

International Centre for Settlement of Investment Disputes  
(ICSID)

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**Glencore International AG,**  
*Claimant,*

*v.*

**Republic of Colombia,**  
*Respondent.*

ICSID Case No. ARB/21/30

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**Republic of Colombia's Summary of its Rebuttal to  
Claimant's Claims**

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15 August 2024

**Arnold & Porter**

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## I. INTRODUCTION

1. Pursuant to paragraph 1 of Annex B to Procedural Order No. 2, the Republic of Colombia hereby provides a high-level summary of its Counter-Memorial, dated 11 July 2024—except in respect of its jurisdictional objection contained therein.
2. Claimant’s claims in this case lack merit and should be dismissed. Such claims challenge judicial decisions (primarily by Colombia’s Constitutional Court) that safeguard the human rights of vulnerable indigenous communities, namely the Wayuu people in La Guajira. Colombia’s courts adopted these decisions in the face of overwhelming evidence and widespread national and international concern regarding the harmful environmental and social impacts of Claimant’s project to divert a stream known as the Bruno Stream (“**Project**”), which aimed to expand one of the largest open-pit coal mines in the world (“**Cerrejón Mine**”). The Cerrejón Mine is operated by two subsidiaries of Glencore International AG (“**Claimant**”): Cerrejón Zona Norte S.A and Carbones del Cerrejón Limited (together “**Cerrejón**”).
3. Claimant alleges that Colombia’s judicial decisions breached its obligations under the Colombia-Switzerland bilateral investment treaty (“**Treaty**”). However, those decisions were principled, evidence-based, well-reasoned, proportionate, and observant of due process. They fell squarely within Colombia’s sovereign right and duty to protect legitimate welfare objectives, and were fully compliant with Colombia’s Treaty obligations.

## II. FACTUAL BACKGROUND TO THE DISPUTE

4. The socio-economic context in La Guajira—where the Cerrejón Mine is located—is critical to understanding the present dispute. La Guajira is an arid, semi-desertic region that is subject to extreme climatic conditions and is one of the poorest regions in Colombia, with levels of child mortality that are over six times the Colombian national average. Its inhabitants face severe socio-economic challenges, including with respect to water and food scarcity.
5. The extreme circumstances faced in La Guajira disproportionately affect indigenous communities—particularly the Wayuu ethnic group—and have led to

recommendations and precautionary measures for urgent action from international and non-governmental organizations, including the IACHR and FAO.<sup>1</sup> In 2023, the Colombian Government declared a State of Emergency due to the severe humanitarian crisis affecting the communities in La Guajira, including severe water access difficulties.

6. Given that the Wayuu are a semi-nomadic people, water sources such as the Bruno Stream play a crucial role in their subsistence and shape their migration routes. Water is also of central spiritual and cultural importance to the impoverished Wayuu communities.
7. The Cerrejón Mine's activities, which have been conducted since 1976, have had a devastating impact in the region and in particular on the Wayuu people. Such activities have led to the extermination of tropical ecosystems, the contamination and disappearance of water sources, air pollution, and the displacement of local communities. Further, Claimant's mining activities require vast amounts of water, resulting in significant water extraction in a region that has one of the greatest water deficits in Colombia. Cerrejón has also repeatedly attempted to circumvent its obligations to conduct prior consultations with local indigenous communities.
8. Against this backdrop, Claimant's project to expand the Cerrejón Mine by diverting 12.9km of the Bruno Stream to exploit the coal beneath the riverbed faced vehement local opposition from indigenous communities. Claimant planned to divert the Bruno Stream into an artificial watercourse, despite being aware that such stream provided important benefits for the local communities, and its diversion would cause severe harm to local flora and fauna—in particular the endangered gallery forest surrounding the stream.
9. In 2015, three indigenous Wayuu communities—namely, the Horqueta, Gran Parada, and Paradero communities—commenced a special judicial proceeding under Colombian law known as a *tutela* proceeding, against Cerrejón and various

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<sup>1</sup> Any term not defined herein shall have the meaning given to it in the Counter-Memorial.

government agencies that had approved the Project (“**First Tutela Proceeding**”). The plaintiff communities alleged that their fundamental rights to prior consultation, equality, integrity and social identity, participation, water, and food safety were being infringed by the Project.

