Summary of Amicus Curiae to the Constitutional Court of Colombia urging implementation of decision in favour of the Wayúu Indigenous people and protection of the Bruno River affected by the Cerrejón open-pit thermal coal mine

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Overview

Glencore and Anglo American initiated arbitration claims against Colombia in a secretive tribunal outside of the national legal system in 2021 to avoid implementation of a Colombian Constitutional Court decision from 2017. This decision favours Wayúu Indigenous and Afro-descendant communities and the protection of the Bruno River. It suspended expansion of the Cerrejón coal mine, Latin America's largest open-pit thermal coal mine, pending the outcome of a technical review of its social and environmental impacts.

The Cerrejón open-pit thermal coal mine, Latin America's largest, has operated in La Guajira, in the north of Colombia for almost four decades. The company Carbones del Cerrejón is now owned by the Swiss transnational Glencore. However, during the last two decades and until early 2022, Glencore, Anglo American and BHP Billiton had equal shareholdings in the company.

For years, local communities in La Guajira and Colombian civil society organizations have documented human rights violations and environmental human rights violations and environmental impacts from the mine. These include the dispossession and displacement of up to 35 Wayúu Indigenous and Afro-descendant communities from their ancestral territories, with irreparable cultural consequences. Coal extraction has also contaminated air, water and soil, including diverting, interfering with, or drying up about 44 local streams, including the Bruno, a major tributary of the Ranchería River and the most important water source in this dry region.

Glencore and Anglo American brought their suits against Colombia using a system formally known as investor-state dispute settlement (ISDS), which is written into some 2,800 trade and investment treaties. The companies used the bilateral investment protection treaties with

Switzerland and the United Kingdom respectively. ISDS gives foreign investors unilateral recourse when they believe that measures taken by a state negatively affect their interests.

In April 2022, the Interinstitutional Technical Working Group that was established to address issues at the Cerrejón mine and is chaired by the Ministry of the Environment issued a report favorable to continuation of the expansion project and disrespectful of Wayúu concerns. According to a complaint from Colombian organizations the report concluded that the Bruno river will remain diverted in an artificial channel, while its natural course is destroyed.
The report from the Interinstitutional Technical Working Group is an indication of the influence that these suits could be having over Colombian authorities, also known as the "chilling effect", where the mere threat of an ISDS claim can be enough to scare governments into letting investors have their way. Anglo American withdrew its claim in July 2022 after selling its shares in Cerrejón to Glencore earlier this year, and possibly as the ISDS claim had already had its desired effect - to push the Colombian government into acquiescence. Glencore's suit continues.

Currently, the Constitutional Court is reviewing implementation of its 2017 decision, in which context the organizations Terra Justa, the Institute for Policy Studies (IPS) – Global Economy Program, War on Want, Global Justice Now and the London Mining Network have presented an amicus brief to the Court. It describes the nature and risks of ISDS to the judiciary, to human rights and corporate accountability, and urges the court not to bend to corporate pressure, but to enforce its decision in favour of the Wayúu and protection of the Bruno River.

Glencore and Anglo American are not the only mining companies that are perversely resorting to ISDS to sue Colombia and other governments in private supranational tribunals when communities have succeeded in getting national state institutions such as the Colombian Constitutional Court to take measures to protect their territories and water.

In the case of Colombia alone, the amicus brief identifies ten suits that transnational mining companies have threatened or brought from 2016-2021 for a total of nearly US$2.5 billion in pending claims. In the vast majority of these claims, investors are suing over measures to protect human rights and the environment, including six cases involving Constitutional Court decisions.

The situation of Cerrejón and Colombia is indicative of a broader trend in Latin America of extractive industry companies bringing ISDS claims to undermine judicial independence, state sovereignty to regulate in the public interest, as well as the self-determination of affected people and steps needed to protect people and the planet.

