INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Glencore International A.G.

v.

Republic of Colombia

(ICSID Case No. ARB/21/30)

PROCEDURAL ORDER NO.4

Members of the Tribunal
Ms. Sabina Sacco, President of the Tribunal
Prof. Bernard Hanotiau, Arbitrator
Prof. Donald M. McRae, Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

Assistant to the Tribunal
Mr. Rahul Donde

23 April 2025

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I. SCOPE OF THIS ORDER

1. This Procedural Order No.4 ("PO4") addresses the Claimant's request that the Tribunal strike certain portions of the submission made by the indigenous Wayuu communities of La Gran Parada and Paradero (the "Communities" or the "NDPs") on 14 November 2024 (the "NDP Submission") and certain documents filed along with that Submission. It also revises the procedural calendar of 25 March 2025.

II. PROCEDURAL BACKGROUND

2. On 11 July 2024, the Communities and the Colectivo de Abogados y Abogadas José Alvear Restrepo together filed a request for being recognized as non-disputing parties in this proceeding in accordance with ICSID Arbitration Rule 37(2).

3. On 2 October 2024, the Tribunal issued Procedural Order No.3 ("PO3"), allowing only the Communities to file a written submission limited to the specific issues mentioned in the Order.

4. On 14 November 2024, the Communities filed the NDP Submission along with supporting documents (Exhs. NDP-0001 to NDP-0030).

5. On 6 February 2025, the Claimant requested the Tribunal to strike certain portions of the NDP Submission and specific accompanying documents (the "Application"). The Application was accompanied by Annexes A and B (collectively, the "Annexes"), which identified the specific paragraphs and documents that the Claimant sought to exclude from the record.

6. At the Tribunal's behest, on 17 February 2025, the Respondent commented on the Application (the "Respondent's Observations"). It *inter alia* requested the Tribunal to allow the NDPs to comment on the Application, as their views were directly implicated and they were best placed to explain how the impugned matters fell within the scope of PO3.

7. On 21 February 2025, the Claimant sought leave to submit short comments, not exceeding three pages, on the Respondent's Observations by 24 February 2025.

8. On the same day, the Tribunal granted this request, inviting the Respondent to submit any further comments by 26 February 2025.

9. On 24 February 2025, the Claimant commented on the Respondent's Observations (the "Claimant's Comments on the Respondent's Observations"). It opposed the Respondent's request that the NDPs be given an opportunity to comment on the Application, arguing that any additional input from the NDPs would be procedurally unnecessary and inconsistent with the framework for the NDPs' participation.

10. On 26 February 2025, the Respondent filed its comments to the Claimant's submission just mentioned (the "Respondent's Further Observations"), reiterating its request to the Tribunal to allow the NDPs to comment on the Application.

11. On 4 March 2025, the Tribunal advised the Parties that it considered it advisable to have the NDPs' views on the various paragraphs and documents the Claimant requested be struck from the record. It revised the Procedural Calendar, directing the Secretariat to send the Annexes to the NDPs, and requiring the latter to file their comments on those Annexes by 14 March 2025.

12. On 4 March 2025, the Secretariat sent the documents just mentioned to the NDPs, inviting them to comment by 14 March 2025. It added that, depending on the Tribunal's decision on the Application, the NDPs might be invited to file a revised Submission taking into account the Tribunal's rulings within 10 days of that ruling.

13. On 12 March 2025, the Communities requested access to the entire Application (and not only its Annexes), as well as an extension until 24 March 2025 to comment on it. Their communication was only addressed to the Tribunal.

14. On 13 March 2025, the Respondent wrote to the Tribunal that it reserved its right to request an extension of the deadline set by the Tribunal on 4 March 2025 for the Respondent to comment on the NDP Submission.

15. On 15 March 2025, the Secretariat advised the NDPs that the Tribunal had granted their request for an extension until 24 March 2025 to submit their views on the Annexes. It also sent the Communities' communication of 12 March 2025 to the Parties and advised them that the Tribunal would adjust the procedural calendar.

