungulu Ngalya, Mr. André Amisi Rushingwa, Mr. Delvaux Bwisibo Mukunda and Mr. Raymond Minani Muganira. In the RfR, the Notifiers claim to represent 4,987 ex-employees of the SOMINKI.

The company named in the RfR is Banro Corporation, a Canadian mining company headquartered in Toronto, Ontario, Canada and operating in the DRC. Banro was a majority shareholder of the SOMINKI when its dissolution was announced in 1997. Banro was also a majority shareholder of its successor, SAKIMA SARL (Société Aurifère du Kivu et du Maniema), until 2002.

Historical Context

Before presenting the positions of both parties, given the particularly complex history, the NCP finds it useful to summarize key historical events and milestones where the roots of today's complex situation of the SOMINKI and the ex-workers can be found.

The Sominki, created in 1976 from the merger of several companies, was the main mining company working in Kivu through the late 1970s to early 1990s. In late 1995, Banro Corporation acquired the SOMINKI with its 12 gold concessions and 35 tin concessions. By January 1996, Banro was a majority shareholder (72%) with the Zaire state holding the balance of the shares. In February 1997, BANRO and the Zaire government signed the Mining Convention. The result was the creation of SAKIMA SARL (93% Banro) to take over the mining projects.

On 29 March, 1997, at their general meeting, SOMINKI's shareholders decided to dissolve the SOMINKI, which was then put in liquidation. A liquidation committee was created to oversee the liquidation of SOMINKI's assets and the settlement of any remaining liability to third parties, including the ex-SOMINKI workers. In 1996, war and pillaging had started to spread over the country, and the Zaire government fell in May 1997 after l'Alliance des forces démocratiques pour la liberation du Congo (AFDL), led by Laurent Kabila, marched into Kinshasa.

In October 1997, SAKIMA leased the SOMINKI tin concessions to Ressources Minérales Africaines (RMA). On 29 July, 1998, President Laurent Kabila executed a series of decrees expropriating SAKIMA's assets and transferred the mining licences and permits to la Société des Mines du Congo SARL (SOMICO), a new state-owned corporation. A dispute between Banro and the DRC government followed which lasted until Joseph Kabila succeeded to his father Laurent Kabila at the Presidency in 2001. An Amicable Settlement Agreement was signed in 18 April 2002 between the Government of Congo and Banro.

In this 2002 agreement, the SAKIMA was reinstated with the government as sole shareholder (100%), Banro regained the gold concessions and four Banro subsidiaries were created to exploit them. In the Agreement, Banro committed, as a majority shareholder of the SOMINKI in liquidation, to seek closure of the liquidation of the company, subject to recovery by SOMINKI in liquidation of what it was owed by the Government, the amount of which was to be determined by an ad hoc committee.

In 2009, negotiations took place between Banro and the DRC government during the process of revisiting the mining conventions under the auspices of the DRC government. In the 2010 amendments to the 1997 Mining Convention between Banro and the DRC government, Banro committed to make available USD 200,000 as a goodwill contribution to the assets realized by SOMINKI in liquidation for the payment of the final accounts to the employees. In the 2010 amendments, Banro and the DRC government also agreed to create a fourteen (14) member- ad-hoc commission made up of experts from SAKIMA, Banro and the Government, in cooperation with the liquidation committee, to monitor and finalize the liquidation. According to Banro, while the company had nominated one person to sit on the ad-hoc commission, the commission's membership was never officially confirmed by the government and the commission never met.

One of the Notifiers informed the NCP that he was originally one of the members of this commission who were representing the ex-workers.

The DRC Minister of Employment, Labour and Social Welfare has since called several working meetings with Banro, the liquidation committee and ex-SOMINKI personnel representatives to discuss the question of final accounts to ex-SOMINKI employees. The NCP could not find any information regarding the outcomes of these meetings.

Issues Raised in the Request for Review and the Position of the Notifiers

In the RfR, the Notifiers claim that Banro has failed to settle the cash final accounts of former employees of the SOMINKI after the decision in 1997 to liquidate SOMINKI and the transfer of mining assets from SOMINKI to a new company, SAKIMA. The Notifiers claim that Banro holds the main assets of the ex-SOMINKI, namely the mining titles.

The Notifiers also allege that massive job losses took place as a result of the new arrangements. They claim that severance pay has yet to be disbursed for the 4,987 ex-employees of SOMINKI who were on the payroll at the time of the dissolution (29 March 1997). They allege that while the expatriate personnel were paid out, most of the company's Congolese employees were not. Notifiers claim that Banro has violated articles 80, 81, 100 and 110 of the Congolese labour code (these articles deal with liquidation and substitution of employer). The Notifiers state that *force majeure* cannot be invoked because the Board of Directors of SOMINKI pronounced the liquidation and the national labour code regarding the liquidation of companies has to be applied to all ex-workers.

