

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Glencore International A.G. and C.I. Prodeco S.A.
Respondents on Annulment

v.

Republic of Colombia
Applicant

(ICSID Case No. ARB/16/6) – Annulment Proceeding

PROCEDURAL ORDER NO. 1

Members of the ad hoc Committee

Sir Christopher Greenwood, President of the *ad hoc* Committee
Ms. Bertha Cooper-Rousseau, Member of the *ad hoc* Committee
Prof. Doug Jones, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Alicia Martín Blanco

28 April 2020

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Introduction

The first session of the *ad hoc* Committee (“Committee”) was held on 20 April 2020. The preliminary procedural consultation of the President with the Parties (“Consultation”) was held on 27 April 2020 by videoconference. The Consultation was adjourned at 10.40 am EDT.

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

Participating in the videoconference were:

Members of the *ad hoc* Committee:

- Sir Christopher Greenwood, President of the Committee

ICSID Secretariat:

- Ms. Alicia Martín Blanco, Secretary of the Committee

On behalf of the Republic of Colombia:

- Ms. Elizabeth Prado López, *Agencia Nacional de Defensa Jurídica del Estado*
- Mr. Andrés Esteban Tovar, *Agencia Nacional de Defensa Jurídica del Estado*
- Ms. Mariana Reyes, *Agencia Nacional de Defensa Jurídica del Estado*
- Mr. Juan A. Sierra, *Agencia Nacional de Defensa Jurídica del Estado*
- Mr. Camilo A. Torres, *Agencia Nacional de Defensa Jurídica del Estado*
- Prof. Eduardo Silva Romero, Dechert LLP

On behalf of Glencore International A.G. and C.I. Prodeco S.A.:

- Mr. Nigel Blackaby QC, Freshfields Bruckhaus Deringer US LLP
- Mr. Elliot Friedman, Freshfields Bruckhaus Deringer US LLP
- Ms. Caroline Richard, Freshfields Bruckhaus Deringer US LLP
- Mr. José Manuel Álvarez Zárate, Álvarez Zárate & Asociados
- Mr. Oscar Gómez, C.I. Prodeco S.A.
- Ms. Natalia Anaya, C.I. Prodeco S.A.

The following documents were circulated in preparation for the Consultation:

- A draft procedural order was circulated by the Secretary of the Committee on 20 April 2020; and
- The Parties submitted their comments on the draft procedural order on 24 April 2020, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

Following the Consultation, the Committee now issues the present order:

Order

Pursuant to ICSID Arbitration Rules 19, 20 and 53, this first procedural order sets out the procedural rules that the Parties have agreed, and the Committee has determined, shall govern this annulment proceeding. The timetable is attached as **Annex A**.

1. Applicable Arbitration Rules

Convention Article 44 and Arbitration Rule 53

1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006. In accordance with Arbitration Rule 53, the Arbitration Rules apply, *mutatis mutandis*, to annulment proceedings.

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

Convention Article 52(3); Arbitration Rules 6 and 52

2.1. The Committee was constituted on 6 March 2020, in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Parties confirmed that the Committee was properly constituted and that no Party has any objection to the appointment of any of its Members.

2.2. The Members of the Committee timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were circulated to the Parties by the ICSID Secretariat on 6 March 2020.

2.3. The Members of the Committee confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of the Committee Members

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

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

3.2. Under the current Schedule of Fees, each Member of the Committee receives:

3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and

3.2.2. Subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.

- 3.3. Each Member of the Committee shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred by the Members of the Committee in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
 - 4.1. The presence of all Members of the Committee constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Rulings of the Committee
Convention Article 48(1); Arbitration Rules 16, 19 and 20
 - 5.1. Decisions of the Committee shall be taken by a majority of its Members.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence among its members except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Committee.
 - 5.3. The Committee will issue all rulings, including its final decision, within a reasonable time period. If a ruling has not been issued within three months, excluding the decision on annulment, after the final submission on a particular matter, the Committee will provide the Parties with status updates every month. The Committee shall endeavor to issue the decision on annulment no later than six months after the hearing. If the decision on annulment has not been issued within that timeframe, the Committee will provide the Parties with status updates every month.
 - 5.4. The President is authorized to issue Procedural Orders on behalf of the Committee.
 - 5.5. Procedural rulings shall be made after the Parties have been afforded an adequate opportunity to present their views in relation thereto.
 - 5.6. The Committee's rulings on procedural matters may be communicated to the Parties by the Secretary of the Committee in the form of a letter or email.
6. Power to Fix Time Limits
Arbitration Rule 26(1)
 - 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.

