

International Centre for Settlement of Investment Disputes

Washington, D.C.

In the Proceeding

Between

Miminco LLC, Dr. Ilunga Jean Mukendi and Mr. John Dormer Tyson
(Claimants)

Versus

The Democratic Republic of the Congo
(Respondent)

ICSID Case No. ARB/03/14

AWARD

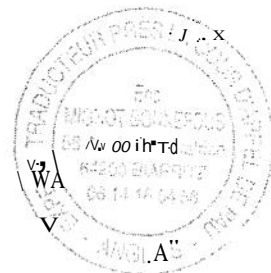
Members of the Tribunal

Dr. Ahmed S. El-Kosheri, President
Professor Catherine Kessedjian, Arbitrator
The Honorable Marc Lalonde, Arbitrator

Secretary of the Tribunal

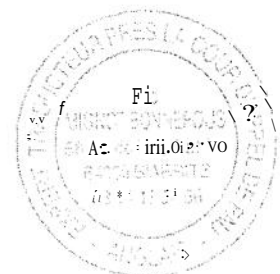
Mrs. Eloïse Obadia

Date of dispatch to the Parties: November 19, 2007



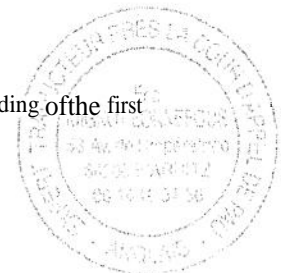
I. PROCEEDING

1. By request dated September 12, 2002, Miminco LLC, a company incorporated in Delaware, United States, Dr. Ilunga Jean Mukendi and Mr. John Tyson Sr., both American citizens (hereinafter the “Claimants”) submitted a request for arbitration to the International Centre for Settlement of Investment Disputes (hereinafter “ICSID” or “Centre”) against the Democratic Republic of the Congo (hereinafter the “Respondent” or the “DRC”), based on provisions relating to arbitration contained in the bilateral Treaty Concerning the Reciprocal Encouragement and Protection of Investments entered into between the United States and the Republic of Zaire on August 3, 1984 and entered into force on July 28, 1989.
2. Following an exchange of correspondence between the Centre and the Claimants, the Deputy Secretary-General of the ICSID registered the Claimants' request on June 9, 2003 and notified the registration to the Parties on the same day in accordance with the Convention of Washington of March 18, 1965 (hereinafter “the Convention”).
3. On February 16, 2004, the Claimants, invoking Article 3(1) of the Arbitration Rules of the ICSID (hereinafter the “Arbitration Rules”), appointed the Honorable Marc Lalonde, a Canadian citizen, as arbitrator. On August 5, 2004, the Respondent appointed Professor Catherine Kessedjian, a French citizen, as arbitrator. As the Parties did not agree on the name of a President, the Claimants invoked Article 38 of the Convention in order that the Chairman of the Administrative Council appoint the President of the Arbitral Tribunal. Pursuant to Article 4(4) of the Arbitration Rules, and after consulting with the Parties, the Chairman of the Administrative Council appointed Dr. Ahmed El-Kosheri, an Egyptian citizen, as President of the Arbitral Tribunal.
4. The Tribunal was constituted on September 17, 2004 by virtue of Article 6(1) of the Arbitration Rules. The Secretary General appointed Mrs. Aurelia Antonietti, legal counsel to the ICSID, as Secretary of the Tribunal. Following the departure of Mrs. Antonietti, Mr. Florian Grisel, legal counsel to the ICSID, was appointed as Secretary of the Tribunal followed in turn by Mrs. EloYse Obadia, senior legal counsel to the ICSID.