10. Subsequently, in 2016 the leader of the Horqueta community brought before the Administrative Tribunal of La Guajira a second *tutela* action, alleging the Project breached the community’s fundamental rights (“**Second Tutela Proceeding**”). In May 2016, the Administrative Tribunal of La Guajira established an inter-institutional working group (“**IWG**”) to examine the Project’s impact on the indigenous communities, and ordered Cerrejón to carry out certain prior consultations. On 13 October 2016, the Council of State (the highest court in Colombia with respect to administrative actions) confirmed the above-mentioned judgment.
11. The First *Tutela* Proceeding was initially rejected by the Bogotá Criminal Court. However, in 2016, the Constitutional Court, Colombia’s highest court for constitutional law matters, selected the First *Tutela* Proceeding for review and on 9 August 2017 ordered the precautionary suspension of the Project works to exploit the coal reserves located underneath the Bruno Stream, in order to protect on an interim basis the fundamental rights of the potentially affected indigenous communities (“**Precautionary Suspension**”). Thereafter, on 27 November 2017, the Constitutional Court issued Judgment SU-698, whereby the Court determined that the Project indeed threatened the fundamental constitutional rights of the three plaintiff communities, including their rights to water, food, and health. The judgment reversed the decisions by the lower courts in the First *Tutela* Proceeding, and ordered a number of measures to protect the constitutional rights of the plaintiff communities.
12. Judgment SU-698, which is the principal measure challenged by Claimant, was based on the Constitutional Court’s diligent and extensive review of factual and technical evidence, including (i) studies by independent experts from various disciplines; (ii) Cerrejón’s technical data and analysis; (iii) evidence provided by various State entities, including those involved in granting the relevant permits; (iv) evidence from

the plaintiff communities; (v) submissions from various civil society organizations; (vi) publications and studies by international organizations and bodies on best environmental practices; and (vii) an in-depth analysis of La Guajira's historical and socio-economic characteristics.

13. The aforementioned independent experts identified serious deficiencies in the information and studies provided by Cerrejón in relation to the Project, including Cerrejón's failure to consider critical environmental impacts on the surface and underground waters, the dry forest ecosystem of the Bruno Stream, and the possibility of a reduction in the Bruno Stream's waterflow. The experts also reported that Cerrejón's modelling exhibited numerous false assumptions and inaccuracies.
14. The Constitutional Court conducted rigorous and extensive legal analysis, including of Colombia's environmental licensing regime, its constitutional framework, its international obligations, and relevant jurisprudence. The Court noted that the Project had been approved pursuant to a transitional regime under Law 99 of 1993, which exempted existing projects from the stringent environmental licensing requirements established by said law. The fact that the Project had not been subject to that licensing regime was one of the reasons why the Constitutional Court concluded that further scrutiny was required to guard against the infringement of the plaintiff communities' fundamental rights.
15. Based on an analysis of the extensive evidence that it had gathered, and applying the relevant legal principles, the Court identified numerous uncertainties with respect to the socio-environmental impacts of the Project. In light of such uncertainties, the Court concluded that the Project threatened the fundamental rights of the indigenous communities.
16. The Court's conclusions gave rise to two important consequences. *First*, the environmental impact of the Project required further investigation, which, given the complexity of the issues and the range of different stakeholders involved, was assigned to the IWG. The IWG included a range of experts, government agencies, and Cerrejón itself. *Second*, the Project could not be allowed to go ahead while its social

and environmental impact remained uncertain and required further investigation. The Court therefore extended the Precautionary Suspension while the IWG carried out its work. Such extension sought to protect the fundamental rights of local indigenous communities by avoiding the potentially deleterious effects of the Project during the review. The Constitutional Court's approach was reasonable and appropriately balanced competing interests, while ensuring that the human rights of the plaintiff communities were safeguarded.

17. The Constitutional Court adopted additional measures with respect to the implementation of Judgment SU-698. On 2 February 2022, the Constitutional Court issued Order 100, pursuant to which it assumed responsibility for monitoring compliance with Judgment SU-698. In line with the cautious and reasonable approach reflected in the judgment itself, the Constitutional Court has been meticulously gathering and reviewing evidence, and carefully examining the views of the various stakeholders while it continues to make the necessary verifications. Such action constitutes a diligent and reasonable effort by Colombia's judiciary to ensure that fundamental rights are protected.

