

IN THE ARBITRATION BEFORE
THE INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

GLENCORE INTERNATIONAL A.G.,
Claimant/Investor,

v.

REPUBLIC OF COLOMBIA,
Respondent/Party.

Submission of Non-Disputing Parties
Revised pursuant to Procedural Order No. 4
La Gran Parada and Paradero Wayuu Indigenous Communities

Rosa María Mateus Parra
Colectivo de Abogados José Alvear Restrepo
rmmateus@cajar.org
Bogota, Colombia

May 2, 2025

TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. THE BRUNO CREEK IS FUNDAMENTALLY IMPORTANT FOR OUR COMMUNITIES AND IS THREATENED BY ITS DIVERSION AND BY THE MINE’S EXPANSION.	5
III. THE SCOPE AND CONTENT OF JUDGMENT SU-698/17 AND RELATED ORDERS WERE INSUFFICIENT FOR PROTECTING OUR RIGHTS.....	22
IV. THE IMPLEMENTATION OF JUDGMENT SU-698/17 HAS PERMITTED CARBONES DEL CERREJÓN TO HAVE A PRIVILEGED POSITION TO THE DETRIMENT OF WAYUU COMMUNITIES.	28
V. THE NEED FOR MEASURES TO PREVENT RETALIATION AGAINST US IN THIS ARBITRAL DISPUTE.....	38
VI. CONCLUSION	39
VII. PETITION	40

I. Introduction

[1] We, the Paradero and Gran Parada Wayuu Indigenous communities (the “non-disputing parties” or “communities”) hereby submit our brief addressing the three factual issues enumerated in the Tribunal’s Procedural Order No. 3 in this arbitration between the Claimant, Glencore International A.G. (“Glencore”), and the Respondent, the Republic of Colombia (“Colombia”), under the Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (the “Treaty”). These three issues are: (i) “The importance of the Bruno Creek for the [C]ommunities and the impacts that have been and will be generated by the development of the diversion project, the exploitation of resources along the creek’s natural channel and the expansion of the La Puente pit,” (the “Project” by Carbones del Cerrejón Ltd. “Cerrejón” or “Carcbones del Cerrejón”); (ii) “[T]he scope and content of relevant judgments, including Judgment SU-698 of 2017, and the orders given”; and (iii) “The implementation status of the orders of Judgment SU-698 of 2017” (“SU-698/17”).

[2] At the heart of this controversy is how the Bruno Creek’s diversion and the Cerrejón mine’s expansion are affecting our communities’ food, water, and health. We depend on the Bruno Creek, which is of existential importance for us, our spirituality, our culture, and our social dynamics. Additionally, it is fundamental for providing water for drinking, growing food, and supporting our health. The creek’s diversion and the mine’s expansion threaten the Bruno Creek’s ability to continue providing these essential ecosystem services. These threats are even greater in the

context of climate change which is contributing to a humanitarian crisis due to water stress in La Guajira.

[3] Glencore's primary argument that Colombia's courts violated the fair and equitable treatment standard under the Treaty ignores these critical impacts to our communities and the importance of the Bruno Creek for our culture. Swift and determinative judicial intervention was necessary to protect our rights, which are well recognized under Colombia's constitution and international law.

[4] As we have argued before Colombia's courts, these orders did not go nearly far enough to protect our rights. Relevant judgments show that Colombia's courts should have gone even further to protect our rights, and the minimum steps they took fell far short of exceeding any reasonable bounds around their authority. The judiciary should have ordered the creek to immediately return to its natural course to protect it and our special relationship to it; and thereby avoid increasing our risks related to water stress and irreparable harm. The judiciary should have also gone further to guarantee our right to *prior* consultation regarding the creek's diversion.

[5] Finally, the implementation of the Constitutional Court's Judgment SU-698/17 has indeed been biased, but this bias has favored Glencore to our detriment. Delays in the implementation were primarily due to the proceedings of the Inter-Institutional Working Group ("IWG"), which was created to implement the court orders in Judgment SU-698/17, Glencore's influence on the IWG's proceedings and decisions, the lack of due diligence of Glencore, and the initiation of this international arbitration dispute. Our exclusion and the delays and uncertainty around the implementation of the court's orders have caused us even further psychological harm

and disruptions to our spiritual, cultural, and social life. An award by this Tribunal in Glencore's favor would further exacerbate these harms to our communities and jeopardize our ability to live with dignity in our ancestral territory.

II. The Bruno Creek Is Fundamentally Important For Our Communities And Is Threatened By Its Diversion And By The Mine's Expansion.

A. The Bruno Creek Is Important For Our Culture And Way Of Life.

[6] The Bruno Creek, also known as *Youluna*, is central to our spiritual life.¹ Water that flows through the Bruno Creek is a sanctuary of the spirit *Pulowi* that provides protection.² *Pulowi* is the wife of *Juyaa*, the spirit of the rain, and together they are guardians of the water.³ The spirit *Chamä* is guardian of forests, including those around the Bruno Creek.⁴ The relationship of the Bruno Creek to Wayuu

¹ Community members have repeated this information throughout this litigation and references here indicate examples of where this information may be found in the courts' records. *See, generally*, Roxana Ipuana and Elsis Sierra Pujuta, *Shuchiku luwopuu youluna, liberen el arroyo bruno*, Constitutional Court of Colombia Case File T-5443609 ("Free the Creek Report") (NDP-0001).

² Free the Creek Report, *supra* n. 1 at p. 160.

³ *Ibid.* *See also*, Constitutional Court, T-302/17, p. 320 (8 May 2017) (R-0032); Nurys Esperanza Silva Cantillo, Anthropologist, National University of Colombia, University of Cauca, *Response to the Judgment of Oversight of Compliance with the Orders of SU-698/2017 of the Constitutional Court Final version* ("Silva Cantillo Expert Report"), p. 31 (29 Mar.2022) (R-0325).

⁴ Free the Creek Report, *supra* n. 1 at p. 160.

communities is that of mother to children.⁵ The Ranchería River fed by the Bruno Creek is also a *river-spirit*, *Perrankanagua*.⁶ The Bruno Creek forms part of the path that the dead use to travel North to return to the sea.⁷ The Bruno Creek also washes away bad dreams, is a place for the living to meet the spirits of the dead, and is a place for ceremonial rituals.⁸ The creek is a living being that cannot be cut into segments because doing so would feel, to us, like cutting one of our own arms.⁹ The forest that covers the Bruno Creek is the *Wayúu Womainpá*, the eye-spirit of the Earth,¹⁰ and for this spirituality to be intact, the limbs of the canopy over the creek created by trees along the shorelines must be touching, or embracing above the creek.¹¹ Failure to care for the creek changes the water from a fountain of life to a source of illness and misfortune.¹² In addition, the forest and animal species that are part of the stream belong to the tropical dry forest ecosystem, an ecosystem that is in

⁵ *Id.* at p. 156.

⁶ T-302/17, *supra* n. 3 at p. 301.

