



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

Academic Directors: Ignacio Torterola, Loukas Mistelis*

Judgment Name and Dates: *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 582 (2007); Merits, Judgment, ICJ Reports 639 (2010).

Case Report by: Isabella Cannatà**, Editor Ignacio Torterola***

Summary: The case *Ahmadou Sadio Diallo* concerns a claim of diplomatic protection brought by the Republic of Guinea (“Guinea”) against the Democratic Republic of Congo (“DRC”) before the International Court of Justice (“ICJ”, “the Court”). Guinea alleged that the DRC had violated the rights of Mr. Ahmadou Sadio Diallo, a Guinean citizen, by arresting and subsequently expelling him from its territory. The ICJ decided on the violation of Mr. Diallo’s rights as an individual and as a shareholder in two Congolese companies. This case summary will only refer to the discussion on Mr. Diallo’s rights as a shareholder.

On 3 October 2002, the DRC raised timely preliminary objections in respect of the admissibility of Guinea’s application. The DRC alleged that Guinea lacked standing to exercise diplomatic protection, since its application sought to protect the rights of two Congolese companies; and that, in any event, neither the companies nor Mr. Diallo had exhausted local remedies.¹ The Court rejected the argument on the failure to exhaust local remedies and admitted Guinea’s application insofar as it concerned Mr. Diallo’s direct rights as a shareholder, and not the rights of the companies.²

On the merits, the Court found the DRC responsible for the violation of various provisions of international human rights treaties and of the 1963 Convention on Consular Relations. The Court found no violation of Mr. Diallo’s rights as shareholder. On 19 June 2012, the Court decided on the compensation owed by the DRC to Guinea.³ This was the second time the ICJ decided on damages,⁴ and the first time it decided on damages in a case dealing with human rights violations.

¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 582 (2007), para 1 [hereinafter “Preliminary Objections (2007)”].

² Preliminary Objections, para 98.

³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 324 (2012).

⁴ After the judgment in *Corfu Channel case (United Kingdom v. Albania)*, Assessment of Amount of Compensation, Judgment, ICJ Reports 244 (1949). See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 639 (2010), para 13 [hereinafter “Merits (2010)”].

Main issues: diplomatic protection, diplomatic protection of shareholders, diplomatic protection “by substitution”, rights of shareholders, protection of investors under general international law.

Judges: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges *ad hoc* Mahiou and Mampuya.

Applicant’s Representation: Colonel Siba Lohalamou, Ms Djénabou Saïfon Diallo, and Mr. Mohamed Camara (as Agent); Mr. Alain Pellet (as Deputy Agent, Counsel and Advocate); Mr. Mathias Forteau, Mr. Daniel Müller, Mr. Jean-Marc Touvenin, Mr. Luke Vidal, and Mr. Samuel Wordsworth (as Counsel and Advocates); H.E. Mr. Ahmed Tidiane Sakho, Mr. Alfred Mathos, Mr. Hassan II Diallo, Mr. Ousmane Diao Balde, Mr. André Saféla Leno, and H.E. Mr. Abdoulaye Sylla (as Advisers); Mr. Ahmadou Sadio Diallo.

Respondent’s Representation: H.E. Mr. Henri Mova Sakanyi (as Agent and Head of Delegation); Mr. Tshibangu Kalala (Co-Agent, Counsel and Advocate); Mr. Lwamba Katansi, Ms Corinne Clavé, Mr. Kadima Mukadi, Mr. Bukasa Kabeya, Mr. Kikangala Ngoie, Mr. Moma Kazimbwa Kalumba, Mr. Tshimpangila Lufuluabo, Ms Mwenze Kisonga Pierrette, and Mr. Kalume Mabingo (as Advisers); Mr. Mukendi Tshibangu, Ms Ali Feza, and Mr. Makaya Kiela (as Assistants).

