

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Glencore International A.G.

v.

Republic of Colombia

(ICSID Case No. ARB/21/30)

PROCEDURAL ORDER No. 5

Members of the Tribunal

Ms. Sabina Sacco, President of the Tribunal
Prof. Bernard Hanotiau, Arbitrator
Prof. Donald M. McRae, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Assistant to the Tribunal

Mr. Rahul Donde

28 May 2025

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Procedural Order No. 5

I. SCOPE OF THIS ORDER

1. This Procedural Order No. 5 (“PO5”) clarifies the Tribunal’s ruling on the request by the indigenous Wayuu communities of La Gran Parada and Paradero (the “Communities” or the “NDPs”) that its submission as non-disputing parties in this arbitration (the “NDP Submission”) be published on the ICSID website and redacted. It also revises the procedural calendar of 25 March 2025.

II. PROCEDURAL BACKGROUND

2. On 23 April 2025, the Tribunal issued Procedural Order No. 4, in which it addressed the Claimant's’ request that the Tribunal strike certain portions of the NDP Submission (“PO4”) and proposed a revised procedural calendar. The Tribunal ordered as follows:

For the reasons set out above, the Tribunal makes the following Order:

- a. This Order shall be notified to the NDPs and to the Parties;
 - b. The Communities shall file a revised NDP Submission accounting for the Tribunal’s rulings in Annex A by Monday, 5 May 2025 and excluding NDP-0002 and NDP-0005 (as well as NDP-0017).
 - c. The Parties shall provide any comments to the revised procedural calendar by Wednesday, **30 April 2025**;
 - d. Prior to its publication on the ICSID website, the NDP Submission shall be redacted so that it identifies the Communities but not the individuals who signed it;
 - e. The Tribunal denies all other requests;
 - f. Costs are reserved for a later decision.¹
3. On 28 and 30 April 2025, the Parties confirmed that they had no objection to the revised procedural calendar proposed by the Tribunal.
 4. On 2 May 025, the NDPs filed a revised Submission, together with Exhibits NDP-0001-SPA to NDP-0030-SPA.
 5. On 5 May 2025, the Claimant requested the Tribunal to “correct” paragraph 59(d) of PO4 in which it granted the NDPs’ request to redact the names of the individuals who signed the NDP Submission before it was published on the ICSID website.

¹ PO4, ¶ 59.

6. At the Tribunal's invitation, on 9 May 2025, the Respondent submitted its comments and opposed the Claimant's request, stating that the Tribunal had correctly addressed the NDPs' combined request for publication and redaction.
7. On 12 May 2025, the Claimant filed its "Comments on the NDP Submission".

III. PUBLICATION AND REDACTION OF THE NDP SUBMISSION

A. Context for this ruling

8. The Tribunal recalls that, on 6 February 2025, the Claimant made an application to strike certain portions of the NDP Submission then in the record. Following several exchanges with the Parties, on 25 March 2025, the NDPs commented on the Claimant's application (the "NDPs' Comments"). PO4 addressed the Claimant's specific requests in an Annex to the Order.
9. In their Comments, the NDPs made several requests in which they mentioned publication and redaction.²
10. Neither Party commented on these requests. The Tribunal thus understood that these requests were not in dispute and ordered that, "[p]rior to its publication on the ICSID website, the [revised] NDP Submission shall be redacted so that it identifies the Communities but not the individuals who signed it".³
11. The Tribunal's order in PO4 clearly orders redaction of the NDP Submission. In doing so, it presupposes publication (the former being relevant only if the latter is accepted). However, the Tribunal appreciates that the PO4 did not clearly order publication, nor did it provide the reasoning for its ruling. In the circumstances and considering the Request, the Tribunal considers it appropriate to clarify its ruling in PO4 and provides its reasons.

B. The Parties' and NDPs' positions

1. NDPs' Position

12. In their Comments, the NDPs requested the Tribunal to publish the NDP Submission after redacting the names of the individuals who signed it. Specifically, they requested the Tribunal "consider and implement [their] petitions related to security in this letter and our Submission of November 2024".⁴ These petitions included the following:

² NDPs' Comments, pp. 5, 38-39. See also p.40 (the NDPs' "Petition": "[f]or the Tribunal to consider and implement our petitions related to security in this letter and our Submission of November 2024").

³ PO4, ¶ 59(d).

⁴ Comments, p. 40.