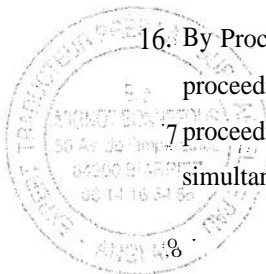


5. The Claimants were represented by Jean Jacques Yoka Mampunga, Esq.¹, attorney at law and member of the Kinshasa/Gombe Bar and Messrs. Ilunga Jean Mukendi and John Dornier Tyson, Sr., whereas the Respondent was represented by Professor Tshibangu Kalala, attorney at law and member of the Kinshasa/Gombe and Brussels Bars and by His Excellency the Minister of Justice and Keeper of the Seals.
6. A hearing for the first session of the Arbitral Tribunal was held at the office of the World Bank in Paris on October 21, 2004. It was there decided, in particular, that the language of the arbitration would be French and that the proceeding would take place at the office of the World Bank in Paris (unless the Tribunal, after consulting with the Parties, considered that it had to hold hearings and meeting at another appropriate location) and that the applicable Arbitration Rules would be those of the ICSID as entered into force on January 1, 2003.
7. After having acquainted himself with the file in its entirety, DRC's counsel stated in a letter dated November 11, 2004 that the Respondent did not intend to raise an objection to jurisdiction.
8. By a Procedural Order dated December 10, 2004, following consultation with the Parties, the Tribunal set the timetable for the exchange of submissions and the date of the hearing on the merits.
9. By letter of March 10, 2005, the Claimants requested an additional time limit from the Tribunal for the filing of their memorandum, due on March 11, 2005. The Tribunal granted an extension until May 13, 2005.
10. By two letters respectively received from the Respondent and the Claimants on April 2 and 4, 2005, the Parties informed the Arbitral Tribunal that they wished to arrange for a preliminary conference as soon as possible with the Members of the Tribunal in order to clarify their respective positions concerning the dispute and reach an amicable settlement.
11. By letter of April II, 2005, the Secretary of the Tribunal informed the Parties that the Members of the Tribunal had delegated powers to the President of the Tribunal to meet with the Parties in the name of the Arbitral Tribunal and that Mr. El-Kosheri would be available on April 21, 2005 for a meeting in Paris, and that Professor Kessedjian and Mr. Lalonde would eventually be present by telephone if needed.

¹ Jean Jacques Yoka Mampunga, Esq. ceased representing the Claimants following the holding of the first session of October 21, 2004.

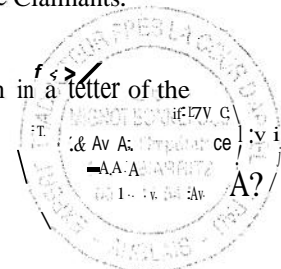


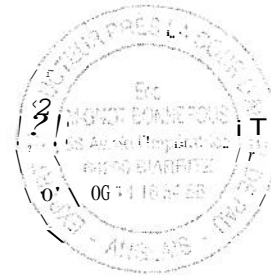
12. On April 21, 2005 a meeting was held on the premises of the World Bank in Paris between the Parties and the President of the Arbitral Tribunal, in the presence of the Secretary of the Tribunal. During such meeting, the Parties signed an agreement entitled "Settlement agreement". Article 4 of this text provides that, pursuant to Article 43(2) of the Arbitration Rules, the Parties request the Arbitral Tribunal to embody this Settlement agreement in an award to be rendered. Article 5 of the Settlement agreement provides that this text shall take effect as of its approval by the Congolese government. Pursuant to Article 43(2), a signed and full original counterpart of this text was delivered to the Secretary of the Tribunal. Minutes of such meeting were drawn up and a copy sent to the Parties by letter from the Secretary of the Tribunal dated April 25, 2005.
13. By letters of May 20, 2005 and June 29, 2005, the Secretary of the Tribunal, recalling that the Settlement agreement would not take effect until following approval by the Congolese government, requested information from the Respondent concerning the status of such approval.
14. Negotiations took place between the Parties on November 23, 2005, following which the Parties agreed to revise the amount of the sum that would be paid by the Respondent to the Claimants as compensation for all of the losses sustained and to set it at USD13,000,000, which was reflected in a report dated November 23, 2005 (hereinafter "Report"). This Report was received by the Secretary of the Tribunal on April 11, 2006, who communicated it to the President and Members of the Tribunal by letter of April 12, 2006. By letter of April 17, 2006, the Secretary of the Tribunal informed the Parties that the Arbitral Tribunal hoped that the Report would be completed in order to rapidly reach a final settlement. By letters of June 26, 2006 and November 29, 2006, the Secretary of the Tribunal queried the Parties concerning the status of the Report.
15. By letter of August 3, 2007, the Claimants, noting that the Congolese government had still not proposed the terms and conditions for payment of the compensation as provided for in the Report, requested the Arbitral Tribunal to reopen the case with a view to a final award, reverting to the initial claim of USD35,000,000.
16. By Procedural Order No. 2 of August 28, 2007, the Arbitral Tribunal ended suspension of the proceeding mutually agreed to by the Parties since 2005, and ordered that the arbitral proceeding be resumed. The Arbitral Tribunal requested the Parties to respectively and simultaneously file a brief written memorandum by October 15, 2007 at the latest, setting out



