

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the annulment proceeding between

**CARNEGIE MINERALS (GAMBIA) LIMITED**

Claimant

and

**REPUBLIC OF THE GAMBIA**

Respondent

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

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**DECISION ON ANNULMENT**

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**Members of the *ad hoc* Committee**

Prof. Donald M. McRae, President

Prof. Bernardo M. Cremades

Ms. Dorothy Ufot, SAN

**Secretary of the *ad hoc* Committee**

Dr. Jonathan Chevry

*Date of dispatch to the Parties: July 7, 2020*

## **REPRESENTATION OF THE PARTIES**

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Limited:*

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*Representing the Republic of The Gambia:*

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## **I. INTRODUCTION AND PARTIES**

1. This case concerns the outcome of a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of a contractual agreement and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966 (the “**ICSID Convention**”).
2. The Claimant in the arbitration proceedings was Carnegie Minerals (Gambia) Limited, a company incorporated under the laws of the Republic of The Gambia (“**Carnegie**” or the “**Claimant**”).
3. The Respondent in the arbitration proceedings and the Applicant in the annulment proceedings is the Republic of The Gambia (“**The Gambia**,” the “**Respondent**,” or the “**Applicant**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed above on page (i).
5. The original arbitral proceeding (the “**Arbitration**”) dealt with a dispute between the Parties arising from the termination by The Gambia of a Mining Licence granted to Carnegie (the “**Mining Licence**”).<sup>1</sup> In short, Carnegie alleged that The Gambia wrongfully terminated the Mining Licence after Carnegie had allegedly already substantially invested in the mining project for which the Licence was concluded, and after the mining operations for this project were, according to Carnegie, underway and productive.<sup>2</sup>
6. On September 29, 2014, the Tribunal issued a Decision on Jurisdiction, Admissibility, Claim, Counterclaim, and Certain Damage Issues, in which it found, among other things, that it had jurisdiction over the dispute, that Carnegie’s claims were admissible, that the termination of the Mining Licence was unlawful, and that Gambia was liable for breach of the Mining Licence (the “**Decision on Jurisdiction and Merits**”).<sup>3</sup> On July 14, 2015, the Tribunal issued its award (the “**Award**”), thereby confirming the findings made in the Decision on Jurisdiction and Merits and

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<sup>1</sup> The Mining Licence has been exhibited in the annulment proceedings as Exhibit R-26, Mining Licence of December 29, 2005 between the Government of the Gambia and Carnegie minerals (Gambia) Limited (hereafter “Mining Licence (R-26)”).

<sup>2</sup> Decision on Jurisdiction and Merits (C-11), ¶¶ 79-147.

<sup>3</sup> Award (C-12), ¶¶ 2-4.

ordering The Gambia to pay Carnegie approximately USD 22 million, corresponding to damages, interest on damages, and arbitration costs.<sup>4</sup>

7. In this annulment proceeding, The Gambia invokes one ground for annulment to the effect that the Tribunal was not properly constituted (ICSID Convention Article 52(1)(a)). The Committee notes that in its Application for Annulment, The Gambia referred to two other grounds for annulment, namely (i) the Tribunal manifestly exceeded its powers (ICSID Convention Article 52(1)(b)); and (ii) there has been a serious departure from a fundamental rule of procedure (ICSID Convention Article 52(1)(d)). However, these grounds for annulment were no longer mentioned in The Gambia's Memorial on Annulment and were not mentioned at the Hearing. Consequently, they are not addressed in this Decision.

## II. PROCEDURAL HISTORY

8. On November 11, 2015, The Gambia filed an Application for Annulment of the Award rendered on July 14, 2015 (the "**Application**") and requested the stay of enforcement of the Award.
9. On November 19, 2015, the Application for Annulment was registered, and the enforcement of the Award was provisionally stayed.
10. On January 22, 2016, the Committee was constituted. Its Members were Prof. Donald M. McRae (Canadian/New Zealand), President; Prof. Zhidong Chen (Chinese); and Prof. Bernardo M. Cremades (Spanish); all members were appointed by the Chairman of the Administrative Council.
11. On February 1, 2016, the Committee wrote to the Parties regarding the first session, and indicated that, pursuant to ICSID Arbitration Rule 54(2), it extended the stay of the enforcement of the Award until it had heard both Parties and had reached a final decision on the continuation of the stay.
12. On March 21, 2016, the Committee decided to postpone the first session scheduled on March 23, 2016, until it had resolved representational issues raised by The Gambia.
13. On March 28, 2016, the Centre notified the Parties of The Gambia's default in paying the required advance.

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<sup>4</sup> Award (C-12), ¶ 100. The exact amounts were USD 18,658,358 in damages, USD 993,683 in interest on damages, and (1) US\$445,860, minus any sums refunded to Carnegie by ICSID on its final accounting, and (2) GBP 2,250,000.

14. On April 12, 2016, the Committee authorized The Gambia to pay the required advance in installments.
15. On June 3, 2016, upon receipt of a partial payment of the required advance, the Parties were invited to confirm their availability for a first session.
16. On October 7, 2016, the Committee issued its decision on the representation of Carnegie in this case (the “**Decision on Representation**”), finding that Clyde & Co is the representative of Carnegie in this annulment proceeding.
17. On December 20, 2016, the Committee, while still discussing holding a first session with the Parties, fixed a timetable for the submissions of written observations on The Gambia’s request for a stay of enforcement. The Gambia was invited to submit its Memorial on the stay of enforcement by January 9, 2017.
18. On January 8, 2017, The Gambia presented a request for disclosure aiming at: “[the] immediate disclosure by Clyde & Co of (1) all corporate documents and correspondence concerning Carnegie’s alleged decision to transfer/assign the Award, including in a trust, and the transfer/assignment/trust documentation itself and (2) all documents creating and/or governing the trust which Clyde & Co describes in its above-mentioned submissions.” The Gambia specified that its submission on the stay of enforcement could not be made without this information.
19. On January 11, 2017, Carnegie replied asking for the dismissal of the annulment application for The Gambia’s failure to comply with the agreed timetable.
20. On January 13, 2017, the Committee held its first session with the Parties and issued Procedural Order No. 1 on January 23, 2017. It was decided that the Committee would rule first on The Gambia’s request of January 8, 2017.
21. On March 7, 2017, the proceeding was suspended for non-payment of the required advance pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).
22. On April 17, 2018, the proceeding resumed following the payment of the required advance.
23. On April 23, 2018, the Secretary-General notified the Parties of the resignation of Prof. Chen and informed them that, pursuant to ICSID Arbitration Rules 53 and 10(2), the proceeding was stayed pending his replacement.

24. On May 21, 2018, the Committee was reconstituted with Ms. Dorothy Ufot, SAN as a Member, and the proceedings were resumed.
25. On May 23, 2018, the Committee invited The Gambia to indicate by May 28, 2018 whether (i) its request dated January 8, 2017 regarding Clyde & Co's disclosures and (ii) its request for the stay of enforcement of the Award were maintained.
26. On May 28, 2018, The Gambia indicated that it was maintaining the requests.
27. By letter of June 13, 2018, the Committee set forth a schedule for submissions on the request for disclosure, indicating that it would deal with the request for the stay of enforcement subsequently. The Parties accordingly filed submissions on June 28, July 12, July 18, and July 25, 2018.
28. On August 20, 2018, the Committee issued Procedural Order No. 2 whereby it rejected The Gambia's request of January 8, 2017 and ordered the Parties to file observations on The Gambia's request regarding the stay of enforcement.
29. On September 4, 2018, The Gambia filed its Application for the continued stay of enforcement.
30. On September 18, 2018, Carnegie filed its Response on the continued stay of enforcement.
31. On September 26, 2018, The Gambia filed its Reply on the continued stay of enforcement.
32. On October 5, 2018, Carnegie filed its Rejoinder on the continued stay of enforcement.
33. On October 18, 2018, the Committee issued its Decision on the Stay of Enforcement of the Award in which it decided to continue the stay of enforcement for one year from the date of the Decision.
34. On December 21, 2018, The Gambia filed its Memorial on Annulment ("**The Gambia's Memorial**") and accompanying documentation.
35. By letter of December 28, 2018, the Centre informed the Parties that The Gambia was in default on the second requested advance and invited it to pay the outstanding balance by January 14, 2019.
36. By letter of January 29, 2019, the Centre informed the Parties that, having received no response on the status of the outstanding advance, the proceeding was stayed in accordance with ICSID Administrative and Financial Regulations 14(3)(d) and (e).

37. By letter of July 8, 2019, the Centre informed the Parties that if payment of the outstanding advance was not received by July 29, 2019 (*i.e.*, six consecutive months since the Committee stayed the proceeding), the Secretary-General would move the Committee to discontinue the proceedings.
38. By letter of August 6, 2019, Carnegie wrote to confirm that the proceedings were to be discontinued.
39. By letter of August 8, 2019, the Centre confirmed that the outstanding advance had been received by the World Bank's financial services department on July 29, 2019 and that the proceedings were therefore resumed. Carnegie was invited to file its Counter-Memorial on September 3, 2019.
40. By email of September 2, 2019, the Parties informed the Committee that they had agreed to an extension for Carnegie's filing until September 6, 2019 and asked the Committee for its consent to the change. By email of the same date, the Committee confirmed its agreement.
41. By letter of September 6, 2019, Carnegie, on the basis of videos reviewed during the preparation of its Counter-Memorial, asked The Gambia to withdraw its Application for Annulment.
42. On September 6, 2019, Carnegie filed its Counter-Memorial on Annulment ("**Carnegie's Counter-Memorial**") with accompanying documentation.
43. By email of September 9, 2019, the Parties were invited to submit, by September 13, 2019, their comments on if they found another round of pleadings necessary.
44. By letter of September 12, 2019, Carnegie stated that it did not think a further round of pleadings was needed.
45. By letter of September 14, 2019, The Gambia stated that it did not think another round of pleadings was necessary. In the same letter, it requested an opportunity to respond to Carnegie's letters of September 6 and 11 [*sic*], 2019 by September 28, 2019.
46. By letter dated September 18, 2019 and received September 19, 2019, Carnegie filed a request for the dismissal of the Application for Annulment.
47. By letter of September 20, 2019, the Committee invited The Gambia to provide its comments on Carnegie's letter of September 18, 2019 by September 25, 2019.

48. By letter of September 25, 2019, The Gambia provided its observations on Carnegie's September 18, 2019 letter.
49. On October 15, 2019, the Committee issued Procedural Order No. 3, deciding (i) to reject Carnegie's request for the dismissal of the annulment; (ii) that no further pleadings would be required and the case would proceed to the hearing; (iii) that all requests to submit new evidence needed to be made at least three weeks prior to the start of the hearing and in accordance with paragraph 16.3 of Procedural Order No. 1; and (iv) to reserve its decision on costs. The Committee also asked the Parties to confirm that they were available for a hearing to be held January 23 and 24, 2020 in London.
50. By email of October 22, 2019, The Gambia confirmed its availability for the proposed hearing dates. By email of the same date, Carnegie asked that different dates be proposed.
51. By email of October 28, 2019, the Tribunal proposed dates between January 29-31, 2020 for the hearing. By email of October 30, 2019, Carnegie confirmed its availability during that period. By email of November 3, 2019, The Gambia confirmed that it was available on January 30 and 31, 2020. By email of November 7, 2019, the Committee confirmed that the hearing would be held on January 30, 2020, with January 31, 2020 held in reserve.
52. By email of November 27, 2019, the Centre invited the Parties to confirm their availability for a pre-hearing conference to be held on either January 3 or 17, 2020 with the President of the Committee. By email of December 2, 2019, The Gambia confirmed its availability for January 17, 2020. By email of December 4, 2019, Carnegie confirmed its availability on both dates. By email of the same date, the Committee confirmed that the pre-hearing call would be held on January 17, 2020.
53. On January 9, 2020, The Gambia filed a request for the Committee to decide on the admissibility of new evidence.
54. By email of January 16, 2020, the Centre circulated a draft timetable for the hearing to be discussed during the pre-hearing call and invited Carnegie to submit its comments on The Gambia's January 9, 2020 request.
55. On January 17, 2020, the President of the Committee held a pre-hearing conference by teleconference.