- a. “to make other further orders, such as publishing Communities’ Submission with the names of the communities but without the details of the identity of the individuals who signed it”;⁵
- b. “to continue to honor and consider our prior request for efforts to minimize our security risks by continuing to redact names and signatures from any publicly available documents that could identify the identity of Community members”;⁶
- c. “[i]n the interests of facilitating transparency, the Communities request that the November 2024 Submission be published on the ICSID website with these redactions”.⁷

2. The Claimant’s position

13. The Claimant opposes the NDPs’ requests for publication and redaction because (i) they contradict the transparency regime set out in Procedural Order No. 2 (“PO2”); and (ii) neither the Parties nor the non-disputing Parties have requested or agreed to the publication of the NDP Submission on the ICSID website.
14. On item (i), the Claimant notes that PO2 did not provide for the publication of non-disputing party submissions, or even Party submissions, because “present[ing] to the public the parties’ one-sided views of the facts and arguments [...] risks aggravating the dispute and imposing an additional burden on the parties, who must sometimes also defend themselves on the public and political arena”.⁸ Publishing the “one-sided” NDP Submission that directly opposed the Claimant’s position would be both disruptive and prejudicial.
15. On item (ii), the Claimant submits that the NDPs had been concerned about the risks that could arise from publishing facts relating to their participation in these proceedings. They consistently sought to limit such disclosure. Their request for redactions was made under the “mistaken apprehension” that the NDP Submission would be published. It was not a request for publication. Further, the request was not responsive to the Claimant’s application to strike certain portions of the NDP Submission, the only matter on which the NDPs were authorized to comment.

⁵ Comments, p. 5.

⁶ Comments, pp. 38-39.

⁷ Comments, pp. 38-39.

⁸ Request, p. 2 quoting PO2, ¶ 41.

3. The Respondent's position

16. The Respondent opposes the Claimant's submissions.
17. On item (i), i.e. the transparency regime applicable in this arbitration, the Respondent submits that PO2 predates the NDPs' participation and thus cannot not regulate publication of the NDP Submission. In any case, publication was consistent with the rationale of PO2 that balanced the interests of transparency and preserving the integrity of the proceedings. The Claimant's concerns of publication of a "one-sided" submission are unfounded as the NDP Submission contains views that were independent and separate from those of the disputing Parties in this arbitration.
18. On item (ii), the Respondent contends that, contrary to the Claimant's position, the NDPs had requested a publication of a redacted version of their Submission in their Comments, consistent with their position of "facilitating transparency" of the arbitration. Their concerns were related to the publication of the "names and signatures" of the specific individuals that had signed the NDP Submission, which the Tribunal had rightly addressed.

C. Analysis

19. The Tribunal recalls that PO2 does not directly address publication or redaction of submissions from Non-Disputing Parties. However, it sets out the "transparency regime applicable to these proceedings",⁹ and its underlying principles thus apply.
20. In PO2, the Tribunal refused publication of "[p]leadings, expert opinions and witness statements" because such publication could affect the integrity of the proceedings, aggravate the dispute, impose additional burdens on the Parties and compromise the Parties' presentation of their case.¹⁰ At the same time, it ordered publication of summaries of the Parties' positions, stating that "the public should have access, from an early stage of these proceedings, to an accurate summarized account of the key facts, the issues in dispute and the Parties' positions. In the absence of such an account, the public would be forced to rely on other sources (e.g., general news articles), which might provide inaccurate or unreliable information. This might cause interested third parties to have a misleading view of the dispute, which in turn undermines the legitimacy of investor-state arbitration".¹¹ The Tribunal struck a careful balance between publicizing the "necessary degree of information"¹² on the issues in dispute, while ensuring that the Parties were not prejudiced in any way by doing so.

⁹ PO2, ¶ 1.

¹⁰ PO2, ¶ 41.

¹¹ PO2, ¶ 45.

¹² PO2, ¶ 44.

21. Here, the NDPs have made a submission on three limited factual issues. They were asked to do so based on the Tribunal's understanding that they would "bring a different perspective to the arbitration"¹³ and that their "knowledge and insight [would] differ from that of the disputing Parties".¹⁴
22. The Tribunal does not see a risk of either Party being prejudiced by accepting the NDPs' request. Further, as mentioned above, in PO2, the Tribunal took efforts to ensure publication of the "necessary degree of information" on the issues in dispute. If the Submission is not published, it might never be accessible to the public, which would contradict this objective. That the Claimant perceives the Submission as being "one-sided" is not reason enough to trump the transparency goals the Tribunal recognized in PO2, particularly that transparency strengthens the legitimacy of the arbitration. Further still, it would not be appropriate to compare the publication of the NDPs Submission with publication of the Parties' pleadings, as the risks occasioned by publishing the latter do not arise to the same extent. The Tribunal does not consider that the publication of a limited, factual submission that is meant to provide a different perspective from that of the disputing Parties will "arguably induce parties, witnesses and experts to be less candid in their submissions or statements", or otherwise "compromis[e] the Parties' possibility of fully presenting their case".¹⁵
23. In conclusion, the Tribunal does not consider that the Parties will be prejudiced by allowing the NDP Submission to be published and redacted as the NDPs' request. That said, even if there were such a risk, the Tribunal considers that it is mitigated by giving the Parties an opportunity to seek redaction of parts of the Submission prior to its publication. Either Party may thus request reasoned redactions of portions of the NDP Submission **by Wednesday, 4 June 2025**.

