**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
# 15 AUGUST 2024

---


Freshfields Bruckhaus Deringer US LLP

700 13th Street, NW
10th Floor
Washington, DC 20005-3960
United States of America

Holland & Knight

Carrera 7 No 71 – 21
Torre A, Piso 8
Bogotá, Colombia

1. Glencore International AG (***Glencore***) summarizes its position on the merits, including its account of the key facts and issues in dispute, and its request for relief in the above-captioned proceedings initiated pursuant to the 2006 Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (the ***Treaty***).

## I. FACTUAL BACKGROUND

2. Glencore, one of the world's largest global diversified natural resources companies, has been a major investor in Colombia for nearly 30 years. Particularly, through its subsidiaries Cerrejón Zona Norte SA and the Colombian branch of Carbones del Cerrejón Limited (together, ***Cerrejón***), Glencore owns and operates the Cerrejón mine.

3. Cerrejón is one of the largest private exporters in Colombia, employing over 12,000 Colombian workers, including over 7,000 from the La Guajira department. In the last 22 years, Cerrejón has paid over US$5 billion in royalties, contributions and taxes, contributing more than 45% of La Guajira's GDP in recent years. Cerrejón has been and continues to be actively engaged with the communities surrounding its operations, having invested over US$50 million in social and infrastructure projects for the local communities in the last five years alone. These initiatives include scholarship programs benefitting neighboring communities, the construction of roads and hospitals, and the delivery of hundreds of millions of liters of drinking water.

4. This dispute concerns Glencore's investments in the Cerrejón mine. Specifically, it relates to Colombia's unfair, inequitable and unreasonable measures which prevented Cerrejón from continuing the fully authorized expansion of the La Puente pit – the pit within the Cerrejón mine with the highest quality coal production, upon which production from other lower quality mining pits is dependent. This expansion was made possible by the diversion of a section (known as "1A") of the Bruno Creek, a small seasonal creek bordering the northern edge of the

La Puente pit. It was fully authorized by the competent Colombian authorities as of the late 1990s.

5. Section 1A of the Bruno Creek was located on land acquired by Cerrejón in the 1990s that was being used for agriculture, primarily cattle farming. Farmers had cleared the land of its native forest and cattle drank water from section 1A of the Creek, compacting its soil and contaminating the water. After agricultural activities ended in the late 1990s, the vegetation in the area only partially recovered.

6. The competent Colombian authorities issued an environmental authorization for the partial diversion of the Bruno Creek in 1998, which was subsequently reiterated in 2005 and 2014. The diversion was planned and carried out to the highest technical and environmental standards. The eco-engineering designs did not simply seek to replicate the *baseline* geomorphological and ecological conditions of section 1A of the Bruno Creek (*ie* the conditions existing at the outset of the project, before any intervention by Cerrejón), but rather sought to replicate, wherever possible, the Creek's original conditions. In other words, Cerrejón sought to not only offset the environmental impacts of the project, but rather to achieve a net benefit in terms of biodiversity. After the diversion was completed in mid-2017, it was lauded as a best-in-class environmental engineering project, both nationally and internationally.

7. However, during and after the completion of the diversion, Colombia subjected the partial creek diversion and associated La Puente pit expansion (the ***Bruno Creek Project***) to arbitrary, unreasonable, inconsistent, and disproportional measures that were lacking in due process and frustrated Claimant's legitimate expectations, in breach of the Treaty.

8. Notably, in late 2017, Colombia's Constitutional Court ordered the suspension of the already completed partial creek diversion, as well as the planned expansion of the La Puente pit, in the context of its review of a constitutional lawsuit (known as a *tutela*) brought by three indigenous communities who were requesting to be consulted in relation to the diversion. The communities filed that lawsuit

notwithstanding that the competent authorities had already concluded (more than once) that they were not impacted by the diversion such that no prior consultation was warranted under the applicable regulatory framework. The authorities had determined that Cerrejón was required to consult with only one indigenous community (the Campo Herrera community) in relation to the partial creek diversion. That consultation was duly carried out in 2014.