their current positions concerning resumption of the arbitral proceeding, the current state of their respective claims and their suggestions for the subsequent conducting of the proceeding. A hearing on the Parties' pleadings was to take place on November 17, 2007 in Paris.

17. By letter of October 15, 2007, the DRC confirmed that the DRC would be duly represented at the hearing of November 17, 2007 and that the Respondent would be ready to execute the documents necessary to place on record the final agreement of the Parties concerning the manner for finally resolving the dispute. By letter of the same date, the Claimants requested that the Tribunal grant it until October 28, 2007 the time necessary for filing their observations.
18. By letter of October 17, 2007, the DRC advised that the Congolese government had approved the settlement agreement entered into with Miminco *et al* providing for payment in the amount of USD13,000,000 to the latter. Attached to this letter was a copy of a letter of September 1, 2007 signed by His Excellency the Minister of Justice of the DRC, Georges Minsay Booka, confirming the conclusion by the Congolese government of this settlement agreement.
19. On November 17, 2007, a meeting was held on the premises of the World Bank in Paris between the Parties and the Members of the Arbitral Tribunal, in the presence of the Secretary of the Tribunal, during which the Parties confirmed the Settlement agreement concluded on April 21, 2005 and amended by the Report of November 23, 2005.
20. During such meeting the Claimants submitted a letter of November 13, 2007 issued by the Chairman and General Manager of Miminco, LLC, sent to the ICSID, and a letter of October 29, 2007 from the Chairman of Miminco, LLC sent to the Minister of Finance of the Democratic Republic of the Congo.
21. In view of these letters and the arguments of the Parties, the Arbitral Tribunal rendered a Procedural Order pursuant to which it requested that the Parties indicate in writing whether they would be satisfied with the Arbitral Tribunal rendering a consent award embodying the Settlement agreement of April 21, 2005 and the Report of November 23, 2005, without settling the terms and conditions for payment by the Democratic Republic of the Congo of the sum of USD13,000,000 as compensation for all of the losses sustained by the Claimants.
22. Following such Order, the Parties immediately gave their consent rewritten in a letter of the same date sent to the Tribunal.





II. AGREEMENT OF THE PARTIES

23. Pursuant to Article 43(2) of the Arbitration Rules which provides that “[i]f the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award”, the Arbitral Tribunal unanimously hereby decides to give effect to the request of the Parties. Accordingly, the Settlement agreement of April 21, 2005 and the Report of November 23, 2005, both reproduced below, are embodied in this award and are deemed to form an integral part thereof:

“SETTLEMENT AGREEMENT

Between the undersigned:

The Democratic Republic of the Congo, represented for the purposes hereof by Tshibangu Kalala, Esq., attorney at law, member of the Kinshasa/Gombe and Brussels Bars, acting by virtue of the special power of attorney granted him by letter of April 9, 2005 from the Minister of Justice and the Keeper of the Seals in the name of the Congolese government, on the one hand,

hereinafter referred to as “DRC”;

and

Miminco, LLC, an American company, located 9248 Three Oaks Drive, Silver Spring, MD 20901, United States of America, represented by its General Manager, Mr. John Dormer Tyson,

Mr. John Dormer Tyson, an American citizen, residing at 9248 Three Oaks Drive, Silver Spring, MD 20901, United States of America,