### III. CLAIMANT'S CLAIMS FAIL ON THE MERITS

18. Claimant challenges the following measures by the Colombian judiciary (together "**Challenged Measures**"): (i) the judgments rendered in the Second *Tutela* Proceeding; (ii) the Precautionary Suspension Order; (iii) Judgment SU-698; and (iv) the Constitutional Court's actions with respect to the implementation of Judgment SU-698, including Order 100.
19. Claimant's claims regarding the Challenged Measures are unmeritorious. Because such claims relate exclusively to judicial decisions, they would give rise to liability under international law only if it were established that the Challenged Measures constitute a denial of justice, which would require a systemic failure of the Colombian justice system as a whole. But the Challenged Measures do not even come close to meeting that demanding threshold.

20. Even if Claimant were not required to demonstrate a denial of justice (*quod non*), it is well-established that investment treaty tribunals do not sit as courts of appeal for decisions of national courts, and should afford particular deference to the determinations of such courts regarding issues of municipal law. This deference is particularly necessary in the present case, as (i) the main judicial decisions that Claimant challenges were issued by the Constitutional Court (the highest judicial authority with respect to constitutional law matters), and (ii) all the Challenged Measures had the purpose of protecting the fundamental rights of indigenous communities.
21. Pursuant to the principles of harmonious interpretation under customary international law, Colombia's other international law obligations *must* be taken into account when interpreting the Treaty. Colombia is required to protect the fundamental rights at stake in this case pursuant to various treaties such as the International Covenant on Civil and Political Rights and the UN Framework Convention on Climate Change. The abovementioned rights are also protected by and subject to various "soft law" international instruments – for example, the UN Guiding Principles on Business and Human Rights, which Claimant commits to apply, but has in fact failed to apply in its Cerrejón operations. The Challenged Measures were in conformity with these international law instruments.
22. Under the customary international law police powers doctrine, a State is not liable to pay compensation to a foreign investor when, in the exercise of its regulatory powers, the State adopts bona fide, non-discriminatory measures that are aimed at protecting the general welfare. The Challenged Measures met these criteria – they were adopted in good faith to safeguard the fundamental rights of the indigenous communities, and were non-discriminatory.
23. Despite the foregoing, Claimant contends that the Challenged Measures breached Colombia's obligation under Article 4.2 of the Treaty to ensure fair and equitable treatment ("FET"), because those measures allegedly: (i) frustrated Claimant's legitimate expectations regarding the Project; (ii) were arbitrary, unreasonable, and



disproportionate; (iii) created an unstable and unpredictable legal environment; and (iv) amounted to a denial of justice. Claimant's claims are unfounded.

24. As a threshold matter, claims (i)-(iii) above must fail because Claimant invokes an inapplicable legal standard in an attempt to circumvent the high threshold for demonstrating a denial of justice.
25. In any event, Claimant's FET claim must be dismissed even under the (incorrect) legal standard proffered by Claimant, for various reasons. *First*, Claimant has failed to establish any frustration of its legitimate expectations. Claimant has not identified any specific commitment by Colombia that its investments would be insulated from judicial scrutiny. Nor is there any evidence that Claimant relied on such an expectation with respect to its investment. In any event, it would not have been reasonable for Claimant to expect that the permits granted to Cerrejón would immunize the Project from judicial review, or that the Project would be allowed to go ahead despite threatening fundamental rights of third parties. Colombia's measures safeguarding those rights merely reflected the proper application of Colombian law, and were in line with the rule of law and separation of powers.
26. *Second*, the Challenged Measures were reasonable, non-arbitrary and proportionate. Judgment SU-698 was a detailed, well-reasoned, and responsible judicial pronouncement. Based on the voluminous evidence (including the findings of independent scientific experts), the Court concluded that the Project was subject to many uncertainties that required detailed investigation to prevent further violations by Cerrejón of the fundamental rights of La Guajira's vulnerable indigenous communities. Likewise, tasking the IWG to review the uncertainties was entirely sensible and appropriate, given the complexity of the issues and the wide range of stakeholders.
27. The Constitutional Court's approach was consistent with Colombia's international obligations – under principles of international law, the Treaty, and other international instruments to which Colombia is bound – including the precautionary principle,

which is enshrined in Article 15 of the Rio Declaration on Environment and Development and incorporated into Colombian law.