⁷ Silva Cantillo Expert Report, *supra* n. 3 at p. 31.

⁸ *Ibid.*

⁹ Constitutional Court SU-698/17, p. 25 (28 Nov. 2017) (R-0171).

¹⁰ Silva Cantillo Expert Report, *supra* n. 3 at p. 19.

¹¹ CAJAR, Pronouncement regarding non-compliance with judgment SU698 of 2017 and request for protection of the fundamental rights to water, health and food sovereignty of the communities of Paradero, Gran Parada and La Horqueta (“Petition For A Judgment On The Merits”), p. 116 (19 Mar. 2024) (NDP—0003).

¹² Silva Cantillo Expert Report, *supra* n. 3 at p. 31.

danger of extinction and has been included in the Colombian government's National Action Plan to Combat Desertification and Drought (PAN).¹³

[7] The Bruno Creek is central to our social life, facilitating social interactions by being part of a system of trails that permits the movement of our and other Wayuu communities to travel to one another.¹⁴ Waters of the Bruno Creek are also a primary motivation for social interactions, as the creek has long been the destination of seasonal migrations from the communities of the Upper and Middle Guajira to visit those closer to the creek.¹⁵ The Bruno Creek is a “perennial” and “permanent” water body that “is not seasonal,”¹⁶ contrary to Glencore’s claims.¹⁷ Disappearance of the creek’s water could displace communities and provoke a loss of our “social fabric.”¹⁸ The water and abundance of resources supported by the Bruno Creek promotes

¹³ Ministry of Environment and Sustainable Environment, *Tropical Dry Forest* <https://www.minambiente.gov.co/direccion-de-bosques-biodiversidad-y-servicios-ecosistemicos/bosque-seco-tropical/> (accessed 11 Nov. 2024).

¹⁴ Free the Creek Report, *supra* n. 1 at 159.

¹⁵ Silva Cantillo Expert Report, *supra* n. 3 at p. 20, 30.

¹⁶ Ministry of Environment and Sustainable Development, Colombian Geological Service, Institute of Hydrology, Meteorology, and Environmental Studies, *Unified Institutional Concept On Environmental Uncertainties In The Framework Of The Unification Decision 698 Of 2017 Of The Honorable Constitutional Court Of Colombia* (“Ministry of Environment 2024 Report”), p. 12 (Apr. 2024) (R-0192).

¹⁷ Glencore, Summary Of Claimant’s Position (“Summary of Glencore’s Position”), p. 1 (15 Aug. 2024) https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9833/DS19906_En.pdf (accessed 8 Nov. 2024).

¹⁸ Comptroller General of Colombia, Environmental Aspects Of Ruling SU-698/17 In Relation To The Bruno Creek Diversion Project (“CGR 2020 report”), p. 57 (June 2020) (R-0284).

harmony and reduces social conflict.¹⁹ We Wayuu are semi-nomadic people, and in periods of drought or low-rains, the Bruno Creek allows communities along its banks to welcome Wayuu pastoralists in search of grazing land for their animals.²⁰ Our social interactions are thus “hydrosocial,” meaning they are organized by or involve water bodies, including, for example, the Bruno Creek.²¹

[8] The Bruno Creek is also central to our culture. To mark the passage from adolescence to adulthood, women from our communities gather in the Bruno Creek to perform a cultural ritual in the water where the creek facilitates communication between the women and trust in one another.²² Natural materials such as stones, shells, or plant-based materials we collect from the Bruno Creek are also important for resolving disputes in our culture. Our *pütchipü'üi*, or *palabrero*, use these materials in their practices, recognized on UNESCO’s list of intangible world heritage, which is a dispute resolution mechanism that centers the repair of a relationship.²³

[9] The Bruno Creek is fundamental for guaranteeing our access to water. The Gran Parada community members, for example, have long relied on wells for drinking

¹⁹ Free the Creek Report, supra n. 1 at p. 156-7.

²⁰ SU-698/17, supra n. 9 at p. 67.

²¹ Astrid Ulloa et al., Territories Without Water In Southern La Guajira: Collaborative Conceptual And Methodological Approaches, p. 34 (2020) (NDP—0004).

²² Free the Creek Report, supra n. 1 at p. 157.

²³ UNESCO Intangible Cultural Heritage, *Wayuu normative system, applied by the Pütchipü'üi (palabrero)* (2024), <https://ich.unesco.org/en/RL/wayuu-normative-system-applied-by-the-putchipu-ui-palabrero-00435?RL=00435> (accessed 6 Nov. 2024).

water and fear that the partial diversion of the Bruno Creek and coal mining in the area are affecting surface waters and aquifers connected to those wells.²⁴ The Gran Parada's wells have already begun to run dry, and as a result they have had to rely on trucks to transport water from sources such as the Bruno Creek.²⁵ Members of the Paradero have wells that dry up in summer and cannot afford to buy bottled water and that their animals are dying for lack of water.²⁶ At least 26 Wayuu communities, including ours, have noted that they source water from the Bruno Creek, and the government has acknowledged this connection for eleven of those communities.²⁷ Other Wayuu communities as far as 40 kilometers away depend on trucks transporting water from the creek for their drinking water.²⁸ Local governments have also considered the Bruno Creek as key for solving the water crisis in the area.²⁹

[10] The Bruno Creek also provides us with water necessary for agriculture. The Bruno Creek's watershed is among the most productive agricultural land in La Guajira,³⁰ and it supports what remains of an "agricultural pantry" that supports a rich diversity of foods,³¹ including corn, beans, bananas, sugar cane, peppers,

²⁴ SU-698/17, *supra* n. 9 at p. 66-7.

²⁵ *Ibid.*

²⁶ SU-698/17, *supra* n. 9 at p. 69.

²⁷ Comptroller General of Colombia, *Concept Note*, p. 5 (3 Oct. 2017) (R-0357).

²⁸ SU-698/17, *supra* n. 9 at p. 60-1.

²⁹ *Id.* at p. 9-10.

³⁰ *Id.* at p. 60.

³¹ Free the Creek Report, *supra* n. 1 at p. 158.

tomatoes, fruit trees,³² yucca, butternut squash, melons, watermelon, plants used for spicy ají pepper sauce, chives, olives, small green plantains, and oats.³³ We also rely on the Bruno Creek for raising cattle and goats and to practice fishing, including for the mojarra fish that we typically eat fried with coconut rice and plantains, and the bocachico fish that is key to our food security.³⁴

[11] The Bruno Creek also is important for our health. We use water from the Bruno Creek for our hygiene and sanitation.³⁵ Additionally, the Bruno Creek supports the growth of our medicinal plants,³⁶ This includes the *dividivi* tree we use for traditional medicine,³⁷ also known as *Caesalpinia spinosa*, that produces substances that boost the immune system and fight melanoma and cancers;³⁸ and Anamú,³⁹ that has anti-inflammatory properties and we use to treat body and stomach pain.⁴⁰

³² SU-698/17, supra n. 9 at p. 11.

³³ Free the Creek Report, supra n. 1 at p. 158.

