

INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES (ICSID)

**GLENCORE INTERNATIONAL A.G.,
C.I. PRODECO S.A.,
CONSORCIO MINERO UNIDO S.A., AND
CARBONES DE LA JAGUA S.A.**

Claimants,

v.

THE REPUBLIC OF COLOMBIA,
Respondent.

ICSID CASE NO. ARB/23/50

**REPUBLIC OF COLOMBIA'S SUMMARY OF ITS POSITION ON
THE MERITS**

23 March 2026

Arnold & Porter

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I. INTRODUCTION

1. Pursuant to Annex E to Procedural Order No. 1, the Republic of Colombia hereby provides a without prejudice summary of its position on the merits as set out in its Counter-Memorial on the Merits, dated 9 March 2026.
2. Claimants present two sets of distinct claims, both of which lack merit and should be dismissed. In essence, Claimants are availing themselves of the Colombia-Switzerland bilateral investment treaty ("**Treaty**") to litigate domestic disputes. The measures challenged by Claimants in this arbitration do not constitute a breach of the Treaty and thus do not give rise to State responsibility.

II. FACTUAL BACKGROUND

3. Claimants' *first* set of claims concerns the liquidation of three open-pit coal mining contracts held by Claimants C.I. Prodeco S.A. ("**Prodeco**"), Consorcio Minero Unido SA ("**CMU**"), and Carbones de la Jagua SA ("**CDJ**") (collectively, "**Subsidiaries**"), all Colombian subsidiaries of Claimant Glencore International A.G. ("**Glencore**"). These contracts – the Prodeco Contract, CDJ 285 Contract, and CMU Contract (collectively, "**Operative Contracts**") – governed the Calenturitas coal mine and substantial parts of La Jagua mine ("**Mines**"), which are located in northeastern Colombia, in the Department of El César.
4. In early 2021, after years of profitable operations and more than a decade before the scheduled expiration of the Operative Contracts, Claimants unilaterally elected to relinquish such contracts. Claimants decided to terminate the Operative Contracts, despite substantial mineable reserves remaining in the Mines, because they determined that market conditions would no longer sustain the returns they sought. This abrupt early exit imposed on Colombia's National Mining Agency ("**ANM**") the unprecedented task of unwinding two of the largest mining projects in the country's history, years before the planned reversion of the Mines and their assets to the State.

5. Under the Operative Contracts, the ANM and the Subsidiaries were required to engage in a bilateral liquidation process to formally conclude their contractual relationship. Liquidation was not a mere administrative formality. It required the ANM to verify the Subsidiaries' compliance with all technical, legal, and economic obligations; to determine the Mines' conditions; to identify and evaluate the over one million assets potentially reverting to the State; and to manage the wind-down of vast, interconnected operations. Only after these steps were completed could the contractual relationship be fully concluded.
6. The ANM promptly mobilized to organize and implement the liquidation process in accordance with the Operative Contracts and Colombian law, including by coordinating with the National Authority for Environmental Licenses ("ANLA") for environmental-status determinations while advancing the remaining multiple liquidation workstreams in parallel.
7. Until those workstreams were completed, the Subsidiaries were legally obligated to maintain the Mines and their assets in operative condition. This obligation was designed, *inter alia*, to ensure the preservation of the State's mineral assets pending their reversion to the State.
8. The Operative Contracts were fully liquidated between September and December 2023.
9. Claimants assert that liquidation took longer than they now consider appropriate. However, the duration of the process reflected the unprecedented scale and complexity of unwinding large integrated mining operations, more than ten years ahead of schedule, a complexity that was compounded by the Subsidiaries' repeated failures to timely submit necessary information.
10. The Claimants' *second* set of claims in this arbitration are of a fundamentally different nature. They do not challenge the performance of mining contracts; instead, they challenge a judicial decision of Colombia's Constitutional Court—Judgment T-375 of 25 September 2023 ("**Judgment T-375**"). That judgment was issued in a *tutela* proceeding brought by members of the Yukpa indigenous people, against the Subsidiaries, another mining company, and

various State entities. In that proceeding, the Yukpa had sought protection of their constitutional right to prior consultation in relation to mining activities in El César, including those associated with the Mines.