28. The Challenged Measures were also proportionate. At no time did any court or Colombian authority suspend the operations of the whole Cerrejón Mine, cancel the Project, or revoke Cerrejón's permits. The Constitutional Court adopted a measured approach and temporarily suspended the Project works until the uncertainties were addressed. Such measures left entirely undisturbed Cerrejón's operations of 7 of its 8 operational pits. Even the lone pit that was affected was not entirely impaired, but rather only its expansion was suspended.
29. *Third*, the legal framework remained stable, and the Challenged Measures did not give rise to inconsistent treatment in breach of the FET standard. Among other allegations, Claimant advances a flawed theory that Judgment SU-698 failed to consider Cerrejón's alleged acquired rights regarding the Project. However, no such acquired rights existed—and even if they had existed (*quod non*), they would have been subordinated to protecting fundamental rights under the Colombian Constitution. Claimant's suggestion that its alleged acquired rights could curtail the Constitutional Court's power to protect the plaintiff communities from violations of their constitutional rights is wrong as a matter of Colombian law. Further, any alleged inconsistency between the acts of the executive and the judiciary merely reflects the proper functioning of a rule of law system that embraces the doctrine of separation of powers.
30. Nor did Colombia commit a denial of justice under international law. At all times throughout the judicial proceedings, Colombia's courts acted in compliance with Colombian law and afforded due process. Those courts conducted all relevant proceedings with diligence, transparency and thoroughness, granting to all relevant parties—including Cerrejón and the respondent State entities—numerous opportunities to present their views. Likewise, and as demonstrated above, Judgment SU-698 was entirely rational, and grounded in clear thought and reason. There is no basis whatsoever on which to conclude that any of the Challenged Measures

constitute a systemic injustice or the failure of the Colombian national system as a whole.

31. Claimant also argues that Colombia breached Article 4.1 of the Treaty, which obliges each Treaty party not to impair investments of investors of the other Treaty party through unreasonable or discriminatory measures. Claimant's claims of breach of this Treaty provision virtually entirely overlap with its claims of FET breach, and fail for the same reasons as its FET claims.
32. For the above reasons, Claimant's claims with respect to the Challenged Measures are baseless and unmeritorious.

#### **IV. CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS**

33. Claimant's damages claim should be rejected. Claimant is seeking USD 489 million in damages, despite the fact that the Challenged Measures affected only a small part of the Cerrejón Mine, which has continued to operate, produce coal, and yield extraordinary profits for Claimant – Cerrejón's revenues were USD 5.6 billion *in 2022 alone*. Indeed, during the period of alleged loss, Claimant even *tripled* its stake in the Mine to acquire 100% of its shares.
34. Claimant bears the burden of proving each element of its damages claim, but fails to discharge that burden. Claimant fails to prove what (if any) loss was caused by each specific Treaty breach alleged. Claimant also fails to prove the quantum of its loss, because its damages model suffers from numerous fatal flaws. In particular, Claimant artificially inflates its claim by applying an *ex post* valuation to take advantage of the surge in coal prices that followed Russia's invasion of Ukraine – an event that neither Claimant nor Colombia could have anticipated at the time of the relevant measures, and for which Claimant should not be compensated.
35. Furthermore, Claimant's damages model is premised on unsupported and unreasonable assumptions. For example, such model rests on the flawed premise that, absent the Challenged Measures, Cerrejón would have increased overall production from the Mine. Such premise is not supported by any evidence or even evaluated by

Claimant's mining experts. In any event, such assumption is unreasonable because it is contradicted by the evidence of Cerrejón's own contemporaneous decision to reduce production based on decreasing coal prices.

36. The damages model is flawed for additional reasons, including because it improperly (i) assumes that Cerrejón would have invested millions of dollars, yielding net negative cash flows, when the Colombian coal export market was in sharp decline, and (ii) ignores existing (and unchallenged) environmental regulations that affected Cerrejón's production in the actual scenario. For these reasons, Claimant should not be awarded any compensation.
37. Finally, the evidence demonstrates that Claimant had ample opportunities to mitigate its alleged loss, but did not do so.

**V. REQUEST FOR RELIEF**

38. For the reasons set forth in its Counter-Memorial, Colombia respectfully requested inter alia that the Tribunal: (i) dismiss all of Claimant's claims; and (ii) order Claimant to pay all costs of the arbitration.