

National Contact Point of Switzerland

Final Statement

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

Berne, 20.12.2022

Executive summary

On 19 January 2021, a specific instance was received from the Global Legal Action Network (hereafter referred to as the “submitting Party” or “GLAN”). The submitting Party was supported by six NGOs – CAJAR, CINEP, AIDA, ABColombia, Ask! and Christian Aid. The specific instance concerned an alleged failure to comply with the OECD Guidelines by the three multinational enterprises which each held a one-third shareholding in the Cerrejón coal mine in northern Colombia (hereafter “responding Parties”). The request raised a number of issues related to the OECD Guidelines, including allegations regarding harming the environment, causing adverse human rights impacts, failing to carry out adequate due diligence and disclose information about the impacts of Cerrejón’s operations (Chapter II, IV and VI of the Guidelines). In view of the fact that the Cerrejón coal mine was owned in equal parts by three multinational enterprises, Anglo American plc headquartered in the UK, BHP Group Limited headquartered in Australia and Glencore International AG headquartered in Switzerland, the submission was addressed to the Australian, UK and Swiss NCPs regarding these three responding Parties.

In its report of 10 January 2022 on the [Initial Assessment](#), the Swiss NCP accepted the submission for further examination and offered its good offices to the Parties. It furthermore proposed, subject to the consent of the Parties, to lead a mediation involving the submitting Party and the three responding Parties. The Swiss NCP’s offer was accepted by the responding Parties and the Australian and UK NCPs; the submitting Party provisionally accepted the offer, though stipulated certain conditions. All Parties agreed to the appointment of an external professional mediator suggested by the Swiss NCP.

Following negotiations over the Terms of Reference (TORs) for the mediation, the submitting Party informed the Swiss NCP on 29 August 2022 of its decision to withdraw from the procedure. This decision was explained by GLAN and the six supporting NGOs on the grounds that in their view the negotiations on the TORs for the mediation had irrevocably failed. At the time of withdrawal, there was according to GLAN no resolution on their requests regarding the following issues: access to the mediation for the six supporting NGOs and, separately, indigenous community leaders; the scope of the mediation required by the three initial assessments; and, the Swiss NCP’s approach to their geographical jurisdiction.

The Swiss NCP regrets that it has not been possible to conduct a mediation with all Parties. It recommends that Glencore, as the sole owner of the Cerrejón coal mine since early 2022, maintains a dialogue with interested NGOs on the issues alleged in the submission, some of which dated from a long time ago. The Australian and UK NCPs will, according to their rules of procedure, publish Final Statements regarding BHP and Anglo American respectively, referring to this Final Statement.

1. Submission and Initial Assessment

The OECD Guidelines represent a set of principles and standards for responsible business conduct, addressed as recommendations by the governments of the 38 OECD member and 13 other adhering States to multinational enterprises operating in or from their territories. The Swiss NCP has the mandate to further the effectiveness and promote observance of the OECD Guidelines and to facilitate communication between different stakeholders. 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 discussion and mediation, assisting Parties concerned to deal with these issues and providing recommendations regarding the implementation 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 each held a one-third shareholding in 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).

The submitting Party addressed its submission, supported by six NGOs (CAJAR, CINEP, AIDA, ABColombia, Ask! and Christian Aid), to the Australian, UK 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 three 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"*.

The Swiss NCP accepted the specific instance for further consideration (see report of 10 January 2022 on the [Initial Assessment](#)) and offered its good offices to the Parties. It furthermore proposed to lead a mediation involving the submitting Party and the three responding Parties, namely Anglo American, BHP and Glencore. The Swiss NCP's offer was accepted by the three responding Parties, as well as by the Australian and UK NCPs who published Initial Assessment reports in the same vein on the same date. GLAN provisionally accepted this offer, provided that certain conditions requested by GLAN were resolved before the start of the mediation and agreed by the Parties, for example that the six supporting NGOs were given the same status in the mediation as to GLAN and that the NCP clarified its geographical jurisdiction to address Glencore's compliance with the OECD Guidelines in Switzerland, Colombia and any other relevant location.

