

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CARNEGIE MINERALS (GAMBIA) LIMITED

Claimant

and

REPUBLIC OF THE GAMBIA

Respondent

**ICSID Case No. ARB/09/19
Annulment Proceedings**

DECISION ON REPRESENTATION

Members of the ad hoc Committee

Prof. Donald M. McRae, President

Mr. Bernardo M. Cremades

Prof. Zhidong Chen

Secretary of the ad hoc Committee

Ms. Mairée Uran Bidegain

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I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment of the award rendered on July 14, 2015 in the arbitration proceeding between Carnegie Minerals (Gambia) Limited (“**Carnegie**”) and the Republic of The Gambia (“**Applicant**” or “**The Gambia**”) (ICSID Case No. ARB/09/19) (the “**Award**”).
2. The application, was filed on November 11, 2015, in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965 (the “**ICSID Convention**”), and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) (the “**Application**”). The Application was submitted within the time period provided for in Article 52(2) of the ICSID Convention.
3. The original dispute was submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the ICSID Convention and the Mining License dated 29 December 2005 (the “**Contract**”) granted to Carnegie , a company incorporated under the law of The Gambia..
4. The Applicant and Carnegie are hereinafter collectively referred to as the “**Parties**”.
5. This decision of the ad hoc Committee relates to the representation of Carnegie in these annulment proceedings.

II. PROCEDURAL HISTORY

6. On November 18, 2015, ICSID acknowledged receipt of the Application. In that same letter ICSID asked for confirmation that Clyde & Co. was still entitled to act for Carnegie for purposes of these annulment proceedings.
7. On November 19, 2015, the Acting Secretary-General registered the Application in accordance with Rule 50(2) of the ICSID Arbitration Rules and transmitted the Notice of Registration to the Parties.

8. By letter of December 10, 2016, Clyde & Co. confirmed that it was authorized to act on behalf of Carnegie for purposes of the annulment application.
9. By letter of January 4, 2016, Counsel for The Gambia, informed ICSID and the Committee that Carnegie was in liquidation by order of the High Court of The Gambia dated August 6, 2015, and requested that it and ICSID be provided a copy of the power of attorney confirming Clyde & Co.'s authorization to act for Carnegie in these annulment proceedings.
10. By letter of January 22, 2016, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that an *ad hoc* Committee had been constituted. The *ad hoc* Committee is composed of Donald McRae (Canadian) as President, Zhidong Chen (Chinese) and Bernardo M. Cremades (Spanish) as Members (the “**Committee**”). The Parties were also informed that the annulment proceedings were deemed to have begun on that date and that Ms. Natalí Sequeira would serve as Secretary of the Committee.
11. On February 8, 2016, counsel for The Gambia, reiterated its request that ICSID and The Gambia be provided with the power of attorney confirming that Clyde & Co. is authorized to act for Carnegie in this proceeding, considering that it has been placed in liquidation.
12. On March 8, 2016, Clyde & Co. sent a letter stating *inter alia* that they “[did] not regard the alleged appointment of a liquidator as having any bearing” and that “it continues to act with the authorisation of the ultimate parent company which exercised ‘foreign control’ at all relevant times, and with the authorisation of the directors of Carnegie.”
13. On June 8, 2016, The Gambia sent a letter to the Committee regarding the issue of representation of Carnegie by Clyde & Co. and the Parties submissions on the matter prior to holding the First Session. The Gambia proposed to the Committee a schedule of pleadings and a hearing on the matter.
14. The Parties exchanged further correspondence on this issue by letters of June 16, 2016 from Clyde & Co. and, June 27, 2016, from the Gambia.