Drawing on examples of other governments that have been reviewing their commitments to International Investment Agreements and ISDS, this brief recommends that Colombia review its existing commitments with the goal of eliminating ISDS in order to recuperate sovereignty and necessary regulatory space, as well as to fulfill obligations to affected peoples and communities.

Following, we provide a more detailed summary of the Amicus Curiae brief. The full document is available in Spanish here.

I. Devastation from decades of coal mining and the 2017 Constitutional Court decision

Since 2013, Carbones de Cerrejón has proposed diverting the Bruno River in order to develop the La Puente pit and extract the coal found in the area. The company has already modified 3.6 kilometers of the river and diverted it to 700 meters north of its natural location.

In 2015, the environmental and social impacts led the affected Wayúu communities, with the support of Colombian civil society organizations, to file an action with the Constitutional Court against Cerrejón and the state institutions that authorized the project. They argued that the diversion of the Bruno River violated their fundamental rights and won.

In 2017, the Constitutional Court issued sentence SU-698, suspending the mine expansion and recognizing that the company and the state institutions violated Wayúu rights to water, health and food sovereignty as a result of authorizing and then diverting the natural course of the Bruno River to expand the coal mine.

Currently, the Constitutional Court is reviewing implementation of this decision.

II. Glencore and Anglo American launch claims over Constitutional Court decision

The Constitutional Court decision was interpreted by Anglo American and Glencore as an affront to their interests. In response, they undertook to sue Colombia using a little known mechanism, found in roughly 2,800 International Investment Agreements globally, called Investor State Dispute Settlement or ISDS.

Glencore International A.G. registered its claim against Colombia on May 28, 2021 alleging violations of the Agreement between Colombia and Switzerland for the Promotion and Reciprocal Protection of Investments. On June 2, 2021, Anglo American PLC filed its claim against Colombia, invoking the Bilateral Investment Agreement between Colombia and the United Kingdom. Both filed their suits with the International Centre for Settlement of

Investment Disputes (ICSID), a World Bank agency and the most frequently used tribunal for this type of arbitration.

The companies allege that the decision adopted by the Constitutional Court is discriminatory, inconsistent, unreasonable, and arbitrary, denying them fair and equitable treatment. The companies' initial claim did not establish the estimated sum that the companies are demanding.

In April 2022, the Interinstitutional Technical Working Group that was established to address issues at the Cerrejón mine and is chaired by the Ministry of the Environment published a study favourable to the company, which approved the destruction of the natural course of the Bruno River. Colombian civil society organizations denounced the study on the grounds that it disregarded guidelines from the 2017 Constitutional Court decision and did not take into consideration the participation of the Wayúu communities. This is evidence of the "chilling effect", common to ISDS cases, such that the companies' suits could be influencing Colombian authorities to act in their interests, instead of abiding by the Constitutional Court's decision in favor of the Wayúu people's rights.

Notably, on July 1, 2022, Anglo American withdrew its claim. Few details are known about the company's decision. However, when questioned by representatives of the London Mining Network during Anglo American's Annual General Meeting of Shareholders in May 2022, the company Chairman announced that they were reviewing their claim after having sold their stake in Cerrejón to Glencore. The decision also too place after the ISDS claim had presumably had its desired effect - to push the Colombian government into acquiescence.

Glencore's arbitration claim remains pending and continues to raise concerns about its possible negative influence on the Wayúu people's efforts to restore the natural course of the Bruno River and defend their rights.

III. ISDS and the global investment protection regime

Today, there is a vast network of some 2,800 International Investment Agreements (IIAs), signed by virtually all countries in the world, that allow recourse to ISDS, including Bilateral Investment Treaties, Free Trade Agreements and other IIAs. Most of these investment treaties and trade agreements were signed in the 1990s, as a result of the trade and investment liberalization policies promoted by the Washington Consensus in line with what corporate lawyers had envisioned decades earlier, providing for the opening of countries to foreign investment. ISDS allows foreign investors to circumvent domestic regulations and courts to initiate international claims against governments when they feel that their investments have been adversely affected.