16. On 20 March 2025, the Secretariat informed the NDPs that the Tribunal has denied their request to access the Application as it considered that the Annexes contained sufficient information for them to comment on each instance where the Claimant requested that a portion of the NDP Submission, or the documents appended thereto, be struck from the record. The Parties were advised of the Tribunal's decision later the same day.

17. On 25 March 2025, the Communities commented on the Annexes (the "NDPs' Comments").

18. On the same date, the Tribunal sent the Parties a revised procedural calendar accounting for the extension granted to the NDPs to file their Comments.

19. On 26 March 2025, the Claimant informed the Tribunal that it would not seek leave to reply to the NDPs' Comments.

20. On 14 April 2025, the Respondent advised the Tribunal that the Parties had agreed to revise the procedural calendar. The Claimant confirmed its agreement to those revisions later the same day.

21. On 16 April 2024, the Tribunal advised the Parties that it would confirm the changes agreed by the Parties on the procedural calendar after it had issued this PO4.

III. THE APPLICATION

A. The Parties' Positions

1. The Claimant's position

22. The Claimant submits that the NDP Submission exceeds the scope permitted by the Tribunal under PO3. It insists that certain portions and exhibits from the Submission either address issues that go beyond the express limitations set by the Tribunal in PO3 or include legal arguments on matters that the Tribunal determined the NDPs were not permitted to address. It further contends that the Submission introduces extraneous issues into the arbitration, and permitting them would place an undue burden on the Claimant, requiring additional responses to materials that should not be part of the record in the first place. It therefore requests that these portions of the Submission and exhibits should be struck from the record.[1]

23. The Claimant recalls that, in PO3, the Tribunal allowed the NDPs to submit observations essentially on three factual issues, namely, (i) the impact of the Bruno Creek Project; (ii) the scope and content of Judgment SU 698 and the orders issued therein; and (iii) the implementation of that Judgment.[2] Notably, it rejected the NDPs' request to address legal issues, such as the alleged compliance issues regarding the regulatory framework of the La Puente pit and the Claimant's alleged human rights violations, among others. It argues however that multiple portions of the NDP Submission breach these limitations.[3] For the Claimant, "[w]hile one can empathize with the NDPs' frustration [with Judgment SU-698], this does not permit them to disregard the Tribunal's orders, nor can it result in Claimant being required to address topics in its forthcoming submission that were expressly prohibited by the Tribunal to ensure due process and compliance with ICSID's Arbitration Rules."[4] As explained below, the Claimant submits that the NDP Submission improperly discusses the scope and content of Judgment SU-698 (a) and the implementation of Judgment SU-698 (b), and improperly appends documents exceeding the scope of PO3 (c).

[1] Application, p.3; Claimant's Comments on the Respondent's Observations, p.3.

[2] Application, p.1; Claimant's Comments on the Respondent's Observations, p.2.

[3] Application, pp.1-2.

[4] Claimant's Comments on the Respondent's Observations, p.3.

(a) The NDP Submission improperly discusses the scope and content of Judgment SU-698

24. The Claimant submits that, rather than limiting itself to describing the scope and content of Judgment SU-698, certain portions of the NDP Submission improperly assert what the Constitutional Court "should have ordered".[5] Others address prohibited legal issues, particularly whether the Constitutional Court's rulings comply with Colombia's human rights and investment obligations. Rather than providing a factual account, these statements constitute legal assessments, which PO3 explicitly prohibits. Accordingly, the Claimant contends that paragraphs 3-4, 24-30, 32-36, and 59 should be struck as they contain arguments that the Constitutional Court should have ordered the Bruno Creek to return to its natural course.[6] Paragraph 26 should also be struck, as it references multiple Colombian and international court rulings to support the claim that the Constitutional Court should have done more to protect the Creek. Finally, paragraph 32 should equally be struck as it discusses the Inter-American Court of Human Rights' standard for effective judicial remedies and asserts that the Constitutional Court failed to meet this standard.[7]