* Directors can be reached by email at: ignacio.tortero@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Isabella Cannatà is an LL.M. candidate in International Legal Studies at NYU School of Law. Before joining NYU, she was an associate at Rivera & Asociados, in Buenos Aires. She has also interned at Clifford Chance LLP, in Paris and at Lalive, in Geneva. She has acted in proceedings conducted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce Centre (ICC) and of the International Centre for Settlement of Investment Disputes (ICSID). Isabella holds an Italian law degree from the University of Turin, Italy. She also completed an intensive program in arbitration at the Universidad Torcuato di Tella, Buenos Aires, and the Directed Studies program in Private International Law at The Hague Academy of International Law. She is admitted to practice in Italy and seeking bar admission in New York. She is a member of the ICC Young Arbitrators Forum (YAF) and of NYU’s International Arbitration Association.

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP in Washington, DC.

Digest:

1. Summary of the facts

In 1964, Mr. Diallo, a Guinean citizen, settled in what was then called the Congo.⁵ Ten years later, in 1974, he founded Africom-Zaire, an import-export company incorporated as a *société privée à responsabilité limitée* (“SPRL”), *i.e.* a private limited liability company.⁶ He

⁵ The Congo was later called “Zaire” between 1971 and 1997 and “Democratic Republic of the Congo” since 1997.

⁶ Because the SPRL is a form of commercial company that is specific to civil law systems, the Court uses French terms also in the English version of the Judgment. Similarly, the court uses other French terms for accuracy. *See* Merits (2010), para 99.

later became its *gérant* (manager). The Articles of Incorporation of Africom-Zaire were never presented in the proceedings by either party.⁷

In his capacity as *gérant* of Africom-Zaire, Mr. Diallo took part in the foundation of Africontainers-Zaire, a SPRL specialized in transport of goods in containers. Initially, the company belonged to three different *associés* (shareholders).⁸ However, since 1980, 60% of the shares of Africontainers-Zaire were held by Africom-Zaire and 40% by Mr. Diallo. Also in 1980, Mr. Diallo became *gérant* of Africontainers-Zaire.⁹

In the late 1980s, Mr. Diallo initiated various proceedings to recover debts owed to Africom-Zaire and Africontainers-Zaire by some of their business partners. These included private companies, namely Plantation Lever au Zaire, Zaire Fina, Zaire Shell, Zaire Mobil Oil, and public entities, namely the DRC, the Office National des Transports (“ONATRA”) and Générale des Carrières et des Mines (“Gécamines”). Most of the claims remained unresolved at the time of the judgment on the merits.¹⁰ Additionally, Guinea alleged that Mr. Diallo was kept in prison between 1988 and 1989.¹¹

On 31 October 1995, the Prime Minister of Zaire (the former name of the DRC) issued an Expulsion Order against Mr. Diallo, stating that his “presence of conduct ha[d] breached public order in Zaire, especially in the economic, financial and monetary areas, and continue[d] to do so”. The Court established that Mr. Diallo remained in detention from 5 November 1995 to 10 January 1996,¹² and then between 25 January 1996 until his expulsion on 31 January 1996.¹³ The expulsion was carried out through a notice of “refusal of entry”, which does not allow for recourse under the law of the DRC.¹⁴

2. On the Admissibility of Guinea’s Claims

Guinea sought to exercise diplomatic protection for the violation of three categories of rights: (i) the rights of Mr. Diallo as an individual, which will only be addressed cursorily in this summary, (ii) his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire and (iii) the companies’ rights by “substitution”. The DRC challenged the admissibility of Guinea’s application, arguing that Guinea lacked standing to protect the rights of companies incorporated in the DRC and that, in any event, Mr. Diallo and the companies failed to exhaust local remedies.¹⁵

The Court divides its analysis by the three different categories of rights that Guinea sought to protect. The Court admitted the exercise diplomatic protection for the violation of the rights of Mr. Diallo as an individual and his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire. It rejected the claims based on the violation of the companies’ rights, which included rights of Africom-Zaire against the state of Zaire, and Africontainers-Zaire against Gécamines, ONATRA, Fina and Shell.

