

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Carnegie Minerals (Gambia) Limited

v.

Republic of The Gambia

(ICSID Case No. ARB/09/19) – Annulment Proceeding

PROCEDURAL ORDER NO. 1

Members of the ad hoc Committee

Professor Donald M. McRae, President of the *ad hoc* Committee
Professor Bernardo M. Cremades, Member of the *ad hoc* Committee
Professor Zhidong Chen, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Aurélia Antonietti

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Introduction

The first session of the *ad hoc* Committee (Committee) was held by telephone conference at 7 am EST on January 13, 2017. The session was adjourned at 8.05 am.

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Committee and the parties.

Participating in the conference were:

Members of the Committee

Professor Donald McRae, President of the *ad hoc* Committee

Professor Bernardo M. Cremades, Member of the *ad hoc* Committee

Professor Zhidong Chen, Member of the *ad hoc* Committee

ICSID Secretariat:

Ms. Aurélie Antonietti, Secretary of the *ad hoc* Committee

Participating on behalf of Carnegie Minerals (Gambia) Limited (“Carnegie” or “the Respondent on Annulment”):

Mr. Maurice Kenton, Clyde & Co LLP

Mr. Simon Schooling, Clyde & Co LLP

Mr. Klaus Reichert SC, Brick Court

Participating on behalf of Republic of The Gambia (“the Applicant”):

Mr. Dany Khayat, Mayer Brown

Mr. José Caceido, Mayer Brown

The Committee and the parties considered the following:

- The Draft Agenda circulated by the Secretary of the Committee on March 14, 2016 and October 27, 2016;
- The Draft Procedural Order circulated by the Secretary of the Committee on March 14, 2016 and October 27, 2016; and
- The parties’ separate comments on the Draft Procedural Order received on November 15, 2016, by Carnegie and on November 28, 2016, by The Gambia, indicating the items on which they agree and their respective positions regarding the items on which they did not agree.

At the outset of the Session, Counsel for The Gambia recorded that, as it had pointed out in the past, it did not recognize Clyde & Co as representatives of Carnegie and did not agree to Carnegie's representation by Clyde & Co, in these proceedings. Clyde and Co. recorded that they made no concessions in respect of any of the positions taken by The Gambia.

Following the session, the Committee now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19, this first Procedural Order sets out the Procedural Rules that the parties have agreed and the Committee has determined that shall govern this annulment proceeding.

1. Applicable Arbitration Rules

Convention Article 44 and Arbitration Rule 53

1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of January 2003

2. Constitution of the Committee and the Committee Members' Declarations

Arbitration Rule 6

2.1. The Committee was constituted on January 22, 2016 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Committee was properly constituted and that no party has any objection to the appointment of any Member of the Committee.

2.2. The Members of the Committee timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on January 22, 2016.

2.3. The Members of the Committee confirmed that they have sufficient availability during the next 18 months to dedicate to this case.

3. Fees and Expenses of the Committee Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees

3.1. The fees and expenses of each Member of the Committee shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

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- 3.2. Under the current Schedule of Fees, each Member of the Committee receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
 - 3.3. Each Member of the Committee shall submit his claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
- 4.1. The presence of all Members of the Committee constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Decisions and Procedural Rulings of the Committee
Convention Article 48(1); Arbitration Rules 16, 19 and 20
- 5.1. Decisions of the Committee shall be taken by a majority of the Members of the Committee.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Committee if time permits.
 - 5.3. The Committee will draft all rulings, including its final decision, within a reasonable time period. If a ruling has not been issued within three months after the final submission on a particular matter, the Committee will provide the parties with status updates every month.
 - 5.4. The President is authorized to issue Procedural Orders on behalf of the Committee.
 - 5.5. The Committee's rulings on procedural matters may be communicated to the parties by the Secretary of the Committee in the form of a letter or email.

6. Power to Fix Time Limits
Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Committee. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Committee.

