INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Glencore International A.G.

v.

Republic of Colombia

(ICSID Case No. ARB/21/30)

PROCEDURAL ORDER No. 8

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

7 October 2025

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I. SCOPE OF THIS ORDER

1. This Procedural Order No. 8 ("PO8") addresses the Respondent's application of 15 August 2025 to strike Exhibit C-370 from the record (the "Application").

II. PROCEDURAL BACKGROUND

2. On 15 August 2025, the Respondent filed the Application, arguing that Exhibit C-370 should be struck from the record as its submission with the Claimant's Rejoinder on Jurisdiction of 29 July 2025 violates Section 15 of Procedural Order No. 1 ("PO1"), which requires the Parties to submit the evidence on which they wish to rely at the first available procedural opportunity.

3. On 20 August 2025, the Claimant opposed the Application, *inter alia* arguing that Section of PO1 does not govern the submission of evidence along with the Rejoinder on Jurisdiction and that Exhibit C-370 directly relates to a jurisdictional issue in dispute (the "Response").

4. On 27 August 2025, the Respondent submitted further observations, asserting that the Exhibit was untimely, irrelevant, and introduced in a procedurally improper manner (the "Reply").

5. On 3 September 2025, the Claimant again disputed the Respondent's position, reiterating that the inclusion of the Exhibit complied with PO1, was responsive to arguments made in prior pleadings, and caused no prejudice (the "Rejoinder").

III. THE APPLICATION

A. The Respondent's Position

6. The Respondent requests the exclusion of Exhibit C-370 (the "Exhibit"), filed by the Claimant along with its Rejoinder on Jurisdiction, which comprises tweets published between 2013 and 2022 by two of the Respondent's witnesses, [redacted] ("[redacted]") and [redacted] ("[redacted]"). The Respondent submits that this was procedurally improper, as the Exhibit failed to meet the requirements of Section 15 of PO1: the Exhibit neither responded to new material in the preceding pleading, i.e., the Rejoinder on Merits and Reply on Jurisdiction (the "Reply on Jurisdiction"), nor was it obtained through document production. Further, the tweets were reasonably available to the Claimant at an earlier stage. The Exhibit should thus be struck from the record.[1]

[1] Application, p.2.

7. The Respondent points out that the Exhibit was introduced in the context of the debate whether the Claimant complied with the Treaty requirement to request amicable consultations with respect to the judgment of the Administrative Tribunal of La Guajira dated 2 May 2016 and the court judgment of the Council of State of 13 October 2016 (the "Decisions") in the "Second Tutela Proceeding".[2] While the Claimant insists that the tweets go to whether the decisions are "part and parcel of the same dispute" as Judgment SU-698, this is "manifestly untenable". The tweets do not reference the Decisions, nor do they concern Judgment SU-698 or the inter-institutional working group ("IWG"). In fact, the authors of the tweets did not even participate in the Second Tutela Proceeding. Nor do the tweets engage with any issues raised in the Respondent's Reply on Jurisdiction of 30 May 2025.[3]

8. The Respondent further points out that, in its own Rejoinder on Jurisdiction, to overcome the Respondent's jurisdictional objection concerning the absence of amicable consultations with respect to the Decisions, the Claimant maintained that there was a link between its claims regarding the Second Tutela Proceedings and its claims regarding Judgment SU-698 based on three arguments: that the IWG was created pursuant to the Decisions, that Judgment SU-698 continued the IWG, and that both proceedings subjected the Bruno Stream Project to "retroactive review". The tweets do not relate to any of these propositions. The Claimant's position that the tweets concern the independence of the Respondent's witnesses falls outside the scope of the jurisdictional dispute. In any event, the Respondent mentioned the independence of [redacted] and [redacted] in its Counter-Memorial on the Merits and Memorial on Jurisdiction of 11 July 2024 (the "Counter-Memorial"). Their witness statements were filed on the same date. The Claimant should have thus submitted Exh. C-370 with its Reply on the Merits and Counter-Memorial on Jurisdiction of 5 December 2024 (the "Reply Memorial").[4]

9. The Respondent condemns the "surreptitious" way in which Exhibit C-370 was introduced. It notes that reference to the Exhibit was made in a footnote in the Rejoinder on Jurisdiction, alongside six other references linked to the issue of the alleged relation between the Second Tutela Proceeding and Judgment SU-698. It argues that this placement was misleading as the tweets did not address this issue at all. Besides, the Exhibit was neither clearly identified as factual evidence nor described in a manner that would reveal its relevance or content. The generic label "Twitter excerpts" obscured the fact that it pertained to two of the Respondent's witnesses.[5]

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[2] Defined by the Respondent as "Proceeding initiated on 15 April 2016 by the leader of the La Horqueta community before the Administrative Tribunal of La Guajira against CCL, the Ministry of Internal Affairs, ANLA and Corpoguajira, concerning the protection of constitutional fundamental rights in connection with the Bruno Stream Project." C-Mem, p.xiii.

