

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID CASE NO ARB/23/50**

**GLENCORE INTERNATIONAL AG**

**CI PRODECO SA**

**CONSORCIO MINERO UNIDO SA**

**&**

**CARBONES DE LA JAGUA SA**

Claimants

-v-

**THE REPUBLIC OF COLOMBIA**

Respondent

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**SUMMARY OF CLAIMANTS' POSITION**

**23 MARCH 2026**

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**FRESHFIELDS**

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Washington, DC 20005 USA

**BOTERO  
SALAZAR  
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& ABOGADOS**

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1. Glencore International AG (**Glencore**), CI Prodeco SA (**Prodeco**), Consorcio Minero Unido SA (**CMU**), and Carbones de La Jagua SA (**CDJ** and jointly with Prodeco and CMU, the **Subsidiaries**) summarize their position on the merits in the above-captioned proceedings initiated pursuant to the 2006 Agreement between the Republic of Colombia (**Colombia**) and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (the **Treaty**).

## **I. FACTUAL BACKGROUND**

2. Glencore, one of the world's largest global diversified natural resource companies, has been a major investor in Colombia for three decades. Glencore originally invested in Colombia in 1995 through its acquisition of Prodeco which held coal mining assets in Colombia. Prodeco's key asset was the Calenturitas open-pit coal mine, one of the largest thermal coal mines in the country, located in the Cesar department, northern Colombia.
3. In 2005, Glencore began acquiring additional investments in the Colombian coal sector. Between 2005 and 2007, Glencore acquired CDJ, CMU and Carbones El Tesoro SA, which held separate mining contracts in the municipality of La Jagua de Ibirico, also in the Cesar department, later integrated into a unified mining operation known as the La Jagua mine (together with the Calenturitas mine, the **Mines**). The La Jagua mine is also an open-pit coal mine.
4. With the operation of the Mines, the Subsidiaries became the third-largest producers of export thermal coal in Colombia. By March 2020, when all operations were suspended, Glencore—through the Subsidiaries—had invested over US\$3 billion in the operation and expansion of the Mines; produced over 200 million tons of coal; contributed US\$2.4 billion in taxes and royalties to Colombia and generated over 7,000 jobs. They also implemented several social investment programs benefiting local communities, including fish farming projects to promote alternatives in the post-mining transition, professional development and

educational initiatives, air and water quality monitoring stations, and the planting of over 610,000 trees.

5. This dispute concerns Claimants' investments in the Mines. Specifically, it relates to Colombia's unlawful conduct in the liquidation of the mining contracts that were still operative when the Mines' operations were suspended, following their termination in September 2021. Colombia aggravated this dispute in September 2023 when its Constitutional Court created another obstacle to the effective liquidation of Claimants' investments in the mining contracts by issuing an unfair, inequitable and unreasonable judgment—Judgment T-375. That Judgment required Prodeco to undertake a retroactive “prior consultation” with, and provide reparations to the Yukpa indigenous community. Judgment T-375 was issued in disregard of fundamental aspects of the legal framework governing prior consultations, and multiple certifications issued by Colombia's competent authorities throughout the operation of the Mines confirming that no prior consultation with any indigenous or ethnic community was required.

**A. COLOMBIA'S UNLAWFUL CONDUCT IN RELATION TO THE LIQUIDATION OF THE MINES' OPERATIVE CONTRACTS**

6. After the Mines' operative contracts were terminated in September 2021, Colombia was required to complete the liquidation of all of these contracts within twelve months (*ie* by September 2022). The liquidation of a state contract consists of a final settlement of accounts and obligations. At the end of the liquidation process, the Subsidiaries would hand over the Mines' areas and those assets subject to reversion to Colombia.
7. However, until liquidation, the Subsidiaries were required to maintain the Mines' areas and reversionary assets in operative condition, unless instructed otherwise. Maintaining the Mines in operative condition is a costly and labor-intensive endeavor. “Operative condition” means that the Mines must, at a moment's notice, start operating again without any material lead time (*ie* within a matter of a few

days, as opposed to “operable condition” which would involve restarting operations within a few weeks or months). The obligation required the Subsidiaries to, among other things, maintain the Mines’ areas and assets, including hundreds of pieces of mining equipment. Given the significant costs associated with maintaining the Mines in “operative condition,” it was critical that Colombia timely liquidate the operative contracts.