7. Secretary of the Committee
Administrative and Financial Regulation 25

- 7.1. The Secretary of the Committee is Aurélia Antonietti, Senior Legal Adviser, ICSID, or such other person as ICSID may notify the Committee and the parties from time to time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Aurélia Antonietti
Senior Legal Adviser
ICSID
MSN J2-200
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-7603
Fax: + 1 (202) 522-2615
Email: aantonietti@worldbank.org
Paralegal Email : aboissaye@worldbank.org

- 7.3. For local messenger deliveries, the contact details are:

Aurélia Antonietti
701 18th Street, N.W. (“J Building”)
2nd Floor
Washington, D.C. 20006
Tel.: + 1 (202) 458-1534

8. Representation of the Parties
Arbitration Rule 18

- 8.1. Each party shall be represented by its respective counsel (below) and may designate additional agents, counsel, or advocates by notifying the ICSID Secretariat promptly of such designation.

For Carnegie Minerals (Gambia)
Limited

Mr. Maurice Kenton
Mr. Simon Schooling
Ms. Anne Sophie Petitdemange
Clyde & Co LLP
The St Botolph Building
138 Houndsditch,
London EC3A 7AR
Tel.: +44 20 7876 6520
Fax: +44 20 7876 5111
Email: Maurice.Kenton@clydeco.com
Simon.Schooling@clydeco.com
Anne-Sophie.Petitdemange@clydeco.com
and

Mr. Klaus Reichert SC
Barrister
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD

For Republic of The Gambia

Mr. Dany Khayat
Mr. José Caicedo
Mayer Brown
20, avenue Hoche
75008 Paris
Tel: +33.1.53.53.43.43
Emails: dkhayat@mayerbrown.com
jcaicedo@mayerbrown.com

9. Apportionment of Costs and Advance Payments to the Centre
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. In accordance with Administrative and Financial Regulation 14(3)(e), when an annulment application is registered, the applicant, in this case the Republic of The Gambia, shall be solely responsible for making the advance payments requested by the ICSID Secretariat to cover the costs following the Committee's constitution. This is without prejudice to the Committee's final decision as to the allocation of costs.
- 9.2. By letter of February 17, 2016 the Centre requested the Applicant to make an advance payment of US\$200,000 (two hundred thousand US dollars) to cover the

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initial costs of the proceeding. The Centre received the Applicant's payment of US\$100,000 on June 3, 2016. Two further installments are to be made ten and thirty days after the receipt of the Committee's First Procedural Order, respectively.

- 9.3. The Centre shall request further advances as needed. Such requests shall be accompanied by an interim statement of account providing details of the direct costs of the proceeding, including the total fees and expenses of all Members of the Committee. At the end of the case, the financial statement will include a breakdown of each Member of the Committee's fees and expenses.

10. Place of Proceeding

Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)

- 10.1. London, United Kingdom shall be the place of the proceeding, in accordance with Clause 22(6) of the Mining Licence.
- 10.2. The Committee may hold hearings at any other place that it deems appropriate if the parties so agree.
- 10.3. The Committee may deliberate at any place it deems convenient.

11. Procedural Language, Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); and Arbitration Rule 20(1)(b)

- 11.1. English is the procedural language of the arbitration, in accordance with ICSID Arbitration Rule 22 and Clause 22(7) of the Mining Licence.
- 11.2. Documents filed in any other language must be accompanied by a translation into English.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Committee may require a fuller or a complete translation at the request of any party or on its own initiative.
- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
- 11.5. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted simultaneously.

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- 11.6. The parties will notify the Committee, as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.7. The costs of the interpreter(s) will be paid from the advance payments made by the Applicant, without prejudice to the decision of the Committee as to which party shall ultimately bear those costs.
- 11.8. The costs of the interpreter(s) will be paid from the advance payments made by the Applicant, without prejudice to the decision of the Committee as to which party shall ultimately bear those costs.
- 11.9. The Committee shall issue any order, decision and the Decision on Annulment in English.