Dr. Ilunga Jean Mukendi, an American citizen, residing at 9248 Three Oaks Drive, Silver Spring, MD 20901, United States of America, of the second part,

hereinafter referred to as “Investor”;

Whereas:

1. The Investor is the owner of two diamond-yielding mining concessions in the Democratic Republic of the Congo: 1) concession no. 222 (Lungu), granted by Ministerial Decree no. 483/95, and 2) mining concession no. 223 (Kabizwaya), granted by Ministerial Decree no. 484/95. These two mining concessions, 25 square kilometers each, are located in the Tshikapa Territory, Kasai Occidental Province.
2. The Investor has established that since the month of October 2006, the beginning of the civil war that entailed the downfall of the regime of Marshal Mobutu, on various occasions the two concessions have been invaded, pillaged and unlawfully operated by the Congolese civil and military authorities to the great detriment of its legally protected rights and interests.
3. In light of the above facts, the Investor is accusing the DRC before the ICSID of having violated the relevant provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965 (ICSID Convention) and those of the bilateral Treaty Concerning the Encouragement and Protection of Investment entered into with the United States of America on August 3, 1984. In this context, the Investor is claiming payment from

the DRC in an amount of 35 million American dollars to compensate the losses sustained.

- 4. Following a minutious examination of the elements furnished by the Investor, it appears that certain of its claims are founded. However, the DRC considers that the claimed amount of 35 million dollars in damages is highly exaggerated.
- 5. In view of the preceding, and above all for the purpose of ensuring the promotion and protection of foreign investments within its territory, the DRC, together with the Investor, consider it useful to explore the ways and means that could lead to the conclusion of an amicable settlement agreement under the control and supervision of the Arbitral Tribunal instituted by the ICSID. The DRC agrees to an extra-judicial solution for the sole purpose of, on the one hand, avoiding the high financial cost of the proceeding before the ICSID and, on the other hand, the risk of a severe condemnation of the State to pay exorbitant amounts to the Investor which shall heavily and unnecessarily burden the public Treasury.

Consequently, the following was agreed to:

Article 1.

- a. The DRC agrees to pay the Investor the sum of USD15,000,000 as compensation for all of the losses sustained by it due to the acts committed by the Congolese civil and military authorities.
- b. The practical terms and conditions for payment of the above amount shall be subsequently determined by the parties.

Article 2.

The Investor agrees and undertakes to reinvest the above amount in the operation of the Lungu and Kabizwaya concessions with a view to the creation of jobs, social infrastructures and public facilities of a social nature and pay the levies and taxes due the Congolese State.

Article 3.

The parties agree that in consideration for the full execution of their reciprocal obligations, they shall consider themselves to have been totally satisfied and shall have nothing further to claim one from the other.

Article 4.

In accordance with the provisions of Article 43, paragraph 2 of the ICSID Rules, the parties hereby request that the Arbitral Tribunal embody this amicable settlement in the award that shall be rendered.

Article 5.

This settlement agreement shall be effective as from its approval by the Congolese government.

Done in Paris before the Arbitral Tribunal, in seven original counterparts,
on April 21, 2005.

For Miminco LLC et til

For the DRC

/signed/

/signed/

Mr. John Dormer Tyson

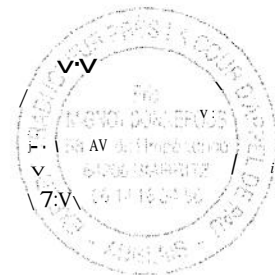
Mr. Tshibangu Kalala, Esq.

/signed/

Dr. Ilunga Jean Mukendi”

/signed/

24. and amended by the following document:



**“REPORT OF NEGOTIATIONS WITH A VIEW TO THE AMICABLE SETTLEMENT OF THE
DISPUTE RELATING TO INVESTMENTS
BETWEEN THE DEMOCRATIC REPUBLIC OF THE CONGO AND
MIMINCO L.L.C. ETAL”**