11. The Yukpa are a semi-nomadic people whose vast ancestral territory has been steadily reduced and degraded over decades of conflict, colonization, displacement, and extractive development. In this context, the exploitation of the Mines by the Subsidiaries has contributed to the Yukpa's territorial dispossession, restricted their access to sacred sites, contaminated rivers essential to their subsistence, and exacerbated the alarming rates of child malnutrition and mortality in the region. The Constitutional Court has long recognized that these conditions place the Yukpa at a real risk of physical and cultural extinction. Such was the factual background of the *tutela* action that culminated in Judgment T-375.
12. It is precisely in circumstances such as these that Colombia's constitutional and statutory framework affords indigenous peoples extensive guarantees. Under Colombia's 1991 Constitution and the Indigenous Rights Law incorporating ILO Convention 169, indigenous communities enjoy the right to prior consultation where measures may directly affect their territories, cultural integrity, or ways of life. Thus, for more than three decades, Colombia's Constitutional Court has consistently held that prior consultation must be conducted when a project is capable of directly affecting an indigenous community. The Court also has identified the Yukpa as a people deserving special constitutional protection. In that context, the Court has repeatedly affirmed that formal administrative certifications – such as those invoked by Claimants in this case – cannot be treated as conclusive, if “on-the-ground reality” shows that a community is directly affected and has not been properly consulted. Claimants would have been well aware of this legal framework when they invested in Colombia and operated the Mines.
13. Applying these principles to the factual record before it, and after reviewing extensive evidence and hearing the parties' submissions, the Constitutional Court concluded in Judgment T-375 that the Yukpa's right to prior consultation

had been violated. Specifically, the Court concluded that mining operations in El César—including the Mines—had (i) caused direct territorial, cultural, and environmental impacts on the Yukpa; and (ii) triggered the obligation to conduct prior consultation, yet no consultation had occurred. On that basis, the Court ordered a consultation process between the Yukpa, Prodeco and other actors to determine appropriate remedial measures. The consultation process concluded without agreement. Accordingly, the first-instance court will now determine appropriate reparations.

III. CLAIMANTS' CLAIMS FAIL ON THE MERITS

A. The Operative Contracts claims fail on the merits

14. Claimants allege that the manner in which Colombia liquidated the Operative Contracts breached the Treaty's fair and equitable treatment ("FET") obligation because it (i) was arbitrary, unreasonable, inconsistent, and disproportionate; (ii) frustrated Claimants' legitimate expectations; and (iii) created an unstable and unpredictable legal environment. They also allege that the same conduct breached the Treaty's non-impairment obligation. These claims lack merit and must be dismissed.
15. As a threshold matter, they must be dismissed because they are fundamentally contractual claims that do not give rise to international liability. In conducting the liquidation process, the ANM acted as a contractual party (*jure gestionis*), not in the exercise of its sovereign powers (*jure imperii*). The conduct challenged by Claimants is the same type of action that ordinary commercial parties routinely take when ending contractual relationships.
16. In any event, the ANM's conduct in liquidating the Operative Contracts was reasonable, justified, consistent, and proportionate, for at least four reasons.
17. *First*, Claimants' assertion that the Operative Contracts had to be liquidated within a maximum of twelve months ignores that the parties agreed to conduct liquidation through an activity-based approach, keyed to the completion of parallel workstreams and deliverables, rather than a deadline-driven process.

18. Even if a fixed period had applied, Colombian law provides an additional two-year post-term period to complete liquidation lawfully. The ANM completed liquidation well within that period.
19. In any event, the duration of the process was reasonable. The ANM acted promptly and implemented a structured liquidation plan, executing multiple workstreams in parallel: verification of the Subsidiaries' compliance with their technical, operational, economic, social, and labor-related obligations; collaborating with ANLA on environmental matters; and inventorying and inspecting more than one million assets to determine which ones would revert to the State. The time required to complete the liquidation process reflected the scale of the Mines' operations and the complexity of an early, unplanned liquidation of vast mining interests.
20. The Subsidiaries' conduct also contributed materially to the process's duration. They repeatedly submitted incomplete or inconsistent information, necessitating multiple clarification requests and the ANM's additional verification. CDJ and CMU also allowed Block 6 of La Jagua Mine to flood, altering site conditions and necessitating further assessments.
21. *Second*, Claimants portray the liquidation process as marked by indecision, confusion, or inter-agency contradiction. In reality, the ANM and ANLA operated within their distinct mandates: the ANM advanced the liquidation workstreams, and ANLA verified whether the Subsidiaries had complied with their environmental obligations. Any additional environmental obligations that the Subsidiaries owed to ANLA arose under separate regulatory instruments and were independent of the Subsidiaries' contractual obligations to the ANM. Moreover, Claimants have not shown that those independent obligations affected the liquidation timeline.
22. *Third*, the ANM's enforcement of the requirement that the Mines be kept in operative condition during the liquidation process likewise presents no basis for complaint. Indeed, the Operative Contracts and applicable mining code required the Subsidiaries to maintain the Mines and related assets in operative

condition until liquidation concluded. The ANM merely enforced that legal obligation. While Claimants contend that the incoming administration's policy stance against open-pit coal mining rendered that requirement irrational or arbitrary, those high-level political developments did not alter Claimants' pre-existing legal obligations or excuse the Subsidiaries' non-compliance.