15. On July 8, 2016, the Committee fixed the timetable for the Parties to submit any additional observations on the question of representation.
16. On July 25 2016, The Gambia submitted its observations, accompanied by exhibits 1-6,
17. On August 19, 2016, Clyde & Co. filed its Response on the issue of representation, accompanied by annexes 1-13,
18. On August 30, 2016, The Gambia submitted a Reply to Clyde & Co.'s letter of August 19, dated August 31, 2016 The accompanying exhibits 1 to 8 were submitted by The Gambia on August 31, 2016.
19. On September 14, 2016, Clyde & Co. submitted a Reply to The Gambia's submission of August 30, 2016.
20. On September 21, 2016, ICSID informed the Parties and the Committee that, due to a redistribution of the Centre's workload, Ms. Mairée Uran Bidegain had been assigned to serve as Secretary of the Committee in these proceedings, replacing Ms. Natalí Sequeira.
21. By message of September 28, 2016, the Committee informed the Parties, through the Secretariat, that it would not require a hearing on the issue of representation and that the Parties would receive the Committee's decision shortly.

III. ANALYSIS

22. The question before the Committee is whether Clyde & Co. the law firm that represented Carnegie in the arbitration proceedings before the ICSID tribunal, is authorized to represent Carnegie in proceedings before this Committee.
23. The Gambia argues that Clyde & Co. is not so entitled. Carnegie, it argues, has been placed in liquidation by the Gambian courts and a liquidator has been appointed who is the sole representative of Carnegie under Gambian law. It further argues that

notwithstanding the Respondent's requests for it to do so, Clyde & Co. has failed to produce a power of attorney from Carnegie authorizing it to act on Carnegie's behalf in these annulment proceedings.

24. Clyde & Co. argues that the matter of representation is not to be determined by Gambian law but rather by the ICSID Convention. It points out that its authority to represent Carnegie was provided by resolution of the Board of Directors of Carnegie, lodged with ICSID at the outset of the arbitration proceedings. That authorization, according to Clyde & Co. remains in place, and Clyde & Co. confirmed its representation in these proceedings in its letter to ICSID of 10 December 2015.

IV. COMPETENCE OF THE COMMITTEE

25. At the outset, the Committee notes that under Article 41 of the ICSID Convention, made applicable to ad hoc Committees by virtue Article 52(4), it is clear that the Committee has the competence to decide this question of representation.

V. RULE 18 OF THE ARBITRATION RULES

26. The representation of parties is dealt with in Rule 18 of the Arbitration Rules, which provides:

“(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.”

27. Thus, the Arbitration Rules require “authorization” for “agents, counsel and advocates” in order for them to represent a party, but it does not specify the form of any such authorization.

VI. ICSID PRACTICE ON REPRESENTATION

28. The Committee has reviewed the practice of ICSID on the question of representation. Evidence of authority to represent the entity requesting the initiation of arbitration proceedings is often filed with the request for arbitration and evidence of authority to represent the respondent state is filed subsequently, in some instances following the registration of the request for arbitration under Article 36(3) of the Convention. The ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”) and the ICSID Arbitration Rules do not provide specific formalities for parties’ in granting their “authority”. Hence, ICSID does not require a power of attorney or a specific form of authorization to indicate representation. Letters of engagement of the lawyers in question have been regarded as sufficient.
29. When an application for annulment is received, ICSID reviews the parties’ representation documents found either in the arbitration proceeding file or accompanying the application for annulment. If the power of attorney, or other representation document, lodged with the arbitration proceeding is sufficiently broad to consider that it also applies to post-award remedies, ICSID treats this as a continuing authorization. If the text of the representation papers is insufficiently clear, ICSID contacts the responding party (investor or State), or the lawyers in the original proceeding, to confirm that the original authorization is still valid.
30. This was the procedure that was followed in the present case. The authorization for Clyde & Co. to represent Carnegie in the arbitration proceedings is found in a resolution of the Board of Directors of Carnegie deposited with the Request for Arbitration on 14 September 2009. That resolution referred to the firm of Barlow, Lyde and Gilbert, which later merged with Clyde & Co. The authorization for Mayer-Brown to represent The Gambia was communicated to the Secretary-General of ICSID on 28 February 2010 in the form of a power of attorney.
31. On 11 November 2015, Mayer-Brown filed an application for annulment of the award of the ICSID tribunal of 14 July 2015. No mention was made in that application of the

authority of Mayer Brown to represent The Gambia. The request for annulment was registered in accordance with Article 36(3) of the ICSID Convention on 19 November 2015.