³⁴ *Id.* at p. 159.

³⁵ SU-698/17, supra n. 9 at p. 35; *See also id.* at p. 60 (bathing and clothes washing still occur in the Upper and Middle Bruno Creek); Free the Creek Report, supra n. 1 at p. 159.

³⁶ Free the Creek Report, supra n. 1 at p. 154.

³⁷ *Id.* at p. 167.

³⁸ Lasso, Paola et al. *An Immunomodulatory Gallotanin-Rich Fraction From Caesalpinia spinosa Enhances the Therapeutic Effect of Anti-PD-L1 in Melanoma*, *Frontiers in immunology* vol. 11 584959 (18 Nov. 2020) <https://pmc.ncbi.nlm.nih.gov/articles/PMC7708328/>.

³⁹ SU-698/17, supra n. 9 at p. 67.

⁴⁰ Brenda Costa da Conceição, et al. *Amazonian Plants: A Global Bibliometric Approach to Petiveria alliacea L. Pharmacological and Toxicological Properties*, *Plants* (Basel, Switzerland) vol. 12,18 3343. 21 (Sep. 2023) <https://pmc.ncbi.nlm.nih.gov/articles/PMC10536944/>.

B. Diversion Of The Bruno Creek And Coal Mining Have Negatively Impacted Our Relationship With The Creek And Threaten Its Ability To Continue Providing Essential Ecosystem Services.

[12] The Carbones del Cerrejón coal mine is one of the world's largest open pit coal mines and it has been mined since 1983.⁴¹ To make room for this mine, the Colombian government seized lands that were part of our people's traditional territory in the early 1980s without consulting us.⁴² Further expansion of one of the pits of the Cerrejón mine (La Puente) has required diverting the Bruno Creek.

[13] From that moment until today, mining has generated various impacts that affect our health, affected our access to water, and has contributed to the loss of cultural practices essential to our lives.⁴³

[14] The partial diversion of the Bruno Creek and mining activities have negatively impacted the spiritual connection between us and the creek. The artificial channel created by Carbones del Cerrejón for the Bruno Creek's diversion cannot be a home of *Pulowi*, the guardians of the water, because *Pulowi* does not reside in artificial

⁴¹ Ministry of Environment 2024 Report, *supra* n. 16 at p. 10-16.

⁴² Silva Cantillo Expert Report, *supra* n. 3 at p. 22-4.

⁴³ See, e.g., CENSAT, Cerrejón. Development? 40 years of open-pit mining, climate crisis, territorial dispossession and permanent cultural and environmental damage in La Guajira (26 oct. 2023) <https://censat.org/cerrejon-desarrollo-40-anos-de-explotacion-minera-a-cielo-abierto-crisis-climatica-despojo-territorial-y-danos-culturales-ambientales-permanentes-en-la-guajira/> (accessed 9 Nov. 2024).

channels.⁴⁴ *Wanezatai*, the guardian of the forest, disappears when mining charges are detonated.⁴⁵ *Epeyui*, the guardian of animals and paths, becomes angry from mine-related pollution and begins to make the people sick.⁴⁶ For us, the deaths of children are related to the spiritual disruption caused by the Bruno Creek diversion.⁴⁷ Mining has also affected the river-spirit *Perrankanagua* (Ranchería River) by affecting aquifers feeding the river.⁴⁸

[15] Diversion of the creek and expansion of the mine also threatens our social life and culture,⁴⁹ including by cutting off paths we use for moving through our territories to visit one another.⁵⁰ By reducing water in the creek, the creek's diversion and mining activities also threaten our semi-nomadic life and the social relationships that the Gran Parada and Paradero have with neighboring communities, including those further north.⁵¹ Migration cycles between our neighboring Wayuu

⁴⁴ CAJAR, Petition For A Judgment On The Merits, *supra* n. 11 at p. 47.

⁴⁵ Free the Creek Report, *supra* n. 1 at p. 160.

⁴⁶ *Ibid.*

⁴⁷ Technical Secretary of the Inter-Institutional Working Group, Compilatory Document Of Observations To The Judicial Inspection March 27 and 28, 2023, p. 82 (NDP-0006).

⁴⁸ Constitutional Court, Judgment T-302/17, p. 301 (8 May 2017) (R-0032).

⁴⁹ *See, e.g.* Inter-Institutional Working Group, *Technical Study in response to the Fifth Order of the Ruling SU - 698 of 2017* ("IWG 2022 Report"), p. 117-8 (Mar. 2022) (noting community objections to how cultural impacts have been minimized and describing some of those impacts) (R-0169).

⁵⁰ SU-698/17, *supra* n. 9 at p. 72-3.

⁵¹ *Id.* at p. 58, 72-73.

communities are being altered by water scarcity, which in turn are affecting norms of hospitality and our poly-residential lifestyle.⁵²

[16] Diversion of the Bruno Creek and mining activities also threaten to reduce the water available from the creek that we need for drinking, growing food, and supporting health.⁵³ As we have said to the Constitutional Court, “if we dry up the Creek today, we will have to leave here.”⁵⁴ We still do not know whether the creek will be able to meet our communities’ needs if the mine expansion continues, despite the court’s orders to resolve this uncertainty. An expert report critiqued the Inter-Institutional Working Group’s finding that the creek supplies sufficient water to meet demand assessment, noting that its analysis had important omissions, such as failing to quantify the water we require from the creek.⁵⁵ Water flows have dropped precipitously and continuously over the past decades. The annual average flowrate through the upper part of the Bruno Creek dropped from peaks of over 1 m³/s in the years before 1990 to approximately 0.1 m³/s in 2015, the last year of recorded data.⁵⁶ Yet Cerrejón is permitted to withdraw approximately a third of the creek’s average

⁵² SU-698/17, *supra* n. 9 at p. 84.

⁵³ SU-698/17, *supra* n. 9 at p. 158; Ministry of Environment 2024 Report *supra* n. 16 at p. 49-50, Table 7.

⁵⁴ SU-698/17, *supra* n. 9 at p. 61.

⁵⁵ Silva Cantillo Expert Report, *supra* n. 3 at p. 29.

⁵⁶ IWG 2022 Report, *supra* n. 49 at p. 180, Graphic 6.

flowrate based on an environmental assessment conducted in 2012 before the humanitarian crisis began.⁵⁷

[17] According to studies by the Ministry of Environment and Sustainable Development and independent technical experts tasked by the Constitutional Court to assist the Inter-Institutional Working Group, the artificial channel's design is negatively impacting surface and groundwater flows. First, the artificial channel runs along rockier terrain that is not as hydrologically connected to the underlying aquifers.⁵⁸ This results in as much as a 100⁵⁹ times greater rate of exchange in water between the Bruno Creek and the underlying aquifers in the artificial channel as compared to the natural channel. Connectivity between surface- and groundwater is important because aquifers flow into the creek especially during dry periods, and the creek recharges aquifers during rainy periods.⁶⁰ Second, the artificial channel, at approximately 30 meters across, is much wider than the natural channel, which makes it more difficult for a forest canopy to grow over the creek to provide shade

⁵⁷ SU-698/17, *supra* n. 9 at p. 85 (30 L/s, or 0.03 m³/s); *See also*, ANLA, *Update of the Regional Analysis Alert Report for the Caribbean - Guajira Hydrographic Zone* ("ANLA 2022 State of Water Report") p. 19-20 (June 2022) (confirming 30 l/s) (NDP-0007).