- 6.2. In exercising this power, the President shall consult with the other Members of the Committee. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Committee.
- 6.3. The Parties may also decide between themselves to grant short extensions of time, on the basis of mutual courtesy, as long as they do not materially affect the timetable and the Committee is informed of such extensions.

7. Secretary of the Committee

Administrative and Financial Regulation 25

- 7.1. The Secretary of the Committee is Ms. Alicia Martín Blanco, Legal Counsel, ICSID, or such other person as ICSID may notify the Committee and the Parties from time to time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Alicia Martín Blanco
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1818 H Street, N.W.
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USA
Tel.: + 1 (202) 473-9105
Fax: + 1 (202) 522-2615
Email: amartinblanco@worldbank.org
Paralegal email: mvazquezmarrero@worldbank.org

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

Ms. Alicia Martín Blanco
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1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
Tel.: + 1 (202) 473-9105

8. Representation of the Parties

Arbitration Rule 18

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

For Glencore International A.G. and C.I.
Prodeco S.A.

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9. Apportionment of Costs and Advance Payments to ICSID

Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. In accordance with Administrative and Financial Regulation 14(3)(e), the Applicant – in this case, the Republic of Colombia, shall be solely responsible for making the advance payments requested by the ICSID Secretariat to cover the costs in the annulment proceeding following the Committee’s constitution.
- 9.2. The above provision is without prejudice to the power of the Committee to determine, pursuant to Article 61 of the Convention and Arbitration Rule 28, how and by whom the expenses incurred in connection with the annulment proceedings shall finally be borne.
- 9.3. By letter of 16 March 2020, the Centre requested the Applicant to make an advance payment of US\$200,000, to cover the initial costs of the proceeding.
- 9.4. ICSID shall request the Applicant to make further advances as needed. Such requests shall be accompanied by a detailed interim statement of account. The final financial statement will include a breakdown of each member of the Committee’s fees and expenses.

10. Place of Proceeding

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

- 10.1. Washington D.C. shall be the place of the proceeding.
- 10.2. The Committee may hold hearings at any place that it considers appropriate, including by telephone and video conference, if the Parties so agree or circumstances (such as government restrictions on social distancing or travel) render that necessary.
- 10.3. The Committee may deliberate at any place it considers convenient.

11. Procedural Languages, Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Arbitration Rule 20(1)(b) and 22

- 11.1. English and Spanish are the procedural languages of the arbitration.

For the ICSID Secretariat

- 11.2. Routine, administrative, or procedural correspondence sent by or addressed to the ICSID Secretariat shall be in English.

For the Parties' requests, applications and pleadings

- 11.3. Written requests, applications and pleadings shall be submitted in English. Any references to portions of the Award that exist only in Spanish shall be accompanied by a courtesy translation into English to be agreed between the Parties, if possible. The Parties will also try to agree on an English glossary of frequently used terms that appear in Spanish in the Award. Any accompanying documentation may be submitted in either procedural language, provided that for documentation submitted in Spanish, a courtesy translation into English shall be submitted within 10 business days of the original submission. Where a Spanish language exhibit on the record of the underlying arbitration has an existing English language translation that was submitted on the record, that translation shall be submitted in the annulment proceedings.
- 11.4. Documents filed in any language other than English or Spanish must be accompanied by a translation into English within 10 business days of the original submission.
- 11.5. If a document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Committee may require a fuller or a complete translation at the request of any Party or on its own initiative.
- 11.6. Translations need not be certified. Should there be a dispute as to the content of a translation, the Parties shall work jointly and in good faith to arrive at an agreed wording. Failing agreement, the Party submitting the initial "unofficial" translation shall provide a certified translation of the relevant parts to be translated.

For Hearings

- 11.7. Oral arguments before the Committee shall be made in either procedural language. If in Spanish, simultaneous interpretation into English shall be available.
- 11.8. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted simultaneously.
- 11.9. Simultaneous interpretation shall be arranged by the ICSID Secretariat. The Parties shall inform the ICSID Secretariat of interpretation requirements as soon as possible and at least five weeks in advance of the hearing.
- 11.10. The costs of the interpreters will be paid from the advance payments made to the Centre, without prejudice to the decision of the Committee as to which Party shall ultimately bear those costs.

For the Committee's Documents Except the Decision on Annulment

11.11. The Committee may make any order or decision in either procedural language.

For the Committee's Decision on Annulment

11.12. The Committee shall issue its Decision on Annulment in English and Spanish. The Committee will undertake its best efforts to avoid delays in the issuance of the Decision on Annulment on account of the preparation of the Spanish version, including by taking steps to prepare the Spanish version on a rolling basis as the drafting of the Decision progresses.