23. Nor did Colombia create or frustrate any legitimate expectations concerning the liquidation period. Claimants identify no specific, definitive, or individualized assurance that liquidation would conclude within a fixed period or that the Subsidiaries would be released from the operative-condition obligation before liquidation concluded. Contractual terms and generally applicable regulations do not, without more, constitute specific assurances capable of generating Treaty-protected expectations. Claimants also offer no contemporaneous evidence that their investment decisions were based on any alleged assurance.
24. Even assuming such an assurance existed, any reliance would have been objectively unreasonable in light of the scale, complexity and timing of the liquidation process and the applicable contractual and statutory framework. Claimants fail to show that the ANM's execution of the liquidation process or its enforcement of the operative-condition obligation frustrated any purported expectation, much less that it constituted exceptional, fundamentally unfair conduct under FET.
25. *Fourth*, Claimants' non-impairment claim merely repackages their baseless and unmeritorious FET arguments, and identifies no specific impairment to the liquidation of the Operative Contracts. Claimants' non-impairment claim thus fails for the same reasons as their FET claims and must be dismissed.

B. The Judgment T-375 claims also fail on the merits

26. Claimants' claims regarding Judgment T-375 are likewise unmeritorious. While numerous reasons compel this conclusion, four stand out.
27. *First*, pursuant to both Treaty Article 12(6) and the customary international law principle of systemic integration, Colombia's other international law

obligations must be taken into account when interpreting and applying the Treaty to Claimants' Judgment T-375 claims. These include obligations under various human rights treaties – such as the ILO Convention 169, the ICCPR and the ICESCR – which require Colombia to protect indigenous communities' right to prior consultation, territory, health, food security, and cultural integrity. Judgment T-375 directly served these obligations, protecting the Yukpa's fundamental rights in accordance with these treaties.

28. Importantly, the international law rules and principles applicable to this arbitration also include the police powers doctrine, which is firmly grounded in customary international law. Judgment T-375 was aimed at protecting the fundamental rights of the Yukpa. It was based on an extensive evidentiary record, applied well-established legal standards, and was non-discriminatory. Such a bona fide, non-discriminatory measure, aimed at safeguarding fundamental human rights in accordance with Colombia's domestic and international obligations, constitutes a legitimate exercise of State police powers that does not give rise to State responsibility under international law or liability under the Treaty.
29. *Second*, Claimants' claims regarding Judgment T-375 in any event do not meet the stringent legal threshold applicable under the Treaty and public international law for challenging domestic judicial measures. Judgment T-375 was a reasoned and well-founded judicial decision. It was adopted within the legal framework that Colombia has developed in the exercise of its prerogative and obligation – under international and domestic constitutional law – to protect fundamental rights of highly vulnerable communities. Claimants disagree with the Constitutional Court's findings. But it is well-established that investment tribunals are not appellate courts sitting in review of domestic constitutional adjudication. Absent a denial of justice or equally egregious conduct – such as fundamental unfairness, bias, or dishonesty – judicial decisions do not engage international responsibility.
30. Here, Claimants allege a denial of justice but do not even assert that the Constitutional Court impeded their access to justice, engaged in procedural

impropriety, or displayed either bias or dishonesty. Rather, Claimants challenge only the Constitutional Court's evidentiary assessments and application of constitutional law. Such types of disagreements with a domestic court's conclusions are not grounds for a Treaty claim.

31. *Third*, Claimants' attempt to repackage their denial of justice claim under the FET standard's strands of arbitrariness, unreasonableness, and legitimate expectations also fails. Their assertion that the Constitutional Court acted arbitrarily and unreasonably because it applied a supposedly "novel" prior consultation test and allegedly lacked evidence of impacts on the Yukpa is baseless. Judgment T-375 was firmly grounded in Colombia's constitutional architecture and decades of jurisprudence on the right to prior consultation. And the Court's findings of direct impact were supported by extensive documentary evidence regarding the Mines' effects on the Yukpa.
32. Claimants' allegations relating to legitimate expectations and legal instability are likewise unmeritorious. Colombia did not alter the applicable legal framework. Since 1991, the *tutela* mechanism and the Constitutional Court's supervisory authority have been key elements of the Colombian legal order. Judgment T-375 reflects continuity, not innovation, including in its treatment of the administrative certifications on which Claimants rely. The Claimants' characterisation of Judgment T-375 as "novel" or "illogical" is simply rhetoric that falls far short of the stringent standards under international law. In any event, a "novel" legal test adopted by a domestic court – which was not the case here – does not meet the high threshold necessary to establish a breach of the FET standard.
33. *Finally*, Claimants' argument that Judgment T-375 impaired their investments because it created a further obstacle to the effective liquidation of the Mining Contracts is equally untenable. The liquidation of the Operative Contracts and the issuance of Judgment T-375 are entirely unrelated measures and have no bearing on each other.