⁵⁸ Geo-Environmental Corporation Terrae, Intervention in relation to the judicial inspection conducted on March 27 and 28, 2023, in the context of the monitoring of compliance with the orders of Judgement SU-698 of 2017 ("Terrae 2023 report"), p. 19 (26 May 2023) (exhibit R-0021).

⁵⁹ Geo-Environmental Corporation Terrae, Pronouncement in relation to the Order of June twenty-eighth (28), two thousand and twenty-fourth (2024) ordering the transfer of the evidence of record ("Terrae 2024 report"), p. 4 (6 July 2024) (NDP-0008).

⁶⁰ Ministry of Environment 2024 Report, *supra* n. 16 at p. 50.

that prevents evaporation.⁶¹ Third, the width of the artificial channel allows for a greater volume of water to flow, which can have upstream effects by making the waters there drain more quickly into the lower part of the Bruno Creek.⁶² Finally, coal mining and diversion of the Bruno Creek has cut off one of its tributaries, La Puente Creek, that cannot reach the artificial channel,⁶³ which further threatens to alter water quantity in the lower part of the Bruno Creek. The photos below show differences between the natural and artificial channel, including the slope of their banks, their width, and canopy cover.

⁶¹ Attorney General of the Nation, *Observations [and] consolidated report on uncertainties in the Bruno Creek* (“Attorney General 2021 Report”), p. 6 (2 Nov. 2021) (NDP-0009).

⁶² Comptroller General of Colombia, *Concept Note*, supra n. 27 at p. 11, 15.

⁶³ Comptroller General of the Republic, Official Communication 2022EE0203897 Communication of Observations – Compliance Audit of the orders of Judgement SU 698/2017, p. 28-9 of 47 (1 Dec. 2022) (NDP-0010).



Fotografía 1: Cauce antiguo. Fuente: Autor. Fecha: 27 de julio de 2017.

Figure 1 Photo from 2017 in the Attorney General's 2021 Report showing the natural channel.



Fotografía 2: Cauce nuevo. Fuente: Autor. Fecha: 27 de julio de 2017.

Figure 2 Photo from 2017 in the Attorney General's 2021 Report showing the artificial channel.

[18] Studies by independent technical experts also show that the expansion of the Puente pit itself threatens our access to water by draining underground aquifers. First, the Puente pit is creating a “siphon effect” that is causing water to drain out of aquifers beneath the Bruno Creek and into the mining pit.⁶⁴ In 2004, Carbones del Cerrejón estimated that the amount of water flowing out of local aquifers into the pits due to this siphon effect is significant, with 70.9 L/s (0.071 m³/s) flowing into the Puente mining pit alone, and 360 L/s (0.36 m³/s) in total flowing into all its mining pits.⁶⁵ To provide context for how large this amount of water is, this total exceeds the limit of approximately 250 L/s (0.25 m³/s) in the mine’s environmental permit for how much water it can drain out of all aquifers for the purpose of keeping mining pits operating and mining-walls stable.⁶⁶ Second, the Cerrejón mine’s operations require large amounts of water, including up to 14.1 L/s drained from aquifers near

⁶⁴ Terrae 2024 report, supra n. 59 at p. 7; See also, Carlos E. Angel, Responses, Replies and Additional Annotations from Hydrogeologist Carlos E. Angel M. To Selected Guiding Questions From Among Those Formulated By The Constitutional Court In Judgment SU-698 of 2017 Technical Session, September 25, Albania (Guajira) and October 17, 2023 (“Carlos Angel 2023 Report”), p. 7 (“studies executed by Cerrejón ... show that the siphon effect of the pit is at work there” where water in the Bruno Creek-QBR alluvial deposit “has a direction of flow towards the pit (to the south)” and the Cerrejon-TC formation is also flowing in that direction, with “abundant ‘waterfalls’” falling out of the mining wall into the pit) (own translation) (NDP-0011).

⁶⁵ Ministry of Environment 2024 Report, supra n. 16 at p. 30 (“the average flows that would enter the Annex [.83 l/s], PW [13.18 l/s], Tabaco [235.9 l/s], Patilla [40.71 l/s] and La Puente [70.9 l/s] pits through the alluvial aquifers” total 360.81 l/s) (own translation).

⁶⁶ ANLA Resolution 1386, p. 95 (13 Nov. 2014) (to “avoid slope instability in the mining pits, Cerrejón collects water from the coal seams (tertiary aquifer) through depressurization wells...The concessioned flow for water from the depressurization wells is equal to 250 L/s”) (exhibit R-0073).

the Bruno Creek.⁶⁷ Expansion of the mine would allow the mine to draw as much as an additional 250 L/s of water from the aquifers, doubling the amount permitted in 2012.⁶⁸ Finally, excavation of the mine pits reduces aquifers' storage capacity, and expansion of the La Puente and Tabaco pits would cause a loss of 77 million m³ of storage capacity and the P40 expansion would result in a 134-139 million m³ loss by 2033.⁶⁹ The photos below taken by an engineer during site visits to the Cerrejón mine show water flows into the mining pit and a reservoir forming on the mine floor.

⁶⁷ SU-698/17, *supra* n. 9 at p. 75. (Cerrejón utilizes between 8.6 l/s and 14.1 l/s of the aquifer, which corresponds to 12% and 20.3% of the total water concession).

⁶⁸ ANLA, Resolution 1386, *supra* n. 66 at p. 96.

⁶⁹ SU-698/17, *supra* n. 9 at p. 85.



Mina Cerrejón. Abundantes “chorreaderos” de agua a lo largo de los taludes que estuvieron a la vista. Observados y fotografiados en la visita del 28 marzo pasado. Ese mismo día las comunidades preguntadas al lado del Ayo, dijeron que lluvias no se habían presentado en últimos 3 meses aprox.

Figure 3 Image taken by Expert Carlos E. Angel with red arrows in the original indicating where water was flowing out of the Cerrejón mine wall.⁷⁰

⁷⁰ Carlos Angel 2023 Report, supra n. 64 at *Photography Annex* (NDP-0012).



Mina Cerrejón. Poza o reservorio ubicada en fondo de la mina, para colección de toda el agua drenada del tajo. Observada y fotografiada en la visita del 28 marzo pasado. Ese mismo día las comunidades preguntadas al lado del Ayo, dijeron que lluvias no se habían presentado en últimos 3 meses aprox.

