



STOP ISDS

International Mission to Colombia

Report of the International Mission to Colombia





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In May 2023, a delegation of 13 representatives from social and environmental justice organisations from eight countries in the Americas and Europe visited Colombia to share experiences of struggles against the global investment protection regime. The mission also went to learn firsthand about the peoples and ecosystems being threatened by corporate lawsuits, as well as the environmental, social and cultural harms that transnational investments have already caused, particularly in the departments of La Guajira and Santander.

The visit came in response to the significant rise in claims that transnational firms have made against the country in recent years, as highlighted in the Declaration “Recover Colombian Sovereignty in Defense of Water, Life and Territories”, signed by more than 280 organisations from 30 countries as well as 54 Colombian members of Congress. In the last five years, Colombia has faced some of the highest number of arbitration claims in Latin America. In 2018 alone, Colombia received more claims than any other country in the world.

Colombia’s pending claims currently total US\$13.2 billion – equivalent to 13% of the nation’s budget for 2023 and nearly equal to what Colombia plans to spend on education this year.

According to the State National Agency for Legal Defense, as of March 2023, 14 arbitration processes were underway with eight more in the pre-arbitration stage. Colombia’s pending claims currently total US\$13.2 billion (52 trillion Colombian pesos as of August 2023)¹, although in three cases the amount claimed is not public. This is equivalent to 13% of the nation’s budget for 2023 and nearly equal to what Colombia plans to spend on education this year.²

The bulk of investors that have brought arbitration cases are involved in the extractive industries, especially mining.

We witnessed how this system enables corporate impunity and threatens the realisation and defence of Colombians’ fundamental human and environmental rights. We also observed how this system interferes with judicial independence, environmental regulation, and national sovereignty.

The Delegation noted with particular concern the following issues:

1) Colombia is part of an investment protection system that is profitable for foreign corporations but leaves no benefits for the country.

Colombia currently has in force eight Bilateral Investment Treaties (BITs) and nine Free Trade Agreements (FTAs) with foreign investment protection clauses that give transnational corporations recourse to investor-state dispute settlement (ISDS). Despite signing on to such treaties later than other countries in the region, Colombia has already faced 22 supranational arbitration claims from foreign investors. Of these, 18 were filed in the last 6 years.

1. Litigation report, State National Agency for Legal Defense (Agencia Nacional de Defensa Jurídica del Estado), March 31, 2023; https://www.defensajuridica.gov.co/gestion/informes/informes_litigiosidad_2023/informe_litigiosidad_primer_trimestre_030523.pdf
2. “Approved General Budget for the Nation for the year 2023”, Congress of the Republic of Colombia: Chamber of Representatives, October 19, 2022: <https://www.camara.gov.co/aprobado-presupuesto-general-de-la-nacion-para-el-ano-2023>



Luis Misael Socarras Ipuana, Wayúu community leader, shares the story of the Bruno Stream

As of today, the Swiss mining transnational Glencore has brought arbitration claims against Colombia for an unknown amount under the terms of the BIT with Switzerland. As owner of Cerrejón, the largest open-pit coal mine in Latin America, Glencore is seeking to interfere with the implementation of the Constitutional Court's 2017 ruling SU 698 in favour of the Wayúu people's rights to health, water and food sovereignty, or otherwise force the State to pay millions in compensation. In order to protect the Bruno stream, the last remaining tributary of the Ranchería River and a vital source of water for Wayúu communities, this ruling ordered the suspension of the opening of a new pit at the mine called "La Puente". Despite the court ruling, the Delegation observed how Glencore continues to operate the "La Puente" pit and has diverted 3.6 kilometres of the Bruno stream.

Glencore's lawsuit reinforces the impunity that the Wayúu people have suffered over decades, following multiple violations of their fundamental rights. Organisations such as the José Alvear Restrepo Lawyers' Collective (CAJAR by its initials in Spanish) have accompanied the Wayúu communities in demanding the full implementation of the Constitutional Court's ruling and the return of the Bruno stream to its natural course.

They note how Glencore's lawsuit is having a chilling effect and interfering in institutional and judicial independence, as well as state obligations to protect fundamental collective rights. During a workshop in La Guajira, lawyer Cindy Forero stated, "Government ministries, from both the executive and judicial branches, are afraid - and when they are asked what is going to happen with La Guajira and the failure to implement the sentence, they prefer not to talk about it. They say, 'We are facing an international lawsuit from the company.'"

Another example of corporate abuse of power is that of Eco Oro Minerals, a Canadian company that sought to exploit gold in the Santurbán Paramo - an ecosystem essential for carbon sequestration and the regulation and supply of water for more than 2.2 million people in northeastern Colombia, including the Metropolitan Areas of Bucaramanga and Cúcuta. The company sued Colombia for US\$736 million under the Canada-Colombia Free Trade Agreement (CCOFTA), after being prevented from moving forward with a gold mining project in the Santurbán páramo. In its exploration phase the project caused serious damage and environmental liabilities that have not been repaired, including arsenic and mercury pollution. To date, the formal closure of the mines has not been carried out.