The Notifiers claim that employees' contracts were never officially terminated and that responsibility to pay the ex-workers' final accounts rests with Banro as the majority shareholder at the time of the dissolution of the SOMINKI. The Notifiers request that Banro respect the rights of former workers of the SOMINKI in liquidation by compensating them for prejudices (severance pay, medical coverage, pensions etc.), estimated at USD 500 million.

In the RfR, the Notifiers cite the following sections of the OECD Guidelines:

- Chapter II: General Policies (page 19 of the 2011 Edition)
- *Enterprises should take fully into account established policies in the countries in which they operate and consider the views of other stakeholders. In this regard:*
- *A. Enterprises should:*
- Paragraph 1: *Contribute to economic, environmental and social progress with a view to achieving sustainable development.*
Paragraph 2: *Respect the internationally recognised human rights of those affected by their activities.*
Paragraph 5: *Refrain from seeking or accepting exemptions not contemplated in the*

statutory or regulatory framework related to human rights, environmental health, safety, labour, taxation, financial incentives or other issues.

Paragraph 11: *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

Paragraph 12: *Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*

Banro's Position

Banro's position on the issues raised by the Notifiers, as expressed in the various communications with the NCP, is summarized in this section. The Company states that it has met, and will further meet, its legal obligations with respect to the liquidation, and that it wants to see the liquidation concluded.

Regarding the workforce of the ex-SOMINKI, Banro's position is that of the original 2,640 employees, 1,983 were transferred to SAKIMA SARL upon its creation in 1997, and 657 were terminated in March 1997 due to *force majeure* because of the war. The company does not recognize the 5 Notifiers as legitimate representatives of the ex-SOMINKI workers entitled to severance pay. The only legitimate claim for severance pay that Banro recognizes is that of 657 ex-workers in the tin operations who were terminated by *force majeure*. Banro states that the claims of the 657 ex-workers was validated after negotiations held in June 1998 between SOMINKI's employees union representatives, the management of RMA and the liquidation committee. The Company also states that ex-workers of SOMINKI falsely claim that the transfer to SAKIMA represented a termination of their employment. According to Banro, whatever loss of employment and earnings suffered by the former SOMINKI workers was the result of the outbreak of war in the DRC and the employment practices of SAKIMA.

The Company rejects all allegations by the Notifiers and states that various individuals and instrumentalized groups have tried to hamper the liquidation process and harm Banro with improprieties. The Company states that Banro is not a direct party to the liquidation process, that Banro was not the employer of the ex-workers and that the DRC state, SAKIMA and the liquidation committee have responsibility for the liquidation process. In Banro's view, obstacles to the liquidation process included the change in government in Zaire in 1997-98, the illegal seizure of the SAKIMA assets on July 29, 1998 by presidential decree, the subsequent looting of most of SAKIMA's assets, the non-payment by debtors of dues upon liquidation, as well as local political interference. Banro states that in addition, the liquidation committee was prevented in 2011, from paying claims to the 657 ex-workers referred to above, despite the fact that some funds for such a purpose were held in escrow after the realisation of certain assets of SOMINKI.

As highlighted in the historical context section, as a goodwill gesture, Banro undertook to make available to the liquidation committee the sum of USD \$200,000 as a contribution to the assets to be released for the payment of the final instalments to the employees. Banro notes, however, that this contribution does not signify that Banro is a debtor in the liquidation of SOMINKI.

The Company has highlighted to the NCP that it is committed to corporate social responsibility and has received a number of awards for its actions. Since its creation in 2005, the Banro Foundation has completed over 70 social development projects in the DRC.

The NCP Process

Timeline:

- 26 February 2016: NCP receives the RfR from the Notifiers
- 29 February 2016: NCP Secretariat acknowledges receipt of the RfR and requests additional information from the Notifiers
- 9 to 15 March 2016: NCP receives additional documentation from Notifiers
- 22 March 2016: NCP contacts a representative of Banro in DRC copied on the RfR
- 11 April 2016: NCP Secretariat call with a senior representative of Banro located in Toronto, Ontario, Canada
- 31 May 2016: Input from Banro to the NCP
- 24 May to 8 September 2016: collection of additional information from both parties and exchange of written comments between parties via the NCP
- 10 January 2017: NCP call with representatives of Banro
- 11 January 2017: NCP call with the Notifiers
- 13 April 2017: Draft Final Statement shared with parties

The Notifiers had also sent the request for review to the NCPs of France, Belgium and the USA. In consultation with those NCPs, it was determined that the Canadian NCP was the designated NCP to take on this case given that the Company is a Canadian multinational and that the allegations are about its activities in the DRC, a country which is non-adherent to the OECD Guidelines and therefore that does not have an NCP.