In the year 2005, on the twenty-third day of the month of November,

Upon instructions from Their Excellencies the Ministers of Justice, Mines and Finance, negotiations were held at the office of the Minister of Justice, between the experts of the Ministries of Justice, Mines and Finance and representatives of the company Miminco L.L.C. *et al.* to examine the terms and conditions for execution of the decision made by the government of the Democratic Republic of the Congo during its meeting of October 28, 2005 in the investments dispute between the parties;

Whereas the settlement agreement signed on April 21, 2005 in Paris between the Democratic Republic of the Congo, represented by Tshibangu Kalala, Esq., duly empowered and Miminco L.L.C., an American company, represented by its Managing Director, Mr. John Dormer Tyson, Mr. John Dormer Tyson and Dr. Ilunga Jean Mukendi, Chairman, both American citizens;

Whereas considering Article 5 of the settlement agreement pursuant to which it is not effective until its approval by the Congolese government;

Whereas during its meeting of October 28, 2005, while approving the principle of the settlement agreement reached on April 21, 2005, the Congolese government instructed the Ministries of Justice, Mines, Finance and the Budget to continue negotiations with Miminco L.L.C. *et al.* with a view to reducing the amount of USD15,000,000 (fifteen million American dollars) set by the settlement agreement as compensation for all of the losses sustained by Miminco L.L.C. *et al.* due to the acts committed by the Congolese civil and military authorities;

After having heard Miminco L.L.C. *et al.* both on the basis of its claims as well as the elements of assessment of the compensation requested and having taken into account the observations of the Congolese party, the two parties agreed as follows:

1. the reduction of the amount requested by Miminco L.L.C. *et al.* and setting it at USD13,000,000 (thirteen million American dollars) as compensation for ail combined losses sustained;
2. the necessity and urgency of revising Article 1, point a) of the settlement agreement signed on April 21, 2005 in Paris with a view to compliance with the terms of the agreement thus reached;
3. to submit the agreement reached to the competent Ministers, for the attention of the Congolese government and to leave it up to the Minister of Finance to propose to the other party the terms and conditions of payment of the amount thus determined.

In witness whereof, the parties have drawn up and signed this report in eight original counterparts in Kinshasa, on the above day, month and year.

**For the Democratic Republic
of the Congo**

**For the Ministry of Justice
Crispin Mutumbe Mbuya, Esq.**
Legal Counsel
/signed/

**For the Ministry of Mines
Puis Bamala Nkolobise**
Administrative and Financial Counsel
/signed/

Marthe Odio Nonde
Counsel In charge of

For Miminco L.L.C. et al.

John Dormer Tyson
Managing Director

/signed/
Dr. Ilunga Jean Mukendi
Chairman
/signed/

John Dormer Tyson
/signed/

Joseph Kabwika Mwanza



Mining Regulations
/signed/

Supervisor
/signed/

For the Ministry of Finance
Bernard Kabese Tshishima
Legal Counsel

In the presence of:

/signed/

Jean Jacques Yoka Mampunga, Esq.
Attorney for Miminco L.L.C. *et al.*

Jean Nkayilu Nkanza
Tax Counsel
/signed/

/signed/

25. In accordance with Article 5 of the Settlement agreement and point 3 of the Report, the DRC produced a letter of September 1, 2007 signed by His Excellency the Minister of Justice, Georges Minsay Booka, confirming the approval of this settlement agreement by the Congolese government and requesting the Ministers of Mines, Finance and the Budget “to each take as regards it, the appropriate measures for payment of the afore cited amount in favor of the beneficiaries.”

26. In accordance with the agreement of the Parties, the Arbitral Tribunal hereby renders this award.

27. Moreover, the Parties agreed at the time of the meeting of April 21, 2005 and confirmed at the time of the meeting of November 17, 2007, that the costs of the arbitration and of the Centre shall be borne in their entirety by the Claimants and paid from the advances made to the Centre by the Claimants. They also indicated that they shall each bear the representation costs incurred by it. The Tribunal takes note of this decision.

[signature]

Dr. Ahmed S. El-Kosheri
President
Date: November 17, 2007



[signature]

The Honorable Marc Lalonde
Arbitrator
Date: November 17, 2007

[signature]

Professor Catherine Kessedjian
Arbitrator
Date: November 17, 2007