34. In any event, given that Claimants' non-impairment claim merely restates their deficient FET arguments on arbitrariness and reasonableness, the claim fails for the same reasons and must be dismissed.

IV. CLAIMANTS ARE NOT ENTITLED TO THE DAMAGES THEY SEEK

35. Claimants seek (i) nearly USD 60 million in damages arising from their Operative Contracts claims; and (ii) an order requiring Colombia to "indemnify" Claimants for "**any** liabilities they incur in connection with or as a result of Judgment T-375" (emphasis added). Claimants' damages claims should be rejected.

A. Claimants have failed to substantiate their damages claim in relation to the liquidation of the Operative Contracts

36. Claimants' damages claim related to the Operative Contracts comprises primarily allegedly "wasted" costs that Claimants incurred during the alleged delay in the liquidation process to maintain the Mines in operative condition. However, Claimants have failed to establish that the amount of costs claimed were, in fact, "wasted," and thus attributable to Colombia's alleged breaches.
37. Specifically, Claimants use an overly and inadequately simplistic methodology to quantify the costs incurred to maintain the Mines in operative condition. They indiscriminately include nearly all costs categorized as "care and maintenance" costs, which almost certainly has resulted in the inclusion of costs that were not in fact "wasted." For example, Claimants' damages request likely includes (i) expenses Claimants would have incurred regardless of the alleged delay, such as for closure and environmental rehabilitation activities that Claimants were independently required to complete; and (ii) one-off costs, such as construction works or non-routine maintenance of mining equipment, that would have provided Claimants with a benefit. Such costs cannot be attributed to any alleged breaching conduct of Colombia, and an award of damages to compensate for them would give Claimants an unjustifiable windfall.

38. Claimants' damages claim is further inflated by (i) their improper accounting for inflation and other timing effects related to the delay, and (ii) their request for an unjustifiably high rate of pre- and post-award interest.
39. Claimants also fail to account for the risk of double recovery caused by their abusive pursuit of their claims in both this arbitration and parallel domestic proceedings, while also seeking a "tax gross-up" that would interfere with the strictly sovereign matter of taxation. Claimants have failed to justify their damages requests, and the Tribunal should decline to award damages on such a speculative and overinclusive basis.

B. Claimants have suffered no compensable damages from Judgment T-375

40. Claimants do not identify any actual, present, quantifiable harm caused to them by Judgment T-375—because there is none. Instead, they ask this Tribunal to order Colombia to reimburse Claimants for *any* financial consequences that might arise from, or be related to, *future* court orders, regardless of the nature, scope, or reasonableness of any such orders.
41. The requested order is incompatible with international law principles of reparation and, in any event, is unworkable and would create perverse incentives. Claimants rest their request entirely on a small handful of investment cases that have granted indemnification requests. Even if the reasoning in those cases were accepted (which it should not be), they still do not justify the sweeping order sought by Claimants here, which encompasses potential harms that are far more uncertain than those in the orders Claimants cite. The Tribunal should reject Claimants' extraordinary indemnification request.

V. REQUEST FOR RELIEF

42. For the reasons set forth in its Counter-Memorial, the Republic of Colombia respectfully requests that the Tribunal:

- a. dismiss all of Claimants' claims for lack of jurisdiction, lack of competence, and/or on the basis that the claims are inadmissible;¹ or
- b. in the event that the Tribunal were to exercise jurisdiction over any of Claimants' claims, declare that Colombia did not breach any of its obligations under the Treaty; or
- c. in the event that the Tribunal were to exercise jurisdiction over any of Claimants' claims, and then also to find Colombia liable for one or more Treaty violations, declare that Claimants are not entitled to any compensation; and
- d. order Claimants to pay, on a joint and several basis, all costs of the arbitration, including the totality of Colombia's outside counsel legal fees and expenses, expert fees and expenses, arbitrator and institutional fees and expenses, and any other expenses incurred in connection with Colombia's defense in this arbitration, plus interest on such amounts from the date of the Award until the date of payment, calculated at the one-year risk-free US Treasury Bill rate; and
- e. award Colombia any additional relief that the Tribunal may consider just and appropriate.

¹ Colombia raised various jurisdictional objections in the Counter-Memorial. However, in accordance with Annex E to Procedural Order No. 1, such objections are not the subject of the present summary.

Respectfully submitted,

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