12. Routing of Communications

Administrative and Financial Regulation 24

12.1. Written communications in the case shall be transmitted by email or other electronic means to the Parties, the Committee Secretary, and the Committee.

12.2. Electronic versions of communications ordered by the Committee to be filed simultaneously shall be transmitted to the Committee Secretary only, who shall send them to the opposing Party and the Committee.

12.3. The Committee Secretary shall not be copied on direct communications between the Parties when such communications are not intended to be transmitted to the Committee.

12.4. The email addresses of the Members of the Committee are:

Christopher Greenwood
c.j.greenwood123@gmail.com

Bertha Cooper-Rousseau
info@rousseaucooper.com

Doug Jones
dougjones@dougjones.info

13. Number of Copies and Method of Filing of Parties' Pleadings

Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d), 23 and 53

13.1. By the relevant filing date, the relevant Party/ies shall:

13.1.1. Submit by email to the Members of the Committee, the Committee Secretary and the opposing Party an electronic version of the pleading with an updated index of all the documents filed in support of the pleading,¹ and

13.2. Within three business days of the relevant filing date, the relevant Party/ies shall:

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

- 13.2.1. Upload the pleading with all its supporting documentation, including all the exhibits and legal authorities, and the updated index to the file sharing platform that will be created by ICSID for purposes of this case.
- 13.3. Within 10 business days of the relevant filing date, the relevant Party/ies shall upload all translations (if any) to the file sharing platform.
- 13.4. Electronic versions of submissions shall be text searchable (i.e., OCR PDF or Word).
- 13.5. All pleadings shall be accompanied by a cumulative index hyperlinked to all the supporting documentation that the Party has submitted in this proceeding up to the date of the pleading. The index shall indicate the document number and the pleading with which it was submitted.
- 13.6. At the conclusion of the written phase of the proceeding, on a date to be determined by the Committee, or at any other time the Committee or the Secretariat so requests, the Parties shall courier to the ICSID Secretariat and each Member of the Committee a USB drive containing an electronic copy of the entire annulment case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Committee decisions and orders to date) with a consolidated and hyperlinked index of all documents. The USB drive shall be readable both on PC and Mac and hyperlinking should be organized so as to be usable on both platforms.
- 13.7. The official date of receipt of a pleading or communication shall be the day on which the electronic version is submitted to the Secretary of the Committee by email.
- 13.8. A filing shall be deemed timely if sent by a Party by midnight, Washington, D.C. time, on the relevant date.

14. Number and Sequence of Pleadings

Arbitration Rules 20(1)(c), 29, 31 and 53

- 14.1. The Parties have agreed to the schedule of submissions in Annex A.

15. Supporting Documentation

Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24

- 15.1. The Memorial and Counter-Memorial shall be accompanied by the supporting documentation relied upon by the Parties, including exhibits and legal authorities. Further supporting documentation relied upon by the Parties in rebuttal shall be submitted with the Reply and Rejoinder.
- 15.2. Given the nature of the grounds for annulment raised in this annulment proceeding,

the Committee expects that the Parties will primarily refer to the documents and evidentiary record of the underlying arbitration and it does not expect to receive evidence that does not consist of documents that form part of the record of the underlying arbitration (“New Evidence”). Any documents from the underlying arbitration on which the Parties seek to rely shall be expressly resubmitted and referred to in the Parties’ written submissions.

15.3. In principle, no New Evidence shall be admitted in this proceeding. Should either Party wish to introduce New Evidence, that Party shall file a request to the Committee to that effect. The Party may not annex to its request the documents which it seeks leave to introduce. The Committee will promptly decide on the admissibility of the New Evidence after hearing from the other Party. For the sake of clarity, new legal authorities shall not be considered New Evidence.

15.4. Any supporting documents introduced in this annulment proceeding shall be labelled as follows:

15.4.1 Any documents submitted from the underlying arbitration that were not exhibits or legal authorities shall be identified as factual exhibits in this proceeding and labelled pursuant to section 15.4.2 below, *i.e.*, “AAE-0001” or “RAE-0001”. Exhibits and legal authorities from the underlying arbitration that are resubmitted in this proceeding shall maintain the same nomenclature as in the underlying arbitration regardless of the Party submitting them in the annulment proceeding. The Parties shall include with their submissions in this proceeding any materials from the underlying arbitration proceeding on which they wish to rely. Pursuant to section 13.3 above, these materials shall be included in the cumulative index to accompany every pleading, and they shall be uploaded to Box pursuant to section 13.2 above.