(b) The NDP Submission improperly discusses the implementation of Judgment SU-698

25. The Claimant points out that, in PO3, the Tribunal explicitly barred the NDPs from discussing Colombia's alleged regulatory violations, as well as the Claimant's alleged failure to meet due diligence standards. [redacted] Similarly, in paragraph 55, the NDPs allege that Glencore failed to comply with Judgment SU-698 by maintaining a restrictive approach to community participation. The NDPs were prohibited from commenting on any of these issues, which should, therefore, be struck from the record. Colombia's attempt to characterize these arguments as factual statements is misleading, as they clearly constitute legal arguments on compliance, which PO3 prohibits.

[5] Application, p.4.

[6] Application, Annex A.

[7] Application, Annex A.

[8] Application, p.5: Claimant's Comments on the Respondent's Observations, pp.2-3.

(c) The NDP Submission improperly appends documents exceeding the scope of PO3

26. The Claimant argues that several documents appended to the NDP Submission also do not comply with PO3 and should be struck from the record. Indeed, while the Tribunal allowed the NDPs to submit only relevant documents that were not already on record, NDP-0002 and NDP-0005 are already in the record as Exhibits R-325 and R-357, respectively. Further, while the NDPs were directed not to address legal issues, NDP-0014 to NDP-0017 are judicial decisions that discuss Colombian and international court rulings regarding human rights and environmental protections, exceeding the scope of PO3.[9] The Claimant alleges that the Respondent has not provided any substantive rebuttal to these objections, further demonstrating that these documents must be excluded.

27. In these circumstances, the Claimant requests the Tribunal to strike the non-compliant paragraphs identified in Annex A to the Application from the record and strike the non-compliant documents identified in Annex B from the record.[10]

2. The Respondent's position

28. The Respondent disagrees with the Claimant's assertion that the NDP Submission exceeds the scope permitted by the Tribunal under PO3. It argues that the challenged portions and exhibits provide relevant factual observations, thereby falling within the ambit of PO3. Striking these portions would not only unfairly limit the perspectives of the NDPs and undermine the transparency of the proceedings,[11] but also reduce the NDPs' participation to a mere restatement of the *tutela* actions without the necessary context to assist the Tribunal.[12] The Claimant seeks to impose an excessively restrictive interpretation of PO3 that was not contemplated by the Tribunal.

29. The Respondent also disagrees with the Claimant's position that the proceedings would be disrupted, and the Parties would suffer an undue burden, unless the Tribunal struck the impugned paragraphs and exhibits from the NDP Submission.[13] It is the Claimant who has burdened the proceedings by making the Application, and then again by seeking leave to respond to the Response. It has forced the Respondent to waste its time and resources at the time it is preparing its Rejoinder. Further, the Claimant has commented on the merits of the NDP Submission well outside of the procedural schedule set out in PO3.

[9] Application, pp.5-6.

[10] Application, p.6.

[11] Respondent's Observations, p.9.

[12] Respondent's Observations, p.2.

[13] Respondent's Further Observations, p.3.

30. The Respondent's comments on the Claimant's specific allegations are summarized below.

(a) The NDP Submission properly discusses the scope and content of Judgment SU-698

31. The Respondent submits that the NDP Submission does not improperly discuss what the Constitutional Court "should have ordered" but rather provides necessary context on the *scope* and *content* of Judgment SU-698. The *scope* of Judgment SU-698 necessarily includes the extent to which the judgment protected the fundamental rights of the NDPs. The *content* of the Judgment includes the dissenting opinion of Judges Fajardo Rivera and Rojas Ríos, where these judges opined that the Judgment did not go far enough to protect the NDPs fundamental rights. Following the Claimant's interpretation of PO3 would mean that the NDPs would only be entitled to summarize Judgment SU-698 and the orders issued therein, which would not assist the Tribunal. Further, the Tribunal explicitly recognized the NDPs' right to present a "different perspective to the arbitration", which necessarily involves a discussion of how they perceive the judgment's impact.[14] Striking the impugned paragraphs would deprive the Tribunal of essential information regarding how the Communities understand the consequences of the judgment.