IIAs contain ambiguous investment protection clauses that lend themselves to very broad interpretations, such as "Fair and Equitable Treatment" or "Indirect Expropriation". These enable foreign investors to initiate lawsuits and demand millions of dollars in compensation, including future profits, when they consider that their interests have been affected by any public policy or governmental measure, regardless of whether these measures are beneficial for the population or the environment.

In recent years, mainly in the last two decades, the number of "Investor-State" cases has multiplied with more than 1,100 known cases brought by 2021, of which almost a third have been brought against governments in Latin America and the Caribbean. Mining, oil and gas companies are the most predisposed to bring arbitration cases, having presented around 25% of all known cases to date and 29% of all cases in 2021 alone. The vast majority are brought by companies domiciled in five countries in the Global North (US, Canada, UK, Netherlands and Australia) against governments in the Global South. In the mining sector, cases are frequently brought over measures to protect people and the environment.

Beyond the economic costs of fighting these suits and possibly paying compensation to companies, a suit or even the threat of a suit can constrain the decisions of authorities, influence their decisions in favor of companies, or coerce governments to negotiate and settle disputes outside the arbitration process. This is called the "chilling effect". In addition, fear of suits may prevent governments from pursuing public policies to protect public health and the environment, or to desist from such protections.

The amicus provides various examples of the chiling effect in connection with arbitration cases brought by mining companies. For example, in the last few years, cases have been documented of pressured negotiations to restart projects or backtrack on policy measures in Pakistan, Thailand, India and Papua New Guinea.

IV. Mining suits against Colombia illustrate how ISDS works against people and nature

Since 2016, Colombia has been the subject of 9 known ISDS arbitration claims brought by mining companies and at least one known threat of arbitration. Of these 10 cases, 8 have to do with situations where the substantive issues relate to the protection of the environment, the rights of communities to live in a healthy environment, Indigenous peoples' rights, among others. **In 6 of these 8 cases, the companies decided to sue or threatened lawsuits over Constitutional Court decisions.**

Mining Company Arbitration Claims and Threats of Claims against Colombia
(Sources: UNCTAD, ICSID, IAReporter)

Year	Company	Country of Origin	Measure in dispute	Amount claimed (millions USD)	Amount awarded to the company (millions USD)
2016	Glencore Internatio nal & C.I. Prodeco	Switzerland	Sanction imposed by the Colombian Comptroller General over royalty payments related to the Calenturitas coal project	767	19
2016	Cosigo Resources and others	U.S.	Resolution establishing the Yaigojé-Apaporis National Park where the company was exploring for gold in Vaupés	16511	Inactive
2016	Eco Oro	Canada	Constitutional Court decision ratifying the prohibition of mining in the páramo ecosystem (high altitude moorlands)	764	Pending
2018	Red Eagle	Canada	Same as Eco Oro above	40	Pending
2018	Galway Gold	Canada	Same as Eco Oro above	196	Pending
2018	GCM (previously Gran Colombia Gold)	Canada	Colombian government inaction in face of protests and informal mining activities in the area of gold projects in Segovia, Antioquia and Marmato, Caldas	700	Pending
2018	South32	UK	Constitutional Court decision ordering compensation to communities affected by the Cerro Matoso ferronickel mine,	After threatening to sue, the company backed off after the	

			consultation with the communities, and application for a new environmental permit	Court overturned the order to compensate communities	
2020	South32	UK	Dispute over Colombian Comptroller General's assessment of royalties owed from the Cerro Matoso nickel mine	Amount unknown	Pending
2021	Glencore	Switzerland	Constitutional Court decision suspending expansion of the Cerrejón coal mine in the area of the Bruno River	Amount unknown	Pending
2021	Anglo American	UK	Same as Glencore above	The company discontinued its suit after selling its shares in Cerrejón to Glencore	
Total amount pending				2,467	19

The cases against Colombia form part of a clear trend among arbitration proceedings brought by mining companies, which frequently relate to the struggles of mining-affected communities when they succeed in convincing various state agencies to make a decision in favor of their rights. Within this trend, there is a pattern of cases being brought against judicial decisions, which has led to criticism of the supranational arbitration system as a parallel justice system solely for transnational corporations and a threat to judicial independence in Latin America.