56. On January 22, 2020, the Committee issued Procedural Order No. 4 detailing the organization of the hearing and granting The Gambia’s January 9, 2020 request to submit additional legal authorities into the record.
57. By letter of January 29, 2020, Carnegie filed a request for the Committee to decide on the admissibility of new evidence. By email of the same date, The Gambia objected to the request. By further letter of the same date, Carnegie sought permission to introduce an additional document into the record.
58. On January 30, 2020, a Hearing on Annulment was held in London (the “**Hearing**”). The following persons were present at the Hearing:

***Ad hoc Committee:***

Prof. Donald McRae	President
Prof. Bernardo Cremades	Member
Ms. Dorothy Ufot, SAN	Member

***ICSID Secretariat:***

Dr. Jonathan Chevy	Acting Secretary of the <i>ad hoc</i> Committee
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***For Carnegie:***

*Counsel*

Mr. Maurice Kenton	Clyde & Co LLP
Mr. Simon Schooling	Clyde & Co LLP
Ms. Melanie Martin	Clyde & Co LLP

***For The Gambia:***

*Counsel*

Mr. Dany Khayat	Mayer Brown
Ms. Luciana Attiye	Mayer Brown

*Parties*

Mr. Kimbeng T. Tah	Attorney General’s Chambers and Ministry of Justice, The Gambia
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***Court Reporter:***

Mr. Trevor McGowan	The Court Reporter
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59. By letter of February 4, 2020, the Committee invited the Parties to provide their corrections to the transcript by February 14, 2020 and their statements of costs by February 28, 2020.

60. By email of February 14, 2020, the Parties submitted their corrections to the transcript to the court reporter.
61. By letter of February 14, 2020, the Secretary-General of the Centre informed the Parties that due to an internal redistribution of cases at the Centre, Dr. Jonathan Chevry would replace Ms. Aurélia Antonietti as Secretary of the Committee.
62. On February 28, 2020, the Parties filed their statements of costs.
63. By letter of June 15, 2020, the Committee declared the proceedings closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

### **III. BACKGROUND ON THE CONSTITUTION OF THE TRIBUNAL IN THE ARBITRATION**

64. The Gambia's Application for Annulment relates to the constitution of the Tribunal in the Arbitration, and more specifically to the appointment of Ms. Jean Kalicki as arbitrator. Both The Gambia and Carnegie present in their submissions summaries of the process resulting in the constitution of the Tribunal and in the aforementioned appointment of Ms. Jean Kalicki.
65. The present section aims to recall the chronology of the procedure for the constitution of the Tribunal and of the issues raised after the constitution, as referred to by the Parties in their summaries, and as completed whenever necessary by the Committee's own reading and understanding of the facts pertaining to this procedure.

#### **A. CARNEGIE'S REQUEST FOR ARBITRATION**

66. On September 14, 2009, Carnegie filed a Request for Arbitration with ICSID (the "**Request**").<sup>5</sup> The Request was dated September 11, 2009.<sup>6</sup> The Request was based on Clause 22 of the Mining Licence, providing for ICSID arbitration as means of settlement of disputes arising out of the

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<sup>5</sup> Letter of October 23, 2009 from ICSID to the Parties with reports of communication by courier, email and fax (R-7).

<sup>6</sup> Carnegie's Request for Arbitration (C-2).

interpretation or application of the Licence.<sup>7</sup> The Gambia received from Carnegie a copy of the Request by courier on September 14, 2009.<sup>8</sup>

67. In the Request, the Claimant referred to, and reproduced almost verbatim, the Mining Licence Clause 22(4).<sup>9</sup> Clause 22(4) states that the ICSID Tribunal to be constituted in case of dispute “shall consist of three arbitrators” and provides for the following procedure to appoint them:

“4. The arbitral tribunal shall consist of three arbitrators who shall be appointed as follows:

(a) The Party or Parties instituting the arbitration shall appoint one arbitrator and the Party or Parties responding shall appoint another arbitrator. The two arbitrators appointed by the Party(ies) shall appoint the third arbitrator in accordance with the Alternative Dispute Resolution Act 2005.

(b) Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party(ies) fails to appoint an arbitrator within forty five (45) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Secretary General of ICSID within forty five (45) days of the date of receipt of such request.

(c) If the two arbitrators appointed in the manner set out in paragraph (b) fail to agree on the appointment of the third arbitrator within forty five (45) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, either Party may request the Secretary-General of ICSID to appoint the third arbitrator, within forty five (45) days after the date of such request in consultation with the Parties to the dispute, in accordance with paragraph (d).

(d) The arbitrators to be appointed pursuant to this sub-Clause shall be selected from among individuals who are (i) not nationals of the country of any of the Parties to the arbitration proceedings or a country in which the Licencee has its principal domicile unless otherwise agreed; (ii) not employees or agents or former employees or agents of any of the Parties; (iii) disinterested in the dispute; (iv) impartial and independent, (v) skilled in the business and/or legal aspects of the subject matter of this Licence and the dispute; and (vi) have such other qualities as are required under the Convention.

(e) If any of the arbitrators fails or is unable to act, his/her successor shall be appointed in the manner set out in this Clause as if he/she was the first appointment.”<sup>10</sup>

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<sup>7</sup> Mining Licence (R-26), p. 37 *et seq.*

<sup>8</sup> Carnegie’s Counter-Memorial, ¶ 7.

<sup>9</sup> Carnegie’s Request for Arbitration (C-2), ¶ 6.1.

<sup>10</sup> Mining Licence (R-26), pp. 38-39.

68. In its Request, Carnegie appointed Mr. Philippe Pinsolle as arbitrator.<sup>11</sup>
69. On September 15, 2009, ICSID acknowledged receipt of the Request, and transmitted by courier the Request and supporting documents to The Gambia. The Request was delivered on September 24, 2009.<sup>12</sup>
70. On October 23, 2009, ICSID registered the Request.<sup>13</sup> The notice of registration was sent by courier to The Gambia, which received it on November 2, 2009.<sup>14</sup>
71. The communications from ICSID to The Gambia referred to in paragraphs 68 and 69 above were sent, by courier, to the following mailing address:

Republic of The Gambia  
c/o Ministry of Energy Geology  
Geology Department of the Republic of The Gambia  
The Director of the Geology Department  
Post Office Road  
Kanifing  
The Gambia<sup>15</sup>

72. This mailing address was indicated as the one to be used for The Gambia in the Request, and is the one referred to in Clause 20(1)(a) of the Mining Licence, which provides for The Gambia's contact details to be used when corresponding under the Licence:

1. Any notice, consent or other communication to be given under this Licence shall be given in writing and shall be sufficiently served if it is delivered personally, or sent by facsimile transmission or by pre-paid registered or recorded delivery mail to:

- a) In the case of the Licensor [*i.e.* The Gambia]:

The Director,  
Geology Department,  
Kanifing North,  
The Gambia  
Tel: 220 4374 357, Fax: 220 4374 203

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<sup>11</sup> Carnegie's Request for Arbitration (C-2), ¶ 6.4.

<sup>12</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal, May 17, 2011 (R-27), ¶ 21; Ms. Kalicki's Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 18.

<sup>13</sup> Decision on Jurisdiction and Merits (C-11), ¶ 10.

<sup>14</sup> Letter of October 23, 2009 from ICSID to the Parties with reports of communication by courier, email and fax (R-7).

<sup>15</sup> *See e.g.*, Letter of October 28, 2009 from the Claimant to the Respondent (R-8).

E-mail: [geologygambia@yahoo.com](mailto:geologygambia@yahoo.com)<sup>16</sup>

73. These ICSID communications to The Gambia were also sent by facsimile and e-mail to the fax number and the e-mail address referred to in the Request, which corresponded to the information contained Clause 20(1)(a). According to The Gambia, however, the fax number and e-mail address were no longer active when the ICSID communications were sent to the Gambia.<sup>17</sup> As a result, neither the facsimiles nor the emails sent by ICSID reached The Gambia.<sup>18</sup> Finally, ICSID sent these communications by email to Mr. Fanny Nyassy, who was – at the time – Acting Director of The Gambia Geology Department, and whom ICSID contacted by phone, on or around September 16, 2009.<sup>19</sup> It appears however that there was a misunderstanding of the email address given over the phone, and the emails from ICSID were not sent to the correct address and did not reach Mr. Nyassy.<sup>20</sup>
74. ICSID also sent a courtesy copy of these communications to the Embassy of The Gambia in Washington, D.C.<sup>21</sup>

**B. THE APPOINTMENT OF MS. KALICKI AND THE CONSTITUTION OF THE TRIBUNAL**

75. By letter dated October 28, 2009, Carnegie requested The Gambia to appoint the second arbitrator within 45 days of receipt of that letter, pursuant to Clause 22(4)(d) of the Mining Licence.<sup>22</sup> That letter was received by the Gambia on November 2, 2009.<sup>23</sup> The deadline for the Respondent to appoint its arbitrator was therefore set for December 17, 2009.<sup>24</sup>

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<sup>16</sup> Mining Licence (R-26), p. 36. The expression “The Licensor” is defined in the preamble of the Mining Licence as “the Secretary of State responsible for Energy and Geology Matters on behalf of the Government of The Gambia.” The preamble of the Mining Licence also indicates that this “expression shall be taken to include his successors and assigns.” *See* Mining Licence (R-26), p. 2.

<sup>17</sup> The Gambia’s Memorial, ¶¶ 36-37.

<sup>18</sup> The Gambia’s Memorial, ¶¶ 36-37; The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 25.

<sup>19</sup> Full set of correspondence between counsel for Respondent and ICSID between March 1, 2010 and April 22, 2010 (R-4), at p. 107 (Email from ICSID to Mr. Khayat - Counsel for the Respondent, April 22, 2010).

<sup>20</sup> The Gambia’s Memorial, ¶ 37; The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 32. The failure in delivering emails to this address appears to result from the incorrect spelling of Mr. Nyassy’s name: “nyafffansu@yahoo.com” instead of “nyassyfansu@yahoo.com.”

<sup>21</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶¶ 21, 27.

<sup>22</sup> Letter of October 28, 2009 from the Claimant to the Respondent (R-8).

<sup>23</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 30.

<sup>24</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 30.

76. On December 18, 2009, Carnegie wrote to ICSID requesting the Secretary-General to appoint an arbitrator on the Respondent's behalf.<sup>25</sup> Carnegie sent a copy of its letter to ICSID and to The Gambia by courier, which was received by The Gambia on December 29, 2009.<sup>26</sup>
77. On December 28, 2009, ICSID wrote the Parties, noting that 45 days had elapsed since Carnegie's request that The Gambia appoint its arbitrator, that The Gambia had not made any appointment, and that, pursuant to Clause 22(4)(b) of the Mining Licence and further to Carnegie's request that the ICSID Secretary-General appoint the second arbitrator, it was considering the appointment of Ms. Jean Kalicki as an arbitrator.<sup>27</sup> ICSID invited "either party" to submit its objection (if any) to the appointment of Ms. Kalicki by January 11, 2010. ICSID sent this letter by courier to the Gambia. The letter was delivered to The Gambia on January 8, 2010, which was Friday, at 13:25. According to The Gambia, that time was after close of business, and the letter was "effectively received" on January 11, 2010.<sup>28</sup>
78. On January 12, 2010, ICSID sent a letter to the Parties advising that it would "proceed to seek acceptance from Ms. Kalicki."<sup>29</sup> This letter was delivered to The Gambia on January 18, 2010.<sup>30</sup>
79. On January 13, 2010, ICSID sent a letter to the Parties advising that Ms. Kalicki had accepted her appointment. This letter was delivered to The Gambia on January 29, 2010.<sup>31</sup>
80. As with previous ICSID communications, the ICSID correspondence referred to in paragraphs 77 to 79 above was sent to The Gambia using the mailing address indicated in the RFA, corresponding to one included in Clause 20(1)(a) of the Mining Licence. This correspondence was also sent to The Gambia by facsimile and by e-mail, although apparently neither communication went

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<sup>25</sup> Letter of December 18, 2009 from the Claimant to ICSID (R-12).