(b) The NDP Submission properly addresses the implementation of Judgment SU-698

32. The Respondent argues that paragraphs 51-55 of the NDP Submission fall within the permitted scope of PO3, [redacted] They bring a different perspective to the arbitration not offered by any of the disputing Parties. They are thus "properly within" the scope of PO3 and should not be excluded from the record.[15]

(c) The NDP Submission properly appends documents within the scope of PO3

33. The Respondent agrees that NDP-0002 and NDP-0005 should be excluded, as they are already part of the record as Exhibits R-325 and R-357. None of the other documents, however, should be struck. NDP-0014 to NDP-0017, which contain judicial decisions, are relevant for contextualizing the Communities' concerns about the legal framework

[14] Respondent's Observations, p.2.

[15] Respondent's Observations, p.3.

surrounding their claims. The documents do not present legal arguments but rather support the factual narrative provided in the NDP Submission, illustrating how the relevant judicial framework has evolved.

34. In these circumstances, the Respondent requests the Tribunal to reject the Claimant's Application to strike portions of the NDP Submission and accompanying documents, except for NDP-0002 and NDP-0005.[16]

B. The NDPs' Position

35. The NDPs submit that the Application is both procedurally flawed and without merit.

36. On the first issue, they contend that the Application was filed in an untimely fashion outside of the procedural calendar.

37. On the second issue, the NDPs contend that their Submission fully complies with the Tribunal's directions under PO3 as it addresses only the three factual issues identified by the Tribunal and will assist in the resolution of the dispute. The challenged portions all fall within the range of matters that the Tribunal concluded the Communities were best placed to advise it on.[17] The Submission is grounded in factual observations drawn from the Communities' experiences and direct participation in the *tutela* proceedings from its inception. The NDPs do not assert legal claims or characterize conduct in legal terms; rather, they present the factual context necessary to understand their situation.

38. The NDPs further insist that they complied with all relevant procedural deadlines and emphasize that their Submission is based exclusively on facts relevant to the permitted issues. The Claimant is seeking to impose an excessively restrictive interpretation of PO3 that was not contemplated by the Tribunal and would reduce the Communities' participation to a mere restatement of the tutela claims, without the necessary context to assist the Tribunal.

39. The NDPs' response to the Claimant's specific allegations is summarized below.

1. The NDP Submission properly discusses the scope and content of Judgment SU-698

40. The NDPs maintain that their discussion of Judgment SU-698 and what the Constitutional Court "should have ordered" is factual in nature and fully within the scope of PO3. After all, the Tribunal recognized that the Communities "are best placed to advise the Tribunal

[16] Respondent's Observations, p.12.

[17] NDPs' Comments, p.4.

of […] the human, social and cultural rights of the Wayuu people."[18] As these human rights have been developed by Colombian courts, advising the Tribunal of the NDPs' human rights requires a discussion of what courts have or should have ordered in relation to those rights. Equally, the Tribunal noted that the Communities' position that neither Colombia nor Carbones del Cerrejón Limited ("Carbones") complied with Judgment SU-698 was relevant to the dispute. Explaining the nuances of why the Communities believe that neither the State nor Carbones complied with Judgment SU-698 requires addressing what the Constitutional Court should have ordered.[19]

41. For the NDPs, the *scope* of Judgment SU-698 is the "range of application or of subjects embraced" by the Judgment.[20] The NDPs can thus discuss a range of actions of what the Constitutional Court did and did not do to protect their human rights. Further, the *content* of Judgment SU-698 includes the origin, objectives, and content of Judgment SU-698, which is what the NDPs have addressed. What the Constitutional Court should have done relates to the scope and content of Judgment SU-698. Further, the NDPs have only discussed the reasoning of the Constitutional Court and the dissenting opinions of Justices Fajardo Rivera, Rojas Ríos and Ortiz Delgado to explain how the Judgment was perceived as falling short of providing full protection. It cannot be contested that this falls within the scope and content of Judgment SU-698: a discussion of what the Constitutional Court should have ordered according to the dissenting Justices clearly falls within the content of Judgment SU-698. The NDPs insist that they have not made legal arguments but rather a factual account of how the Judgment SU-698 affected the Communities.

