INTERNATIONAL CENTRE FOR THE SETTLEMENT OF

INVESTMENT DISPUTES

ICSID CASE NO ARB/21/30

GLENCORE INTERNATIONAL AG

Claimant

-v-

THE REPUBLIC OF COLOMBIA

Respondent

SUMMARY OF CLAIMANT'S POSITION ON JURISDICTION 12 AUGUST 2025

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1. Glencore International AG (***Glencore***) summarizes its position on the Republic of Colombia's sole jurisdictional objection in this arbitration under the 2006 Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (the ***Treaty***).

2. Glencore's claim relates to Colombia's measures affecting Glencore's investment in the Cerrejón mine.[1] Specifically, the claim arises from Colombia's judicial measures issued in the context of two constitutional lawsuits (known in Colombia as "tutela" actions) brought by indigenous communities relating to the partial diversion of a creek as part of the expansion of the Cerrejón mine.

3. Colombia has raised a single jurisdictional objection: it claims that the Tribunal lacks jurisdiction over Glencore's claims regarding the second lawsuit. The Treaty provides for investors to request consultation with the state hosting their investment regarding measures considered to be inconsistent with the state's obligations under the Treaty. If the matter is not settled within six months of the request for consultations, it may be submitted to arbitration under the Treaty.

4. Colombia claims that Glencore's request for consultations (***Request for Consultation***), which it delivered on 30 April 2020, did not sufficiently identify the second lawsuit decisions as within the scope of the request and accordingly must fall outside the Tribunal's jurisdiction.

5. Colombia's jurisdictional objection is without merit. First, it is based on a factually incorrect premise because the Request for Consultation does *expressly* identify the second lawsuit decisions as part of the "measures underlying the dispute." In any event, Colombia's objection lacks any basis in the Treaty, which does not impose formalistic requirements as to the form and content of requests for consultation. Glencore has therefore asked that the Tribunal dismiss Colombia's jurisdictional objection.

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1 *See* Summary of Claimant's Position of 15 August 2024.

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Background

6. As background, and as described in the Summary of Claimant's Position of 15 August 2024, the first constitutional lawsuit was brought by three indigenous communities requesting to be consulted about the partial diversion of the Bruno Creek. This first lawsuit was rejected by the first and second instance courts.

7. Even though the first lawsuit was rejected, one of the three communities filed another tutela action before a different court. The courts in that second lawsuit ordered Cerrejón to carry out additional prior consultations with communities based on court-created criteria with no basis in the regulatory framework. Nevertheless, Cerrejón complied in good faith and carried out these consultations in 2017.

8. Subsequently, Colombia's Constitutional Court chose to review the judgments of the first lawsuit (but not the second lawsuit). It determined that the issues regarding prior consultation had been finally settled in the second lawsuit. The Court then reframed the plaintiffs' *consultation* claims into a re-examination of the *environmental viability* of the diversion (even though they had not questioned the competent authorities' evaluation of the project's environmental viability). It then ordered the suspension not only of the already completed partial creek diversion, but also the planned mining expansion.

9. Glencore seeks both a declaration that the Constitutional Court's measures are in breach of the Treaty and compensation for the losses it suffered as a result. But for the orders issued in the second lawsuit, Glencore seeks only a declaration that they breached the Treaty. It does not seek compensation in relation to the second lawsuit orders. As noted above, Colombia's jurisdictional objection relates solely to Glencore's claims in relation to the second lawsuit.

Colombia's jurisdictional objection is without merit

10. Contrary to Colombia's contentions in its jurisdictional pleadings, the judicial measures in the second lawsuit were described in detail in Glencore's Request for Consultation and specifically identified as part of the dispute.

11. The introductory text of the Request for Consultation states that "Glencore's investments are described in greater detail below (section I) together with ***the measures underlying the dispute (section II)*** and the manner in which ***those measures*** breached the treaty (section III)." Section II—describing the "measures underlying the dispute"—in turn describes the proceedings in the second lawsuit in great detail. Section III then describes how "***those measures***"—*ie* the measures described in Section II—"breached the Treaty."

12. Colombia has admitted in its Counter Memorial that the Request for Consultation *did* describe the second lawsuit and measures. The objection can therefore be summarily dismissed.

13. Even if, *arguendo*, the Request for Consultation did not clearly describe the second lawsuit's orders (it did), Colombia fails to show its objection has any basis in the Treaty. Article 11 of the Treaty provides:

> (1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.
>
> (2) Any such matter which has not been settled within a period of six months from the date of written request for consultations may be referred to […] international arbitration. […]

14. The plain text imposes only two requirements: that consultations be requested (a) in writing, and (b) "with a view to resolve the ***matter*** amicably." Both are met here: the Request for Consultation was in writing, and it robustly described the subject matter underlying the dispute, namely Colombia's state actions against the fully authorized Bruno Creek Project as well as the Treaty provisions alleged to have

been breached. This description fully aligns with the dispute presented in Glencore's pleadings in the arbitration.

15. Investment tribunals have opined that where an investor puts a respondent state on notice of the relevant factual circumstances, this will constitute sufficient notice for a treaty's consultation period even if the investor subsequently ascribes a different legal characterization to such facts.[2] Consequently, investment tribunals faced with similar jurisdictional objections have rejected them. Tribunals interpreting treaties even more onerous than the Treaty have allowed claims that were not notified at all pre-arbitration, as long as they have a sufficient nexus to or are part of the same "subject matter" as the notified measures. Colombia does not dispute that the state measures at issue in its jurisdictional objection relate to the subject matter of the dispute outlined in the Request for Consultation.

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16. Glencore has respectfully requested that the Tribunal reject Colombia's jurisdictional objection.

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[2] *See eg Generation Ukraine, Inc v Ukraine* (ICSID Case No ARB/00/9) Award, 16 September 2003, **CL-97**, para 14.5; *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CL-12**, para 123; *Eco Oro Minerals Corp v Republic of Colombia* (ICSID Case No ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, **CL-75**, para 325-329; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CL-58**, paras 449-457.