<sup>26</sup> The Gambia's Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 30.

<sup>27</sup> Letter of December 28, 2009 from ICSID to the Parties, with reports of communication by courier, fax and email (R-14).

<sup>28</sup> The Gambia's Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 30.

<sup>29</sup> Letter of January 12, 2010 from ICSID to the Parties with reports of communication by courier, fax and email (R-19).

<sup>30</sup> Letter of January 12, 2010 from ICSID to the Parties with reports of communication by courier, fax and email (R-19).

<sup>31</sup> Letter of January 13, 2010 from ICSID to the Parties with reports of communication by courier, fax and email (R-20).

through.<sup>32</sup> As with previous ICSID communication, ICSID also sent courtesy copies of the correspondence to the Embassy of The Gambia in Washington, D.C.<sup>33</sup>

81. On February 22, 2010, ICSID notified the Parties that, acting under Clause 22(4)(a), Mr. Pinsolle and Ms. Kalicki had appointed Mr. Donald Francis Donovan to serve as presiding arbitrator. As explained below, on January 18, 2010, The Gambia sent a letter to ICSID regarding the constitution of the Tribunal in this case. In this letter, The Gambia provided updated contact information for the Respondent. The ICSID February 22, 2010 letter was sent by email only, using the updated contact information for The Gambia.<sup>34</sup>

82. By letter dated March 3, 2010, ICSID advised the Parties that Mr. Donovan had accepted the appointment and that the Tribunal was therefore constituted.

**C. THE GAMBIA’S COMMUNICATIONS AND REQUESTS FURTHER TO THE APPOINTMENT OF MS. KALICKI**

83. On January 13, 2010, The Gambia wrote to Carnegie regarding the “Request for Arbitration by Carnegie Minerals (Gambia) Limited.”<sup>35</sup> This appears to be the first communication from The Gambia relating to the Arbitration available on the record in this annulment proceeding.

84. On January 18, 2010, The Gambia, through its Attorney General and Minister of Justice, wrote a letter to ICSID.<sup>36</sup> This letter was the first communication by The Gambia sent specifically to ICSID in relation to the Arbitration. In this letter, The Gambia acknowledged receipt of ICSID’s “correspondences on the request for Arbitration by Carnegie Minerals and to appoint a second Arbitrator respectively.”<sup>37</sup> The letter also informed ICSID that The Gambia “intend[ed] to participate in the Arbitration and [was] currently in the process of identifying Counsel and appointing an Arbitrator as requested under the Mining Licence.”<sup>38</sup> The Gambia therefore

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<sup>32</sup> The Gambia’s Memorial, ¶¶ 44-50.

<sup>33</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶¶ 35, 41 and 43.

<sup>34</sup> Full set of correspondence between counsel for Respondent and ICSID between March 1, 2010 and April 22, 2010 (R-4), at p. 1.

<sup>35</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶ 44.

<sup>36</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>37</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>38</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

requested “that the respondent be given more time to communicate the name of its Counsel and submit the name of the second Arbitrator soonest.”<sup>39</sup> The January 18, 2010 letter indicated that it would be sent to ICSID by fax.<sup>40</sup> A stamp visible at the bottom right corner on the copy of the January 18, 2010 letter available on the record shows that it was faxed on January 20, 2010.<sup>41</sup> It is unclear if and when ICSID received the fax. A copy of this letter was sent to Carnegie by fax and e-mail.<sup>42</sup>

85. On January 20, 2010, the Claimant sent a letter to ICSID objecting to The Gambia’s request and to any reconsideration of the appointment of Ms. Kalicki.<sup>43</sup>
86. Also on January 20, 2010, ICSID sent a letter to the Parties referring to the procedure for the constitution of the Tribunal mentioned in Clause 22(4) of the Mining Licence and noting that, pursuant to this procedure, Ms. Kalicki had accepted her appointment and Ms. Kalicki and Mr. Pinsolle were in the process of appointing the third arbitrator.<sup>44</sup>
87. On January 26, 2010, The Gambia sent a letter to ICSID. The Gambia explained that, due to delays in communications between ICSID and The Gambia, it had sent the letter of January 18, 2010 requesting more time to appoint the second arbitrator before it received a confirmation of the appointment of Ms. Kalicki. The Gambia reiterated its request to appoint the second arbitrator, and further requested that if “it would be necessary for Ms. Kalicki to resign in order for The Gambia to appoint its own arbitrator,” that ICSID “forward this letter to Ms. Kalicki.”<sup>45</sup>
88. On January 28, 2010, ICSID sent a letter to the Parties, referring to earlier correspondence and noting that Ms. Kalicki’s appointment was made “in accordance with the parties’ agreement,” and that ICSID was “unable to unilaterally revoke the appointment of Ms. Kalicki.”<sup>46</sup> ICSID also explained that the ICSID “Secretariat made every effort to communicate with The Gambia, both

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<sup>39</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>40</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>41</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>42</sup> Letter of January 18, 2010 from the Respondent to ICSID (R-21).

<sup>43</sup> Letter of January 20, 2010 from the Claimant to ICSID (R-22).

<sup>44</sup> Letter of January 20, 2010 from ICSID to the Parties, with reports of communication by courier, fax and email (R-23).

<sup>45</sup> Letter of January 26, 2010 from the Republic of The Gambia to ICSID (R-5).

<sup>46</sup> Letter of January 28, 2010 from ICSID to the Parties with reports of communication by email (R-24).

directly to the Government by email, fax and courier, as well as through the Embassy of The Gambia in Washington, D.C.”<sup>47</sup>

89. On April 23, 2010, The Gambia informed the Tribunal (as constituted on March 3, 2010) that it considered that the Tribunal had not been properly and validly constituted.<sup>48</sup> The Gambia therefore requested that Ms. Kalicki resign, and it indicated that should Ms. Kalicki refuse to do so, it would seek her disqualification.<sup>49</sup>
90. After a number of exchanges between the Parties and the Tribunal, on July 6, 2010, Ms. Kalicki issued a Decision on Request for Resignation (the “**Ms. Kalicki’s Decision**”).<sup>50</sup> In her Decision, Ms. Kalicki explained that:

“While it is unfortunate that communications with the Respondent by email and facsimile proved difficult, and therefore that the Respondent experienced certain delays before receiving hard copy notices from ICSID, the responsibility for these delays cannot fairly be attributed to ICSID. The ICSID Secretariat followed to the letter the notice provisions of the Mining Licence, attempting to communicate regularly by email, facsimile and courier, to the addresses agreed by the parties. The Secretariat in fact went further to try to ensure actual notice to the Respondent, through its regular communications with the Embassy, which is the Gambia’s duly appointed representative in Washington, D.C. The Respondent, for its part, was on actual notice of the progression of these proceedings since at least September 14, 2009, when it received by courier in the Gambia a copy of the Claimant’s Request for Arbitration as filed with ICSID. The Respondent had numerous opportunities to provide alternate email or facsimile addresses to facilitate communications to it from ICSID, but it did not do so.”<sup>51</sup>

91. Ms. Kalicki therefore concluded that “[i]n light of [the] facts [leading to her appointment], the integrity of the ICSID process and the importance of honoring the agreement of the parties compel[ed] [her] to decline to voluntarily resign [her] appointment.”<sup>52</sup>

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<sup>47</sup> Letter of January 28, 2010 from ICSID to the Parties with reports of communication by email (R-24).

<sup>48</sup> Letter of April 23, 2010 from the Respondent to the Arbitral Tribunal (R-31).

<sup>49</sup> Letter of April 23, 2010 from the Respondent to the Arbitral Tribunal (R-31).

<sup>50</sup> Ms. Kalicki’s Decision of July 6, 2010 on Request for Resignation (R-32).

<sup>51</sup> Ms. Kalicki’s Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 44.

<sup>52</sup> Ms. Kalicki’s Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 53.

92. On August 30, 2010, The Gambia submitted a Proposal for the Disqualification of Ms. Kalicki, pursuant to Article 57 of the ICSID Convention.<sup>53</sup>
93. Further to this submission, and to additional submissions made by the Parties pursuant to the President of the Tribunal’s instructions, Mr. Donovan and Mr. Pinsolle, as the remaining two members of the Tribunal, acting under Article 58 of the ICSID Convention, issued their Decision on the Proposal for the Disqualification of a Member of the Tribunal (the “**Disqualification Decision**”).<sup>54</sup> In their Disqualification Decision, Messrs. Donovan and Pinsolle found that “Ms. Kalicki was appointed in accord with the procedures agreed by the parties in Clause 22 of the Mining Licence and hence there [was] no basis to disqualify her under the second sentence of Article 57 of the Convention.”<sup>55</sup> Messrs. Donovan and Pinsolle “therefore den[ie]d The Gambia’s Proposal For The Disqualification of Ms. Kalicki.”<sup>56</sup>
94. The Arbitration then proceeded and, as indicated earlier,<sup>57</sup> on September 29, 2014, the Tribunal issued its Decision on Jurisdiction and Merits, and on July 14, 2015, its final Award.
95. In virtually all of its communications relating to the appointment of Ms. Kalicki, and later in both its request of April 23, 2010 for the resignation of Ms. Kalicki, and its request of August 30, 2010 for the disqualification of Ms. Kalicki, The Gambia emphasized that its position on, and its requests against, the appointment of Ms. Kalicki as arbitrator were based only on the procedural history of her appointment, and on its intention to vindicate what The Gambia referred to as its right to participate in the constitution of the Tribunal.<sup>58</sup> The Gambia noted on various occasions that it in no way intended to disrespect Ms. Kalicki’s abilities, professionalism or expertise, nor did it wish to question her integrity, independence and impartiality.<sup>59</sup>

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<sup>53</sup> Respondent’s Proposal for the Disqualification of Ms. Jean Kalicki (R-33).

<sup>54</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011(R-27).

<sup>55</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶ 106.

<sup>56</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶ 107.

<sup>57</sup> See above, ¶ 6.

<sup>58</sup> See e.g., Letter of January 26, 2010 from the Republic of The Gambia to ICSID (R-5), p. 1; Letter of April 23, 2010 from the Respondent to the Arbitral Tribunal (R-31), ¶ 3; Respondent’s Proposal for the Disqualification of Ms. Jean Kalicki (R-33), ¶ 5; Minutes of First Session (C-3), p. 2.

<sup>59</sup> See e.g., Letter of January 26, 2010 from the Republic of The Gambia to ICSID (R-5), p. 2; Respondent’s Proposal for the Disqualification of Ms. Jean Kalicki (R-33), ¶ 3; Minutes of First Session (C-3), p. 2.

#### **IV. THE PARTIES' POSITIONS**

96. In the interest of efficiency, the present Decision focuses only on questions that must be answered in order to address the ground of annulment advanced by The Gambia. The summaries of the Parties' positions that appear herein are not intended to capture all the points made during this annulment proceeding, but, rather, to present the points that, in the Committee's view, call for attention. The Committee has taken into account the full range of arguments raised by each Party. The Committee has also given due consideration to the legal authorities cited by the Parties, including other awards and annulment decisions, but has reached its own conclusions.