⁷ The DRC disputed the continued existence and operation of the company. See Merits (2010), paras 107, 110.

⁸ Each of them having the same rights under Congolese law. See Merits (2010), para 99.

⁹ Preliminary Objections (2007), para 14.

¹⁰ Preliminary Objections (2007), para 14; Merits (2010), para 17.

¹¹ Merits (2010), paras 51-48.

¹² Merits (2010), paras 59-60.

¹³ Preliminary objections (2007), para 16. Merits (2010), paras 15-20.

¹⁴ Preliminary objections (2007), para 15.

¹⁵ Preliminary objections (2007), para 32.

a. Exhaustion of Local Remedies

The Court discussed the alleged failure to exhaust local remedies in connection with the admissibility of the claims related to Mr. Diallo's rights as an individual. In its objections, the DRC only made reference to remedies against expulsion. The notice served to Mr. Diallo was characterized as a "refusal of entry", which cannot be appealed under Congolese law. The DRC argued that the correct characterization was "expulsion", which allowed Mr. Diallo to request the reconsideration of the decision, with good prospects of succeeding.¹⁶

The Court first recalled parties' respective burdens of proof as to the availability of the remedies and their exhaustion.¹⁷ The Court stated that the DRC cannot rely on an error made by its own administration on the characterization of the expulsion notice, on which Mr. Diallo legitimately relied. The Court also noted that, in any event, effective remedies are those aimed at vindicating a right, not at obtaining a favour, in this case the reconsideration of the decision. The Court concluded by rejecting the DRC's objection.¹⁸

b. Diplomatic Protection of Mr. Diallo's Rights as *Associé*

The Court then considered the admissibility of Guinea's claim concerning Mr. Diallo's rights as *associé* in Africom-Zaire and Africontainers-Zaire. The DRC objected that, first, Guinea confused the rights of the companies with the rights of its shareholders; and second, that the rights of shareholders can be violated only by "acts of interference in relations between the company and its shareholders", and Mr. Diallo's arrest and expulsion could not constitute any of such acts. The DRC maintains that the rights of *associé* could have been exercised without Mr. Diallo's physical presence in the DRC.¹⁹

In response to the DRC's objection, Guinea referred to the judgment in *Barcelona Traction*, where the Court held that an act directly infringing the rights of the shareholders involves responsibility towards them. Guinea maintains that Mr. Diallo's arrest and expulsion were specifically directed at preventing him from exercising his rights as *associé* and *gérant*. However, Guinea also states that it was virtually impossible to distinguish Mr. Diallo from his companies in fact and in law, because of the accentuated *intuitu personae* of the two SPRLs.²⁰

The Court noted that under Article 1 of the Congolese Decree of 27 February 1887 (the "1887 Decree"), commercial corporations have a personality distinct from that of their members. As such, a state can exercise diplomatic over an *associé* only for violation of their direct rights, under domestic law, in relation to the company. The Court found that Guinea had standing insofar as its action involved Mr. Diallo's direct rights as *associé*. The court left for the merits stage the assessment of which rights pertain to the *gérance* and which pertain to the status of *associé* of the companies.²¹

¹⁶ Preliminary Objections (2007), para 36.

¹⁷ Preliminary Objections (2007), para 44.

¹⁸ Preliminary Objections (2007), para 46-48.

¹⁹ Preliminary Objections (2007), paras 59-53.

²⁰ Preliminary Objections (2007), paras 54-58.