42. The NDPs contest the Claimant's request to strike paragraphs 3, 4, 24-30, 32-36, and 59. These paragraphs provide a narrative of what the Communities expected from the Constitutional Court since the very beginning of the process and set out the basis of the Communities' disappointment in the Judgment's outcome. Paragraph 4 for instance addresses the Communities' "special relationship" to the Bruno Creek, the "risks related to water stress," and "irreparable harm," all of which relate to the importance of the Bruno Creek for the Communities. Paragraph 34 explains how the impact of the diversion of the Bruno Creek compares to the costs associated with mitigation measures. The text does not "relate[ ]to the discussion of what the Constitutional Court should have ordered," but rather "the impact of an alternative order".[21] Nor does it discuss Colombia's human rights obligations. For the NDPs, "this type of statement[s] shares with the Tribunal our posture during the domestic proceedings, clarifying what our posture has been during the judicial

[18] NDPs' Comments, p.10.

[19] NDPs' Comments, p.10.

[20] NDPs' Comments, p.11.

[21] NDPs' Comments, p.14.

process that has already taken place."[22] Paragraph 36 discusses the distances of the Communities to the mine and thus relates to the "knowledge of the local territory," and "the impacts of the creek's diversion" both of which fall within the ambit of issues the Communities were allowed to address. It says nothing about whether the Constitutional Court's orders are compliant with Colombia's human rights obligations or alleged compliance issues.

2. The NDP Submission properly addresses the implementation of Judgment SU-698

43. The Communities further maintain that paragraphs 51-55 of their Submission remain within the bounds of PO3. The Tribunal allowed the Communities to make submissions on the implementation status of Judgment SU-698 because of their experiences at the early stages of the *tutela* action. Besides, these paragraphs provide factual observations on the impact of the Bruno Creek diversion and the manner in which the Judgment has or has not been implemented. They also describe the NDPs' ability to effectively participate in the inter-institutional working group constituted because of Judgment SU-698. None of the impugned paragraphs constitute legal argument regarding regulatory compliance or due diligence.

44. [redacted] Many of these arguments apply to reject the striking of paragraphs 53, 54 and 55. Finally, paragraph 59 is simply a summary of the NDPs' views, prepared to assist the Tribunal in the resolution of the dispute.

[22] NDPs' Comments, p.14.

[23] NDPs' Comments, p.33.

3. The NDP Submission properly appends documents within the scope of PO 3

45. The NDPs acknowledge that NDP-0002 and NDP-0005 are duplicates of documents already on the record and do not object to their removal. However, they maintain that the remaining documents appended to their Submission are appropriate and within the scope authorized by the Tribunal. The Claimant's objections to the inclusion of these documents fail for the same reasons summarized above in relation to the paragraphs that they support.

46. In these circumstances, the NDPs request the Tribunal to reject the Application. In light of the security threats that have increased since the filing of the NDP Submission, they further request that, when the Submission is published on the ICSID website, it should mention only the names of the Communities but not the individuals who signed it.[24] Finally, in the event the Tribunal decides to strike certain portions of the Submission, the NDPs request they be given 15 business days to file a revised submission.

C. Analysis

1. Admissibility of the Application

47. The NDPs first request the Tribunal to deny the Application as it is belated.

48. While the Claimant could have raised its objections to the NDP Submission earlier, neither the Respondent nor the NDPs have been prejudiced by the delay. Indeed, as recounted in the procedural history above, the Respondent has made multiple submissions on the Application, and the NDPs too were given a full opportunity to express their views. This request is thus denied.