12. Routing of Communications
Administrative and Financial Regulation 24

- 12.1. Written communications in the case shall be transmitted by email or other electronic means to the parties, the Secretary of the Committee, and the Committee.
- 12.2. Electronic versions of communications ordered by the Committee to be filed simultaneously shall be transmitted to the Secretary of the Committee only, who shall send them to the opposing party and the Committee.
- 12.3. The Secretary of the Committee shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Committee.
- 12.4. The email addresses of the Members of the Committee are:

Prof. Donald McRae

Email:

Donald.Mcrae@uottawa.ca

Prof. Bernardo M. Cremades

Email:

bcremades@bcremades.com

Prof. Zhidong Chen

Email:

zhidongch@163.com;
zdchen@fudan.edu.cn

13. Number of Copies and Method of Filing of Parties' Pleadings
Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23

- 13.1. By the relevant filing date, the parties shall submit by email to the Secretary of the Committee and the opposing party an electronic version of the pleading with witness statements, expert reports and a list of documents,¹ and upload the pleading with the supporting documentation to the file sharing platform that will be created

¹ Please note that the World Bank server does not accept emails larger than 25 MB.

by ICSID for purposes of this case.

13.2. On the day following the electronic filing, the parties shall courier to the Secretary of the Committee:

13.2.1. one unbound hard copy in A4 format² of the entire submission, including signed originals of the pleading, witness statements, and expert reports, together with documents (but not including legal authorities);

13.2.2. one hard copy in A4 format of the entire submission including the pleading, the witness statements, expert reports, and documents (but not including legal authorities); and

13.2.3. two USB drives, or CD-ROMs or DVDs, with full copies of the entire submission, including the pleading, the witness statements, expert reports, documents, and legal authorities.

13.3. Also on the day following the electronic filing, the parties shall courier to the opposing party at, for the Applicant, Mayer Brown in Paris, and for the Respondent to the Application, Clyde & Co in London, and to each Member of the Committee at the addresses indicated at §13.4 below:

13.3.1. one hard copy in A4 format of the entire submission including the pleading, the witness statements, expert reports, and documents (but not including legal authorities); and

13.3.2. one minimum USB drive, or CD-ROMs or DVDs, with a full copy of the entire submission, including the pleading, the witness statements, expert reports, documents, and legal authorities.

13.4. The addresses of the Committee Members are as follows:

Prof. Donald Mc Rae
Faculty of Law, Common
Law Section
University of Ottawa
57 Louis Pasteur
Ottawa, Ont. K1N 6N5
Tel: (+ 1) 613 562-5800
ext. 3304

Prof. Bernardo M. Cremades
B. Cremades y Asociados
Goya, 18, 28001
Madrid, Spain
Tel: (+34) 91 423 72 00

Prof. Zhidong Chen
No. 10-701
1277 Chang Ning Road,
Shanghai 200051, China
Tel: (+86) 21 5241 2212

² The A4/Letter format is required for ICSID's archiving.

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- 13.5. Legal authorities shall be submitted in electronic format only, unless a hard copy is specifically requested by the Committee.
 - 13.6. Electronic versions of a pleading shall be text searchable (i.e., OCR PDF or Word).
 - 13.7. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to the Secretary of the Committee.
 - 13.8. A filing shall be deemed timely if sent by a party by midnight, Washington, D.C. time, on the relevant date.
14. Sequence and Timetable of Pleadings on the Stay of Enforcement
Convention Article 52(5); Arbitration Rule 54
- 14.1. The Committee will decide the sequence and timetable of pleadings on the Stay of Enforcement once it has ruled on the Application of The Gambia of January 11, 2017.
15. Number and Sequence of Pleadings
Arbitration Rules 20(1)(e) and 29
- 15.1. The proceeding shall consist of a written phase followed by an oral phase.
 - 15.2. The Committee will confirm the exact sequence and timetable of pleadings once it has ruled on the Application presented by The Gambia on January 11, 2017 (hereafter “the Decision of the Committee”).
 - 15.3. The Applicant will submit, within 65 days of the Decision of the Committee, its Memorial on Annulment.
 - 15.4. The Claimant will submit its Counter-Memorial on Annulment within 65 days after the date of submission of the Applicant’s Memorial on Annulment.
 - 15.5. The Committee will thereafter promptly decide whether a Reply and a Rejoinder is needed. If it decides so, the Applicant will submit a Reply on annulment within 40 days, in which case the Claimant will submit a Rejoinder 40 days later.
16. Submission of Documents
Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24
- 16.1. The Memorial and Counter-Memorial on Annulment shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal may be submitted with the Reply and Rejoinder, if any.