²¹ Preliminary Objections (2007), paras 61-67.

c. Diplomatic Protection “by Substitution”

The Court then considered the admissibility of Guinea’s exercise of diplomatic protection with respect of Mr. Diallo “by substitution” for Africom-Zaire and Africontainers-Zaire, in defence of the direct rights of the two companies. The DRC contested the validity of diplomatic protection “by substitution” as a positive norm of public international law. According to the DRC, even in deciding based on equity, the Court should not allow for diplomatic protection “by substitution”, since it would inequitably place companies owned by foreign investors in a better position than companies owned by nationals.²²

Guinea replied that the Court left open the possibility for an exception to rules on diplomatic protection based on reasons of equity in the *Barcelona Traction* judgement. Guinea also asserted that the application of the exception would be particularly adequate in this case, since the two companies have marked *intuitu personae* character. In support of its assertion, Guinea recalled Article 11(d) of the 2006 International Law Commission *Draft Articles on Diplomatic Protection*, under which Guinea could exercise diplomatic protection if the companies’ “incorporation [in the DRC] was required by [the DRC] as a precondition for doing business there”. Guinea refuted the allegations of Mr. Diallo’s fraudulent conduct.²³

The Court noted that the protection of rights of companies and shareholders are essentially regulated by bilateral or multilateral agreements for the protection of foreign investment, and the settlement of disputes on such rights is regulated by the Washington Convention and by contracts between states and foreign investors. As a consequence, the role of diplomatic protection in this area has become marginal. The Court examined state practice and decisions of international courts and tribunals and ruled that diplomatic protection by substitution is not customary law. The existence of a myriad of investment treaties does not prove that international custom has evolved; in fact, it could also prove the contrary.²⁴

Finally, the Court answered the question whether customary law contains an exception applying when the incorporation of the company in the host state is required as a precondition for doing business there, as in Article 11(d) of the *Draft Articles on Diplomatic Protection*. The Court does not determine whether this exception is customary, but does not find sufficient proof that the incorporation of Africom-Zaire and Africontainers-Zaire in the DRC was necessary to operate there. In conclusion, the Court dismisses Guinea’s claim to exercise diplomatic protection by substitution.²⁵

3. On the Merits of the Claims

On the merits, Guinea requested the court to adjudge and declare the DRC’s responsibility on the grounds of arbitrarily arresting and expelling Mr. Diallo, denying him the benefits of the 1963 Vienna Convention on Consular Relations, subjecting him to humiliating and degrading treatment, depriving him of his rights of ownership, oversight and management in respect of Africom-Zaire and Africontainers-Zaire, preventing him from pursuing the debt owed to the companies, and expropriating his property *de facto*.²⁶ The DRC requested the Court to adjudge and declare that it had not committed any internationally wrongful act in respect of

²² Preliminary Objections (2007), paras 77-81.

²³ Preliminary Objections (2007), paras 82-85.

²⁴ Preliminary Objections (2007), paras 86-90.

²⁵ Preliminary Objections (2007), paras 91-93.

²⁶ Merits (2010), para 14.

Mr. Diallo's personal rights and direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.²⁷

After having established the continued existence of the companies and Mr. Diallo's roles as *associé gérant* of both of them,²⁸ the Court addressed the alleged violation of Mr. Diallo's rights as *associé* under the law of the DRC. This assessment is premised on the division between the legal personalities of the companies and Mr. Diallo. The Court admits that the distinction may sound artificial in the present case, but must be nonetheless respected as well-founded in law.²⁹ First, it discussed Mr. Diallo's right to vote and take part to general meetings; second, his rights related to the *gérance* of the two companies; third, his rights related to overseeing and monitoring the management of the companies; and, fourth, his rights to property over his shares.

a. The Right to Take Part and Vote in General Meetings

Under Article 79 of the 1887 Decree, "all *associés* shall have the right to take part in general meetings and shall be entitled to one vote per share". The Court concludes that the right belongs to the *associés*, not to the company, consistently with its finding in *Barcelona Traction*. As such, under Congolese law, Mr. Diallo had the power to convene a general meeting either as *gérant* or as an *associé* holding at least one-fifth of the total number of shares.³⁰