15.4.2 New Evidence, if admitted, and new legal authorities shall be identified as follows:

15.4.2.1 Exhibits and legal authorities filed by the Applicant shall be labelled “AAE-0001” for factual exhibits and “AAL-0001” for legal exhibits containing authorities. Witness statements and expert reports shall be labelled AA-WS-[name] for witness statements and AA-ER-[name] for expert reports.

15.4.2.2 Exhibits and legal authorities filed by the Respondents on Annulment shall be labelled “RAE-0001” for factual exhibits and “RAL-0001” for legal exhibits containing authorities. Witness statements and expert reports shall be labelled RA-WS-[name] for witness statements and RA-ER-[name] for expert

reports.

15.4.3 Every updated and hyperlinked index submitted by a Party shall clearly identify each document with its corresponding identification and indicate the submission with which it is being filed in the annulment proceeding.

15.4.4 Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a party, in which case the Tribunal will determine whether authentication is necessary.

15.5. The Parties shall include all of the documents on which they intend to rely with their written submissions.

15.6. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Committee determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party.

15.6.1 Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.

15.6.2 If the Committee grants such an application for submission of an additional or responsive document, the Committee shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.

15.7. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no New Evidence and no documents from the underlying arbitration that have not been resubmitted in the annulment proceeding. Each Party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The Party submitting such exhibits shall provide them in electronic and hard copy to the other Party, the Committee Members, the Secretary, the court reporter(s) and interpreter(s) at the hearing in advance of their use.

16. Examination of Witnesses and Experts

Arbitration Rules 35, 36

16.1. If admitted, witness statements and expert reports shall be filed together with the relevant Party's pleading.

16.2. Neither Party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Committee determines that exceptional circumstances exist based on a reasoned written request followed by observations

from the other Party (following the procedure outlined in section 15.6).

16.3. Each witness statement and expert report shall be signed and dated by the witness.

17. Pre-Hearing Organizational Meetings

Arbitration Rule 13

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

18. Hearings

Arbitration Rules 20(1)(e), 32 and 53

18.1. The oral procedure shall consist of oral arguments and include the examination of witness and experts, if any.

18.2. The hearing shall be held at a place to be determined in accordance with section 10 above.

18.3. The hearing shall take place in accordance with the timetable established in Annex A.

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

19. Records of Hearings and Sessions

Arbitration Rules 13, 20(1)(g) and 53

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

19.2. Verbatim transcripts in the procedural language shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the Parties or ordered by the Committee, the verbatim transcripts shall be available in real-time using LiveNote or similar software, and electronic transcripts shall be provided to the Parties and the Committee on a same-day basis. All necessary arrangements for the audio recordings and verbatim transcription shall be made by ICSID.

19.3. The Parties shall agree on any corrections to the transcripts within one week from the hearing, or within such period as shall be agreed between them and approved by the Committee. The agreed corrections shall be entered by the Parties in the transcripts (“Revised Transcripts”). The Committee shall decide upon any disagreement between the Parties and any correction adopted by the Committee

shall be entered by the Parties in the revised transcripts.

20. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

20.1. All matters concerning post-hearing memorials and statements of costs shall be discussed by the Committee and the Parties at the close of the oral hearing(s).

21. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4) and 53

21.1. The Parties consent to the publication by ICSID of the decision on annulment and any order or decision issued in the present proceeding.

22. Stay of enforcement

22.1. The Parties agreed that the Respondents on Annulment would not oppose the Applicant's request for a stay of enforcement of the Award in exchange for the accelerated timetable in Annex A. The Committee finds that these circumstances require that enforcement be stayed in accordance with Article 52(5) of the ICSID Convention, and therefore decides to continue the stay of enforcement that had been provisionally in place pursuant to the second sentence of Article 52(5).

For and on behalf of the *ad hoc* Committee,

[signed]

Christopher Greenwood
President of the Committee
Date: 28 April 2020

Annex A – Procedural Calendar

Procedural Step	By	Date
First Session	Committee	20 April 2020
Consultation	President and Parties	27 April 2020
Memorial on Annulment	Republic of Colombia	10 April 2020
Counter-Memorial on Annulment	Glencore International A.G. and C.I. Prodeco S.A.	12 June 2020
Reply on Annulment	Republic of Colombia	7 August 2020
Rejoinder on Annulment	Glencore International A.G. and C.I. Prodeco S.A.	9 October 2020
Pre-Hearing Organizational Meeting	All	TBD
Hearing on Annulment	All	6 November 2020, London
Agreed Corrections to the Transcript	[Both Parties]	13 November 2020
Post-Hearing Submissions (if any)	[Both Parties]	TBD
Costs Submissions	[Both Parties]	TBD
Decision on Annulment	Committee	TBD