2. Proceedings of the Swiss NCP

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

19.01.2021	Acknowledgement of receipt of the specific instance to the submitting Party (GLAN)
20.01.2021	Information and forwarding of the submission to Glencore
21.01.2021	Information of the Swiss Embassy in Bogota, Colombia on the submission
28.01.2021	Conference call of Swiss, Australian, Colombian, Irish and UK NCPs

22.03.2021	Conference call of Swiss, Australian, Irish and UK NCPs with the Chair of the WPRBC ¹ and OECD Secretariat
23.04.2021	Letter of Swiss NCP to Glencore with requests for written reply to the specific instance as well as to specific questions related to amongst others a 2019 Colombian Constitutional Court judgment against Carbones del Cerrejón
26.04.2021	Letter of the Australian NCP to GLAN informing it of the coordinated process among NCPs and requesting further information on various issues
31.05.2021	Responses received from GLAN to NCPs' requests for information
28.06.2021	Information received from Glencore of its decision to acquire joint venture partners' shares (i.e. own 100%) of Cerrejón, expected by mid-2022; forwarding this information to the Australian and UK NCPs
20.07.2021	Conference call between the Swiss, Australian and UK NCPs which confirmed that each NCP will prepare an Initial Assessment regarding the MNE from its country, will share drafts and decide suitable next steps
5.07.2021	Receipt of Glencore's written response to the NCP's letter of 23 April 2021
30.07.2021	Receipt of Glencore's written response to the submission which was forwarded to the submitting Party on 5 August 2021
16.08.2021	Request received from GLAN to share Glencore's and Carbones del Cerrejón's written responses with six supporting NGOs
19.08.2021	Information received from Glencore indicating its position that it was not necessary or appropriate to share its written responses with the six NGOs supporting GLAN at the Initial Assessment stage of the proceedings
27.09.2021	Draft Initial Assessment shared for factual comments with submitting and responding Parties as well as Australian and UK NCPs
28.10.2021	Information received from Glencore that they do "not object to GLAN's identified partner organizations being granted participant status for the remainder of these proceedings."
21.12.2021	Receive comments on Initial Assessment from submitting Party
10.01.2022	Initial Assessment published
21.02.2022	Meet with GLAN to discuss indigenous community engagement with the process, and jurisdiction of the Swiss NCP in relation to impacts in Colombia
03.03.2022	Information received from BHP, following similar information from AA, Glencore and the Australian and UK NCPs of their consent to a Swiss NCP-led mediation, and of their interest to participate in it, like AA and Glencore
28.03.2022	Appointment of external professional mediator agreed by all Parties
13.04.2022	Circulate draft TORs to Parties
03.05.2022	Meet with GLAN, six supporting NGOs, and mediator to discuss outstanding issues in relation to: access to the mechanism for the six supporting NGOs and, separately, indigenous community leaders; the scope of mediation; and, the Swiss NCP's jurisdiction
10.05.2022	Circulate second draft TORs to Parties
22.06.2022	Meet with GLAN and six supporting NGOs to discuss outstanding issues
29.08.2022	Decision of submitting Party to withdraw from the negotiation of TORs for mediation
01.11.2022	Draft Final Statement shared for factual comments with submitting and responding Parties
15.11.2022	Receipt of comments to Final Statement by submitting and responding Parties

¹ OECD Working Party on Responsible Business Conduct

3. Outcome of the process

In view of a possible mediation, the Swiss NCP offered the Parties its good offices, proposed the nomination of an experienced mediator, mandated her and provided draft Terms of reference (TORs) for the mediation to the Parties on 13 April 2022.

The Parties' comments to the TORs were received on 1 and 2 May 2022 respectively, and discussed in online meetings with the mediator and GLAN and the six supporting NGOs, and separately with the mediator and the three companies, on 3 and 4 May. A revised version of the TORs taking as much as possible account of the Parties' remarks and the Implementation Procedure of the OECD Guidelines was submitted by the Swiss NCP on 10 May, with a request for comments by 16 May, taking into account the decision to hold the first mediation meeting on 20 May. The Swiss NCP proposed to examine in the mediation the nature, adequacy and results of the due diligence processes of Anglo American, BHP and Glencore as (previous) shareholders of Cerrejón. While the companies' common remarks to the TORs were received on 18 May, GLAN informed the Swiss NCP of its inability to attend the first mediation meeting, in view of a series of open issues with the 2nd draft TORs submitted by the Swiss NCP.