- 16.2. The documents shall be submitted in the manner and form set forth in §13 above.
- 16.3. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Committee determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.
- 16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.
- 16.3.2. If the Committee grants such an application for submission of an additional or responsive document, the Committee shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.
- 16.4. The Committee may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. The documents shall be submitted in the following form:
- 16.5.1. When referring to documents from the original arbitration proceeding, the parties shall reproduce the original exhibit or document and shall refer to such exhibits using their original exhibit numbers.
- 16.5.2. Any new documents introduced for the first time in this annulment proceeding shall be numbered consecutively throughout these proceedings, following the format used during the original arbitration proceeding.
- 16.5.3. Each Exhibit shall have a divider with the Exhibit identification number on the tab.
- 16.5.4. A party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.
- 16.5.5. Exhibits shall also be submitted in PDF format.
- 16.5.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a party, in which case the Committee will determine whether authentication is necessary.
- 16.6. The parties shall file all documents only once by attaching them to their pleadings. Documents so filed need not be resubmitted with witness statements and/or expert reports even if referred to in such statements.

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- 16.7. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in hard copy to the other party, the Committee Members, the Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.
17. Witnesses Statements and Expert Reports
Convention Article 43(a); Arbitration Rules 24, 35 and 36
- 17.1. Given the nature of an annulment proceeding, the Committee expects that the parties will primarily refer to the evidentiary record of the arbitration proceeding.
- 17.2. In this regard, the record of the witness or expert testimony given during the original arbitral proceeding shall stand as the testimony of that witness or expert for purposes of the annulment proceeding, without the need to re-submit the witness or expert for examination or cross-examination.
- 17.3. In principle, no new evidence shall be admitted in this proceeding. Should either party wish to introduce new documents or other evidence, other than legal authorities or expert reports, that party shall file a request to the Committee to that effect. The Committee will promptly decide on the admissibility of the new documents and/or evidence, after hearing from the other party.
- 17.4. Witness statements and expert reports shall be filed together with the parties' pleadings.
- 17.5. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Committee determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.3).
- 17.6. Each witness statement and expert report shall be signed and dated by the witness.
18. Examination of Witnesses and Experts
Arbitration Rules 35 and 36
- 18.1. In the event that the Committee or one party wishes to examine a witness or an expert, if any, Arbitration Rules 35 and 36 will apply. Further procedures will be put in place ahead of the hearing, if needed.

19. Pre-Hearing Organizational Meetings
Arbitration Rule 13

19.1. A pre-hearing organizational meeting shall be held at a date determined by the Committee after consultation with the parties by telephone between the Committee, or its President, and the parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.

20. Hearings
Arbitration Rules 20(1)(e) and 32

20.1. The oral procedure shall consist of a hearing for oral argument and for the examination of witnesses and experts, if any.

20.2. The hearing shall be held in London, England.

20.3. The hearing shall take place at a date to be determined in consultation with the parties.

20.4. The Members of the Committee shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.

21. Records of Hearings and Sessions
Arbitration Rules 13 and 20(1)(g)

21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Committee Members.

21.2. Verbatim transcript(s) in English shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Committee, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Committee on a same-day basis.

21.3. The parties shall agree on any corrections to the transcripts within 15 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Committee shall decide upon any disagreement between the parties and any correction adopted by the Committee shall be entered by the court reporter in the revised transcripts.

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22. Post-Hearing Memorials and Statements of Costs
Convention Article 44; Arbitration Rule 28(2)

22.1. Whether there are to be post-hearing briefs will be decided by the Committee at the close of the hearing after consultation with the Parties.

22.2. At the close of the hearing, the Committee will also decide the schedule for statements of costs including how many rounds will be required.

23. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

23.1. The parties consent to ICSID publication of any order or decision issued in the present proceeding on a rolling-basis as soon as the order or decision is issued.

[Signed]

Professor Donald M. McRae, C.C.
President of the *ad hoc* Committee
Date: January 23, 2017