##### **A. THE GAMBIA'S POSITION**

###### **(1) The Fundamental Nature of a Party's Right to Appoint its Arbitrator**

97. The Gambia's annulment Application refers extensively to what The Gambia refers to as its fundamental right to appoint an arbitrator.<sup>60</sup> According to The Gambia, this right constitutes the very essence of arbitral justice. It is not only a distinguishing feature of international arbitration, but one of its most valuable characteristics.<sup>61</sup>

98. According to The Gambia, this right was embedded in the Clause 22 of the Mining Licence.<sup>62</sup> The Gambia in fact argues that it was one of the reasons why it agreed to include an arbitration clause in the Mining Licence.<sup>63</sup>

###### **(2) The Application for Annulment on the Ground that the Tribunal was not Properly Constituted (Article 52(1)(a) of the ICSID Convention)**

###### **a. The Nature of the Review to be Conducted by the Ad Hoc Committee under Article 52(1)(a)**

99. At the Hearing, The Gambia made a number of comments in response to Carnegie's position on the nature of annulment mechanism under the ICSID Convention.<sup>64</sup>

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<sup>60</sup> The Gambia's Memorial, ¶¶ 5-13.

<sup>61</sup> The Gambia's Memorial, ¶¶ 6-8.

<sup>62</sup> The Gambia's Memorial, ¶ 11.

<sup>63</sup> The Gambia's Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 20.

<sup>64</sup> The Gambia's Opening Statement, PowerPoint Presentation, January 30, 2020, Slides 5-18.

100. According to The Gambia, Carnegie’s position that The Gambia’s application is nothing more than an appeal request against the Disqualification Decision is misguided. According to The Gambia, the Disqualification Decision cannot be seen as an obstacle to The Gambia’s Application for annulment, because in order for the Party requesting the annulment of an award for improper constitution of the tribunal, it must have previously objected to the constitution of the tribunal in a timely manner.<sup>65</sup>
101. The Gambia argues that had it not challenged Ms. Kalicki during the Arbitration proceedings, it would have faced the risk of losing its right to present an application for annulment of the Award under Article 52(1)(a) of the ICSID Convention.<sup>66</sup> In support, The Gambia refers to extracts of a widely-cited commentary of the ICSID Convention where the authors explain that, in the context of Article 52(1)(a), “[f]or the purposes of a request for annulment ... a party must exhaust the remedies available during the primary proceedings. Failure to do so should lead to the inadmissibility of this ground for annulment.”<sup>67</sup>
102. The Gambia then turns specifically to the scope of review to be conducted by this Committee under Article 52(1)(a). According to The Gambia, Carnegie’s arguments that (i) the Committee should somehow be bound by the findings of the two co-arbitrators in their Disqualification Decision, or that (ii) the Committee should limit its review of the Disqualification Decision to finding whether it constituted a decision that no reasonable decision-maker could take, are largely misguided.<sup>68</sup>
103. The Gambia notes that the case law relied on by Carnegie is restrictive.<sup>69</sup> In particular, The Gambia argues that this case law only related to the situation of an annulment sought under Article 52(1)(a) due to an issue with the independence and impartiality of one arbitrator, and therefore should be

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<sup>65</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 5.

<sup>66</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 5, referring to the Claimant’s Counter-Memorial, ¶¶ 38-59.

<sup>67</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 5 (citing Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009) (RA-22).

<sup>68</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 5.

<sup>69</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 11 (explaining that Carnegie relied mainly on the *ad hoc* committee’s decision in *Azurix v. Argentina*, which has not been followed by “most subsequent decisions,” and referring specifically to *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009 (CA-6); *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (CA-8); and *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment May 5, 2017 (CA-5)).

distinguished.<sup>70</sup> According to The Gambia, “[n]othing in the Convention restricts the scope of the review which can be conducted by the *ad hoc* Committee in an annulment proceeding on the basis of Article 52(1)(a) nor prohibits it from conducting its own review and forming its own opinion.”<sup>71</sup>

104. Relying on the Decision in *RSM v. Saint Lucia*, The Gambia further argues that the Committee can and should make a *de novo* review of the considerations brought before the Tribunal, which may be used as a basis for a challenge under Article 52(1)(a).<sup>72</sup> In The Gambia’s own words, “The Gambia does not contend that the Committee should disregard the previous decision rendered by the two members of the Tribunal, however, it is not bound by it and should conduct its own review of the facts that led to the improper constitution of the Tribunal.”<sup>73</sup>
105. The Gambia concludes that the Committee “can and should conduct its own review in this annulment proceeding on the basis of Article 52(1)(a) which relates to establishing whether the procedure for the constitution of the Tribunal, which led to the loss of The Gambia’s fundamental right to appoint its own arbitrator, was complied with as per the Parties’ agreement.”<sup>74</sup>

**b. The Gambia’s Arguments on the Appointment of Ms. Kalicki**

106. According to The Gambia, the Tribunal was not properly constituted, and the Award should therefore be annulled on the basis of Article 52(1)(a) of the ICSID Convention, because the circumstances leading to the appointment of Ms. Kalicki unduly deprived the Respondent of its right to appoint an arbitrator.<sup>75</sup>
107. To support this assertion, The Gambia relies on a series of facts which occurred throughout the procedure for the constitution of the Tribunal. The Gambia insists, *inter alia*, on the following elements:

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<sup>70</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slides 11-12.

<sup>71</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 12.

<sup>72</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 19.

<sup>73</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 7.

<sup>74</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 18.

<sup>75</sup> The Gambia’s Memorial, Section II; The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slides 25-43. At the hearing, The Gambia noted that its application for annulment and its position on the circumstances leading to the appointment of Ms. Kalicki by ICSID should not equated with criticism against ICSID. *See* Transcript Day 1, p. 7, lines 5-10.

- The systematic failures and delays in all the means of communications sent by ICSID prior to the constitution of the Tribunal.<sup>76</sup> In particular, The Gambia asserts that (i) all e-mails and facsimiles sent by ICSID never reached the Respondent,<sup>77</sup> (ii) and that the delivery of all ICSID letters sent by courier was significantly delayed.
- The Courtesy Communications to The Gambia’s Embassy in Washington D.C do not amount to proper notice to the Respondent.
- Neither ICSID nor the Claimant attempted to remedy the situation even though they received delivery failure notifications and were therefore aware that The Gambia either did not receive their communications or received them with significant delay.<sup>78</sup>

108. Due to these facts, The Gambia explains that it “effectively learned for the first time of a potential appointment of an arbitrator by ICSID, namely Ms. Kalicki on the day she was appointed”<sup>79</sup> (*i.e.* on December 28, 2009, which is the date of the ICSID letter informing the Parties that the Centre was going to proceed with the appointment of Ms. Kalicki and inviting the Parties to comment on this appointment<sup>80</sup>), and that it “learned of a time period to provide comments on the appointment of Ms. Kalicki on the day the deadline lapsed” (*i.e.* on January 11, 2010, when it received the ICSID Letter of December 28, 2009).<sup>81</sup> According to The Gambia, this delay resulted in its inability to participate and appoint an arbitrator within the procedural framework provided for in Clause 22 of the Mining Licence.<sup>82</sup>

109. The Gambia further argues that Clause 22(4)(b) states that time periods should run from the date of receipt, and not the date of notice.<sup>83</sup> The time period fixed by ICSID for the Parties to provide comments on Ms. Kalicki should have started to run from the date when The Gambia received ICSID’s letter. On this basis, The Gambia affirms that “the 14 day timeframe [for the Parties to

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<sup>76</sup> The Gambia’s Memorial, ¶¶ 33-56.

<sup>77</sup> The Gambia’s Memorial, ¶¶ 33-56; The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slides 25-29.

<sup>78</sup> The Gambia’s Memorial, ¶¶ 33-56; The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slides 32-33.

<sup>79</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 45.

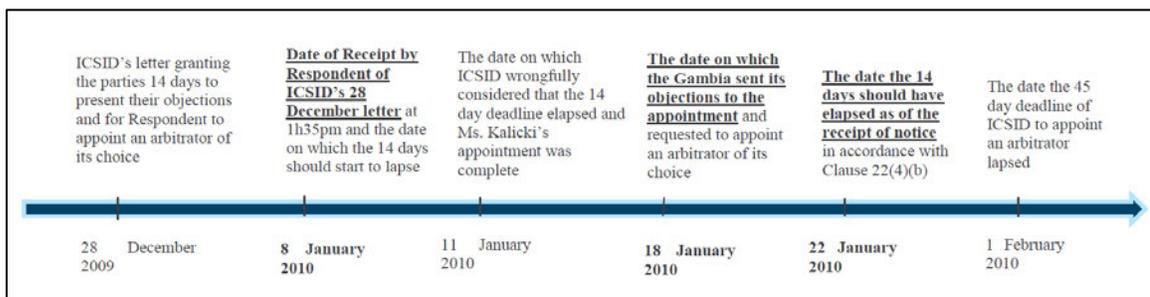
<sup>80</sup> Letter of December 28, 2009 from ICSID to the Parties, with reports of communication by courier, fax and email (R-14).

<sup>81</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 45.

<sup>82</sup> The Gambia’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 45.

<sup>83</sup> The Gambia’s Memorial, ¶ 117.

provide comments on the possible appointment of Ms. Kalicki] should have elapsed not on 11 January 2010, 14 days as of 28 December 2010, the date ICSID sent its letter, but on 22 January 2010, 14 days after the date of receipt of notice by Respondent on 8 January 2010.”<sup>84</sup> The Gambia illustrates this argument with the following timeline:<sup>85</sup>



110. Hence, The Gambia contends that Ms. Kalicki's appointment by ICSID was in breach of the Parties' agreement under Clause 22 of the Mining Licence, and further "contrary to the principles of party autonomy, due process, and party equality"<sup>86</sup> given that Carnegie was effectively the only party given the possibility to appoint an arbitrator and comment on the appointment made by ICSID.
111. The Gambia concludes that these breaches have resulted in a failure to properly constitute the Tribunal, and the Award should therefore be annulled pursuant to Article 52(1)(a) of the ICSID Convention.

## B. CARNEGIE'S POSITION

### (1) The Nature of ICSID Annulment Proceedings

112. Carnegie begins its analysis by submitting that the function of an *ad hoc* Committee under the ICSID Convention is of limited review and it is inappropriate for the Committee to perform an exercise that has been already done several times, first by ICSID, next by Ms. Kalicki, and finally by the two co-arbitrators.<sup>87</sup> Carnegie insists that The Gambia's arguments and grievances against the appointment of Ms. Kalicki in this annulment proceeding are essentially the same as those The

<sup>84</sup> The Gambia's Memorial, ¶ 118.

<sup>85</sup> The Gambia's Memorial, ¶ 118.

<sup>86</sup> The Gambia's Memorial, ¶ 133.

<sup>87</sup> Transcript Day 1, p. 67, lines 11-21.

Gambia raised earlier in its request for the resignation of Ms. Kalicki and later in its proposal for her disqualification.<sup>88</sup> It is clear therefore, in Carnegie's view, that what The Gambia asks the Committee to do is a *de novo* review,<sup>89</sup> which the Committee does not have the authority to do.

113. According to Carnegie, ICSID annulment proceedings are not appellate proceedings, and annulment under Article 52 of the ICSID Convention is both exceptional and limited.<sup>90</sup> Carnegie relies on the wording of Article 52(1)(a) specifically, which requires that the constitution of the Tribunal be "improper."<sup>91</sup> Therefore, Article 52(1)(a) "does not mean, when applied to the present case, that a mere difference of view between that of the Committee on the one hand, and the previous views of the Secretary-General, as later endorsed by Ms Kalicki, and again by Mr Donovan and Mr Pinsolle, should in itself lead to the conclusion that the constitution of the Tribunal was 'improper'."<sup>92</sup>
114. Carnegie further relies on ICSID annulment precedents on Article 52(1)(a) of the ICSID Convention, and cases where – like in the present case – a decision on the appointment of one tribunal member had been issued during the arbitral proceedings.<sup>93</sup> According to Carnegie, under this caselaw, the test to be performed at the annulment stage is that the award cannot be annulled "unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision."<sup>94</sup>

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<sup>88</sup> Transcript Day 1, p. 68, lines 13-18.

