

# National Contact Point of Switzerland

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## Initial Assessment

### Specific Instance regarding Glencore International AG submitted by the Global Legal Action Network (GLAN)

Berne, 10.1.2022

#### Overview of the NCP and its role

The OECD Guidelines for Multinational Enterprises (hereafter “OECD Guidelines”) represent a set of principles for responsible business conduct, addressed as recommendations by the governments of the 38 OECD member and 12 other adhering States to multinational enterprises operating in or from their territories. The National Contact Point of Switzerland for the OECD Guidelines (hereafter “Swiss NCP”) has the mandate to raise awareness and promote observance of the OECD Guidelines. The Swiss NCP also contributes to the resolution of issues that arise relating to the implementation of the OECD Guidelines in specific instances by offering a forum for mediation, assisting parties concerned to deal with these issues and providing recommendations regarding the implementation of the OECD Guidelines.

#### Executive Summary

On 19 January 2021, a submission was received from the Global Legal Action Network (hereafter “submitting party” or “GLAN”) over a failure to comply with the OECD Guidelines by the three entities which own and operate the Cerrejón coal mine in northern Colombia. The request raised a number of issues related to the OECD Guidelines, including harming the environment, causing adverse human rights impacts, failing to carry out adequate due diligence and disclose information about the impacts of its operations (Chapter II, IV and VI of the Guidelines).

In view of the fact that Cerrejón is an entity owned in equal parts by three multinational enterprises – Anglo American plc (headquartered in the UK, hereafter “Anglo American”), BHP Group Limited (headquartered in Australia, hereafter “BHP”) and Glencore International AG (headquartered in Switzerland, hereafter “Glencore”) – the submitting party addressed the request to the Australian, British and Swiss NCPs and suggested that they agree on a lead NCP. The said NCPs held discussions among themselves involving at start the Colombian NCP as the aspects raised in the submission bear impacts in Colombia. They agreed that each NCP would conduct its Initial Assessment regarding the enterprise headquartered in its respective country, with a view to possibly deciding on a lead NCP at a later stage. Therefore, this Initial Assessment of the Swiss NCP is limited to Glencore. The Swiss NCP accepts the submission and offers its good services to the parties. The scope of a possible mediation will concern Glencore’s due diligence duties regarding the issues raised and shall not interfere with ongoing parallel proceedings.

The decision to accept this specific instance for further examination is not based on conclusive research or fact-finding, nor does it represent a conclusion as to whether the enterprises observed the Guidelines or not.

## 1 Request and alleged violations of the OECD Guidelines

On 19 January 2021, the Global Legal Action Network (GLAN), a registered charity in the UK, submitted a request for examination of a specific instance under the OECD Guidelines alleging non-compliance by the three entities which own and operate the Cerrejón coal mine in northern Colombia. Owned since 2000 as a joint venture in equal parts by Anglo American (headquartered in the UK), BHP (headquartered in Australia) and Glencore (headquartered in Switzerland), Cerrejón is among the largest surface mining operations in the world and one of the largest in Colombia. Under normal circumstances, it mines 25-30 million tons of coal a year over 13'000 hectares (concession: 69'000 hectares) and employs more than 10,000 direct employees and contractors (combined).

The submitting party addressed its request to the Australian, British and Swiss NCPs. This was explained by the fact that while the impact of Cerrejón's activities was felt in Colombia, the issue raised in the submission, i.e. the parent companies' alleged failure to comply with the OECD Guidelines, arose in Australia, Switzerland and the UK. GLAN also suggested the concerned NCPs to agree on a lead NCP, citing the following from the Guidelines advising that *"When issues arise from... the activity of a group of enterprises organised as a consortium, joint venture or other similar form, based in different adhering countries, the NCPs involved should consult with a view to agreeing on which NCP will take the lead in assisting the parties"*. On the same occasion, GLAN submitted two other requests to two Irish companies which respectively (i) import and (ii) market coal from Cerrejón.

GLAN's submission raises a number of issues related to the OECD Guidelines:

- i. it alleges harms to the environment in the form of air and water pollution as well as disturbing the hydrological system and failure to improve environmental performance of mining over time; as an illustration, the air around the mine is said to contain particulate matter in excess of the limits recommended by the WHO and imposed on Cerrejón by the Colombian courts;
- ii. the request also claims adverse human rights impacts, caused by displacing local and indigenous populations without their consent and impacting upon their rights to health through environmental harms; reports have revealed unsafe levels of harmful metals in the water and/or in the blood of communities near the mine; Cerrejón's diversion, consumption and contamination of water is alleged to have led to water and food scarcity; the request further claims several examples of forced community displacement over the years;
- iii. finally it alleges inadequate due diligence and information disclosure, by failing to identify, prevent, mitigate or remedy impacts on human rights and the environment, as well as failing to consult and inform the concerned populations.