The NCP's Initial Assessment and Conclusions

The NCP would like to thank Banro and the Notifiers for their constructive cooperation during the review process. All documents provided in the RfR and subsequently obtained from the Notifiers by the NCP, were shared with the Company. The Company answered questions and information requests from the NCP in a timely fashion and gave their consent for the NCP to share all documentation it provided with the Notifiers. Over several months, there was a useful and healthy exchange of written comments between the Parties via the NCP. In the NCP's view, this exchange was an opportunity for achieving a better understanding of each other's perspective and position. The NCP regrets that the process took a long time. The need to translate all documentation, to and from French or English, contributed to additional delays.

The Procedural Guidance chapter of the OECD Guidelines provides that NCPs shall make an Initial Assessment by considering "whether the issues raised merit further examination". In doing so, the NCP has considered the RfR against the criteria listed in the OECD Guidelines Procedural Guidance and the Canadian NCP Procedures Guide (see Annex).

The NCP has assessed that the Notifiers have an interest in the issues raised in the request for review because they are ex-employees of the SOMINKI.

After reviewing all the supporting documentation presented by both parties, and conducting desk research, the NCP found that the issue regarding the liquidation of the SOMINKI presented in the RfR is material to the OECD Guidelines, and substantiated. Twenty years after the dissolution of the SOMINKI, the liquidation has not yet been completed. As a result, it is the NCP's conclusion 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.

Typically when the NCP assesses that an issue in a request for review merits further examination, it offers its good offices in the form of mediation or facilitated dialogue between the parties. However, in this particular instance, the NCP has 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 NCP recognizes the long-standing and complicated situation in which the ex-workers of the SOMINKI find themselves. A long series of events, circumstances and legacy issues, compounded by war and political uncertainty, have contributed to the present situation. The NCP acknowledges the difficult and confusing nature of the events surrounding the dissolution and liquidation of SOMINKI. The NCP further acknowledges the suffering that the situation has been causing to the ex-workers of SOMINKI.

The NCP finds it useful to recall that, in line with the Government of Canada's approach to responsible business conduct, the NCP expects that Canadian companies will promote Canadian values and operate at home and abroad with the highest ethical standards. Companies are expected to respect human rights and all applicable laws, and to meet or exceed widely recognized international standards for responsible business conduct, including and in particular, the OECD Guidelines. Where host country requirements differ from the international standards, it is the duty of the company to meet the higher, more rigorous standards.

The Government of Canada also expects Canadian companies to operate in accordance with internationally recognized labour standards in all cases, even where a host country fails to enforce domestic laws or implement international standards or in challenging environments such as a weak governance zone, zones of conflict or an unstable political environment.

Furthermore, the Guidelines (Chapter V - Employment and Industrial Relations, paragraph 6 page 36) recommend that, in considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, companies should provide reasonable notice of such changes to representatives of the workers and cooperate with the workers representatives and appropriate governmental authorities so as to mitigate any adverse effects to the maximum extent practicable. The Guidelines further suggest that means may be employed to provide meaningful

cooperation between employer and employees to mitigate the potential negative effects of significant employment changes.

The Company may find useful the recent OECD Due Diligence Guidance for Meaningful Stakeholder Engagement (including workers and other groups) in the Extractive Sector. The guidance offers practical tools for companies to help them implement the provisions of the OECD Guidelines on due diligence for effective stakeholder engagement throughout the lifecycle of their operations (Chapter II – General Policies, paragraph 14, page 20).

While the company was facing a particularly challenging set of circumstances, the decision to liquidate SOMINKI, the creation of SAKIMA and the transfer to RMA constituted a situation of significant employment changes. The liquidation of the SOMINKI is not complete to date, and this situation has caused real negative impacts on the livelihood of some workers. It is the NCP's view that the Company should make all efforts possible to engage with the government of the DRC to reactivate the liquidation process with a view to contributing to an effective completion of the liquidation process and payment of outstanding employee compensation where appropriate.

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 non-binding 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, the NCP takes into account a number of factors, as outlined below (paragraph 25, page 83 of the 2011 edition):

- *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; and,*
- *whether the consideration of the specific issue would contribute to the purposes and effectiveness 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 “guilt” 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 on responsible business conduct by multinational enterprises.

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 publically available by publishing a final statement on its web site.

Link to the Canadian NCP’s website: www.ncp-pcn.gc.ca.

Link to the Final Statement on the Canadian NCP’s website:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-banro.aspx?lang=eng>