9. The lawsuit was rejected by the first and second instance courts. However, in a second lawsuit filed by one of the three indigenous communities, the courts decided that Cerrejón should carry out additional prior consultations with communities that fulfilled a set of novel criteria, not provided for under the applicable regulatory framework, created specifically by the courts in relation to the partial creek diversion. Under these broader criteria, even communities that were not within the direct area of influence of, and not directly affected by, the partial creek diversion could be subject to prior consultations. However, even under these broader criteria, two of the three communities that initiated the first lawsuit did not qualify for a prior consultation. In good faith, Cerrejón undertook the additional consultations in 2017.

10. The Constitutional Court then selected the judgments in the first lawsuit – but not the second lawsuit – for review. However, by that time, the plaintiff communities' request for consultations had been definitively addressed by the judgments in the second lawsuit (with *res judicata* effects), which had not been selected for review. The Constitutional Court then reframed the plaintiffs' *consultation* claims and pivoted to questioning the *environmental viability* of the diversion. In that context, while the Court admitted that the competent authorities had properly applied the correct legal framework in authorizing the partial creek diversion, through its Judgment SU-698, it ordered that the project be subjected to an unprecedented *ad hoc* additional layer of environmental review not provided for under the applicable regulatory framework.

11. This review was to be undertaken by a body – an *ad hoc* inter-institutional working group invented by the second lawsuit courts composed of several government entities (the ***IWG***) – with no statutory basis or competence to determine the environmental viability of projects. Not only was the IWG *itself* devoid of competence, but it was composed of several entities which, by their own admission, lacked any legal competence or technical expertise to determine the environmental viability of a project. As one of those entities, the Rural Development Agency, pointed out to the Court, no matter how laudable the goal, no state entity should engage in activities that exceed the scope of its competence in accordance with the law, as doing so would breach the constitutional principle of legality.

12. The review to be undertaken by the IWG consisted of analyzing the Court's own subjective "uncertainties" with respect to the potential impacts of the project – many of which far exceeded the scope of any regulatory review process – and indicating what, if any, additional environmental measures should be included in Cerrejón's environmental management plan (***EMP***) in relation to the partial creek diversion. The IWG was given no framework, legal criteria or procedure to carry out this mandate. The suspension was ordered to last until the IWG had completed its review and the Court's orders had been complied with.

13. Not only did the Constitutional Court's orders betray a complete disregard for applicable legal standards, but they were issued pursuant to a process lacking in basic due process. The Constitutional Court: (a) disregarded applicable procedural rules; (b) reversed the burden of proof and failed to treat Cerrejón in an even-handed manner with respect to the submission of arguments and evidence; (c) modified orders set out in judgments issued in the context of a different constitutional action notwithstanding that these judgments were *res judicata*; (d) issued a summary of its Judgment SU-698 in a press release in November 2017 and inexplicably failed to issue the full text of its judgment until over 14 months later (during which time the IWG could not even begin its review, while the suspension remained in place); and (e) refused to release two of the justices' dissenting opinions.

14. In March 2022, the IWG completed its review and issued its final technical report concluding that the "uncertainties" were unwarranted and that the project was viable. It also proposed certain additional environmental measures to be included in Cerrejón's EMP. Nevertheless, the Court refused to accept the conclusions of the very technical body (the IWG) that it had established in its judgment. Two years later, the suspension remains in place while the Court has carried out its own substantive review of the correctness of the conclusions in respect of the questions that it had delegated to the IWG.

15. For the past two years, the Constitutional Court has undertaken an unprecedented review process of the already unprecedented IWG environmental review of the diversion. This process has gone well beyond the verification of the IWG's compliance with the Court's orders and has effectively reopened the substantive conclusions reached in Judgment SU-698 – with the Court requesting submissions and evidence on issues not relevant to the uncertainties delegated to the IWG and that are not even related to the Bruno Creek Project. In fact, the Court has, alarmingly, asserted its right to "modify the orders set out in the judgment", notwithstanding that Judgment SU-698 is *res judicata*.