Figure 4 Image by Expert Carlos Angel with red arrow in original showing a reservoir at the bottom of the Puente pit.⁷¹

C. Access To The Bruno Creek's Water Is Crucial In The Context Of La Guajira's Humanitarian And Climate Crisis.

[19] Between 2012-16, we experienced a humanitarian crisis related to chronic hunger and deaths from malnutrition that were associated with intense water scarcity in La

⁷¹ *Id.*

Guajira.⁷² By 2013, food shortages affected 510,000 people,⁷³ between 2013 and 2014 chronic malnutrition reached 40% of Wayuu children,⁷⁴ and by 2017 rates of death due to malnutrition for Wayuu under five years old reached rates of 60 out of every 1,000 children.⁷⁵ Between 2008-2015, 4,771 children died from causes related to malnutrition.⁷⁶

[20] The primary causes of the crisis are complex, and include land displacement impeding our ability to grow or trade for food, and water scarcity affecting our ability to obtain drinking water, grow crops, or raise cattle.⁷⁷ Factors leading to water scarcity include, amongst other things, a drought intensified by the climate crisis,⁷⁸ which Colombia recognized in 2010 as a high risk for La Guajira.⁷⁹

[21] In July 2023, given the seriousness of the humanitarian and environmental crisis in La Guajira, the National Government issued Decree 1085 of 2023 “*Whereby a State of Economic, Social and Ecological Emergency is declared in the Department*

⁷² Colombia Human Rights Ombudsman, Omduds Resolution N° 065, Humanitarian crisis in the department of La Guajira (3 Feb. 2015) (R-0016).

⁷³ U.S. AID, *Rural Colombians Weather Drought and Conflict* (Jul. 2015) <https://2012-2017.usaid.gov/results-data/success-stories/re-establishing-hope-rural-colombia> (accessed 8 Nov. 2024).

⁷⁴ T-302/17, supra n. 3 at p. 39.

⁷⁵ SU-698/2017, supra n. 9 at p. 84.

⁷⁶ Inter-American Commission on Human Rights, *Resolution 60/2015, Precautionary Measures 51/15* (“IACHR Res. 60/2015”), p. 3 (11 Dec. 2015) (R-0028).

⁷⁷ T-302/17, supra n. 3 at p. 41-3.

⁷⁸ T-302/17, supra n. 3 at p. 42.

⁷⁹ See, Colombia, Second National Communication to the United Nations Framework Convention on Climate Change, Chapter 4, p. 206, 221 (2010) (NDP-0013).

of *La Guajira*"⁸⁰ due to multiple causes such as the shortage of drinking water for human consumption; the food crisis due to difficulties for physical and economic access to food; the effects of climate change accentuated by the hot desert and hot arid climates that predominate in the territory and that has been deeply affecting water sources, among others.

[22] The Bruno Creek is essential in periods of water scarcity because its connection to underground aquifers allows it to provide water even in times of low rainfall.⁸¹ However, as detailed above, the partial and future diversion of the Bruno Creek and coal mining threaten to negatively affect water flows in the creek and aquifer levels.

III. The Scope And Content Of Judgment SU-698/17 And Related Orders Were Insufficient For Protecting Our Rights.

[23] In Judgment SU-698/17, the Constitutional Court found that the diversion of the Bruno Creek threatens the creek's ability to provide essential ecosystem services and therefore directly threatens our human rights.⁸² The Constitutional Court also found that the mine's operators had not adequately assessed these threats⁸³ and held that the protection of our rights required the temporary suspension of activities related to

⁸⁰ Decree 1085 of 2 Jul. 2023, <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=213770> (visited 11 Nov. 2024).

⁸¹ Ministry of Environment 2024 Report, *supra* n. 16 at p. 5-51.

⁸² SU-698/17, *supra* n. 9 at p. 151-5.

⁸³ *Id.* at p. 157.

the Puente pit expansion and the creek's diversion.⁸⁴ The court re-authorized the Inter-Institutional Working Group to resolve uncertainties about the mine's environmental impacts to assist the court in reaching a decision on the merits.⁸⁵

[24] However, the court had sufficient evidence and the constitutional mandate of the Constitutional Court to protect our rights, and the Court should have gone even further in protecting those rights.

A. Ordering Initial Steps For The Bruno Creek To Return To Its Natural Course Is Within The Constitutional Court's Authority Under Applicable Law.

[25] Justices Fajardo Rivera and Rojas Rios concluded in their partial dissent in Judgment SU-698/17 that the court "should have ordered the removal of the hydraulic plug that impedes the natural course of the Bruno Creek."⁸⁶ This was necessary because "the orders issued by the Full Chamber did not go far enough to maximize the protection of the rights of the plaintiff communities."⁸⁷

[26] There are multiple rulings by Colombian and international courts that support the conclusion of Justices Fajardo Rivera and Rojas Ríos that the court should have

⁸⁴ *Id.* at p. 158, para. 6.5. *See also*, Constitutional Court, Judgment A419/17, First order (9 Aug. 2017) (exhibit C-0037).

⁸⁵ SU-698/17, *supra* n. 9 at Eighth order.

⁸⁶ SU-698/17, *supra* n. 9 at p. 171, Partial Dissent of J. Fajardo Rivera and Rojas Rios.

⁸⁷ *Id.*

done more to protect the creek based on the risks of harm, even if it was not certain the harm would materialize.

[27] For example, in 1992 pursuant to a *tutela* action filed by the Wayuu, Colombia's Constitutional Court ordered government agencies to prevent violations of the right to life and the right to a healthy environment from the Cerrejón's emission of particulate matter.⁸⁸ There, in order to show the "required causal relationship" in a *tutela* action, the Constitutional Court required plaintiffs to show only that the mine was creating environmental contamination and that the Minister of Health had found that the contamination created an area at "risk to human health" but did not require a showing that the harm was certain to materialize.⁸⁹

[28] In Judgment T-256/15, the Constitutional Court in a *tutela* action found that Carbones del Cerrejón was responsible for violations of the right to water of communities that included Wayuu for failing to guarantee adequate access to water after resettling the communities.⁹⁰ The court reaffirmed a longstanding principle that a constitutional judge:

... once verified the violation or threat to fundamental rights, he cannot limit its work to recognizing the complexity and the various challenges posed by the situation ... On the contrary: the constitutional judge has the duty to ask himself ... what kind of orders he can give to remedy the omissions, negligence or simple bureaucratic obstacles that prevent taking

⁸⁸ Constitutional Court, T-528/92 (18 Sep. 1992) (NDP-0014).

⁸⁹ *Id.* at p. 25 (own translation).