8. Colombia, however, did not do this. It unlawfully drew out the liquidation process for 27 months through unfair, inequitable and unreasonable conduct, resulting in Claimants incurring excess care and maintenance costs amounting to approximately US\$60 million to date.
9. From the outset of the liquidation process, it was clear that the government had not decided what it wanted to do with the Mines after liquidation. There were two options. It could either grant new mining contracts to a new operator to resume the exploitation of the Mines, or it could decide not to resume operations and require the Subsidiaries to carry out an environmental closure of the Mines. In the latter scenario, it would make no sense to maintain the Mines in operative condition.
10. Shortly after the termination of the operative mining contracts, it was apparent that the government did not want to take on responsibility for the Mines while it waited to see how it wanted to proceed. And so, the government delayed the completion of the liquidation process, and thus the handover of the Mines’ areas and assets to the state, forcing Claimants to incur the costs of maintaining them in operative condition while it decided whether to retender the Mines to a new operator.
11. After President Petro took office in August 2022—just weeks before the expiry of the twelve-month outer time limit to liquidate all of the operative contracts—senior government officials consistently articulated a policy against the resumption of the Mines’ operations. Following his election, President Petro halted the bidding process to retender the rights to the Mines, and asserted over the following months that his aim was “to close coal projects.” Against this backdrop, the president of the

mining agency asserted that “no new mining contracts” would be granted for open-pit coal mines. And the environmental authority enacted a two-year ban on the granting of mining contracts in the area of the Mines. As noted above, the Mines could not be operated again unless new mining contracts were awarded to a new operator.

12. Yet, in spite of this policy against retendering the Mines, the government continued to insist that the Subsidiaries incur the significant costs of maintaining the Mines in operative condition until late 2023, more than one year after the outer time limit to liquidate all of the operative contracts, only for the environmental authority to then instruct the Subsidiaries to prepare a definitive environmental closure plan.

**B. COLOMBIA ISSUED JUDGMENT T-375 IN BREACH OF THE TREATY**

13. Colombia aggravated this dispute in September 2023 when its Constitutional Court issued Judgment T-375, requiring Prodeco to provide reparations to the Yukpa indigenous community for the alleged impacts of the Mines, creating a further obstacle to the effective liquidation of Claimants’ investments in their mining contracts. Colombia expressly noted in the liquidation act for Prodeco’s mining contract that Prodeco remained subject to compliance with Judgment T-375.
14. In July 2022, more than two years after the Mines’ operations were finally suspended, and shortly after newly-elected President Petro halted the process to retender the Mines to a new operator—clearly signaling his new government’s opposition to the resumption of the Mines’ operations—the leaders of the Yukpa indigenous community brought a *tutela* action against Prodeco, Drummond Ltd (an unrelated mining company with three neighboring coal mines) and various government entities. The Yukpa community claimed that the coal mining projects had been developed on what it claimed to be its ancestral territory without consultation, thereby violating its right to prior consultation. The Yukpa community’s claims to ancestral territory encompass a vast area (approximately

129 times the size of Manhattan) that has yet to be legally recognized by the government.

15. Under the framework applicable to the Mines' operations, where a project *directly affects* indigenous communities, the government, together with the project proponent, must consult these communities in order for an environmental authorization to be issued. The purpose of prior consultation is to seek to agree on measures to be implemented to prevent, mitigate, and compensate for the project's impacts on those communities.
16. Colombia developed a legal framework establishing a clear methodology for identifying communities that may be directly affected by, and must be consulted in relation to, a given project. It provided that only communities *directly affected* by a project must be consulted. This was determined by establishing the geographical area in which the project has impacts (the area of influence) and then assessing which, if any, indigenous communities are present in that area.
17. In accordance with that framework, during the operation of the Mines, Claimants obtained multiple certifications from the competent authorities, all of which consistently confirmed that no indigenous or ethnic communities were directly affected by the Mines.
18. In Judgment T-375, the Court disregarded those certifications which were issued in accordance with the legal requirements in force at the time. Instead, it conducted its own analysis, retroactively applying a novel test to determine whether the Yukpa community had been directly affected by the Mines such that it should have been consulted. In doing so, the Court disregarded the fundamental aspect of the legal framework, namely that evidence of a project's direct, concrete (not hypothetical) impact on an indigenous community is a prerequisite for a prior consultation. The Court also disregarded prior rulings, finding that prior consultations with the Yukpa community could not be ordered until the State had delimited their ancestral territory.