16. Throughout these proceedings, the Constitutional Court has completely disregarded Cerrejón's constitutionally protected acquired rights pursuant to contracts and authorizations granted over the course of several decades.

17. The suspension remains in place seven years after it was ordered. It is not known whether the suspension will ever be lifted.

## II. LEGAL ARGUMENTS

18. Colombia's obligations under the Treaty include treating Swiss investors, such as Glencore, in a fair and equitable manner, and not impairing their investments by unreasonable or discriminatory measures. Colombia has breached these obligations in relation to Glencore and its investments in the Cerrejón mine.

## A. FAIR AND EQUITABLE TREATMENT

19. The fair and equitable standard includes the following core components: (a) protection of the investor's legitimate expectations; (b) prohibition against arbitrary and unreasonable measures; (c) provision of a predictable, consistent and stable legal framework; and (d) conduct consistent with due process. These requirements must be respected by all branches of the state, including the judiciary. Colombia's conduct is inconsistent with these requirements.

20. Legitimate expectations: under the Treaty, Colombia must refrain from frustrating Claimant's legitimate expectations. Claimant had the legitimate expectation that it could carry out the Bruno Creek Project, in accordance with: (a) the Zona Norte Contract under which Cerrejón holds the right to explore and exploit the La Puente pit; (b) the environmental authorizations granted by the competent authorities, authorizing Cerrejón to carry out the Bruno Creek Project; and (c) the Ministry of Interior's certifications providing that Cerrejón would only need to undertake consultations with the Campo Herrera community.

21. Claimant also had the legitimate expectation that Colombia would act in a manner consistent with the Zona Norte Contract, the environmental authorizations, and the applicable legal framework, such that any decision that Colombia adopted would be in accordance with Colombian law and regulations.

22. Relying on the above, Cerrejón began the partial diversion of the Bruno Creek in February 2016, and completed it in July 2017. Accordingly, Cerrejón planned to mine the coal reserves in the La Puente 1A area beginning in early 2018. However, Cerrejón has been unable to do this as a result of Colombia's measures that have frustrated Claimant's legitimate expectations and have prevented Cerrejón from carrying out the exploitation of the La Puente 1A reserves.

23. In particular, Colombia frustrated Claimant's legitimate expectations by:

    (a) ordering Cerrejón to carry out prior consultations with communities that did not satisfy the criteria set out under the applicable regulatory framework,

based on the application of novel and bespoke criteria created by the courts in the second lawsuit. This directly contradicted Colombia's own prior certifications that the Campo Herrera community was the only community subject to a prior consultation process;

(b) ordering the suspension of the Bruno Creek Project, through a provisional order issued by the Constitutional Court in August 2017 that was then indefinitely extended through Judgment SU-698, which frustrated Claimant's expectation that it could carry out the fully authorized and permitted works pursuant to the terms of its Zona Norte Contract and the environmental authorizations that had been granted by the competent authorities over the course of nearly two decades; and

(c) ordering an unprecedented and retroactive additional layer of environmental review of the partial creek diversion by the IWG – a body without any competence to carry out such a review under Colombian law (and composed of several entities devoid of any technical expertise to do so), and lacking a framework, legal criteria or procedure to carry out this mandate. This order disregarded the applicable framework pursuant to which specified environmental entities are competent to analyze a project's environmental impacts and determine its environmental viability, as well as the measures necessary to mitigate, control and compensate for the project's impacts, pursuant to procedures and criteria established by law and regulation.

24. Arbitrariness: under the Treaty, Colombia must refrain from acting in an arbitrary, unreasonable, inconsistent and disproportionate manner. This includes refraining from adopting measures that: (a) are not based on legal standards, or are adopted in disregard of the applicable legal framework, proper procedure and/or due process; (b) are inconsistent with prior state conduct; or (c) impose a burden on the investor that is disproportionate to the public benefit of the measures in question.