<sup>89</sup> Carnegie's Counter-Memorial, ¶ 28; Transcript Day 1, p. 68, lines 13-18.

<sup>90</sup> Carnegie's Counter-Memorial, ¶¶ 38-40 (citing "The Updated Background Paper on Annulment for the Administrative Council of ICSID," May 5, 2016 (CA-3), ¶¶ 71 and 73).

<sup>91</sup> Carnegie's Counter-Memorial, ¶ 41.

<sup>92</sup> Carnegie's Counter-Memorial, ¶ 41.

<sup>93</sup> Carnegie's Counter-Memorial, ¶¶ 47-56 (referring to *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA vs Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment, May 5, 2017 (CA-5); *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009 (CA-6); *OI European Group BV v. Venezuela*, ICSID Case No. ARB/11/25, Decision on Annulment, December 6, 2018 (CA-7); *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (CA-8)).

<sup>94</sup> Carnegie's Counter-Memorial, ¶ 55 (citing *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICISD Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (CA-8), ¶ 145).

115. Carnegie finally argues that the Committee retains discretion on whether to annul an award, even where a ground for annulment under Article 52(1) is found to exist.<sup>95</sup> According to Carnegie, this “discretion” results from the principle of the finality of awards, a “fundamental goal” under the system of the ICSID Convention.<sup>96</sup> Carnegie submits that in the present case, the exercise of such “discretion” would require the Committee to perform a “balancing exercise” between on the one hand “the Claimant being deprived, after years of investment and activity pursuant to the Mining Licence, and later, following abrupt cancellation of the Mining Licence, years of arbitration, of compensation due to it,” and, on the other hand “actions of the ICSID Secretary-General herself, in respect of which no error was perceived upon subsequent review under processes within the framework of the ICSID Convention by Ms Kalicki, and later Mr Donovan and Mr Pinsolle.”<sup>97</sup>

## **(2) Carnegie’s Response to the Gambia’s Application for Annulment**

### **a. The Appointment of Ms. Kalicki**

116. Carnegie argues that the appointment of Ms. Kalicki, which was completed on January 12, 2010, was made pursuant to the wording of Clause 22.4 of the Mining Licence and should therefore be considered as valid.

117. Carnegie first recalls that The Gambia was aware that arbitral proceedings were ongoing from the moment it received Carnegie’s Request for Arbitration (on September 14, 2009), and when it later received the notice of registration from ICSID (on November 2, 2009).<sup>98</sup> The Gambia was therefore not taken “by surprise” when Ms. Kalicki was appointed in January in 2010, as the Respondent would want the Committee to believe. To illustrate this point, Carnegie uses the following timeline, displaying the “events leading to Ms. Kalicki’s appointment.”<sup>99</sup>

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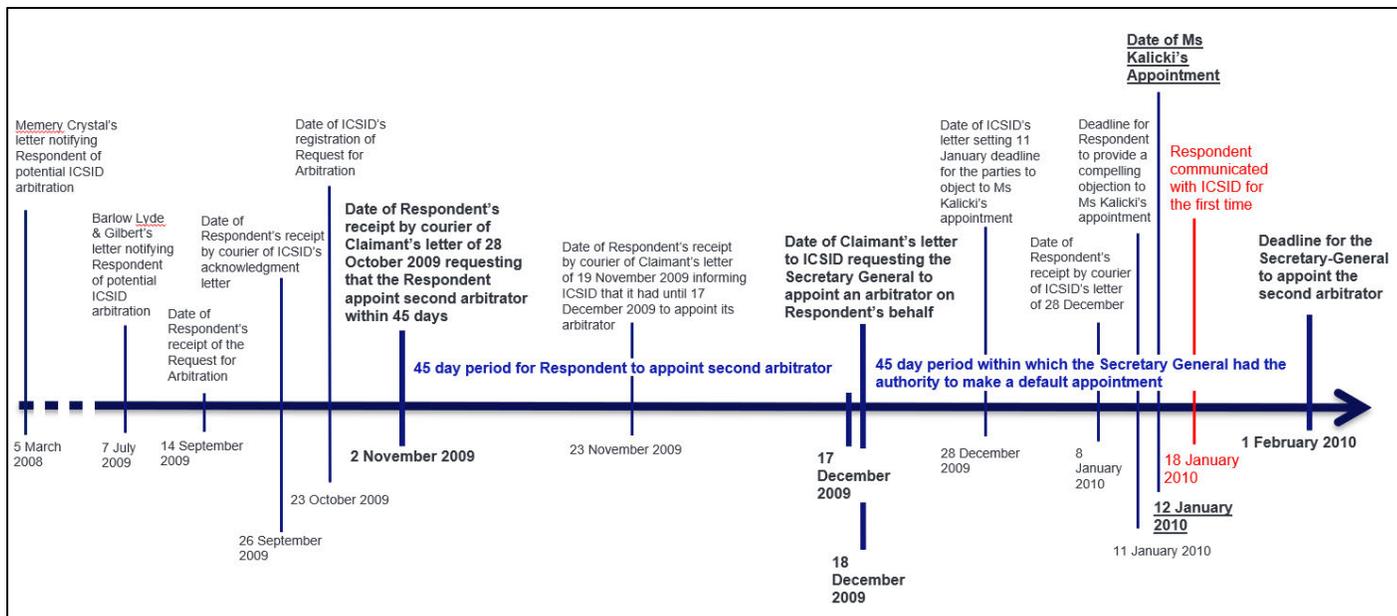
<sup>95</sup> Carnegie’s Counter-Memorial, ¶¶ 60-63 (referring to, *inter alia*, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 (CA-9); *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005 (CA-4)).

<sup>96</sup> Carnegie’s Counter-Memorial, ¶ 62 (citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 (CA-9)).

<sup>97</sup> Carnegie’s Counter-Memorial, ¶ 64.

<sup>98</sup> Transcript Day 1, p. 86, lines 10-14.

<sup>99</sup> Carnegie’s Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 1.



118. Carnegie argues that The Gambia could have elected to “speak up,” so as to at least inform ICSID and/or the Claimant that there was a breakdown of communication but that it intended to take part in the process.<sup>100</sup> Yet, according to Carnegie, it chose not to do so.<sup>101</sup>
119. Carnegie further disagrees with The Gambia’s argument that the timescale provided for in Clause 22(4) of the Mining Licence is to be seen as running from the date of the receipt of notices, and as a result, the 14 day timeframe to provide comments on the upcoming appointment of Ms. Kalicki should have run from the date of receipt by the Respondent on January 8, 2010. According to Carnegie, Clause 20 of the Mining Licence, which specifically concerns “Notices,” does not provide “that service of a notice shall be deemed effective on receipt, but rather according to the formula set out, namely service is deemed to be effected on the second day after posting pre-paid mail, or at the time it was sent by fax when sent between certain hours.”<sup>102</sup>
120. Carnegie also insists on the fact that Clause 22(4)(b) of the Mining Licence imposes no obligation on ICSID to consult the Parties on the upcoming appointment of an arbitrator, “and hence no timescale for any such consultation.”<sup>103</sup> Under the wording of Clause 22(4)(b), the ICSID Secretary-General has “a right to appoint immediately after receipt by her of the Claimant’s letter

<sup>100</sup> Transcript Day 1, p. 87, lines 9-15.

<sup>101</sup> Transcript Day 1, p. 88, lines 2-3.

<sup>102</sup> Carnegie’s Counter-Memorial, ¶ 78.

<sup>103</sup> Carnegie’s Counter-Memorial, ¶ 79.

dated 18 December 2009.”<sup>104</sup> According to Carnegie, therefore, the 14-day period to provide comments on the upcoming appointment of Ms. Kalicki by ICSID mentioned by the Respondent “does not arise from the Mining Licence at all,” and “it cannot be sensibly argued that the 14 day period is to be interpreted by reference to an alleged practice ... of calculating timescales from the date of receipt of the relevant notice.”<sup>105</sup>

121. Carnegie therefore concludes that there cannot be a procedural irregularity in the appointment of Ms. Kalicki and, by extension, in the constitution of the arbitral Tribunal. As a result, The Gambia’s application for annulment under Article 52(1)(a) of the ICSID Convention should be rejected.

**b. The Nature of the Right to Appoint an Arbitrator**

122. While Carnegie concedes the existence of a right for the parties to an arbitration to appoint an arbitrator, Carnegie notes that this right is not absolute, and is in fact “almost always restricted in some way, either (as here) by specific terms agreed and enshrined in the parties’ agreement to arbitrate, or by the parties’ agreement to submit to institutional rules containing restrictions such as a default mechanism, or by the application of national arbitration statutes.”<sup>106</sup>
123. Carnegie argues that, consistent with this concept of the right to appoint an arbitrator, the terms of Clause 22 of the Mining Licence restrict this right by providing for a default mechanism, the absence of which would result in a party being able to permanently delay the arbitration.<sup>107</sup> Carnegie therefore concludes that “if the Committee were to find that the terms of Clause 22 have been observed, then the Award cannot be annulled.”<sup>108</sup>

**V. THE *AD HOC* COMMITTEE’S ANALYSIS**

**A. THE CLAIM FOR ANNULMENT**

124. The annulment requested in this case is solely on the basis of Article 52(1)(a) of the ICSID Convention. No challenge has been pursued before this Committee on any of the other grounds in

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<sup>104</sup> Carnegie’s Counter-Memorial, ¶ 79.

<sup>105</sup> Carnegie’s Counter-Memorial, ¶ 79.

<sup>106</sup> Carnegie’s Counter-Memorial, ¶ 92.

<sup>107</sup> Carnegie’s Counter-Memorial, ¶ 92.

<sup>108</sup> Carnegie’s Counter-Memorial, ¶ 96.

Article 52.<sup>109</sup> Thus, the Committee has no mandate to look at any aspect of the Award itself. The only question is whether the Award of the Tribunal should be annulled on the ground, set out in Article 52(1)(a), that “the Tribunal was not properly constituted.” The essence of The Gambia’s argument is that the Tribunal was not properly constituted because The Gambia had been denied the opportunity to make its own appointment of an arbitrator. Instead of The Gambia making the appointment, ICSID appointed Ms. Jean Kalicki to act as the second party-appointed arbitrator. Thus, The Gambia argues, it was deprived of its “fundamental right” to appoint its own arbitrator.

125. Although The Gambia asserts that the right to appoint an arbitrator by a party to a dispute is a “fundamental” right, it also agrees that the right is not absolute and the parties can agree how the right is to be exercised,<sup>110</sup> which is what was done in Clause 22 of the Mining Licence. The Claimant takes the view that characterizing the right to appoint an arbitrator as a “fundamental” right is not useful since the question is still whether the terms relating to the appointment of an arbitrator as set out in Clause 22 of the Mining Licence have been complied with.
126. The Committee agrees that in many respects the right to appoint an arbitrator can be described as fundamental and this is recognized by the authorities quoted by The Gambia.<sup>111</sup> Thus, the importance of the right has to be taken into account in deciding the consequences of a party having been deprived of that right. However, as the Parties agree, the exercise of the right in this case has to be in accordance with their agreement on the appointment of arbitrators in the event of a dispute as set out in Clause 22 of the Mining Licence. Thus, the question for the Committee is whether the appointment of Ms. Kalicki by ICSID, in the absence of the appointment of an arbitrator by The Gambia, is in accordance with Clause 22.

## **B. THE NATURE OF ANNULMENT**

127. The Claimant argues that the scope of annulment under Article 51(1)(a) is limited,<sup>112</sup> particularly in the context of a claim for annulment on which two members of the tribunal have already made a decision on the issue. Here, the Claimant points out, the decision has already been made about the disqualification of Ms. Kalicki by two members of the Tribunal and in addition, Ms. Kalicki

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<sup>109</sup> A claim had initially been made under Article 52 (1)(b), but that claim was not pursued. Transcript Day 1, p. 64, lines 17-21.