On 22 June 2022, in a bilateral online meeting GLAN raised a number of barriers which they said had been raised previously and were preventing their participation in the proceedings, remaining "non-negotiable issues". These were that: (1) there was no equal party status for the six supporting NGOs; (2) there were barriers to effective accessibility of the mechanism for indigenous leaders; (3) there were barriers to addressing in the mediation issues accepted in the Initial Assessments of the three NCPs; (4) the Swiss NCP had limited its geographical jurisdiction in respect of the compliance of the companies with the OECD Guidelines; (5) there were barriers to access arising from translation costs; (6) coordination with the Australian and UK NCPs was unaddressed. The Swiss NCP promptly decided to cover translation costs and informed GLAN thereof. The NCP further informed GLAN that it would continue the ongoing coordination with the Australian and UK NCPs, while asking for clarification on other issues in order to ensure their acceptance by all Parties. In spite of efforts to foster solutions which could be acceptable by all Parties, GLAN refused at short notice to participate in a rescheduled first mediation meeting, focused on finalizing the TORs, on 5 July 2022. GLAN indicated that it would respond in writing to the 2nd draft TORs. Instead, GLAN submitted on 29 August 2022 a 20-page letter stating the conviction of GLAN and the six supporting NGOs that negotiations on the TORs for the mediation had irrevocably failed, and asking the Swiss NCP to make a Final Statement in relation to the submission it had received.

The Swiss NCP took note of GLAN's request and forwarded it, after seeking GLAN's approval, to the Australian and UK NCPs as well as to the three responding Parties. In accordance with the Australian and UK NCPs, the Swiss NCP agreed to write a Final Statement according to its rules of procedures concluding the proceeding.

4. Conclusions and recommendations

The Swiss NCP acknowledges that the procedure initiated by GLAN was a very complex one, involving three responding Parties headquartered in three adherent countries to the OECD Guidelines, hence three NCPs, and concerning a joint undertaking in a fourth adherent country. In addition to extensive coordination among the three NCPs having received the submission, this setting also required communication with the WPRBC Chair, the OECD Secretariat and the Colombian NCP. This led to the Swiss NCP issuing its Initial Assessment report, along with the Australian and UK NCPs, almost 12 months after GLAN's specific instance was received.

On the side of the submitting Party, numerous organizations were involved, which made communication with the NCP difficult. Further complications of the proceedings were due to changes regarding ownership of the Cerrejón coal mine during the process as well as numerous administrative and judicial national and international parallel procedures. This led to a very complex starting position for mediation.

The Swiss NCP welcomes the continued efforts and the time and resources invested by the Parties in the proceedings, including the drafting of the TORs for the mediation. It regrets that it has not been possible to conduct a mediation, which could have established the basis for a possible future-oriented solution to the dispute between the Parties.

The Swiss NCP recommends:

- Glencore, as the sole owner of the Cerrejón coal mine since early 2022, should maintain a dialogue with all stakeholders including the submitting Party, its supporting NGOs and further local interested groups (e.g. representatives from affected Wayúu and afro-Colombian communities) on issues alleged in the submission, some of which date from a long time ago;
- Glencore, as the sole owner of the Cerrejón coal mine since early 2022, should ensure that its due diligence policies and measures foster a responsible business conduct at Cerrejón;

The Australian and UK NCPs will, according to their rules of procedure, publish Final Statements regarding BHP and Anglo American respectively, referring to this Final Statement.

According to its standard practice, the Swiss NCP will send out feedback forms to be filled out by the Parties; these will allow the Swiss NCP to draw lessons from this case and continue improving its work.

With this Final Statement, the Swiss NCP closes the specific instance.