However, no evidence suggests that Mr. Diallo sought to convene a general meeting after 1980, either before or after being expelled. The Court considers that his right to take part and vote in general meetings "could only have been breached if general meetings had actually been convened after his expulsion from the DRC". The Court also considered Article 81 of the 1887 Decree, which allows for proxies to represent *associés* in general meetings. The Articles of Incorporation of Africontainers-Zaire also provide for the possibility of being represented by a proxy. Article 80 of the 1887 Decree also provides that votes may be expressed in writing.³¹

In sum, Congolese law does not provide for a right to participate and express a vote while physically present at general meetings. The Court found that Guinea failed to establish the impossibility for Mr. Diallo to participate in the meetings through a proxy. Therefore, the Court decided that the DRC, by expelling Mr. Diallo, did not deprive him of his right to take part and vote in general meetings.³²

b. The Rights relating to the *Gérance*

As for the rights related to the *gérance*, Guinea contended that the unlawful expulsion amounted to a violation of Mr. Diallo's right to appoint a *gérant*, to be appointed as *gérant*, to exercise the functions of a *gérant*, and not to be removed as *gérant*. The DRC argued that the right to appoint a *gérant* is a right of the company, not of the *associé*, and that it is, in any event, the same as the right to participate in the general meeting; that no general meeting was

²⁷ Merits (2010), paras 13.

²⁸ Merits (2010), paras 106-13.

²⁹ Merits (2010), para 115.

³⁰ Merits (2010), paras 119-121.

³¹ Merits (2010), para 123.

³² Merits (2010), para 124-26.

convened and that Mr. N’Kanza was appointed as *gérant* of Africontainers-Zaire following Mr. Diallo’s expulsion.³³

The Court noted that Mr. N’Kanza’s appointment as *gérant* is not established. It then began by citing the 1887 Decree and the articles of incorporation of the companies as the sources governing the appointment and functions of the *gérant*.

First, on the right to appoint a *gérant*, the Court stated that it is a right of the company, not of *associés*. Second, on the right to be appointed as *gérant*, the right cannot be violated in this case, because Mr. Diallo was and is the *gérant* of the two companies.³⁴

Third, the Court quoted Article 69 of the 1887 Decree, which provides that “the *gérance* may entrust the day-to-day management of the company and special powers to agents or other proxies, whether *associés* or not”. The court acknowledged that it might have become more difficult for Mr. Diallo to perform his duties as *gérant* from abroad. However, under this provision it was possible for him to exercise it through a proxy. In fact, the Court noted that various documents indicated that representatives of Africontainers-Zaire continued to act after Mr. Diallo’s expulsion.³⁵

Fourth, Article 67 of the 1887 Decree establishes that *gérants associés* appointed for the life of the company may only be removed for good cause in a general meeting. The Court found that no general meeting was convened to remove Mr. Diallo. Legally, he remained the *gérant* of both companies. Also, the right not to be removed pertains to a *gérant associé*, not a simple right of an *associé*. To the extent that it is a right of the *gérant*, it is precluded by paragraph 98(3)(c) of the Court’s Judgment on Preliminary Objections.³⁶

The court concluded by rejecting all of Guinea’s claims of violation of Mr. Diallo’s rights related to the *gérance*.

c. The Right to Oversee and Monitor the Management

Guinea argued that Articles 71 and 75 of the 1887 Decree, as well as the Articles of Incorporation of Africom-Zaire, give to *associés* the rights to oversee and monitor their management. Guinea contended that since Mr. Diallo was the sole *associé* of both companies, he enjoyed all the rights and powers of a *commissaire* (auditor). The DRC replied that Mr. Diallo was not allowed to perform such functions.

The Court decided that Mr. Diallo was permitted to act as auditor, although it is unclear under Congolese law whether the sole *associé* of a company can do so. However, Mr. Diallo’s expulsion could not have rendered the oversight and monitoring of the companies impossible.³⁷

³³ Merits (2010), para 128.

³⁴ Merits (2010), para 129-34.

³⁵ Merits (2010), para 135-36.

³⁶ Merits (2010), para 138-39.