<sup>110</sup> The Gambia’s Memorial, ¶ 11.

<sup>111</sup> The Gambia’s Memorial, ¶¶ 8-10.

<sup>112</sup> Carnegie’s Counter-Memorial, p. 11, section B.

herself reached a decision on whether she should resign. In such circumstances, it is argued, the Committee cannot conduct a *de novo* review of the appropriateness of Ms. Kalicki's appointment. The Claimant argues that the Committee can only decide whether the decision of the two members on disqualification was "so plainly unreasonable that no reasonable decision-maker could have come to such a decision."<sup>113</sup>

128. The Gambia argues that it is open to an annulment Committee to conduct a *de novo* review. It distinguishes between the present case and cases where an arbitrator is challenged on the grounds of conflict of interest or competency to sit. The Gambia reiterates that it is not challenging Ms. Kalicki's competence or alleging any conflict of interest. Its challenge is to the appointment of Ms. Kalicki by ICSID in circumstances which denied The Gambia the opportunity to make its own choice of an arbitrator. In this respect, it claims, this is the first annulment case under Article 52(1)(a) "on grounds completely unrelated to the challenge of an arbitrator on the basis of lack of independence and impartiality."<sup>114</sup>
129. The Committee notes that the two members who decided on the proposal for the disqualification of Ms. Kalicki (Disqualification Decision) proceeded on the basis that their mandate derived from the second sentence of Article 57, that is that they were dealing with a request for disqualification on the ground that the individual was ineligible for appointment under Section 2 of Part IV of the Convention. That is how the argument was put by The Gambia and that way of framing the issue was not objected to by Carnegie.<sup>115</sup> The Disqualification Decision states that there was no basis to disqualify Ms. Kalicki "under the second sentence of Article 57 of the Convention."<sup>116</sup>
130. The task for the Committee is not to answer whether there has been compliance with the second sentence of Article 57. Indeed, leading commentators claim that the second sentence relates to nationality issues.<sup>117</sup> Thus, a decision on a proposal for disqualification under Article 57 does not necessarily answer the question posed by Article 52(1)(a) as to whether a tribunal has been properly constituted. The Committee's task is to determine whether the Tribunal was properly constituted

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<sup>113</sup> Carnegie's Counter-Memorial, ¶ 55 (citing *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (CA-8), ¶ 145).

<sup>114</sup> The Gambia's Opening Statement, PowerPoint Presentation, January 30, 2020, Slide 16.

<sup>115</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶¶ 65 and 87.

<sup>116</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶ 106.

<sup>117</sup> Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009) (RA-22), para. 44.

within the meaning of Article 52(1)(a). As a result, the Committee does not see itself as constrained by reference to the second sentence of Article 57, or by the Disqualification Decision, or by the decision of Ms. Kalicki herself who was addressing the question of whether she should resign.

131. In this regard, the Committee agrees that this case is essentially one of first impression and does not readily fall under the decisions of *ad hoc* committees dealing with cases where disqualification has been requested on the basis of a lack of independence or impartiality of an arbitrator or some other conflict of interest. In those cases, the very issue that a committee must consider is the issue before the two members dealing with disqualification. Here, the question is not about Ms. Kalicki at all; it is about the action of ICSID in making an appointment of an arbitrator which, The Gambia says, deprived it of its right to appoint an arbitrator.
132. Of course, much of what was dealt with in the Disqualification Decision or in the Kalicki Decision is relevant to the questions before the Committee, because in both instances the question of ICSID's action in appointing Ms. Kalicki was to the fore. As a result, the Committee will consider carefully the analysis in each of these decisions. However, these analyses are not dispositive of this case. Moreover, the approaches in *Azurix v. Argentina* and *EDF v. Argentina* and the cases that followed *EDF v. Argentina*, which sought to provide a standard of review for disqualification decisions based on the independence or impartiality of an arbitrator, are not applicable to the annulment request in this case for the very reason that the claim is not about the arbitrator, Ms. Kalicki, but about the actions of ICSID.

### **C. THE QUESTION BEFORE THE COMMITTEE**

133. The Committee must, then, consider the specific grounds on which the claim to annulment rest. As mentioned already, The Gambia claims that the Award should be annulled because it was denied the opportunity to appoint its own arbitrator and an arbitrator was appointed by ICSID instead. The right to appoint an arbitrator is embodied in Clause 22 of the Mining Licence which both Parties agree is the basic instrument providing for the arbitration. Paragraph 4(a) provides:

“The Party or Parties instituting the arbitration shall appoint one arbitrator and the Party or Parties responding shall appoint another arbitrator.”<sup>118</sup>

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<sup>118</sup> Mining Licence (R-26), pp. 38-39.

134. Thus, the Committee accepts that, whether it is fundamental or not, the right of The Gambia as the responding party in this dispute to appoint an arbitrator is clearly established in paragraph 4(a).

135. Paragraph 4(b) provides:

“Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party(ies) fails to appoint an arbitrator within forty five (45) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Secretary General of ICSID within forty five (45) days of the date of receipt of such request.”<sup>119</sup>

136. It is this provision that is at the core of The Gambia’s claim that the Tribunal was not properly constituted. In accordance with paragraph 4(b), ICSID was asked by the Claimant to appoint an arbitrator but, The Gambia argues, the appointment was not made in in conformity with this provision and thus the Tribunal was not properly constituted.

#### **D. THE SEQUENCE OF EVENTS**

137. In order to consider The Gambia’s claim, the Committee finds it useful to set out the sequence of events that led to ICSID’s appointment of Ms. Kalicki.

138. The request for arbitration was dated September 11, 2009 although not lodged with ICSID until September 14, 2009. On that same date, The Gambia received a courier copy of this request from the Claimant. That request included the appointment by the Claimant of an arbitrator, Mr. Philippe Pinsolle. On October 23, 2009, ICSID registered the request and sent a notification by courier to The Gambia, which was received on November 2, 2009. The delay between the date of sending and the date of receipt was due to the time it took courier services to reach Kanifing in The Gambia, where the designated recipient for notices under the Mining Licence was located.<sup>120</sup>

139. On October 28, 2009, in accordance with paragraph 4(b), the Claimant requested The Gambia to appoint the second arbitrator within 45 days of that request. This request was received by The Gambia on November 2, 2009. The 45-day period expired on December 17, 2009 with no arbitrator having been appointed by The Gambia. On December 18, 2009 the Claimant requested that ICSID make the appointment of the second arbitrator, again as provided for in paragraph 4(b) of the

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<sup>119</sup> Mining Licence (R-26), pp. 38-39.

<sup>120</sup> See above ¶ 71. Kanifing is the government area adjacent to the capital Banjul.

Mining Licence. A copy of that letter was sent by courier to The Gambia, which it received on December 29, 2009.

140. On December 28, 2009, the Secretary-General of ICSID wrote to the Parties indicating that she was considering appointing Ms. Jean Kalicki as arbitrator and inviting comments by the Parties by January 11, 2010. That letter reached The Gambia on January 8, 2010, but since it arrived after the close of business on a Friday, it was not seen by the relevant authorities until January 11, 2010.
141. On January 12, 2010, ICSID advised the Parties that the Secretary-General had appointed Ms. Kalicki as arbitrator. That letter reached The Gambia on January 18, 2010. On January 13, 2010, ICSID advised the Parties that Ms. Kalicki had accepted her appointment as arbitrator. That letter reached The Gambia on January 29, 2010.
142. In a letter dated January 18, 2010, but apparently sent by fax on January 20, 2010, the Attorney-General of Gambia wrote to ICSID requesting that it be granted more time to engage counsel and appoint an arbitrator. ICSID responded on January 20, 2010, pointing out the provisions of the Mining Licence under which Ms. Kalicki was appointed and stating that the two arbitrators were in the process of appointing a third arbitrator. On the same date, January 20, 2010, the Claimant sent a letter to ICSID objecting to The Gambia's request for more time to appoint an arbitrator and opposing any reconsideration of Ms. Kalicki's appointment.
143. On January 26, 2010 The Gambia wrote to ICSID indicating that as a result of delays in communications, it did not receive confirmation of Ms. Kalicki's appointment until after it had sent its January 18, 2010 letter. It reiterated the request that it be given an opportunity to appoint its own arbitrator and stated that if this entailed Ms. Kalicki having to resign, then to forward the letter to her.
144. On January 28, 2010, ICSID wrote to the Parties pointing out that the appointment of Ms. Kalicki was in accordance with the agreement of the Parties in Clause 22(4)(b) of the Mining Licence and that ICSID could not unilaterally revoke the appointment. On April 23, 2010, The Gambia wrote to ICSID stating that it did not consider that the Tribunal had been properly constituted and calling on Ms. Kalicki to resign so that it could appoint its own arbitrator. It also invited the Claimant to participate in a joint request for Ms. Kalicki to resign.

145. The Claimant declined to join in a request for Ms. Kalicki to resign<sup>121</sup> and subsequently Ms. Kalicki issued a decision in which she declined to resign. She pointed out that the request for her resignation was by The Gambia alone and not supported by the Claimant and concluded that her appointment had been in accordance with the terms of Clause 22(4)(b) of the Mining Licence. Thus, she found that there was no legal basis for the conclusion that her appointment had not been properly made.
146. The above sequence of events shows that following the appointment of its arbitrator, Mr. Pinsolle, the Claimant, as it was entitled to do under Clause 22(4)(b), requested The Gambia to appoint its own arbitrator. Under Clause 22(4)(b), The Gambia had 45 days to make such an appointment before a request could be made to ICSID to make the appointment. The Gambia did not appoint an arbitrator within that period. After the 45 days, again as it was entitled to do so under Clause 22(4)(b), the Claimant requested ICSID to appoint the second arbitrator. ICSID made that appointment, appointing Ms. Kalicki within the 45-day period provided for in Clause 22(4)(b). On its face, therefore, the terms of Clause 22(4)(b) of the Mining Licence were complied with and The Gambia has no basis for complaining that its right to appoint an arbitrator, which is governed by Clause 22(4)(b), had been denied.

**E. THE GAMBIA’S ARGUMENT IN SUPPORT OF ANNULMENT**

147. The Committee now turns to the arguments of The Gambia in support of its claim that it was deprived of its right to appoint an arbitrator, why the terms of Clause 22(4)(b) were not complied with, and thus why the Tribunal was not properly constituted.
148. The fundamental and overarching claim of The Gambia is that communications sent by the Claimant and by ICSID were delayed or never reached The Gambia. In particular, the deadline for objecting to Ms. Kalicki’s appointment expired on the day that the notice of ICSID’s intention to appoint her was received by The Gambia.
149. The Committee accepts that there were deficiencies in the way in which communications were sent to the Gambia. Communications were sent by email, fax and courier. Emails and faxes were never received. This was due to the fact that the information in the Mining Licence for sending notices was outdated. The fax and email addresses were no longer operable. Letters sent by courier did arrive but several days later. The fact that emails and faxes were not being received would have

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<sup>121</sup> Carnegie’s letter of April 26, 2010 (R-40).

been obvious to the sender in that emails would have bounced back and faxes would have indicated that they were not sent. Information to that effect was provided to the Committee and is not disputed.<sup>122</sup>

150. Indeed, ICSID was aware of this as in late September 2009, there was a phone conversation between an ICSID official and the Acting Director of the Geology Department, the body authorized under the Mining Licence to receive communications, in which a new email address was provided. Although it is not clear whether that email address was provided incorrectly or incorrectly transcribed, it never worked, so emails sent to The Gambia were still not received.<sup>123</sup>
151. Thus, all communications received by The Gambia in respect of the arbitration, including the appointment of arbitrators, were received by courier. And couriered mail arrived, according to The Gambia, from 6-16 days after the date they were sent.<sup>124</sup>
152. The Gambia makes much of the fact that apart from the phone conversation in September 2009, ICSID made no apparent attempt to discover why the emails and faxes were not being received. It also points out that the Claimant had been dealing with The Gambia for a number of years and knew how to contact the Gambian officials but did not draw the correct addresses and facsimile numbers to ICSID's attention.<sup>125</sup> The Gambia also argues that it was unaware that there was difficulty with email and facsimile communication and that when it became aware of it, it wrote on January 26, 2010 to point out the correct email and facsimile addresses.<sup>126</sup>
153. But The Gambia does not explain why when it received the letter by courier from ICSID on October 23, 2009 with notification of the Request for Arbitration, which stated that advance copies of the letter had been sent by email and fax, it did not contact ICSID to point out that it had never received the advance copies by email or fax. Thus, if it is to be said that ICSID should have done more to ensure that emails and faxes were delivered, it can equally be said that The Gambia, being fully aware that emails and faxes had apparently been sent but had not been received, should have taken action itself. If The Gambia had sent on October 23, 2009, when it was first was on notice that

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<sup>122</sup> See Failed Facsimile Delivery Reports sent by ICSID Secretariat to the Respondent on March 29, 2010 (R-3) and Failed Email Delivery Reports sent by ICSID Secretariat to the Respondent on March 29, 2010 (R-6).