The Amicus cites examples of other claims that seek to erode judicial autonomy and challenge decisions in Guatemala, Costa Rica, Ecuador, and Peru. It also expands on how such cases have sought, as in Colombia, to circumvent respect for Indigenous peoples' rights and ensure impunity for transnational corporations that destroy the environment and ways of life. In the medium term, such suits may cause a state to adjust the law even more in favor of transnational

investors to avoid future arbitration. Even in cases where companies fail to achieve their objectives, the submission argues that there is a high and unnecessary cost of having to pass a country's legal and legislative decisions before an arbitration tribunal, which is not governed by the democratic and sovereign processes of that country.

What's at risk?

ISDS enables extractive companies to avoid responsibility for human rights violations, while at the same time potentially contributing to such harms. It also hinders the development of public policies necessary for greater corporate accountability and obstructs the obligations of States to respect, protect and guarantee human rights and a safe living environment for all.

A clear illustration is the case of the Marlin mine in northwestern Guatemala. The risk that Canadian mining company Goldcorp could have sued Guatemala influenced the state's failure to comply with an order issued by the Inter-American Commission on Human Rights (IACHR). The IACHR ordered the suspension of this open-pit gold mine in May 2010 and the implementation of measures to address water contamination and health harms of 18 indigenous Maya Mam and Sipakapense communities. However, at risk of being sued, the State never complied with this mandatory order and undertook to manage the conflict so as to deny the communities' rights to due process, omitting independent evidence of damage to the water and health of the population, and additionally ignoring important issues such as fraudulent land purchases and the right to free, prior and informed consent of the affected population. At the same time, human rights defenders suffered from threats, intimidation, attack, violent repression, and legal persecution. The mine closed in 2017. Meanwhile the communities' petition to the IACHR was admitted in 2014 and is still in process. The precautionary measures in favor of the communities were modified in 2011 to not include the suspension of the mine. The State has never complied with the precautionary measures, while the communities continue to live with the serious damage to their lives and environment.

The amicus provides additional examples where arbitration cases have contributed to human rights violations, including in El Salvador, Ecuador, Peru and Papua New Guinea.

As a result of these practices and the privileged structure of the IIAs and the SCIE, several civil society organizations point out the serious overall risk posed by this system in the face of the need for major public policy changes to address climate change and for greater corporate accountability when companies violate the laws and human rights of peoples and communities affected by their investments.

Professor Nicolás Perrone concludes that the effect of this unilateral remedy for transnational investors not only restricts the right to regulate of states, but also undermines the fundamental demands of communities for self-determination, the right to a healthy environment, health, water and justice: "Demands for recognition are articulated in a language that arbitrators distrust: a language of politics, values, and aspirations that relate not to the global economy but to the local community [...] Locals are not expected to have much of a voice, but to adapt to the demands of the global natural resource sector."[1] In short, this reinforces colonial asymmetries of power between transnational investors and many governments in the Global South, and especially between Indigenous peoples, affected communities and transnational investors.

Because of the accumulation of negative experiences and concerns over IIAs and ISDS, human rights bodies have also expressed concern. The amicus cites the United Nations Working Group on the issue of human rights and transnational corporations, which tabled its report A/76/238 on IIAs and the ISDS mechanism to the UN General Assembly on July 27, 2021. This report recognizes the incompatibility of international investment agreements with the protection of and respect for human rights, as well as to the remedy of human rights violations.

Governments have also been raising concern. In recent years, states such as Bolivia, Ecuador, Venezuela, New Zealand, South Africa, and India have also taken action to limit their exposure to ISDS cases. In the European Union, where ISDS claims under the Energy Charter Treaty are prohibitively delaying and making the energy transition prohibitively expensive, the European Court of Justice has ruled that ISDS claims between EU countries are incompatible with EU law.