[3] Reply, pp. 2, 3. See also, Application, p. 2.

[4] Reply, pp. 2, 3. See also, Application, p. 2.

[5] Reply, pp. 3, 4. See also, Application, p. 2.

10. The Respondent alleges that it has been prejudiced by the late introduction of the Exhibit, as it has been deprived of the opportunity to address it in writing before the hearing and to respond through further witness statements. Besides, the Claimant now has had more opportunities than the Respondent to present factual evidence concerning the merits of the case. Contrary to what the Claimant suggests, this harm cannot be cured by allowing the Respondent to make submissions during the hearing and in post-hearing briefs. In the context of the Respondent's introduction of new evidence in support of its alternative valuation of damages, it was the Claimant who insisted on the importance of procedural sequencing under PO1 and sought exclusion of that evidence. The same approach should be taken here.[6]

11. The Respondent opposes the Claimant's interpretation of Section 15 of PO1, observing that the title of the provision "Pleadings or Written Submissions," applies to all main submissions in the arbitration, not solely to those on the merits. The distinction in Section 15 between the "first exchange of submissions (i.e., Memorial and Counter-Memorial)" and the "second exchange of submissions (i.e., Reply and Rejoinder)" refer to the Parties' submissions on both merits and jurisdiction. Further, the Claimant's interpretation contradicts its own earlier reading of Section 15 pursuant to which it had stressed the importance of the provision to maintain procedural fairness and prevent ambushes through the late submission of evidence. Following the Claimant's new interpretation would allow it to "ambush Colombia with belated fact evidence on the merits, to which Colombia has no opportunity to respond in writing."[7]

12. Finally, the Respondent denies any link between the timing of the Application and the Claimant's agreement to the Respondent's request to introduce into the record the advisory opinions on climate change issued by the International Court of Justice and the Inter-American Court of Human Rights.[8]

B. The Claimant's position

13. The Claimant asserts that its submission of Exhibit C-370 along with its Rejoinder on Jurisdiction was procedurally appropriate and responsive to arguments raised by the Respondent.

14. At the outset, the Claimant contends that Sections 15.1 and 15.2 of PO1 do not govern the submission of evidence along with the Rejoinder on Jurisdiction. The provisions of PO1 apply only to the Memorial, Counter-Memorial, Reply, and Rejoinder on the merits.

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[6] Reply, p. 4.

[7] Reply, p. 2.

[8] Reply, p. 5.

15. In any event, says the Claimant, the submission of Exhibit C-370 was consistent with PO1 as interpreted by the Tribunal in Procedural Order No. 6. There, the Tribunal clarified that the test for filing evidence was whether the impugned material directly responds to the preceding pleading, not when the underlying issue first arose. The Exhibit was submitted in response to arguments made in the Respondent's Reply on Jurisdiction, in which the Respondent characterized [redacted] and [redacted] as independent and reliable for the first time, besides implying that every disputed measure must have been listed in the notice of dispute. These arguments were not previously raised. The Exhibit directly addresses the independence of the experts whose views were relied upon by the Respondent.[9]

16. The Claimant further submits that Exhibit C-370 goes "directly" to the jurisdictional issue of whether the Decisions in the Second Tutela Proceeding form part of the same dispute as Judgment SU-698, such that the Tribunal would have jurisdiction. It explains that one aspect of the dispute relating to Judgment SU-698 was the independence of the experts that raised the "uncertainties" that the IWG was to resolve. The IWG itself was created pursuant to the Decisions. Thus, says the Claimant, the Decisions "are part and parcel of the same dispute as Judgment SU-698"[10] adding further that "the independence of [the] experts cannot be understood in isolation from the decisions that created the IWG in the first place." The tweets, which put into question the independence of the experts reinforce the Claimant's argument that the Decisions form part of the dispute before the Tribunal.[11]

17. The Claimant rejects the Respondent's claim that the tweets were submitted in a non-transparent manner. The Exhibit was clearly introduced following the relevant jurisdictional argument, titled "Twitter excerpts", and directly linked to the Claimant's challenge to the independence of the Respondent's experts.