19. The Court held that it could dispense with basic rules of causation and liability, as the claim concerned a request for prior consultation rather than a determination of liability for the purpose of ordering reparations. This was contrary to the established legal standard—set out in the legal framework and endorsed by the Court itself in Judgment T-375—that required establishing a causal link between the project and the impact on the community before ordering a prior consultation. More egregiously, it contradicted the Court’s ultimate holding that, since a prior consultation was no longer possible given that the Mines’ operations had concluded, the proper remedy was the granting of reparations for *damages caused* to the community. In ordering such reparations, the Court assumed causation had been established when, in fact, the Court had not established that the Mines had had any concrete impact on the Yukpa community.
20. Judgment T-375 ultimately ordered Prodeco to provide reparations for damages it never established that the company had caused—and that it could not possibly have caused in relation to the La Jagua mine, given that it held no rights to that mine—and for breaches of third parties (namely the government’s failure to delimit the Yukpa community’s ancestral territory).

## **II. LEGAL ARGUMENTS**

21. Colombia’s obligations under the Treaty include treating Swiss investors, such as Claimants, in a fair and equitable manner, and not impairing their investments by unreasonable or discriminatory measures. Colombia has breached these obligations.

### **A. FAIR AND EQUITABLE TREATMENT**

22. The fair and equitable standard includes the following core components: (a) prohibition against arbitrary and unreasonable, inconsistent and disproportionate measures; (b) protection of the investor’s legitimate expectations; (c) provision of a predictable, consistent and stable legal framework; and

- (d) conduct consistent with due process. These requirements must be respected by all branches of the state, including the judiciary. Colombia's conduct is inconsistent with these requirements.
23. Arbitrariness: under the Treaty, Colombia must refrain from acting in an arbitrary, unreasonable, inconsistent and disproportionate manner. This includes refraining from adopting measures that, amongst other things: (a) are not based on legal standards, or are adopted in disregard of the applicable legal framework, proper procedure and/or due process; (b) that are irrational in themselves or result from an irrational decision-making process; (c) are inconsistent and/or contradictory with prior state conduct; or (d) impose a burden on the investor that is disproportionate to the public benefit of the measures in question.
- (a) *Colombia's conduct in the liquidation of the operative mining contracts, described in paragraphs 6-12 above, was arbitrary, unreasonable, inconsistent and disproportionate.* Colombia held Claimants hostage, forcing them to undertake costly (and futile) activities to maintain the Mines in operative condition beyond the applicable liquidation period for no apparent purpose, notwithstanding that it was clear that the Mines would not operate again. The government disregarded its obligation and applicable legal standards; it inflicted damage on Claimants, without serving any apparent legitimate purpose; and it subjected Claimants to a 'roller-coaster' of contradictory and inconsistent statements, falling far below the standards of treatment it committed to accord investors under the Treaty.
- (b) *Colombia's conduct through Judgment T-375, described in paragraphs 13-20 above, was also arbitrary, unreasonable, inconsistent and disproportionate, and in breach of due process.* Judgment T-375 is not based on legal standards and was the result of an irrational decision-making process. Judgment T-375 was inconsistent with the legal framework and the certifications that had been issued pursuant to that framework, and inconsistent with prior rulings finding that prior consultations with the Yukpa community could not be ordered until the State had delimited their

ancestral territory. Moreover, Judgment T-375 disregarded proper procedure and basic due process principles.

24. Legitimate expectations: under the Treaty, Colombia must refrain from frustrating Claimants' legitimate expectations.

(a) *Colombia's measures frustrated Claimants' legitimate expectations in relation to the liquidation of the operative mining contracts.* Claimants had the legitimate expectation that Colombia would timely liquidate the operative contracts at the latest within twelve months of their termination (*ie* by September 2022). Claimants also had the legitimate expectation that they would not be required to maintain the mining areas and reversionary assets in operative condition beyond that term. However, Colombia frustrated those expectations by failing to timely liquidate the contracts by September 2022 and by requiring the Subsidiaries to maintain the Mines in operative condition after the deadline had passed, notwithstanding that, throughout that period, it was clear that the Mines would not operate again. Colombia only liquidated the operative mining contracts, relieving the Subsidiaries of the obligation to maintain the mining areas in operative condition, twelve to fifteen months after the term expired.