In addition, in the recently renegotiated free trade agreement between Canada, the United States and Mexico, which entered into force on July 1, 2020, the ISDS mechanism was eliminated between Canada and the United States. Canada's former Foreign Minister Chrystia Freeland highlighted this achievement, recognizing that ISDS undermines state sovereignty and necessary protections to people and the environment: "The ISDS elevates the rights of corporations above those of sovereign governments. By eliminating it, we have strengthened our government's right to regulate in the public interest, to protect the public's health, and to in the public interest, to protect public health and the environment."[2]

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[1] Nicolás M. Perrone, Investment Treaties & the Legal Imagination: How Foreign Investors Play by Their Own Rules, Oxford University Press, 2021, p. 198.

[2] Government of Canada, "Prime Minister Trudeau and Minister Freeland speaking notes for the United States-Mexico-Canada Agreement press conference", 1 de octubre de 2018; https://pm.gc.ca/en/news/speeches/2018/10/01/prime-minister-trudeau-and-minister-freeland-speaking-notes-united-states

What can be done?

The ISDS system poses a threat to the efforts of governments, justice systems, Indigenous peoples, communities, and civil society organizations seeking to protect human rights, indigenous rights, the environment, climate, labour rights, public services, and life itself.

Colombian civil society organizations, the Wayúu indigenous people and Afro-descendant communities in La Guajira have struggled for years to make visible and reverse the impacts of coal mining in their territories. They celebrated the 2017 Constitutional Court decision SU-698 as an achievement of their tireless efforts, even as they have repeatedly denounced the non-compliance with the judgement. This achievement took place within Colombia's legal processes and democratic institutional framework, which must be respected above any foreign business interests. Disrespect and non-compliance with Ruling SU-698 of 2017, is, in essence, an attack on the affected people and the Colombian judicial system.

It is our firm conviction that Anglo American at the time, and Glencore presently, have used and continue to use ISDS and the international legal regime provided by IIAs and ICSID as a way to evade their responsibilities for violating community rights and to blackmail the Colombian state to grant them the permits and guarantees necessary to develop the La Puente coal mine pit, or, otherwise, to pay them financial compensation. We believe, instead, that any dispute should be resolved within Colombian jurisdiction.

A process of revision, renegotiation and denunciation of all International Investment Agreements is urgently needed. These treaties and agreements are what ultimately empower foreign companies and investors to sue sovereign countries in supranational tribunals. Contrary to popular belief, there is no compelling evidence that IIAs are a determining factor in attracting foreign investment. On the contrary, they become straitjackets for state institutions and affected people in countries such as Colombia.

The organizations that present this Amicus Curiae make the following requests of the Colombian Constitutional Court:

- We request that the Constitutional Court listen to the call of the Wayúu people and the Afro-descendant communities of La Guajira, who demand effective compliance with sentence SU-698 of 2017. In the interest of protecting their rights, the natural course of the Bruno River should be restored and the development of the La Puente pit stopped.
- We request that the Constitutional Court call on the relevant Colombian authorities and institutions to refrain from issuing any statements that stigmatize local communities as groups that oppose a project of strategic national interest. This leads to threats of which many Indigenous and community leaders are already victims.

- We request that the Constitutional Court urge the Colombian government to initiate a comprehensive review of IIAs that it has signed onto, including the ICSID Convention, in order to abandon ICSID and to urgently denounce or renegotiate all existing international investment agreements, with the aim of eliminating ISDS. This is necessary to recuperate sovereignty in order to regulate in the interest of the Colombian people and environmental protection, as well as to defend the independence and role of the judicial system, and to respect the self-determination of Indigenous and other communities, including those who seek justice and accountability for environmental harm and rights violations.
- We request that the Constitutional Court call on the government of Colombia to not sign any new IIAs that include ISDS, and to ensure justice for the people of La Guajira.