The Pajarito Lagoon in the municipality of Vetás, Santurbán páramo, Santander.

The project was blocked by a Constitutional Court decision prohibiting mining in the páramos, as well as a strong popular mobilisation led by the Committee for the Defense of Water and Santurbán Paramo, who underlined the threat that commercial mining posed to one of the country's most important ecosystems. In September 2021, the arbitration tribunal ruled against Colombia, but the final amount to be paid is not yet known. Two other Canadian companies, Galway Gold and Red Eagle, have sued on the same basis.

In this same hydrographic region, but at an altitude below the line defined as a páramo, Emirati company Minesa is currently implementing another mega-mining project called "Soto Norte," in partnership with the Canadian company Aris Mining. This project threatens the water supply of millions of people. It takes advantage of the páramo delimitation policy, which according to the Committee for the Defense of Water and the Santurbán Paramo, "is an extractivist policy that fragments the ecosystem and water to make the plundering and exploitation of the territory viable through transnational mining projects".

Days after the visit of the international mission, the Emiratis made a governmental visit to Colombia. They informed about the investments they have made, and promoted their investment and social insertion strategy, through the formalisation and modernisation of the Association of Miners of California, Santander (Calimineros), a group of local, small-scale miners. They also spoke of "corporate social

responsibility" programs, which promise to deliver funds to hospitals and schools in the region. In the face of popular demands and the judicial mandates of Rulings C-035 of 2016 and T-361 of 2017 that oblige the government to adopt measures for the comprehensive protection of the watershed that supplies Bucaramanga and its surroundings, we observed how public officials fear attracting more lawsuits from these companies. This could happen if the BIT between the United Arab Emirates and Colombia is ratified by Congress, or through the investment of Aris Mining (which owns a 20% stake in the project), since this Canadian company could resort to the FTA between Canada and Colombia. In fact, Aris has already brought a claim against Colombia related to another mining project.

These observations underscore how corporate claims, or even the mere threat of one, produce a deterring, chilling or blackmailing effect intended to undermine national sovereignty and prevent the adoption of measures for environmental protection and climate action. At the same time, these lawsuits undermine judicial independence and the tremendous efforts of affected communities and peoples to seek justice for the harms and gross human rights violations transnational firms cause, and that remain unpunished.

We reject this system that gives exclusive rights to transnational corporations, producing sacrifice zones in the territories where they operate, and encouraging investors to push forward with mining projects with disregard for human rights and due diligence.

2) The legal privileges granted to corporations empower them to act with impunity, with serious consequences for territories and human rights.

Corporations' profit motive leads to destruction in the territories where they operate and the violation of fundamental human rights, as well as impunity helped by the existence of supranational instruments that protect them. In many cases, such as in La Guajira and Santander, when local communities and social organisations have achieved protection measures for their territories, companies use supranational arbitration to threaten governments and influence their decisions.

“I was surprised by [Glencore’s] lawsuit because, instead of having its head held high, the company should have its head hung in shame for all the destruction it has caused... I can’t grasp how the person that is hurting you can then come and demand millions of dollars.”

Aura Robles Wayúu plaintiff

In this way, the system deepens and perpetuates unequal and colonialist relations, as well as historical patterns of discrimination and dispossession, with indigenous peoples and peasant communities disproportionately suffering the effects of foreign investment. Aura Robles, one of the Wayúu plaintiffs who won the Constitutional Court Ruling 698 in favour of their collective rights in 2017, eloquently

Wayúu leader, Andrónico Urbay Ipuana, addresses a public hearing on ISDS in the Colombian Congress.



expressed this reality: “I was surprised by [Glencore’s] lawsuit because, instead of having its head held high, the company should have its head hung in shame for all the destruction it has caused... I can’t grasp how the person that is hurting you can then come and demand millions of dollars.” So far, the Cerrejon mine has displaced 25 Wayúu communities and led to the disappearance of 18 streams. The lack of clean water in the region has contributed to the deaths of thousands of children.

In practice, international investment treaties produce a legal hierarchy in which the rights of transnational corporations are privileged over the domestic constitutional order. This is particularly critical in the context of the climate crisis and accelerated biodiversity loss, when decisive actions and urgent measures are required in the face of the irreparable damage and devastating effects that the operations of large corporations can produce. During the Mission’s visit, the National Government mentioned land use planning around water and the prohibition of fracking as important steps to address this multidimensional crisis. However, such actions could be negatively affected or limited by the risk of attracting more lawsuits by transnational companies.

For this reason, together with the communities and organisations struggling to defend their territories and who invited us to carry out this International Mission, we call for the dismantling of this unfair system, which provides an exclusive pathway to guarantee the profits of transnational corporations and which violates the human rights of communities.

Coal mining operations at the La Puente pit at Cerrejón, La Guajira.



A waterfall at the Santurbán Páramo. The ecosystem supplies water to over 2.2 million people in northeastern Colombia.



3) The current government understands that it must take action to review its commitments under the investment protection system, but its steps so far raise doubts about the potential reach and democratic openness of this process.