18. The Claimant maintains that the Respondent has not suffered any prejudice by the inclusion of Exhibit C-370. It is free to respond to the tweets at the hearing or in post-hearing briefs. In fact, the Respondent previously argued that such opportunities were sufficient to address new evidence. The Claimant rejects any comparison between the Respondent's request to exclude Exhibit C-370 and the Claimant's request to exclude the new evidence related to the Respondent's alternative valuation of damages, noting that, the former case involved complex mine and economic models which made it impossible to respond at the hearing. Here however, the tweets were limited in scope and factual in nature and could be addressed at the hearing.[12]

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[9] Rejoinder, p. 1. See also, Response, p. 2.

[10] Response, p. 2.

[11] Response, p. 2.

[12] Rejoinder, p. 2. See also, Response, p. 2.

19. Finally, the Claimant notes that the Application was filed immediately after the Claimant consented to the Respondent's request to introduce the advisory opinions on climate change issued by the International Court of Justice and the Inter-American Court of Human Rights. This sequence of events raises questions about the Respondent's motives.

C. Analysis

20. The Respondent seeks the exclusion of Exhibit C-370, arguing that it violates the procedural rules set out in PO1. The Claimant opposes the request, asserting that the submission of that document was procedurally proper.

21. As a preliminary matter, the Parties disagree as to whether Section 15 of PO1 applies to the introduction of evidence along with the Rejoinder on Jurisdiction.

22. PO 1 does not specifically mention the Rejoinder on Jurisdiction or the evidence that may accompany it. However, Sections 15.1 and 15.2 set out the rules governing the introduction of factual evidence in the written phase of the arbitration. Specifically:

    a. Section 15.1 states that "[e]ach Party shall submit with its Memorial or Counter-Memorial the factual exhibits and legal authorities on which it intends to rely," thereby requiring that all primary factual and legal material be submitted at the first opportunity;

    b. Section 15.2 permits the introduction of new factual material in subsequent rounds only "to the extent that it is responsive to the arguments, facts or evidence contained in the preceding submission of the other Party," or where it was obtained through document production or could not reasonably have been submitted earlier.

23. The procedural economy and coherence intended by Sections 15.1 and 15.2 apply equally to all principal submissions in the arbitration, including jurisdictional pleadings. These paragraphs determine what evidence is available in the second round of submissions on a particular subject matter. The Rejoinder on Jurisdiction is the Claimant's second submission on jurisdiction. It follows that the rules set out in Section 15 above equally apply to it.

24. In PO6, in addressing the Claimant's objection to the Respondent's introduction of new evidence in support of its alternative valuation of damages, the Tribunal clarified that "the focus [of Section 15.2] is not on when the underlying issues first arose, but whether the contested material directly responds to arguments or evidence presented in the prior pleading."[13]

[13] PO 6, ¶ 36.

25. Thus, the key test is not solely when the information first became available but whether the submission of Exhibit C-370 directly responds to arguments or evidence presented in the prior pleading. The Tribunal therefore turns to whether Exhibit C-370 is responsive within the meaning of PO1.

26. Here, the Claimant contends that Exhibit C-370 is responsive as it is directly relevant to the jurisdictional question of whether the Decisions form part of the same dispute as Judgment SU-698. It contends that the dispute over Judgment SU-698 includes disputes concerning the IWG. As the IWG itself was created pursuant to the Decisions, the latter forms part of the disputes over Judgment SU-698. For the Claimant, the independence of [redacted] and [redacted], whose assessments were relied upon in the IWG, is thus a jurisdictional issue. The tweets in Exhibit C-370 bear on the independence of those experts.