32. The authorizations referred to above were reviewed by ICSID following the receipt of the request for annulment. Since the authorization for Carnegie was still in the name of Barlow, Lyde and Gilbert, the letter to Clyde & Co. of 18 November 2015, transmitting the Application for Annulment, added:

“We would be grateful if you could confirm, at your earliest convenience, that your firm is authorized to act on behalf of Carnegie Minerals (Gambia) Limited for purposes of the Annulment Application.”

33. By letter of 10 December 2015, Clyde & Co. responded:

“We confirm that this Firm is authorised to act on behalf of Carnegie Minerals (Gambia) Ltd for the purposes of the Annulment Application.”

34. No request for confirmation of representation was made to The Gambia or to Mayer-Brown.

35. Thus, in accordance with ICSID practice both Mayer-Brown and Clyde & Co. were recognized as authorized to represent Gambia and Carnegie respectively in this annulment proceeding. In short, as far as representation was concerned the case had followed the usual practice of ICSID in dealing with authorization of lawyers to represent parties in ICSID proceedings including the annulment process.

VII. THE CHALLENGE TO CLYDE & CO.

36. On 4 January 2016, Gambia wrote to the Secretary-General of ICSID informing her that, “Carnegie Minerals (Gambia) Ltd had been placed in liquidation by order of the High Court of The Gambia dated 6 August 2015 which also appointed Mr. Augustine Prom as the liquidator.” It then requested Clyde & Co., “to provide ICSID and The Gambia with the power of attorney confirming that it is authorized to act for Carnegie

Minerals (Gambia) Ltd in liquidation in these annulment proceedings.” This request has been reiterated on subsequent occasions.

37. The Committee notes that Gambia’s request for a power of attorney from Clyde & Co. is a request to provide authorization to act for “Carnegie Minerals (Gambia) Ltd in liquidation”. In other words it is the position of Gambia that Clyde & Co. must provide new evidence of its authority to represent Carnegie now that Carnegie is in liquidation. Gambia argues in its letter of 26 July 2016 that in light of the liquidation of Carnegie, under Gambian law the liquidator is the sole person who can represent Carnegie in these proceedings. On that basis Gambia takes the view that Clyde & Co. must obtain its authority to represent Carnegie in these proceedings from the liquidator. Carnegie, by contrast, is claiming that the liquidator has no authority in these proceedings and hence the authorization from Carnegie’s Board of Directors, provided to ICSID for the arbitration proceedings, suffices. The essence of the question before the Committee is whether the representation of Carnegie should be decided on the basis of Gambian law.
38. The Committee further notes that the question that arises in the present case is unique to the particular facts of this case. The company that brought the claim, Carnegie Minerals (Gambia) Ltd, is a national of the respondent state, The Gambia. In accordance with ICSID Article 25(2)(b) such a company is to be included within the definition of a “national of another contracting state” if it is a company which “because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.” The Tribunal in the arbitration proceedings concluded that at the time of consent to arbitration the parties had agreed that Carnegie, a company incorporated under the laws of Gambia but with Australian control, met the requirements of Article 25(2)(b) and thus could bring a claim against The Gambia.
39. In most ICSID arbitrations the claimant is a foreign company and thus the question of the effect on representation of liquidation of that company under the laws of the respondent state would not arise. Since Carnegie is incorporated under the laws of Gambia, it is susceptible to being placed in liquidation under Gambian law. Thus, the

issue raised here is to some extent unique and limited. As a result, we make no comment generally on the effects on ICSID proceedings of liquidation of a claimant corporation by the law of the state of its nationality. We only deal with the effect of liquidation by the respondent state of a claimant which is its own national but also deemed to be a national of another contracting state for the purposes of the Convention within the meaning of Article 25(2)(b). We have no evidence that this point has arisen in other cases.