In terms of the OECD Guidelines, alleged violations are the following:

- harming the environment: Chap. II, A.1 + A.11; Chap. VI, art. 6 (a) + (d);
- impacting human rights: Chap. II, A.2 + A.11; Chap. IV, art. 1 + 2 + 6;
- due diligence/disclosure: Chap. II, 1 + 3 + 4 + 10; Chap IV, art. 5; Chap. VI, art. 2.

GLAN considers that the nature of the precise obligations of the three companies under the Guidelines in dispute are fact sensitive issues to be addressed in mediation and thereafter. With regard to remedies, the submitting party expects Cerrejón [or Glencore, as a shareholder in Cerrejón] to stop causing adverse impacts by a progressive closure of the Cerrejón mine and the immediate closure of the pits located in close proximity to human settlements. Cerrejón [or Glencore] should also remedy the human rights impacts allegedly caused by its activities, through environmental rehabilitation. Finally, it should issue a formal apology for the irreversible damage allegedly done to the La Guajira region and to the lives of its people.

## 2 Statement of the responding party

On 30 July 2021, Glencore submitted a written statement to the Swiss NCP concerning the issues raised in the specific instance. It included a response by each Glencore and Cerrejón.

According to Glencore, GLAN's request should be rejected by the Swiss NCP for a number of reasons including:

- None of the current minority shareholders is able to exercise independent management of control over Cerrejón's activities.
- There is a risk of interfering with ongoing administrative and judicial national and international parallel procedures on the same or similar issues including:
  - the specific legal process applicable under Colombian law to alleged breaches of fundamental constitutional human rights, known as "*tutela proceedings*";
  - Cerrejón's recent engagement with certain Special Rapporteurs under the UN Special Procedures;
  - parallel administrative proceedings against Cerrejón taking place in Colombia;
  - the Conciliation Agreement between representatives of Cerrejón and the Provincial Community dated September 2015;
  - the Agreement between Cerrejón and the Provincial Community in February 2021;
  - the Social Dialogue Project launched following the Constitutional Court's judgement T-704 of 2016.
- Also, the views of the NGOs supporting GLAN's request (CAJAR, CINEP, Christian Aid, AIDA, ask! And ABColombia) represent only a small number of community members opposed to the mine and need to be balanced against the interests and wishes of others.

In its response, Glencore also commented on the submitting party's request in detail. It stated inter alia that the criticized diversion of the Arroyo Bruno was approved by the Colombian government and Cerrejón has not been required to revert the Arroyo to its original course. In addition Glencore submitted that the Patilla pit is operated in accordance with Colombian environmental standards and approvals. Glencore rejected the request to progressively close the mine as this would among other things result in the sterilization of extensive economically recoverable coal reserves, to the detriment of Colombia's and more specifically, the La Guajira region's economic wellbeing.

Cerrejón provided information on its positive economic and social contributions locally, an explanation of how very similar issues have been, or are being, considered in other domestic or international proceedings and responses to the detailed factual allegations by GLAN.

According to Cerrejón, the company is a major economic contributor to the region, representing 45% of the La Guajira region's GDP, having paid around USD 8 billion over the past 19 years in taxes and royalties.

Cerrejón provided detailed information on each of the mentioned parallel proceedings. A number of environmental issues (including air and noise pollution, water contamination, impacts on the food security system) and displacement of local and indigenous communities are being or have been treated in the mentioned parallel proceedings. The implementation of the court decisions and the fulfilment of Cerrejón's obligations are ongoing.

Cerrejón concluded with detailed responses regarding each factual allegation in the submission, referring to various sources such as: decisions and permits of the authorities (e.g. regarding the diversion of the Arroyo Bruno); international guidelines and standards (e.g. by WHO, IFC, DIN); results of monitoring activities (e.g. on quality and volume of the Rancheria River or on heavy metals) and studies and outcomes of consultations with local communities.

### 3 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 19 January 2021, the Swiss NCP has carried out or taken part in the following actions:

19.1.2021	Acknowledgement of receipt of the request to the submitting party (GLAN)
20.1.2021	Information and forwarding of the submission to Glencore
21.1.2021	Information of the Swiss Embassy in Bogota, Colombia on the submission
28.1.2021	Conference call of Swiss, Australian, Colombian, Irish and UK NCPs
22.3.2021	Conference call of Swiss, Australian, Irish and UK NCPs with the Chair of the WPRBC <sup>1</sup> and OECD Secretariat
9.4.2021	Confirmation in writing by the Irish NCP to Swiss, Australian and UK NCPs that it finds it inappropriate to take a coordinating role in the request to these NCPs
26.4.2021	Letter of the Australian NCP to GLAN informing it of the coordinated process among NCPs and requesting further information as to: the targeted parties, the reason for not addressing the Colombian NCP, any other groups involved in the request and a 2019 Colombian court order
23.4.2021	Letter of Swiss NCP to Glencore with requests for written reply to the request as well as to specific questions related to a 2019 Colombian court order
30.5.2021	ICSID <sup>2</sup> complaint lodged by Glencore against Colombia over the retroactive reassessment of an expansion project in the Cerrejón mine, which included a creek's rerouting, and the consequent suspension of mining operations on the area of the expansion project; forwarding this information to the Australian and UK NCPs
31.5.2021	Responses received from GLAN to NCPs' requests for information
28.6.2021	Information by Glencore of its decision to acquire joint venture partners' shares (i.e. own 100%) of Cerrejón, a move subject to Colombian authorities' approvals, to be expected by mid-2022; forwarding this information to the Australian and UK NCPs
20.7.2021	Conference call between the Swiss, Australian and UK NCPs who confirmed that each NCP will prepare an Initial Assessment of the MNE from its country, will share drafts and decide suitable next steps
5.7.2021	Receipt of Glencore's written response to the NCP's letter of 23 April 2021
30.7.2021	Receipt of Glencore's written response to the submission which was forwarded to the submitting party on 5 August 2021
19.8.2021	Information received from Glencore indicating its refusal that its written responses be shared with the 6 NGOs supporting GLAN due to procedural and confidentiality issues (see 4.a) below).
27.9.2021	Draft Initial Assessment shared for factual comments with submitting and responding parties as well as Australian and UK NCPs
10.01.2022	Initial Assessment published

### 4 Considerations and decision of the Swiss NCP

Based on the Procedural Guidance for the OECD Guidelines and the Specific Instances Procedures of the Swiss NCP, the Swiss NCP has decided to accept the submission. This decision was reached independently from the other NCPs concerned but in consultation with them. The scope of a possible mediation concerns Glencore's due diligence duties regarding the issues raised and shall not interfere with ongoing parallel proceedings.

<sup>1</sup> OECD Working Party on Responsible Business Conduct

<sup>2</sup> International Center for Settlements for Investment Disputes

The Swiss NCP has considered the following points according to its Specific Instance Procedure:

**a) Identity of the submitting party and its interest in the matter**

The Swiss NCP concludes that the submitting party has provided sufficient information regarding its interest in the issues raised. GLAN is a registered charity established in England and Wales aimed, among other things, “*to protect and promote human rights [...] throughout the world by monitoring and reporting cases of human rights [abuses]*”.

The submitting party GLAN is supported in the request by six NGOs: Christian Aid, ABColombia, Arbeitsgruppe Schweiz Kolumbien (ask!), Interamerican Association for Environmental Defense (AIDA), Centro de Investigación y Educación Popular (CINEP), and Colectivo de Abogados José Alvear Restrepo (CAJAR). All but Christian Aid target environmental and/or social work in Colombia while Christian Aid recently issued a report on human rights at Cerrejón.

**b) Responsibility of the Swiss NCP**

In principle, a specific instance must be raised in the country in which the alleged breach occurred. Commentary 23 on the implementation procedures of the OECD Guidelines states, “*generally, issues will be dealt with by the NCP of the country in which the issues have arisen.*”

In its request, as well as in its response to requests for further information (on 31.5.2021), GLAN explained that the omission of the Colombian NCP as a recipient of the request was due to the fact that, while the impact of Cerrejón’s activities is felt in Colombia, the issues raised in the submission concern the parent companies’ failure to comply with the OECD Guidelines in Australia, Switzerland and the UK.

The Swiss NCP is competent regarding the due diligence duties of Glencore as a multinational enterprise headquartered in Switzerland and a shareholder of Cerrejón. However, the Swiss NCP is not competent to address issues related to local operations of Cerrejón – as a Colombian enterprise with its own management – because Colombia hosts an NCP. In view of the involvement of an Australian and a British company as joint investors in Cerrejón, careful coordination will be needed between the NCPs concerned (Australian, British and Swiss).

**c) Scope of application of the OECD Guidelines and materiality of the specific instance**

The submission is material in the sense that it refers to alleged breaches of specific provisions of Chapters II (General Policies), IV (Human Rights) and VI (Environment) of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the Swiss NCP to consider the issues raised.

**d) Legal context and parallel proceedings**

The Swiss NCP will take into consideration ongoing parallel proceedings, including court rulings. According to its Specific Instances Procedures, already concluded or ongoing parallel proceedings will not necessarily prevent the Swiss NCP from pursuing a specific instance. However, in each individual case, the Swiss NCP shall assess whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised or if it would prejudice either of the parties involved in other proceedings.