27. The Tribunal recalls that the connection between the Decisions and the Judgment SU-698 was first raised in the Respondent's Counter-Memorial.[14] In that submission, the Respondent also alleged that numerous independent experts were asked to appear before the Constitutional Court in the proceeding that led to Judgment SU-698,[15] including [redacted] and [redacted], who the Respondent put forward as witnesses.[16] In other words, the Respondent mentioned the independence of [redacted] and [redacted] already in its Counter-Memorial. Strictly speaking, following the procedural rules set out above, if the Claimant wished to contest the independence of these experts, it should have submitted Exhibit C-370 along with its Reply Memorial. It did not do so. Rather, in its Reply Memorial, the Claimant challenged the contribution of the experts before the Constitutional Court,[17] besides more fully setting out its case on the linkage between the disputes related to the Decisions and those relating to Judgment SU-698.[18]

28. That said, the Tribunal finds that Exhibit C-370 directly responds to arguments presented by the Respondent in its Reply on Jurisdiction. In that submission, the Respondent responded to the Claimant's arguments on the experts' contribution to the Constitutional Court proceedings, insisting on the independence and testimonies of [redacted] and [redacted]

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[14] Counter-Memorial, ¶ 501 ("To the extent that Claimant argues in its Reply that the [Decisions] form part of the same overall dispute as the measures raised in its Amicable Consultations Request, such argument would be untenable.").

[15] Counter-Memorial, ¶ 18(a) ("Judgment SU-698 was based on the Constitutional Court's diligent and extensive review of a massive quantity of factual and technical evidence […] Of particular relevance, such evidence included the following: a. evidence provided by numerous renowned independent experts from various disciplines, including biologists, geologists, engineers, environmental experts, and anthropologists").

[16] Counter-Memorial, ¶ 41(a) and (b). See also, ¶¶ 321, 864 and fn.1873.

[17] Reply Memorial, ¶ 260.

[18] Reply on Merits, ¶ 560 ("Importantly, Colombia accepts that [the Decisions] are entirely related to the crux of the matter described in Claimant's Request for Consultations.").

[redacted][19] and denying any link between the disputes concerning the Decisions and those concerning Judgment SU-698.[20] In the Tribunal's view, it was appropriate for the Claimant to respond to these arguments with new evidence, including Exhibit C-370.

29. While it is true that Exhibit C-370 was available to the Claimant when it filed its Reply Memorial, evidence might well become material and relevant only in light of how it is used or characterized in subsequent pleadings. Here, the independence of [redacted] and [redacted] and the Parties' positions on the relationship between the dispute concerning the Decisions and the dispute concerning Judgment SU-698 became clearer through each subsequent submission of the Parties. The fact that the tweets could have been submitted earlier does not, in itself, render their later submission improper if their significance was not reasonably foreseeable or if they serve a narrowly tailored rebuttal function.

30. Further, the Tribunal notes that Exhibit C-370 is limited in scope. It consists of publicly available social media posts comprising a limited number of tweets by two witnesses, and meant primarily to serve the narrow purposes of contesting their independence and supporting the Claimant's case on the link between the disputes concerning the Decisions and those concerning Judgment SU-698. The Tribunal is not persuaded that the inclusion of Exhibit C-370 would unduly prejudice the Respondent, who will have the opportunity to respond to it orally at the hearing or in its post-hearing brief (the Tribunal notes that the Respondent has not requested an opportunity to respond in writing or through supplementary witness statements). Further, as this evidence was submitted into the record after [redacted] and [redacted] second witness statements, they are entitled to comment on Exhibit C-370 in their direct examinations.

31. As to the Respondent's argument that the Exhibit was filed "surreptitiously", the Tribunal considers that, while it would have been preferable for the Claimant to explicitly identify Exhibit C-370 as new factual evidence and explain its relevance in the body of the Rejoinder on Jurisdiction, the context and citation make its purpose sufficiently discernible. Indeed, in footnote 55 of its Rejoinder on Jurisdiction, the Exhibit immediately follows the Claimant's statement that the experts who appeared before the Constitutional Court were wrongly characterized by the Respondent as "independent and reliable sources".[21] The Exhibit is properly paginated and listed, and the Respondent had full access to it. The Tribunal does not consider it necessary to strike the Exhibit on this basis.

32. For the foregoing reasons, the Tribunal denies the Application and admits Exhibit C-370 into the record. The witnesses and the Respondent will have the opportunity to review the

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[19] Rejoinder on Merits and Reply on Jurisdiction, ¶¶ 335-342.

[20] Rejoinder on Merits and Reply on Jurisdiction, ¶¶ 788 et. seq.

[21] Rejoinder on Jurisdiction, n. 55.

document prior to the hearing, and may address the Exhibit at the hearing and/or in post-hearing submissions, as discussed at para. 30 above.

IV. ORDER

33. For the reasons set out above, the Tribunal:

a. Denies the Application;

b. Reserves all questions of costs for a later decision.

On behalf of the Tribunal,

[Signed]

Sabina Sacco
President of the Tribunal

Date: 7 October 2025