2. Merits of the Application

49. The Respondent and the NDPs then request the Tribunal to deny the Application, arguing that it is meritless.

50. The Tribunal recalls that, in PO3, bearing in mind that that the Communities were "best placed" to advise the Tribunal of the "their 'world view and cultural norms"; "the human, social and cultural rights of the Wayuu people"; the "knowledge of the local territory, of the Cerrejón mine and its history"; and the Claimant's alleged "disregard for] the […] rights of the Wayuu people"[25] and that their intervention would assist the Tribunal in better

[24] NDPs' Comments, p.5.

[25] PO3, ¶58.

understanding certain aspects of the claims before it,[26] it invited the NDPs to make a submission on three factual issues:

a. "[t]he importance of the Bruno Creek for the [NDPs] 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" ("Issue I");

b. "the scope and content of relevant judgments, including Judgment SU-698 of 2017, and the orders given" ("Issue II"); and

c. "[t]he implementation status of the orders of Judgment SU-698 of 2017" ("Issue III").[27]

51. At the same time, equally keeping in mind that the Parties were "assisted by multiple, qualified lawyers with specific knowledge and expertise of […] legal matters", the Tribunal was not convinced that the NDPs would make any useful contribution differing from that of the disputing Parties on certain legal issues, including: [28]

a. "[t]he lack of compliance with the regulatory framework of the La Puente pit expansion project and the systematic disregard of human rights by the company, Carbones de Cerrejón and Glencore;"

b. "[t]he application of the constitutional mechanism of the *tutela* action";

c. "the relationship between the different orders of the constitutional judges and the creation of inter-institutional working tables in the framework of tutela judgements";

d. "[the] consistency [of the *tutela* proceedings and court orders] with the State of Colombia's obligations to respect and guarantee human rights and with the guarantees for investors contained in the Treaty;" and

e. "The jurisdiction of the national courts, the *tutela* judge, and specifically the Constitutional Court, to resolve the matter in dispute regarding the violation of the rights of the plaintiff communities due to the mining project of the Claimant's company and to create Inter- institutional working groups".

52. In setting this framework, the Tribunal intended to ensure that it received factual insights within the Communities' purview on (i) the rights of the Communities and the impact of the project on those rights; (ii) the scope and content of Judgment SU-698 and the orders

[26] PO3, ¶58.

[27] PO3, ¶¶55-59.

[28] PO3, ¶55, 61.

given; and (iii) the implementation status of the orders of Judgment SU-698. The objective was to include all relevant contextual background that would help the Tribunal understand the broader implications of the expansion of the Cerrejón mine's La Puente pit, which involves diverting a section of the Bruno Creek, without duplicating the legal analysis that the Parties had already done (and would continue to do) in their subsequent submissions, and ensuring that the NDPs' intervention would not disrupt the proceeding or unduly burden or unfairly prejudice either Party.

53. PO3 thus allowed the NDPs to comment on three specific factual issues (Issues I to III), and denied the NDPs the possibility to comment on the legal issues identified at para. 55(b) of PO3. The Tribunal recognizes, however, that the distinction between factual and legal issues can be particularly blurry when the factual issues at stake relate to legal situations, namely, the relationship of the NDPs with the Bruno Creek and the impact of its diversion on that relationship, and the scope and implementation of a judicial decision that has had a legal effect on that relationship. After considering the Parties' and the NDPs' positions, the Tribunal finds that, for the NDP Submission to be able to assist the Tribunal, the NDPs must be allowed to draw legal conclusions related to Issues I to III; otherwise, the NDPs would be limited to summarizing the content of Judgment SU-698 and the facts surrounding its implementation, which would not assist the Tribunal and would make the NDP Submission superfluous. However, the Tribunal has stricken any comments by the NDPs that directly address the legal issues which PO3 excluded from the scope of the NDP Submission, in particular "[t]he lack of compliance with the regulatory framework of the La Puente pit expansion project and the systematic disregard of human rights by the company, Carbones de Cerrejón and Glencore",[29] or "[the] consistency [of the *tutela* proceedings and court orders] with the State of Colombia's obligations to respect and guarantee human rights and with the guarantees for investors contained in the Treaty."[30]