⁹⁰ Constitutional Court, T-256/15, p. 258-9 (5 May 2015) (R-0186).

measures to eliminate or mitigate the risk of a new and serious violation of fundamental rights.⁹¹

[29] The Supreme Court of Justice has affirmed this standard for the burden of proof in *tutela* actions as well in a case against the emissions of particulate matter from Carbones del Cerrejón:

the lack of scientific support to demonstrate that fugitive coal particles are damaging the soil, water sources or air quality of the municipalities of the Department of La Guajira referred to in the action, in no way prevents the violation of the right to a healthy environment.⁹²

[30] These decisions are also consistent with those of the Inter-American Court of Human Rights that has found a material risk of harm is sufficient to violate rights to life and personal integrity.⁹³

[31] Here, the Constitutional Court found that the Bruno Creek diversion threatened our right to water, food, and health.⁹⁴ The mere presence of the creek in its artificial channel affects spiritual, cultural, and social values of the creek and also presents a real significant risk of causing reductions in surface- and ground-water that would threaten the lives of those who depend on that water.⁹⁵ As Justices Fajardo Rivera and Rojas Rios concluded, we as plaintiffs met our burden to show that there was a

⁹¹ *Id.* at p. 262-3 (own translation).

⁹² Civil Appeals Chamber of the Supreme Court of Justice, Judgment STC9813-2016, p. 28-30 (19 Jul. 2016) (NDP-0015) (own translation).

⁹³ I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2021, Merits and Reparations, para. 247-8, 341 (27 Jun. 2012) (RL-0108).

⁹⁴ SU-698/17, *supra* n. 9 at p. 118, s. 5.1.1. *See also, id.* at p. 158, s. 6.4.

⁹⁵ *See* section II.B, *supra*.

significant risk to our rights from the Bruno Creek diversion, and as a consequence the court should have ordered the creek to immediately return to its natural course to attenuate these significant risks.

[32] Ordering the return of the Bruno Creek to its natural course would also have guaranteed our right of access to an effective judicial remedy. Colombia's Constitutional Court has similarly recognized effective remedies related to violations of the right to water for Indigenous people require ensuring the provision of water "in a manner compatible with their aspirations, identity and ways of life."⁹⁶ The Inter-American Court of Human Rights has recognized that, in cases relating to Indigenous peoples, an effective remedy is one that recognizes our "special vulnerability" and "customary law, values, and customs."⁹⁷

[34] Lastly, the impact to Cerrejón caused by an order returning the Bruno Creek to its natural course would have been minor in comparison to the environmental and social impacts. The company stated to the Inter-Institutional Working Group that it did not intend, at least by December 2020, to mine coal beneath the Bruno Creek due to drops in coal prices.⁹⁸ The benefits of mitigating risks by returning

⁹⁶ T-256/15, *supra* n. 90 at p. 220, Order 5.

⁹⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, Merits, Reparations and Costs, para. 63 (June 17, 2005) (NDP-0016). *See also*, Indigenous and Tribal Peoples Convention, 1989 (No. 169) ("ILO 169") (Ratified by Colombia 1991), art. 4, 15 ("special measures shall be adopted as appropriate for safeguarding the...environment of the peoples") (RL-0032).

⁹⁸ Ministry of Environment and Sustainable Development, *Working Group IWG entities for joint review of Uncertainty III contained in Ruling 698 of 2017*, p. 3 (28 Dec. 2020)

the creek to its natural course outweighed impacts for a project that was uncertain to proceed.

B. Relevant Judicial Opinions Support The Dissent's Position That The Courts Should Have Gone Further In Protecting Our Right To Prior Consultation.

[35] In our *tutela* action filed in December 2015, we requested an injunction against the diversion of the Bruno Creek until we could be appropriately consulted.⁹⁹ The courts did not grant our requests for consultation and, as the dissenting Justices Fajardo Rivera and Rojas Rios in Judgment SU-698/17 noted, no other court actions filed by any other Wayuu community were effective in ensuring that we were consulted on the Bruno Creek diversion.¹⁰⁰ To protect our right to *prior* consultation, the court should not only have ordered the Bruno Creek to return to its natural channel, but it should also have ordered that we be appropriately consulted.¹⁰¹

(“Cerrejón menciona que hoy en día no hay plan para intervención de arroyo Bruno, que el Plan Minero no ha incluido reservas que se relacionen con alguna intervención futura de este arroyo, por el precio del carbón y otros factores”) (NDP-0018).

⁹⁹ Criminal Court of Bogota, Tutela Action (12 Jan. 2016) (summarizing our tutela) (exhibit C-0029).

¹⁰⁰ SU-698/17, *supra* n. 9 at p. 168-9.

¹⁰¹ See UN Declaration on the Rights of Indigenous People, Art. 32(2) (2007) (NDP-0019). See also, UN Special Rapporteur James Anaya, *Extractive industries and Indigenous peoples*, A/HRC/24/41, para. 44 (01 Jul. 2013) (the duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement) (NDP-0020). UN Human Rights Council, *Free*,

[36] Here, Carbones del Cerrejón did not engage in prior consultation with us regarding the diversion, despite our *tutela* where we demonstrated how we would be affected. Additionally, the company could not have relied on the Ministry of Interior's determination we were not affected in light of clear constitutional precedent that a project proponent cannot depend on the Ministry of Interior's assessment as to whether Indigenous people would be affected by a project given the Ministry's many erroneous assessments.¹⁰² The Paradero, at approximately 5 km from the project, are closer than the Indigenous peoples in *Kaliña and Lokono Peoples v. Suriname* where the Inter-American Court of Human Rights required consultation in a similar case,¹⁰³ and the Gran Parada have demonstrated they would also be significantly impacted by the creek's diversion.¹⁰⁴

IV. The Implementation Of Judgment SU-698/17 Has Permitted Carbones del Cerrejón To Have A Privileged Position To The Detriment of Wayuu Communities.

prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/39/62, para. 32 (10 Aug. 2018) (noting, in the context of extractive activities, that consent may be required for a project “outside their territories” depending on the project's impacts) (NDP-0021).

¹⁰² Constitutional Court, T-704/16, p. 32, para. 4.11 (13 Dec. 2016) (citing, amongst others, decision T-880/06) (R-0187).

¹⁰³ I/A Court H.R., *The Kaliña and Lokono Peoples v. Suriname*, Ser. C, No. 309, para. 205-7 (25 Nov. 2015) (NDP-0022).

¹⁰⁴ T-256/15, *supra* n. 90 at p. 183 (broadly interpreting where impacts may be located to trigger consultation requirements).

A. Unlike The Wayuu Communities, Carbones Del Cerrejón Was A Member Of The Inter-Institutional Working Group.

[37] Judgment SU-698/17 established that the Inter-Institutional Working Group would be made up of public entities and Carbones de Cerrejón.¹⁰⁵ The Court instructed the Inter-Institutional Working Group to promote an intercultural dialogue to determine the socio-environmental viability of the project,¹⁰⁶ providing full guarantees to the communities, but the Inter-Institutional Working Group limited our participation to spaces for only the presentation of reports, which was a deficient approach to engaging in dialogue. We stated on multiple occasions that the composition of the Inter-Institutional Working Group was unbalanced and lacked independence and impartiality, preventing us from raising central points for the discussion on the diversion of the Bruno stream.¹⁰⁷

B. The Influence Of Carbones Del Cerrejón Allowed It To Sway The Scope Of Judgment SU-698/17's Implementation And Obtain Decisions That Favored It.

¹⁰⁵ SU-698/17, supra n. 9 at Order 3.