40. The question for the Committee, then, is whether the appointment of a liquidator in Gambia has any effect on the authority of Clyde & Co. to represent Carnegie in these annulment proceedings, or to put it more broadly, does the domestic law of Gambia govern the question of the representation of Carnegie in these annulment proceedings.
41. The starting point in dealing with this question is the Convention itself. As pointed out above, Rule 18 of the Arbitration Rules provides that each party to the arbitration is entitled to be represented by “agents, counsel or advocates” whose authority to so act “shall be notified by that party to the Secretary-General”. Hence it is clear that it is the party before the ICSID tribunal that has the right to grant authority to a law firm to represent it before an ICSID proceeding and to notify that authority to the Secretary-General.
42. The party before the arbitration proceedings is Carnegie, and Carnegie is the same party in these annulment proceedings. The only question is whether the right to speak on behalf of Carnegie, which was recognized as resting with the Board of Directors in the case of the arbitration proceedings, has now changed as a result of the appointment of a liquidator under Gambian law. In other words, should the domestic law of Gambia apply to determine who is entitled to represent Carnegie in these annulment proceedings?
43. The domestic law of a party certainly has a role to play in investment arbitration, particularly in the determination of whether an investment has been created. See Campbell McLachlan, Laurence Shaw and Matthew Weiniger, *International Investment Arbitration* (2008) 2.60-2.66. Thus, the domestic law of Gambia would be

relevant to the question whether Carnegie had made an investment in Gambia. But, just as the question of who is a party to proceedings before an ICSID tribunal is a matter governed by the ICSID Convention, not by the domestic law of a party, so too the question of who represents a party before ICSID must be a matter for the ICSID Convention as well and not for the domestic law of a party to the proceedings. As pointed out, Article 18 of the Arbitration Rules provides for representation of the parties under the Convention, but it makes no *renvoi* to the domestic law of a party to the proceedings before an ICSID tribunal for the purpose of deciding who represents a party.

44. That the domestic law of the respondent state should not determine who is able to represent a claimant in cases where the claimant is deemed to be a national of a foreign state under Article 25(2)(b) follows as well from the logic of that provision. Under Article 25(2)(b) investors who are nationals of the Contracting State are to be included within the definition of a “national of another contracting state” where the parties have agreed to treat it “as a national of another Contracting State for the purposes of this Convention.” A respondent state cannot assert a right to determine the representation of a claimant who is a national of another contracting state. Thus, a claimant who under Article 25(2)(b) is deemed “a national of another contracting state” would not be truly standing in the shoes of a national of another contracting state if the respondent state could determine its representation in ICSID proceedings. If the domestic law of Gambia were to be applied to determine who represents Carnegie in these proceedings, Carnegie would not be treated in the same way as a national of another contracting state for the purposes of the Convention.
45. In light of the above, the Commission considers that there is no basis in the Convention for concluding that the question of representation of a claimant who is a deemed “national of another contracting state” under Article 25(2)(b) is to be decided by application of the domestic law of the respondent state. Accordingly, the Committee concludes that the issue of representation is not to be determined under Gambian law, and thus the appointment of a liquidator for Carnegie does not resolve the question of who represents Carnegie in this case.

46. In accordance with the normal practice of ICSID, the authority of Clyde & Co. to represent Carnegie provided to ICSID for the arbitration proceedings continues for the annulment proceedings. Although ICSID practice is not determinative on the interpretation or application of the Convention, the Committee sees no reason to depart from it in this case. Clyde & Co. was duly authorized to represent Carnegie in the arbitration proceedings and Clyde & Co. has confirmed that its representation continues. The only ground that has been raised to challenge that representation is the appointment of a liquidator under Gambian law. But, the Committee has rejected the application of Gambian law to determine the question of representation. Thus, the Committee sees no ground for looking beyond the affirmation of Clyde & Co. in its letter of 10 December 2015 that its representation of Carnegie continues for the purposes of these annulment proceedings.

VIII. DECISION

47. In light of the above, the Committee decides that Clyde & Co. is the representative of Carnegie in these annulment proceedings.

[Signed]

Donald McRae
President of the Committee
Date: October 7, 2016

On behalf of the Committee