54. The Tribunal finds that a more restrictive approach would limit the NDPs to summarizing the content of Judgment SU-698 and the facts surrounding its implementation, rendering the NDP Submission superfluous. By contrast, the Tribunal's approach allows the NDPs to express their different perspective on the issues before the Tribunal without unduly burdening the Parties.

55. The Tribunal has applied this framework to rule on each of the Claimant's requests to strike in Annex A. For the reasons mentioned therein, the Tribunal has granted, either partially or fully, the requests pertaining to paragraphs 33 (excerpt), 51 (excerpt), 52, and 53 of the Claimant's requests to strike and rejected the other requests.

[29] PO3, ¶ 55(b)(iv).

[30] PO3, ¶ 55(b)(vii).

56. Finally, pursuant to agreement between the Parties and the NDPs, the Tribunal excludes from the record NDP-0002 and NDP-0005 as those documents are already on record as Exhibits R-325 and R-357 respectively.

57. The Tribunal invites the NDPs to file a revised submission implementing the Tribunal's decision **by Monday, 5 May 2025**. In light of the limited portions that have been stricken, the Tribunal finds that this time frame should suffice.

IV. PROCEDURAL CALENDAR

58. As mentioned above, on 14 April 2025, the Parties jointly agreed to modify the procedural calendar of 25 March 2025. In light of the timing of this PO4, the procedural calendar agreed by the Parties requires certain adjustments. The Tribunal proposes a revised calendar, which is being circulated as an Excel document in the same communication as this Order. The Tribunal invites the Parties to comment on the revised calendar **by Wednesday, 30 April 2025**.

V. ORDER

59. For the reasons set out above, the Tribunal makes the following Order:

a. This Order shall be notified to the NDPs and to the Parties;

b. The Communities shall file a revised NDP Submission accounting for the Tribunal's rulings in Annex A **by Monday, 5 May 2025** and excluding NDP-0002 and NDP-0005 (as well as NDP-0017).

c. The Parties shall provide any comments to the revised procedural calendar **by Wednesday, 30 April 2025**;

d. Prior to its publication on the ICSID website, the NDP Submission shall be redacted so that it identifies the Communities but not the individuals who signed it;

e. The Tribunal denies all other requests;

f. Costs are reserved for a later decision.

On behalf of the Tribunal,

_____[Signed]_____

Sabina Sacco
President of the Tribunal

Date: 23 April 2025

ANNEX A

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
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.	**Retain** as it falls within the ambit of Issue I. The first sentence is a factual description of the current situation according to the NDPs and does not draw legal conclusions. The second sentence reflects the NDPs' perspective regarding the importance of the Bruno Creek to their rights, an issue on which the NDPs were allowed to comment.
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.	**Retain.** The Tribunal finds that addressing what the NDPs' perceive as the failings of Judgment SU-698 falls with the scope of Issue II. Further, this paragraph paraphrases the dissenting views of Justices Fajardo Rivera and Rojas Ríos[31] as well as Justice Ortiz Delgado.[32]

[31] Ex. R-0171, Constitutional Court Judgment SU-698, 28 November 2017 (Updated Translation of Ex. C-0038), p.169 (Partial Dissent of J. Fajardo Rivera and Rojas Rios).

[32] Ex. R-0171, Constitutional Court Judgment SU-698, 28 November 2017 (Updated Translation of Ex. C-0038), p.173 (Partial Dissent of J. Ortiz Delgado).