¹⁰⁶ SU-698/17, supra n. 9 at Order 4.

¹⁰⁷ Constitutional Court, A100/22, para. 50 (2 Feb. 2022) (C-176).

[38] The role of Carbones del Cerrejón was decisive in restricting the spaces for dialogue with the communities, and influenced the limited methodology for the creation of the reports ordered by the court.

1. Carbones del Cerrejón's influential role allowed it to sway the Inter-Institutional Working Group to adopt a limited approach to our participation in spaces meant for dialogue.

[39] One of the main disputes related to compliance with the court orders focused on the inadequate participation of affected communities in the Inter-Institutional Working Group's processes.¹⁰⁸ Carbones del Cerrejón used its influence to encourage a limited interpretation of the guarantees of participation before the Inter-Institutional Working Group, arguing that the group was empowered to establish its own participation methodology,¹⁰⁹ and that spaces for participation should be limited to moments of presenting reports rather than the integration of comments issued by the communities during the participation processes.¹¹⁰

[40] The implementation phase began upon the Constitutional Court's official notification to the parties of Judgment 698/17 on March 22, 2019.¹¹¹ On April 9, the

¹⁰⁸ *See, for example*, Constitutional Court, A523/2019 (17 Sep. 2019) (R-0265), A100/2022, *supra* n. 107.

¹⁰⁹ Carbones del Cerrejón, Statement on the Report of the Office of the Comptroller General of the Republic, para. 3.2.3. et seq. (21 Mar. 2023) (R-0332).

¹¹⁰ *Id.* at p. 21.

¹¹¹ ANLA, Letter T-5-443.609. SU 698/17.- OFICIO OPT-A-2484/2021, p. 4 (25 Aug. 2021) (NDP-0023).

Inter-Institutional Working Group met to respond to the court's orders to decide, within 30 days, whether the Bruno Creek should remain in its artificial channel or return to its natural course.¹¹² On May 3, the Inter-Institutional Working Group decided that the Bruno Creek should remain in its artificial channel until the court's remaining orders had been complied with.¹¹³ The group then met with communities on June 5-6.¹¹⁴ From the first meetings held to assess the implementation of the Judgment, we requested "guarantees of participation for the communities in the whole process [and] that the uses and customs of the Wayuu normative system be taken into account"¹¹⁵ because we were being excluded from the Inter-Institutional Working Group's spaces.¹¹⁶

2. Cerrejón's influence allowed it to sway the Inter-Institutional Working Group to give greater credence to Cerrejón's technical information.

[41] Glencore's position allowed it to influence the Inter-Institutional Working Group to decide to maintain the Bruno stream in its artificial channel without valuing the perspective of the communities. This was evident in the substantive reports used by

¹¹² *Id.*

¹¹³ Ministry of Environment and Sustainable Development, *Report on Progress for Judgment SU-698/17 Inter-Institutional Working Group*, p. 8 (2019) (NDP-0024).

¹¹⁴ *Id.*

¹¹⁵ Office of the Comptroller General of the Republic, Field Visit and Public Hearing July 6, 7, 8 and 9, 2019. Minutes and follow-up report, p. 6 (NDP-0025).

¹¹⁶ CGR 2020 Report, *supra* n. 18 at p. 44-5.

the Inter-Institutional Working Group to prepare the studies responsive to the court's eighth order (regarding partial deviation) and the fifth order (regarding uncertainties), because many of these reports were provided by the company Carbones del Cerrejón itself, which in various spaces has announced that "it has been participating in the meetings of the Working Group and has delivered the information and tasks assigned in compliance with the third and fifth orders."¹¹⁷

[42] Entities have warned about privileging these technical inputs, alleging that in developing the studies, there was an insufficient handling of information, incomplete analyses were made and the information presented by Carbones del Cerrejón was overvalued.¹¹⁸

3. The influential position of Glencore permitted it to sway the Inter-Institutional Working Group to decide to keep the Bruno Creek in its artificial channel without valuing the perspective of communities or experts.

[43] The Inter-Institutional Working Group was tasked to decide "on the reestablishment of the passage of surface waters of the Bruno Stream to its natural

¹¹⁷ A100/22, supra n. 107 at p. 11-2.

¹¹⁸ See, for example, CGR 2020 Report, supra n. 18 at p. 34, 43; *id.* at Findings 1, 3, 4, 7.D2-D5; Comptroller General of the Republic, Letter *OPTB-064/2022 Report on Compliance with Order 4 of Judgment SU-698/17 ("CGR 2022 Compliance Letter")*, para. 6-13 (5 May 2022) (NDP-0026).

channel while the technical study referred to in the fifth paragraph of the operative part of this decision.”¹¹⁹

[44] The privileged position of the company is evident by its occupation of a decision-making seat at the Inter-Institutional Working Group to directly influence the development of this report,¹²⁰ which led to a limited analysis in the methodologies and analyses that were carried out. Regarding the creek’s return, the group conducted a partial analysis because it assessed primarily the negative impacts of the return of the Bruno Creek to its natural channel, without assessing the provision of ecosystem services of the natural channel and without integrating our worldview into their report.¹²¹

[45] When considering the impact that the project would have on our lives, the group conducted a limited study, proposing a “replacement” of the entire spiritual relationship with the creek with a hut as a meeting space for “the realization of traditional activities that strengthen the Wayuu culture.”¹²² Even the IWG itself found that “the environmental economics approach used in the cost-benefit analysis **did**

¹¹⁹ SU-698/2017, supra n. 9 at Order 8. An “enramada” is a type of cabin or communal house for meetings.

¹²⁰ Comptroller General of the Republic, Compliance Audit Report On Compliance With The Orders Issued In The Arroyo Bruno 698/17 And Cerrejón T 614/19 Judgments (“CGR 2022 Dec. Audit”), p. 59 (Dec. 2022) (NDP-0027).

¹²¹ CGR 2020 Report, supra n. 18 at p. 47.

¹²² IWG 2022 Report, supra n. 49 at p. 125.

not include the quantification of non-use values such as spiritual and cultural damage.”¹²³

[46] Carbones del Cerrejón also influenced Inter-Institutional Working Group to decide to maintain Bruno Creek in its artificial channel without valuing the perspective of independent experts.¹²⁴ This position continued throughout various stages of the process, and even contradicted the findings of the Comptroller's Office in its thematic finding regarding culture and the potential for intervening experts to provide information in support of the process.

4. Glencore’s ability to influence the Inter-Institutional Working Group resulted in a report on uncertainties identified by the fifth order of the court that favored the company to the detriment of communities.

[47] The second report issued by the Inter-Institutional Working Group in March 2022 addressed the seven uncertainties identified in Judgment SU-698/17,¹²⁵ studying the social, environmental and economic impacts of the diversion of the Bruno stream and the subsequent exploitation of the La Puente pit.

¹²³ IWG, Consolidated Document Answers To The Questions Posed By The Claimant And Intervening Communities, According To The Participation Day Of Judgment Su - 698 Of 2017 January 31 And February 1, p. 11 (27 Oct. 2020) (NDP-0028) (emphasis added).