The Swiss NCP notes that parallel proceedings have taken place or are ongoing in Colombia including:

- the specific legal processes applicable under Colombian law to alleged breaches of fundamental constitutional human rights, known as “*tutela* proceedings”;

- parallel administrative proceedings against Cerrejón taking place in Colombia;
- the Conciliation Agreement between representatives of Cerrejón and the Provincial Community dated September 2015;
- the Agreement between Cerrejón and the Provincial Community in February 2021;
- the Social Dialogue Project launched following the Constitutional Court's judgement T-704 of 2016 and
- the ongoing ICSID proceeding regarding the diversion of the Arroyo Bruno.

The Swiss NCP considers that these parallel proceedings do not prevent the NCP from accepting this specific instance and offering its good offices. As a non-judicial mechanism, the Swiss NCP has a different role than national courts and administrative authorities. However, when defining the topics of a possible mediation, the NCP, together with the parties, shall ensure that the mediation does not interfere with ongoing parallel proceedings. In particular, the Swiss NCP's involvement shall not be prejudicial to the outcome of such proceedings<sup>3</sup>.

#### **e) Contribution to the purpose and effectiveness of the OECD Guidelines**

The role of the Swiss NCP is to offer a forum for discussion and to assist the parties concerned to address the issues raised. The submitting party expects to engage in dialogue with Cerrejón's parent companies on their due diligence as minority shareholders of Cerrejón as recommended by the OECD Guidelines. GLAN grants a special attention to the compliance of previous judicial orders, the closure of the closest pit to local communities (Patilla) and its expectations to progressive closure of the Cerrejón mines based on a strategy created in consultation with all stakeholders including local communities and the Cerrejón labour union.

The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation on Glencore's due diligence as a shareholder of Cerrejón, it could help the parties to reach a better understanding and a mutually acceptable outcome.

## **5 Conclusion**

The Swiss NCP is of the opinion that this submission merits further consideration on the basis of the criteria laid out in the Specific Instance Procedure of the Swiss NCP. The scope for a possible mediation concerns Glencore's due diligence duties regarding the issues raised and shall not interfere with ongoing parallel proceedings. A possible process under a lead NCP is discussed below.

The conclusions reached by the Swiss NCP in this Initial Assessment are based on the information received from both parties. The Swiss NCP does not express an opinion on the correctness of the statements of the parties or the validity of the documentation provided by them, nor on their possible impact on the issues raised in the specific instance.

## **6 Next steps**

The Swiss NCP offers its good offices with regard to this specific instance. It could either moderate a mediation between GLAN and Glencore on Glencore's due diligence duties or it could, based on the Initial Assessments of the Australian and UK NCPs and in consultation with them, GLAN and the responding parties, consider to extend such mediation to the other two shareholders of Cerrejón, i.e. Anglo American and BHP. Such an approach would, however, require consent of all parties to the mediation.

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<sup>3</sup> See Guide for National Contacts Points on the Initial Assessment of Specific Instances (OECD), p. 15.

In a next step, the Swiss NCP will ask the parties whether they are willing to engage in a mediation process and with which group of participants, with the aim of agreeing on how the issues can be successfully addressed. Should it not be possible to conduct a mediation, the Swiss NCP will conclude the proceeding and issue a final statement with recommendations.

A possible mediation will be based on Terms of Reference (TORs) to be signed by all parties/participants ahead of the mediation. The TORs will entail indications such as: issues to be discussed; parties/participants to the mediation; name and role of the mediator; confidentiality rules for all parties/participants to the mediation. Further to GLAN's request and the approval received from the three companies owning Cerrejón, the 6 NGOs having supported GLAN's submission will be represented in the mediation provided that the number of participants to the mediation can ensure effective proceedings.

If the mediation is held and parties cannot reach an agreement as a result of the good offices, the Swiss NCP will issue a final statement with the results of the proceedings and recommendations. In the event that an agreement is reached, the Swiss NCP will issue a final report with the agreed outcome, possibly linked to recommendations. In addition, the Swiss NCP can envisage to request specific follow-up activities, for which it will provide support following completion of the specific instance procedure.

Final statements are published on the Swiss NCP's website and in the annual report by the Chair of the OECD Working Party on Responsible Business Conduct. Before the statement is issued, the Swiss NCP gives the parties the opportunity to comment on a draft. If no agreement is reached between the Swiss NCP and the parties about the wording of the statement, the Swiss NCP makes the final decision.

The Swiss NCP requests that the parties agree to maintain confidentiality during the proceedings. In order to establish an atmosphere of trust, the OECD Guidelines foresee that no information regarding the content of the proceedings be shared with third parties or supporters of the submission. If sensitive business information is provided or discussed during the meetings, special requirements concerning the treatment of confidential information can be agreed upon by the parties involved. The Swiss NCP reserves the right to stop the proceedings should any of the parties fail to respect this confidentiality. Even after the proceedings are concluded, parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other party or parties agree/s to their disclosure.

The Swiss NCP will publish this Initial Assessment on its website.