IV. PROCEDURAL CALENDAR

24. As mentioned above, on 14 April 2025, the Parties jointly agreed to modify the procedural calendar of 25 March 2025. In light of the timing of PO4, the procedural calendar agreed by the Parties required certain adjustments. In PO4, the Tribunal proposed a revised calendar and invited the Parties to comment by Wednesday, 30 April 2025.
25. Neither Party objected to the Tribunal's proposal. The Tribunal therefore confirms the revised procedural calendar, which is attached as Annex A of this Order.

¹³ PO3, ¶¶ 58-59.

¹⁴ Id.

¹⁵ PO2, ¶ 41.

V. ORDER

26. For the reasons set out above, the Tribunal makes the following Order:

- a. This Order shall be notified to the NDPs and to the Parties;
- b. The revised NDP Submission shall be published on the ICSID website. Prior to its publication, the NDP Submission shall be redacted so that it identifies the Communities but not the individuals who signed it;
- c. The Parties may make a reasoned request for redaction of parts of the NDP Submission **by Wednesday, 4 June 2025**, if they wish to do so;
- d. The Tribunal issues the revised procedural calendar contained at Annex A;
- e. The Tribunal denies all other requests;
- f. Costs are reserved for a later decision.

On behalf of the Tribunal,

_____[Signed]_____

Sabina Sacco
President of the Tribunal

Date: 28 May 2025

ANNEX A – PROCEDURAL CALENDAR

Procedural Step	Party	Days	Due date
INITIAL PHASE			
First Session	All		Tuesday, October 24, 2023
Memorial on Merits	Claimant	129	Friday, March 1, 2024
Counter-Memorial on Merits, including any objection to the Tribunal's jurisdiction and/or counterclaim	Respondent	131	Wednesday, July 10, 2024
FURTHER WRITTEN PLEADINGS			
NDP Submission	NDPs	N/A	Thursday, November 14, 2024 ¹⁶
Reply on Merits and Counter-Memorial on Jurisdiction	Claimant	148	Thursday, December 5, 2024
ICSID sends Annexes A and B of the Claimant's Application to Strike of February 6, 2025 to the NDPs, inviting their comments	ICSID	N/A	Tuesday, March 4, 2025
NDPs' comments on Claimant's Application	NDPs	21	Tuesday, March 25, 2025 ¹⁷
Procedural Order No. 4 on Claimant's Application	Tribunal	29	Wednesday, April 23, 2025
Revised NDPs Submission	NDPs	9	Friday, May 2, 2025 ¹⁸
Claimant's Comments on Revised NDP Submission	Claimant	10	Monday, May 12, 2025
Rejoinder on Merits and Reply on Jurisdiction	Respondent	176 ¹⁹	Friday, May 30, 2025

¹⁶ The date agreed by the Parties was January 9, 2025, but the NDPs filed their submission on 14 November 2024.

¹⁷ The date set was March 24, 2025, but the NDPs filed their comments on March 25, 2025.

¹⁸ The date set was May 5, 2025, but the NDPs filed their revised submission on May 2, 2025.

¹⁹ Date calculated from Reply on Merits and Counter-Memorial on Jurisdiction.

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Procedural Step	Party	Days	Due date
Respondent's comments on the Revised NDP Submission	Respondent	32	Friday, June 13, 2025, or earlier, including with Rejoinder on Merits and Reply on Jurisdiction
Rejoinder on Jurisdiction	Claimant	60	Tuesday, July 29, 2025
ORAL PLEADINGS			
Notification of witnesses and experts for examination at the Hearing	Parties	Hearing - 117	Wednesday, July 16, 2025
Tribunal to circulate draft order on the organization of the Hearing	Tribunal		As soon as possible after June 25, 2025
Tribunal to notify any witnesses or experts for examination at the hearing	Tribunal	Hearing - 87	Friday, August 15, 2025
Pre-hearing Conference	All	Hearing - 60	Thursday, September 11, 2025 (9 am Bogotá / 10 am Washington, D.C. / 3 pm London / 4 pm Geneva)
Hearing	All	N/A	Monday, November 10 to Monday, November 17, 2025 ²⁰
Correction of transcripts	Parties	TBC	TBC
Post-Hearing Briefs	Parties	TBC	TBC
Costs Submissions	Parties	TBC	TBC

²⁰ The specific number of effective hearing days within this period will be determined by the Tribunal in due course, in consultation with the Parties.