(b) *Colombia's measures frustrated Glencore and Prodeco's legitimate expectations in relation to prior consultation.* Glencore and Prodeco had a legitimate expectation that Colombia would act in a manner consistent with its own laws. They likewise had a legitimate expectation, as investors operating under the longstanding legal framework governing prior consultation, that Colombia would not suddenly, fundamentally and retroactively alter the framework under which the Mines had operated for many years and under which the government had confirmed that there was no obligation to consult with the Yukpa community. However, through Judgment T-375, Colombia frustrated Claimants' legitimate expectations by:

(i) establishing a novel legal test for prior consultation that disregarded the legal framework and the certifications issued by Colombia's competent

authorities confirming that no prior consultation was required, and applying that novel test retroactively, some three-and-a-half years after the Mines had stopped operating, to find that Prodeco had breached its prior consultation obligation;

- (ii) disregarding fundamental legal requirements set out in the legal framework that the Court itself had endorsed in Judgment T-375, in particular that a prior consultation is only required where a project has a direct, concrete (as opposed to hypothetical) impact on an ethnic community; and
  - (iii) disregarding fundamental legal principles with respect to liability and compensation by ordering Prodeco to provide compensation for damages it never established that the company had caused and for the breaches of third parties.
25. Consistent, stable and predictable treatment: the state must act coherently, without ambiguity, transparently, and maintaining an environment that allows a reasonably diligent investor to adopt a commercial strategy that it can implement over time. Investors are thus protected from inconsistency of action between arms of the same government and from incoherent application of state policies. Colombia has breached this obligation through the same above-described conduct that breached the standards of arbitrariness, inconsistency, unreasonableness, and the protection of legitimate expectations.
26. Denial of justice: foreign investors are protected from proceedings that are fundamentally unfair and unjust, and that produce irrational outcomes beyond the mere misapplication of the law, based on unexpected grounds, including by the retroactive application of the law. Colombia has violated that standard through Judgment T-375 amongst other things by retroactively applying a novel legal test and repudiating fundamental aspects of the applicable legal framework (which had been endorsed by the Court) and basic legal principles of liability. In reaching its conclusions, the Court relied on the Yukpa community's unilateral

characterizations of fact and untested assertions, ignoring the respondents' arguments, reversing the burden of proof against the respondents, and requiring them to satisfy an impossible burden of proof. This was fundamentally unfair and in violation of basic due process requirements.

**B. UNREASONABLE MEASURES**

27. Colombia must also refrain from impairing by unreasonable measures Claimants' management, maintenance, use, enjoyment or liquidation of their investments. Colombia has breached this obligation as a result of its above-described measures.

**III. COMPENSATION CLAIM**

28. Under international law, Claimants are entitled to full reparation for the losses arising from Colombia's breaches of the Treaty. To be fully repaired Claimants are entitled to:
- (a) Compensation for the losses that Claimants have incurred, and will continue to incur, due to Colombia's unlawful conduct in relation to the liquidation of the mining contracts that were terminated in September 2021. Because of Colombia's unlawful conduct, Claimants were forced to maintain the Mines in operative condition beyond the mandatory liquidation period, as a result of which they incurred and will continue to incur excess care and maintenance costs. Claimants engaged independent experts to assess their losses. They have assessed Claimants' losses as of 3 July 2025 at US\$59.4 million.
  - (b) Indemnification for future losses flowing from the Constitutional Court's Judgment T-375. While the Judgment orders Prodeco to provide reparations to the Yukpa community, the Constitutional Court did not specify what those reparations would consist of. These reparations will now be determined by a Colombian court. An indemnity order ensures that the state does not evade its obligation to provide full reparation for its breaches of the Treaty.

#### **IV. REQUEST FOR RELIEF**

29. Claimants have requested that the Tribunal:
- (a) declare that it has jurisdiction to hear Claimants' claims;
  - (b) declare that Colombia has breached Articles 4(1) and 4(2) of the Treaty;
  - (c) order Colombia to pay Claimants US\$59.4 million for its breaches of the Treaty or such other sum as the Tribunal sees fit;
  - (d) indemnify and hold Prodeco and Glencore harmless in respect of any financial consequences that may be incurred as a result of the enforcement of Judgment T-375;
  - (e) award to Claimants post-award interest on all amounts awarded at a normal commercial rate, to be calculated on a compound basis with annual compounding, until the date of payment in full;
  - (f) declare that: (i) the award of any damages and interest is made net of applicable Colombian taxes; and (ii) Colombia may not impose or withhold taxes in respect of the payment of the award of any damages and interest, or in the alternative, order Colombia to indemnify Claimants with respect to any Colombian taxes imposed on such amounts;
  - (g) order Colombia to pay all of the costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of the Tribunal and ICSID's other costs; and
  - (h) award such other relief as the Tribunal considers appropriate.
30. Claimants have reserved their right to supplement or amend their request for relief as appropriate.