During the delegation's visit to Colombia, we participated in meetings with officials from six ministries and public agencies, in addition to members of Congress. During these conversations, various government officials expressed their awareness of the impacts of international investment agreements signed under prior administrations. These include limitations on the State's capacity to fulfil its role and on its ability to fulfil the objectives of the recently approved National Development Plan.

This was evident in the announcement from the Ministry of Trade, Tourism and Industry regarding the review of the BITs in effect with Colombia.³ Subsequently, the Ministry told us that there will be an exhaustive review of the investment chapters within FTAs as well, but that the current focus of the review is on the BIT with Switzerland, which has already been used

by the mining company Glencore to denounce the Colombian State three times and threaten it twice more. Accordingly, the FTAs with Canada and the USA will also be reviewed, both of which facilitate recourse to ISDS. Investors have also used these FTAs to sue Colombia.

The organisations that participated in the delegation support the government's decision to review its treaties and take action against the investment protection system. However, we are concerned with two issues:

First, we note a lack of commitment on the government's part to ensure democratic participation in the review of investment agreements. We believe that any process of this type should be open, with broad public debate, especially with affected communities, and meaningful inclusion of civil society. We also reiterate that the government is capable of promoting a **comprehensive citizens' audit of the effects of trade and investment agreements and of the international arbitration system in Colombia.** The results of such an audit would shed light on the impacts of treaties on human and environmental rights, as well as their economic impacts.

3. "Aranceles y revisión de acuerdos de inversión, temas clave en la gira de MinComercio", La República, May 24 2023: <https://www.larepublica.co/economia/aranceles-y-revision-de-acuerdos-de-inversion-temas-clave-de-la-gira-de-mincomercio-3621941>

Second, the government announced that the review will seek to “strike a balance between the role of the State and that of transnationals”. Such a statement is worrisome because it suggests a focus on “modernising” treaties and making adjustments to clauses that grant exclusive privileges to foreign investors, rather than evaluating whether or not these should remain in place. **Renegotiating existing agreements but leaving in ISDS, even with modified clauses, continues to grant special rights to foreign investors over the Colombian population and domestic companies.**

Colombia is not alone in this review process: it can draw on many allies and experiences from around the world of governments that have reined in foreign investor privileges, terminating investment treaties, and exiting ISDS. This includes countries such as South Africa, India, Pakistan, Indonesia, Ecuador and Bolivia, as well as the withdrawal of ISDS between Canada and the United States in the renegotiated North American FTA (known as CUSMA, USMCA or T-MEC). For more than a decade we have heard voices from governments, jurists, academics and international organisations such as UNCTAD, who have pushed for a thorough review of these treaties. Similarly, the UN Working Group on Business and Human Rights recommends that States renegotiate or terminate such treaties. In this sense, it is both possible and necessary that Colombia sets on a path of deep renegotiation of its treaties and exiting ISDS, based on social participation and broad public debate.

In the same vein, we reiterate the need for Colombia **to cease being an observer of the Energy Charter Treaty (ECT)**, which protects investors in the fossil fuel sector, undermining the possibilities of working toward a just energy transition. This treaty is the most widely used at the global level to sue States that have embarked on a path of decarbonisation. This is why 11 countries in Europe have already announced their withdrawal from the treaty. The ECT is flagging in the context of the climate emergency and the energy transition, in Latin America and globally.


Similarly, it is important that Colombia avoids ratifying the various BITs it has signed but that are not yet in force. This includes the BIT with the UAE, signed in 2017, which is a risk for the communities that depend on the Santurbán páramo and headwaters, as the company

could sue the State for halting Minesa’s project. Notably, however, this company has entered into a partnership with a Canadian company, Aris Mining, which could resort to arbitration through the FTA with Canada.

The current Colombian government has as its slogan to be a Global Force for Life. Fulfilling these plans entails confronting the challenges of ending reliance on mineral and fossil fuel extractivism—which puts the sustainability of life on the planet at risk—and of moving towards a just energy transition. However, as part of these efforts, it is also urgent to confront the extraordinary power of transnational corporations and to dismantle a system that is undermining peoples’ sovereignty and the obligations of States to protect human rights, the environment and the climate.


More information

Committee for the Defence of Water and the Santurbán Páramo

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La Guajira le Habla al País

(La Guajira Speaks to the Country)

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Members of the International Mission

Colombia

Interamerican Association for Environmental Defense (AIDA)

José Alvear Restrepo Lawyers’ Collective (CAJAR)

Colombian Network for Environmental Justice

International

Alliance Sud (Switzerland)

América Latina y el Caribe Mejor sin TLC

Argentina Mejor sin TLC

ATTAC Argentina

Global Justice Now (United Kingdom)

Institute for Policy Studies – Global Economy Program (United States)

Public Services International

London Mining Network (United Kingdom)

MiningWatch Canada

TerraJusta (Bolivia)

Transnational Institute

War on Want (United Kingdom)



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Recover Colombia's sovereignty in defense of water, life and territories

SIGN-ON to call on the Colombian government to withdraw from treaties that allow Colombia to be sued in tribunals designed by and for transnational corporations