<sup>123</sup> See above ¶ 73.

<sup>124</sup> The Gambia's Memorial, ¶ 35.

<sup>125</sup> The Gambia's Memorial, ¶¶ 67-68.

<sup>126</sup> The Gambia's Memorial, ¶ 71.

emails and faxes were purported to have been sent but had not been received, the letter that it did not send until January 26, 2010 pointing out the correct email and fax addresses, the subsequent delays that are the basis for this annulment claim could have been avoided.

154. ICSID had also been sending copies of correspondence with The Gambia to the Embassy of the Republic of The Gambia in Washington. The Committee is of the same view as that expressed in the Disqualification Decision<sup>127</sup> that such communications did not constitute notice to The Gambia for the purposes of this arbitration. Notice requirements were set out in the Mining Licence and the Embassy of The Gambia in Washington was not included as a possible recipient, nor was it the representative of The Gambia for World Bank purposes.<sup>128</sup> The Gambia also points out that there was no Gambian Ambassador in Washington at that time and that, in any event, nothing was forwarded by the Embassy to the relevant authorities in The Gambia dealing with the arbitration. Thus, in the view of the Committee, communications to the Gambian Embassy simply have no relevance for the purposes of this annulment request.
155. The Committee notes that The Gambia's complaint relates to the receipt of a letter from ICSID relating to an intention to appoint Ms. Kalicki in exercise of the power to appoint an arbitrator under Clause 22(4)(b) and inviting observations by January 11, 2010. But the fact that the letter did not reach The Gambia until January 8, 2010 and was not seen until January 11, 2010 was not a breach of that clause. As The Gambia recognized, there was no obligation under Clause 22(4)(b) to consult with The Gambia before making an appointment. It was certainly the practice of the ICSID Secretary-General to give parties the opportunity to comment on an appointment before it was made. And the Secretary-General did that in the present case, using the method by which all communications with The Gambia had been sent.
156. In short, while The Gambia can say that it did not receive communications from ICSID as quickly as if emails and faxes had been used, this had no real impact on its right to appoint an arbitrator under Clause 22 of the Mining Licence. It received notice of the Request for Arbitration on November 2, 2009 and should have been aware then that the operative provisions on dispute settlement in the Mining Licence had been invoked. By that point at the latest, it would have known that it would have to appoint an arbitrator. On that date too, it received notice of the request from the Claimant that The Gambia appoint its arbitrator. It had 45 days to make that appointment before

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<sup>127</sup> Decision of Two Members on The Proposal for the Disqualification of a Member of the Tribunal dated May 17, 2011 (R-27), ¶ 91.

<sup>128</sup> The Gambia's Memorial, ¶¶ 61 and 62.

the Claimant could request that ICSID make the appointment. The Gambia provides no reason for the arbitrator not being appointed within that period.

157. Certainly, it is true, as The Gambia points out, the 45-day period did not provide a limit on the time that it had to make an appointment, it was a limit on the Claimant's ability to request ICSID to make the appointment. But once the request for ICSID to appoint an arbitrator was made there was certainly an indication to The Gambia that the clock for its appointment of an arbitrator was running and that its right to appoint an arbitrator was now time-limited. As soon as ICSID made an appointment, The Gambia would no longer have the right to appoint an arbitrator. That is what The Gambia had agreed to when it entered into the Mining Licence.
158. The Gambia maintains, nonetheless, that Ms. Kalicki was not properly appointed because The Gambia was not given time to object to her appointment. There are two branches to this argument. First that, The Gambia did not have a proper opportunity to object to the appointment because the deadline for making an objection expired on the day that The Gambia received the letter from ICSID inviting comments and thus it did not get the 14-day period for making any objections that ICSID had provided. Second, the 14-day period for comments should have run from the date that The Gambia received ICSID's letter, January 11, 2010. Accordingly, when in its letter of January 18, 2010, The Gambia objected to Ms. Kalicki's appointment, it had made an objection well within the 14-day period.
159. With regard to its claim that it was not given an opportunity to object to the appointment of Ms. Kalicki, The Gambia refers to Article 38 of the ICSID Convention where an obligation is placed on the Chairman of the Administrative Council to consult before making an appointment when he has authority to do so. Under that provision, the Chairman is required, before making the appointment, to "consult both parties as far as possible."<sup>129</sup> The Claimant points out that no obligation on the ICSID Secretary-General to consult when making an appointment is contained in Clause 22 of the Mining Licence, and The Gambia acknowledges that there is no such express provision. However, The Gambia argues, the practice of the Secretary-General is to consult, and she was clearly intending to do so in this case.
160. The Committee accepts that in fact The Gambia had little time to provide comments on or object to Ms. Kalicki's appointment. The letter notifying of an intention to appoint Ms. Kalicki and inviting comments received by The Gambia on January 8, 2010 was not viewed until January 11,

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<sup>129</sup> The Gambia's Memorial, ¶¶ 105-108.

2010, which was the date on which time for commenting expired. On January 12, 2010, ICSID offered Ms. Kalicki the appointment which she accepted on January 13, 2010.

161. It is here that the communication delays between ICSID and The Gambia had their impact. The consequence of The Gambia's failure to advise ICSID that although the letters it received had on their face been sent by email and fax, communications by fax or email were never received by fax or email, or that it only received letters from ICSID after a considerable delay, becomes clear. ICSID would have been aware that the emails and faxes were not sent at the time of sending the letters and it could have become aware of the delay in the receipt of the letters if the notices of proof of service were checked. But there is no evidence that the fact of delay in couriered letters had been communicated to them as a problem for The Gambia. Indeed, the first occasion on which The Gambia communicated with ICSID at all on this case was its letter of January 18, 2010, sent to ICSID on January 20, 2010.
162. The lack of an appreciation of the delay in The Gambia's receipt of letters is evident in the setting of the date of January 11, 2010 for comments on the potential appointment of Ms. Kalicki. That ICSID intended to provide a 14-day period for comments is made clear in ICSID's letter of January 20, 2010, which states that the December 28, 2009 letter "gave the parties 14 days to submit any observations that they might have."<sup>130</sup> Fourteen days was not specifically mentioned in the December 28, 2009 letter, but it was obviously used in calculating January 11, 2010 as a deadline for the receipt of observations on Ms. Kalicki's appointment. If ICSID was aware that there was little chance of its letter being received much before January 11, 2010, it seems unlikely that the letter would have set January 11, 2010 as the expiration of the 14-day period for observations.
163. Yet, faced with the knowledge on January 11, 2010 that time to object to the appointment of Ms. Kalicki had essentially run out, The Gambia waited until January 18, 2010 to prepare a reply to ICSID, which it did not send it until January 20, 2010, when it was sent by fax. If The Gambia had faxed a letter to ICSID on January 11, 2010, it would, given the time zones, have been received by ICSID on the same day, in advance of ICSID communicating with Ms. Kalicki and well before Ms. Kalicki accepted her appointment.

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<sup>130</sup> Letter of January 20, 2010 from ICSID to the Parties, with reports of communication by courier, fax and email (R-23).

164. The Gambia has argued that decisions to respond like that cannot be made so quickly and that it would have been unreasonable to expect that The Gambia could have responded on the day it received the letter.<sup>131</sup> A letter, it argues, would have to be vetted and approved by the Attorney-General.<sup>132</sup> But this is not a case where The Gambia had to decide whether it should object to the competence of Ms. Kalicki as an arbitrator. That indeed would have taken some time. The Gambia's objection was to the very fact that an arbitrator was being appointed. That was an objection that The Gambia would have had at least from the time of being advised that the Claimant had requested that ICSID appoint an arbitrator, December 29, 2009. It strains credulity to suppose that the first time The Gambia considered whether it should appoint an arbitrator was when it saw ICSID's letter on January 11, 2010.
165. Thus, the date for objecting to the appointment of Ms. Kalicki was essentially irrelevant. The Gambia has made clear that it had no objection to Ms. Kalicki; its objection was to ICSID making any appointment which would have the effect of taking away its own right to appoint an arbitrator. The loss of the right to appoint an arbitrator took place on the appointment of Ms. Kalicki and this occurred after January 11, 2010. All that happened on January 11, 2010 was the expiry of the time for commenting on Ms. Kalicki, and as pointed out earlier, The Gambia actually had no comments on Ms. Kalicki as an arbitrator and in any event could have responded immediately and met that deadline.
166. In short, while The Gambia treats the late receipt of ICSID's letter on January 11, 2010 as effectively denying it the right to appoint an arbitrator, the right to appoint an arbitrator by The Gambia was not lost by virtue of that letter. It was lost by the appointment of Ms. Kalicki and her acceptance on January 13, 2010, completely in conformity with Clause 22(4)(b) of the Mining Licence. The ICSID letter of December 28, 2009 that The Gambia received on January 11, 2010 did constitute a reminder that the right would be lost on the appointment by ICSID of an arbitrator, but The Gambia could have objected to ICSID appointing an arbitrator as early as December 29, 2009, when it learned of the request made by the Claimant to ICSID, and must have known about its objection to the appointment of any arbitrator by ICSID when it saw ICSID's letter on January 11, 2010.
167. With regard to the second argument of The Gambia, that the times under the Mining Licence ran from the date of receipt of communications not the date of sending, the Committee has difficulty

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<sup>131</sup> Transcript Day 1, p. 59, lines 21-23.

<sup>132</sup> Transcript Day 1, p. 116, lines 19-20.

seeing this as a correct construction of the Licence. Clause 20 of the Mining Licence sets up a scheme for notices which provides that a notice is effective two business days after posting, not on its receipt. It is true that Clause 22(4)(b) provides that the right to request ICSID to appoint an arbitrator arises 45 days after receipt of the notice requesting that the other party appoint an arbitrator and ICSID must appoint within 45 days of receipt of the request to make the appointment. But the fact that these times are specifically provided for in Clause 22(4)(b) suggests that where there is no such specific provision then the general rule of Clause 20 will apply. Thus, the Committee sees no basis for The Gambia's contention that, assuming the notice in ICSID's letter of December 28, 2009 was a 14-day notice period, then those 14 days would run from the date of receipt of ICSID's letter by The Gambia.