25. Through its measures described in paragraph 23 above (amongst other measures), Colombia has treated Claimant's investments in an arbitrary, unreasonable,

inconsistent and disproportionate manner. These measures disregarded the applicable regulatory framework and the environmental authorizations and other administrative acts duly granted by the government in relation to the project (which were not reversed). Nowhere in its Judgment SU-698 did the Constitutional Court take into consideration or weigh Cerrejón's constitutionally protected rights, or the consequences that the Court's orders would have on its operations. Moreover, for the reasons described in paragraph 13 above, Colombia acted in disregard for the proper procedure and basic due process principles.

26. Consistent, stable and predictable treatment: the state must act in a coherent manner, without ambiguity, transparently, and maintaining an environment that allows a reasonably diligent investor to adopt a commercial strategy that it can implement over time.

27. Colombia has breached this obligation through its above-described measures. Notwithstanding that the Bruno Creek Project had been fully authorized and approved by the competent authorities, Colombia's measures have confusingly imposed various additional requirements and review processes not provided for under the applicable framework, leaving the Bruno Creek Project shrouded in uncertainty and now stuck in limbo. First, the courts in the second lawsuit ordered additional consultations not required under the regulatory framework, to be carried out in parallel to the completion of the project. While carrying out this order, the Constitutional Court ordered the suspension of the project pending the completion of an additional environmental review process by an *ad hoc* body (the IWG) not provided for by law. Even after that review confirmed the viability of the project in Q1 2022, the suspension remains in force while the Court carries out an additional layer of review of the IWG's review process. This constant moving of the goalposts has led to a complete lack of legal certainty and predictability of the requirements to be fulfilled in order to complete the project, contrary to the Treaty's requirements.

28. Denial of justice: foreign investors are protected from proceedings that are unduly delayed, fundamentally unfair, and that produce irrational outcomes beyond the mere misapplication of the law. Colombia has violated that standard through the above-described proceedings.

### B. UNREASONABLE MEASURES

29. Colombia must also refrain from impairing by unreasonable measures Claimant's management, maintenance, use or enjoyment of its investment. Colombia has breached this obligation as a result of its above-described measures.

## III. COMPENSATION CLAIM

30. Colombia's actions have prevented Cerrejón from extracting the additional tonnes of coal associated with the Bruno Creek Project in the La Puente pit, and has resulted in lower coal volumes being extracted from other pits. Glencore has suffered damages by virtue of its shareholding in Cerrejón. Under international law, Glencore is entitled to compensation from Colombia to wipe out all effects of Colombia's unlawful actions. Even though Glencore is now Cerrejón's sole shareholder, it is only claiming compensation reflecting the 33% stake in Cerrejón that it held when the suspension of the Bruno Creek Project took effect.

31. Glencore engaged independent experts to assess its losses. The experts have considered all relevant information available to present, thereby excluding the effects of value-eroding events that are unrelated to Colombia's measures (eg Covid disruptions). Glencore's losses amount to US$489.2 million.

32. Glencore's damages claim is limited to the economic effects of Colombia's suspension of exploitation activities in the La Puente pit. Glencore is not claiming damages for conducting the consultations it has been ordered to undertake with local communities.

## IV. REQUEST FOR RELIEF

33. Glencore has requested that the Tribunal:

(a) declare that Colombia has breached Articles 4.1 and 4.2 of the Treaty;

(b) order Colombia to pay Claimant US$489.2 million for its breaches of the Treaty or such other sum as the Tribunal sees fit;

(c) order Colombia to pay post-award interest on all damages awarded, from the date of the award (*ie* the valuation date) to the date on which Colombia effectively pays the compensation awarded by the Tribunal;

(d) declare that: (i) the award of any damages and interest is made net of applicable Colombian taxes; and (ii) Colombia may not deduct taxes in respect of the payment of the award of any damages and interest, or in the alternative, order Colombia to indemnify Claimant with respect to any Colombian taxes imposed on such amounts;

(e) order Colombia to pay all of the costs and expenses of the arbitration; and

(f) award such other relief as the Tribunal considers appropriate.

34. Claimant has reserved its right to supplement or amend its request for relief as appropriate.