¹²⁴ *Id.* at p. 7.

¹²⁵ IWG 2022 Report *supra* n. 49.

[48] This report did not adequately take into account our comments and views regarding the provision of ecosystem services of the creek, our Wayuu cosmovision, the fundamental importance of the Bruno Creek and the impacts associated with climate change.¹²⁶ However, the inputs shared by Glencore as part of the IWG were taken into account. The Comptroller's Office warned that “The uncertainties addressed in the technical study in response to the Fifth Order... do not comprehensively resolve all the uncertainties of the Judgment,”¹²⁷ and highlighted that “the cultural services [identified] did not take into account what water means to the communities.”¹²⁸

[49] All these situations caused the implementation process of the judgment to be delayed and inefficient. This led us to request new processes before the Constitutional Court, such as a judicial inspection or technical sessions that were held in 2023.

[50] After these processes were developed, several of the entities of the Inter-Institutional Working Group warned that the pertinent analyses had not been carried out to address uncertainties of the project.¹²⁹ The Ministry of Environment and Sustainable Development, the entity that is the technical secretariat of the Inter-Institutional Working Group, issued a unified report where it evaluated conclusions

¹²⁶ See, e.g., CGR 2022 Dec. Audit, *supra* n. 120 at p. 9, 81, 89 Finding 3.D3 (on climate); *id.* at p. 8, 78, 81, 114 (on ecosystem services).

¹²⁷ *Id.* at p. 9.

¹²⁸ *Ibid.*

¹²⁹ Constitutional Court, *Technical Session*, Presentation Ministry of Environment and ANLA, p. 10 (Oct. 2023) (NDP-0029).

of the report on uncertainties identified by the court, and evaluated different scenarios for next steps in the development of the case, concluding that the option that would guarantee our protected rights was the return of the Bruno Creek to its original channel.¹³⁰

5. Glencore's lack of due diligence on the impacts generated by its mining operations to the communities of Paradero and La Gran Parada have hindered the implementation of Judgment SU-698/17.

[54] The lack of due diligence has also been evident in the implementation of Judgment SU-698/17. This judgment gave Glencore an additional indicator on impacts of its operations on our communities, which again evidenced the need to undertake a due diligence process to identify and manage risks to stop, prevent, or mitigate the impacts they were causing to the communities.

[55] But in the framework of the implementation of the judgment, Glencore omitted to carry out a due diligence process, took a restrictive view of participation for our communities and maintained a strategy to move forward with the project to divert the Bruno Creek and extract coal from the La Puente pit, without contemplating the risks and impacts that this will generate in our territory.

C. The Filing Of Glencore's Arbitration Claim Against Colombia Has Created Unfavorable Conditions For The Proper

¹³⁰ Ministry of Environment 2024 Report *supra* n. 16.

Implementation Of Judgment SU-698/17 And A Final And Timely Decision By The Constitutional Court.

[56] At the time the request for arbitration by Glencore against Colombia was filed, the IWG was working on the preparation of the report responsive to the fifth order of the Constitutional Court. During the judicial process, the National Agency for the Legal Defense of the State (hereinafter ANDJE) issued a series of requirements to multiple national entities in the framework of the Prevention of Anti-legal Damage Policy, with emphasis on investment arbitration.¹³¹ This phenomenon led the Constitutional Court itself to consult with ANDJE officials on the development of the arbitration process and the implications it could have on the State's public finances.¹³² The concern of the arbitration was expressed on subsequent occasions by several of the judges of the Constitutional Court during the development of the technical session and the judicial inspection during the year 2023.

¹³¹ María Paula Arenas Quijano, *Prevention of anti-judicial harm from investment disputes*, <https://conocimientojuridico.defensajuridica.gov.co/prevencion-dano-antijuridico-frente-controversias-inversion> (11 Nov. 2024).

¹³² Constitutional Court, *Follow-up on compliance with the orders issued in Ruling SU-698 of 2017 Case T-5443609* (31 Mar. 2022) (NDP-0030) ("Through the General Secretariat of this Corporation, TO REQUEST the National Agency for the Legal Defense of the State that, within ten (10) working days from the notification of this order, to inform whether it knows or has been informed of any intention to submit disputes related to Judgment SU-698 of 2017 to international arbitration and, if so, to indicate the legal-procedural acts that have been carried out so far to ensure the safeguarding of national interests and the current status of the litigation").

[57] In addition to this, according to information from ANDJE, Glencore still has 3 arbitration claims pending resolution,¹³³ being the plaintiff with the highest number of pending cases against the Colombian State.¹³⁴ All of this has affected the constitutional proceedings by placing additional external pressure on the final decision to be taken by the Constitutional Court on effectively guaranteeing our rights to water, food security, and health.

V. The Need For Measures To Prevent Retaliation Against Us In This Arbitral Dispute.

[58] Given the complexity of the matter dealt with in this process, and the risks that our participation in it may generate for the life or integrity of us and/or the members of the communities we represent, we request this honorable Tribunal to require the defendant and claimant to keep the identity of the Non-Disputing-Parties confidential and to avoid any public and/or private pronouncement that may generate risks of retaliation against us.

¹³³ ICSID, *Cases Pending* <https://icsid.worldbank.org/cases/pending> (search results for “Glencore”).

¹³⁴ ANDJE, *Litigation Report 2024* (30 Sep.2024), https://www.defensajuridica.gov.co/gestion/informes/informes_litigiosida_2024/informe_litigiosidad_tercer_trimestre_301024.pdf (accessed 10 Nov. 2024).

VI. Conclusion

[59] The court orders at issue in this arbitration did not cause a “constant moving of the goalposts” creating legal uncertainty, nor create “novel and bespoke criteria” for assessing the impacts of the mine, as Glencore claims.¹³⁵ The content and scope of Judgment SU-698/17 was necessary to meet the goalposts and evaluate the criteria that have always been relevant to our human rights. However, the court’s orders were insufficient to protect and guarantee our rights. Relevant judgments show that the court should have gone further in protecting the Bruno Creek and our right to prior consultation, and the minimum steps the courts took were well within their authority.

[60] The implementation of the orders of Judgment SU-698/18 has been slow and inefficient due to the influence that Glencore has had in this process, its lack of due diligence, the lack of our participation, and the effects that this arbitration claim has had on the process.

[61] A favorable ruling by this Court in favor of Glencore could undermine the scope and meaning of the final decision of the Constitutional Court and end up affecting any possibility that our communities have of seeing their rights protected and guaranteed in relation to Bruno Creek and the coal mining taking place around us.

¹³⁵ Summary of Glencore’s Position, *supra* n. 17.

VII. Petition

1. Accept and consider the submissions set forth in this document in order to make a final decision on the dispute in this case.
2. Accept our petition to adopt measures to prevent retaliation.

Communities of Paradero and La Gran Parada

[Signed]

[Name]

Gran Parada

[Signed]

[Name]

Paradero