³⁷ Merits (2010), para 141-48.

d. Mr. Diallo's Right to Property over his *Parts Sociales*

According to Guinea, the DRC indirectly expropriated Mr. Diallo's property right through three sets of acts. First, Mr. Diallo's detention in 1988-89, which prevented him from recovering certain debts of the company and resulted in a loss of value of his investment. Second, the Congolese authorities' stay of enforcement of the judgment for the plaintiff in *Africontainers v. Zaire Shell*, which resulted in a loss of value of Mr. Diallo's *parts sociales*. Finally, the arrest and expulsion of Mr. Diallo, which, according to Guinea, resulted in the deprivation of any possibility of controlling and using his *parts sociales*.³⁸

The DRC contended that Mr. Diallo was able to receive dividends on account of his removal from Congo. It also stated that never ordered Africontainers-Zaire not make payments in respect of Mr. Diallo's *parts sociales* in its annual dividend allocation. The DRC also contends that the value of the share is irrespective of Mr. Diallo's presence in the territory, since both companies have been in a state of "undeclared bankruptcy" for several years before Mr. Diallo's expulsion and did not have any activity since 1991 at least.³⁹

The Court noted again that the principle of domestic law that a company has a separate legal personality is well-established under international law. This is true even in the case of a unipersonal SPRL. The property of the company does not merge with the property of its shareholder. And the liabilities of the company are not the liabilities of its shareholder. Mr. Diallo's only direct property rights are the receipt of dividends or any monies payable on a winding-up of the companies. However, there is no evidence that dividends were at any time declared. As such, no infringement of Mr. Diallo's right to property was established.⁴⁰

4. Dissenting and Separate Opinions

Judges Al-Khasawneh and Yusuf appended a joint dissenting opinion on the Court's finding that the DRC has not violated Mr. Diallo's direct rights as *associé*. The judges noted that injustices directed towards Mr. Diallo were ultimately aimed at preventing him from recovering his companies' debt. Also, Mr. Diallo's position in the companies made his situation incomparable with the multitude of shareholders in *Barcelona Traction*. Mr. Diallo was *de facto* the same as the two companies, and derived all his wealth from them.

Judges Al-Khasawneh and Yusuf also warned against the negative precedent that the decision could set, allowing states to expropriate small unipersonal companies by expelling their *associés*. The Judges note that under bilateral investment treaties the distinction between corporate personality of the company and its shareholders has been abandoned. The Court failed to give Mr. Diallo adequate protection and to bring the customary law standard of protection up to the one of modern investment law.

Judge Bennouna appended his dissenting opinion. He stressed the causal link between Mr. Diallo's attempts to recover debts and his detention and expulsion, showing that the DRC's authorities sought to deprive Mr. Diallo precisely of his rights as *associé* and *gérant* of Africom-Zaire and Africontainers-Zaire. Judge Bennouna believes that the Court's judgment

³⁸ Merits (2010), paras 149-150.

³⁹ Merits (2010), paras 152-154.

⁴⁰ Merits (2010), paras 157.

may set a dangerous precedent in favour of countries that neutralize foreign investors by expelling them from their territories.

Judge *ad hoc* Mahiou appended his dissenting opinion. He dwelled on the corporate structure of the two companies, stressing that Mr. Diallo is the only *associé* of both of them, which creates a situation of “osmosis” between him and his companies. Judge *ad hoc* Mahiou states that relying on *Barcelona Traction* is misguided in the present situation, where two companies are *de facto* a one-person business. The Court is adopting an approach that is too formalistic, disregarding the reality of two companies that cannot operate normally without the presence of their sole *associé*.

Judge *ad hoc* Mampuya appended a separate opinion. He briefly addressed the judgment on Mr. Diallo’s rights as *associé*. He stressed that *associés*’ direct rights come into being, take effect and are exercised in regard to the operation of the company. As such, they are only entitlements *vis-à-vis* the company itself. *Associés* may only seek redress against the company itself, not against the company’s state of incorporation.