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
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.	**Retain**, for the same reasons given for paragraph 4. Further, the dissenting opinions of Justices Fajardo Rivera and Rojas Ríos[33] as well as Ortiz Delgado[34] observe that the Constitutional Court should have done more to protect the Communities' rights.
25 (excerpt)	[…] This [ordering the removal of the hydraulic plug that impedes the natural course of the Bruno Creek] 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."	**Retain**, for the same reasons given for paragraphs 4 and 24. Further, the paragraph reproduces the dissenting opinion Justices Fajardo Rivera and Rojas Ríos.[35]
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 done more to protect the creek based on the risks of harm, even if it was not certain the harm would materialize.	**Retain.** The Tribunal considers the factual reference to other domestic and international rulings along the lines of the dissenting opinions of Justices Fajardo Rivera and Rojas Ríos as well as Ortiz Delgado falls within the scope of Issue II.
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. 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	**Retain**, for the same reason given for paragraph 26.

[33] Ex. R-0171, Constitutional Court Judgment SU-698, 28 November 2017 (Updated Translation of Ex. C-0038), p.171 (Partial Dissent of J. Fajardo Rivera and Rojas Rios).

[34] Ex. R-0171, Constitutional Court Judgment SU-698, 28 November 2017 (Updated Translation of Ex. C-0038), p.173 (Partial Dissent of J. Ortiz Delgado).

[35] Ex. R-0171, Constitutional Court Judgment SU-698, 28 November 2017 (Updated Translation of Ex. C-0038), p.171.

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
	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.	
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. 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 measures to eliminate or mitigate the risk of a new and serious violation of fundamental rights."	**Retain**, for the same reasons given for paragraphs 26 and 27.
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] [92] Civil Appeals Chamber of the Supreme Court of Justice, Judgment STC9813-2016, p. 28-30 (19 Jul. 2016) (NDP-0015) (own translation).	**Retain paragraph 29 and NDP-0015**, for the same reason as paragraphs 26, 27 and 28.
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.	**Retain**, for the same reason given for paragraph 26.

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
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." 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] [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).	**Retain paragraph 32 and NDP-0016**, as they address matters falling within Issues I and II, and for the reason given for paragraph 26.
33 (excerpt)	[redacted]	[redacted]
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 the drops in coal prices. The benefits of mitigating risks by returning the creek to its	**Retain,** for the same reasons given for paragraph 4.

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
	natural course outweighed impacts for a project that was uncertain to proceed.	
35 (excerpt)	[…] 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.[103] [103] *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, 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).	**Retain paragraph 35,** for the same reasons given for paragraphs 4 and 34. **Retain NDP-0019, NDP-0020 and NDP-0021,** which provide support for paragraph 35.
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. 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,[105] and the Gran	**Retain paragraph 36,** as it addresses matters falling within the scope of Issues I and II. **Retain NDP-0022**, as it provides support for the third sentence of paragraph 36. **Retain NDP-0022**, as it provides support for the third sentence of paragraph 36.

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
	Parada have demonstrated they would also be significantly impacted by the creek's diversion. [105] I/A Court H.R., *The Kaliña and Lokono Peoples v. Suriname,* Ser. C, No. 309, para. 205-7 (25 Nov. 2015) (NDP-0022).	
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. 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.	**Retain,** as the paragraph addresses matters falling with the scope of Issue II.
51 (excerpt)	[redacted]	**Strike**. The issues discussed are outside the scope of Issues I and III. They address neither the impact of the Bruno Creek diversion project, nor the implementation status of the orders of Judgment SU-698.
52	[redacted]	**Strike,** for the same reasons as those for striking paragraph 51 above.

Paragraph of NDP Submission	Text of paragraph / Excerpt	Decision
	[redacted]	
53	[redacted]	**Strike,** for the same reasons as those for striking paragraph 51 above.
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.	**Retain**, as the paragraph addresses matters falling with the scope of Issue III.
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.	**Retain,** for the same reason given for paragraph 54.