168. The Gambia's request to have Ms. Kalicki resign from her appointment was unsuccessful. The Claimant refused to join in the request and urged Ms. Kalicki not to resign. In concluding she should not resign voluntarily, as her appointment fully conformed with Clause 22(4)(b), Ms. Kalicki also stated that if there had been a joint request by the Parties for her resignation, she would have resigned.<sup>133</sup> The Gambia's attempt to have Ms. Kalicki disqualified under the second sentence of Article 57 of the ICSID Convention was also unsuccessful. The two unchallenged members of the Tribunal concluded that there had been no violation of Article 57 because the appointment of Ms. Kalicki was in accordance with Clause 22(4)(b). As the Committee earlier said it would do, it has taken account of these decisions. In fact, it reaches conclusions that on the question of compliance with Clause 22(4)(b) are essentially the same as those of these two decisions.
169. There is a further consideration. The claim for annulment has been based on the deprivation of the Respondent's right to appoint its own arbitrator. The Gambia has not claimed before this Committee that there is anything in the Award of the Tribunal that would independently justify annulment. Moreover, The Gambia has made very clear from the outset that it has no concerns about Ms. Kalicki's qualifications and independence. In effect, the claim is that the Tribunal was not properly constituted, but the result in the Tribunal's Award did not raise concerns under Article 52 that The Gambia was prepared to pursue.
170. In this regard, as mentioned earlier, this case is quite different from cases where the challenge is based on a lack of independence or impartiality. There the grounds for the challenge go to the very integrity of the dispute settlement process itself. Here there is a challenge because of alleged

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<sup>133</sup> Ms. Kalicki's Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 46.

disregard of the principle urged by The Gambia that a party has a right, characterized as a “fundamental” right, to appoint an arbitrator of its choosing. Yet the consequence of the denial of that right does not go to the integrity of the outcome in the same way. Annulling an award where there has been no challenge to the award as such and the defect in the constitution of the tribunal has not affected the integrity of the arbitral award or process seems to have little justification. Thus, even if the Committee had concluded that the Tribunal had not been properly constituted, it would have had to give serious consideration to whether it should exercise its discretion not to annul the award notwithstanding a finding that the appointment process had been defective.

## **F. CONCLUSION**

171. In light of the above, the Committee concludes that the Tribunal was constituted in accordance with the provisions of Clause 22 of the Mining Licence. The Gambia had not appointed an arbitrator in the 45 days since the request for it to do so. Thus, the Claimant was entitled under paragraph 4(b) to request ICSID to make the appointment. ICSID made the appointment within the 45-day period following the request. Thus, the provisions relating to the appointment of arbitrators in the event of a dispute, to which The Gambia had agreed to in the Mining Licence, were complied with.
172. The Gambia’s complaint that delays in its receipt of communications from ICSID meant that it had been deprived of its right to appoint an arbitrator focuses largely on the receipt of the letter from ICSID dated December 28, 2009, which, although arriving in The Gambia on January 8, 2010, was not seen until January 11, 2010. Instead of demonstrating at this point that it realized that the appointment of an arbitrator by ICSID was imminent and contacting ICSID with its objection to ICSID appointing an arbitrator, it delayed until January 20, 2010, by which time ICSID’s appointment of Ms. Kalicki as arbitrator had been completed. Thus, by the time The Gambia finally asserted its right to make an appointment, that right, under the terms of Clause 22(4)(b) of the Mining Licence, had already come to an end.
173. In the result, The Gambia was not denied the opportunity to appoint an arbitrator. It lost that opportunity because it failed to make an appointment between the date on which it was called on by the Claimant to appoint an arbitrator, November 2, 2009, and the date on which ICSID made the appointment, January 12/13, 2010, in accordance with Article 22(4)(b) of the Mining Licence. Indeed, The Gambia had been told on December 29, 2009, that ICSID had been granted the power to appoint the arbitrator in its place and it still made no appointment of its own arbitrator or even contacted ICSID before ICSID made the appointment.

174. The Committee thus concludes that the Tribunal was properly constituted and there is no basis for annulling the Award under Article 51(1)(a) of the Convention.

## **VI. COSTS**

175. Pursuant to ICSID Administrative and Financial Regulation 14(3)(2), the party applying for annulment, this case The Gambia, is solely responsible for making advance payments to the Centre without prejudice to the Committee's eventual decision as to how and by whom the expenses incurred in the annulment proceeding are to be borne.

176. The Gambia paid a total amount of USD 450,000.00 in advance payments as requested by ICSID, through several installments:

- USD 100,000, acknowledged on June 3, 2016;<sup>134</sup>
- USD 75,000, acknowledged on April 6, 2018;<sup>135</sup>
- USD 75,000, acknowledged on June 4, 2018;<sup>136</sup>
- USD 100,000, acknowledged on August 8, 2019;<sup>137</sup> and
- USD 100,000, acknowledged on November 22, 2019.<sup>138</sup>

177. The Parties made their submissions on cost in their Memorial and Counter-Memorial respectively,<sup>139</sup> and further submitted statements of costs.<sup>140</sup>

### **A. THE GAMBIA'S COSTS SUBMISSIONS**

178. In its Statement of Costs, The Gambia requests "to be awarded the following:

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<sup>134</sup> ICSID's Letter to the Parties, June 3, 2016.

<sup>135</sup> ICSID's Letter to the Parties, April 6, 2018.

<sup>136</sup> ICSID's Letter to the Parties, June 4, 2018.

<sup>137</sup> ICSID's Letter to the Parties, August 8, 2019.

<sup>138</sup> ICSID's Letter to the Parties, November 22, 2019.

<sup>139</sup> The Gambia's Memorial, ¶ 134; Carnegie's Counter-Memorial, ¶ 112(c).

<sup>140</sup> See above, ¶ 63.

- An amount of USD 450,000 for the advance on costs in these proceedings, for the payment of (i) the fees and expenses of the *ad hoc* Committee, (ii) ICSID’s administrative expenses, as well as (iii) all other direct expenses for the hearing;
- An amount of EUR 2,852.4 covering Mayer Brown’s travel expenses for the 30 January 2020 hearing (which comprise of train tickets and hotel costs).<sup>141</sup>

**B. CARNEGIE’S COSTS SUBMISSIONS**

179. In its Counter-Memorial, Carnegie requests that the Committee “[o]rder the Respondent to reimburse to Claimant all of its costs relating to this annulment proceeding, including the fees and costs of its legal representatives.”<sup>142</sup>

180. In its Statement of Costs,<sup>143</sup> Carnegie provides for the following information:

TYPE OF FEES AND EXPENSES	AMOUNT (GBP)
<i>Counsel’s fees</i>	
Fees for advice / attendances / conferences / documents	442,722.80
<i>Barrister’s fees (Mr Klaus Reichert SC of Brick Court Chambers, Year of Call: 1996)</i>	
Fees for advice / conference / documents	20,000.00
<i>Other expenses</i>	
SOAS Library entrance and photocopying charges	35.00
External photocopying charges	199.65
Miscellaneous stationery charges	92.00
Legal research charges	309.53
Color photocopying charges	541.00
Black & white photocopying charges	1780.20
<b>Grand Total</b>	<b>465,680.18</b>

**C. THE FEES AND EXPENSES OF THE COMMITTEE AND OF THE CENTRE**

181. The costs of the annulment proceeding, including the fees and expenses of the *ad hoc* Committee, ICSID’s administrative fees and direct expenses, amount to 443,984.37 (in USD):

<sup>141</sup> The Gambia’s Statement of Costs, dated February 28, 2020.

<sup>142</sup> Carnegie’s Counter-Memorial, ¶ 112(c).

<sup>143</sup> Carnegie’s Statement of Costs, dated February 28, 2020.

Committee Members' fees and expenses	
Prof. Donald McRae	93,430.02
Prof. Bernardo Cremades	78,291.10
Prof. Zhidong Chen (prior to his resignation)	15,000.00
Ms. Dorothy Ufot, SAN	47,509.19
ICSID's administrative fees	190,000.00
Direct expenses	19,754.06
<b>Total</b>	<b><u>443,984.37</u></b>

**D. THE *AD HOC* COMMITTEE'S DECISION ON COSTS**

182. The Committee has some discretion in the awarding of costs. This is clearly recognized in Article 61(2) of the ICSID Convention which provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

183. Each party has invited the Committee to award it its own costs as well as the costs of the annulment proceeding. In considering the question of costs, the Committee notes that a frequently invoked principle is that costs follow the event. On that basis, costs should be awarded to the Claimant because it succeeded on the main, indeed the sole, issue in this case, that the appointment by ICSID of Ms. Kalicki was in accordance with Clause 22(4)(b) of the Mining Licence. However, in the particular circumstances of this case, the Committee has concluded that each party should bear its own costs and share the costs of the annulment process.

184. The question of annulment was anticipated by the Parties in their submissions on the request for the voluntary resignation of Ms. Kalicki. In its letter of April 23, 2010 to the Tribunal in support of its request that Ms. Kalicki resign, The Gambia stated that it reserved the right to raise the issues in its letter about the constitution of the Tribunal as the basis for annulment under Article 52(1)(a) of the ICSID Convention. The Claimant in its letter of April 26, 2010 said that the "threat" to take the matter to annulment under Article 52(1)(a) "had no substance."

185. The exchange was adverted to by Ms. Kalicki in her Decision. She said, "I would resign if both parties felt that my doing so would best serve the interest of preserving the integrity of the

proceedings, for example by removing any possible future cloud over the case or any decision or award that may be rendered therein.”<sup>144</sup> She then referred to the question of annulment as “a possible cloud” and said that the Claimant had the opportunity “as a matter of prudence” of removing that cloud by joining in the request for her voluntary resignation but declined to do so.<sup>145</sup>

186. The Parties’ exchanges and the Kalicki Decision indicate that the possibility of the case going through an annulment phase was anticipated by the Parties, and the Claimant had an opportunity to act to avoid the basis for an annulment claim by joining in the request for Ms. Kalicki to voluntarily resign, which she indicated she would have done. The Claimant had the perfect right to decline to join in the request for Ms. Kalicki’s resignation, but having anticipated the possibility of an annulment request and not taking action that might have avoided that request, the Claimant cannot expect to be reimbursed for its full costs of an annulment process it might have avoided.
187. Accordingly, the Committee considers it appropriate in the circumstances of this case for each party to be responsible for its own costs and the costs of the annulment process to be shared equally between them.
188. As indicated above, and pursuant to ICSID Administrative and Financial Regulation 14(3)(2), The Gambia paid the totality of the advance on costs in this annulment proceeding.<sup>146</sup> As a result, Carnegie shall reimburse The Gambia 50% of the costs of the annulment process.

## VII. DECISION

189. For the reasons set forth above, the *ad hoc* Committee decides as follows:

- (1) The Application for Annulment of the Republic of The Gambia is rejected in its entirety;
- (2) The Parties equally bear 50% of the costs covering the *ad hoc* Committee Member’s fees and expenses, the ICSID administrative fees and other direct expenses, as set out in paragraph 181 above, and the Claimant shall therefore reimburse The Gambia the sum of USD 221,992.19;

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<sup>144</sup> Ms. Kalicki’s Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 46.

<sup>145</sup> Ms. Kalicki’s Decision of July 6, 2010 on Request for Resignation (R-32), ¶ 47.

<sup>146</sup> See above, ¶¶ 175-176.

(3) Each party shall bear its own legal costs and expenses;

(4) The stay of enforcement is lifted.

[Signed]

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Bernardo M. Cremades  
*Ad hoc* Committee Member

Date: 19/6/2022

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Dorothy Ufot, SAN  
*Ad hoc* Committee Member

Date:

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Donald M. McRae  
President of the *ad hoc* Committee

Date:

[Signed]

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Bernardo M. Cremades  
*Ad hoc* Committee Member

Date:

Dorothy Ufot, SAN  
*Ad hoc* Committee Member

Date:

19/6/2020

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Donald M. McRae  
President of the *ad hoc* Committee

Date:

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Bernardo M. Cremades  
*Ad hoc* Committee Member

Date:

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Dorothy Ufot, SAN  
*Ad hoc* Committee Member

Date:

[Signed]

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Donald M. McRae  
President of the *ad hoc* Committee

Date: 19 June 2020