**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Glencore International A.G.**

**v.**

**Republic of Colombia**

**(ICSID Case No. ARB/21/30)**

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# PROCEDURAL ORDER NO. 3

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***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

10 October 2024

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## I. SCOPE OF THIS ORDER

1. This Procedural Order No. 3 ("PO3") addresses a request made by certain entities to be recognized as non-disputing parties ("NDPs") in this proceeding.

## II. PROCEDURAL BACKGROUND

2. On 11 July 2024, the indigenous Wayuu communities of La Gran Parada and Paradero (the "Communities"), and the Colectivo de Abogados y Abogadas José Alvear Restrepo ("CAJAR") (together, the "Petitioners") filed a request to be recognized as NDPs in this proceeding in accordance with ICSID Arbitration Rule 37(2) (the "NDP Petition").

3. At the Tribunal's behest, on 31 July 2024, the Claimant filed its "Comments on the Non-Disputing Parties' Application for Leave to File a Submission" (the "Claimant's Comments"). The Respondent filed its "Comments on Non-Disputing Party Petition" (the "Respondent's Comments") on the same date.

## III. LEGAL FRAMEWORK

4. Rule 37(2) of the ICSID Arbitration Rules sets out the legal framework applicable to the NDP participation in the following terms:

> (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

## IV. THE NDP PETITION

5. The Petitioners, i.e. the Communities and CAJAR, state that at issue in this arbitration is the diversion of the Bruno Creek[1] to expand the La Puente pit, part of the six-pit mine project operated by Carbones del Cerrejón Limited ("Carbones") and owned by the Claimant (the "Cerrejón mine"). The Petitioners allege that they have "important connections" to the Bruno Creek. Accordingly, they should be recognized as NDPs pursuant to Rule 37(2) of the ICSID Arbitration Rules.[2]

6. The Petitioners insist that they satisfy all the requirements of Rule 37(2), specifically:

   a. Perspective, knowledge or insight into the dispute that is different from that of the disputing Parties;

   b. The NDP submission would address a matter within the scope of the dispute;

   c. The Petitioners have a significant interest in the proceeding.

### A. Perspective, knowledge or insight

7. The Petitioners submit that investment tribunals generally adopt a flexible standard to determine whether this requirement is met. Some tribunals have accepted a request to intervene when they thought it would "provide a different perspective from the Parties". Others have done so when there was "a reasonable potential" of a different perspective or knowledge.[3]

8. Here, the leaders of the Communities filed the "*tutela* action [constitutional injunction]" that resulted in Judgment SU-698 of 2017 of the Constitutional Court of Colombia ("Judgment SU-698") in which the Court found that the diversion of the Bruno Creek would impact the Communities, threatening their physical survival and their ancestral Wayuu world view.[4] CAJAR, an organization that defends human rights, represented the Communities in the *tutela* action, the implementation of Judgment SU-698 and actions

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[1] The Claimant describes this as the "Bruno Creek", while the Respondent uses the term "Bruno Stream". The Petitioners appear to use the words "creek" and "stream" interchangeably. For purposes of this Order, the Tribunal will use the term "Bruno Creek".

[2] NDP Petition, ¶¶ 1 and 6.

[3] NDP Petition, ¶ 11, referring to *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Procedural Order No. 2 dated 1 June 2016 ("**Infinito**"), ¶ 31 and to *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 5 dated 2 February 2007, ¶ 50(a).

[4] NDP Petition, ¶¶ 3-4.

arising out of its alleged non-compliance.[5] Given their social and cultural relationship with the Bruno Creek,[6] the Petitioners intend to explain the cultural and environmental importance of the Creek and to show the lack of procedures to identify the environmental and social impacts of the diversion of the Creek.[7] The Petitioners submit that neither Party will advance these perspectives.

9. To further support their position that their perspectives differ from those of the disputing Parties, the Petitioners point out that the disputing Parties opposed the Communities in the litigation before the national courts. Further, in some cases, both Parties alleged that the Communities had misinterpreted the decisions of the Constitutional Court.[8] The Petitioners and the Parties clearly have different views regarding the application of constitutional mechanisms and the scope and content of relevant judgments and orders. Moreover, the Petitioners have detailed knowledge of the procedural history of the domestic actions,[9] and only they can demonstrate that their rights continue to be violated despite Judgment SU-698.[10]

10. Besides the factual issues mentioned above, the Petitioners submit that the legal perspectives and knowledge they will bring into the arbitration will differ from those of the disputing Parties. Particularly, the Petitioners intend to make the following legal arguments related to the dispute: (i) Carbones and the Claimant's failure to comply with the applicable legal framework governing the la Puente pit expansion project and their systematic disregard of human rights;[11] (ii) that the *tutela* process and the orders of the courts are consistent both with Colombia's human rights obligations and its obligations under the Treaty;[12] and (iii) that Colombian courts have jurisdiction to review the violation of the Communities' rights by both Parties and to create inter-institutional working groups.[13] These issues might not be addressed by the Parties.

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5 NDP Petition, ¶ 8.

6 NDP Petition, ¶¶ 12-13.

7 NDP Petition, ¶ 14.

8 NDP Petition, ¶ 16.

9 NDP Petition, ¶¶ 16-17.

10 NDP Petition, ¶ 18.

11 NDP Petition, ¶¶ 20-22.

12 NDP Petition, ¶ 23.

13 NDP Petition, ¶¶ 24-25.

### B. Scope of the dispute

11. The Petitioners state that, if allowed to intervene, their submissions will address issues within the scope of the dispute.

12. On the facts, the Petitioners will set out the Communities' views on the importance of the Bruno Creek and the impact of diverting the Creek and of expanding La Puente mining pit.[14] They will also describe the constitutional mechanism of *tutela* actions and the scope and content of the resulting judgments and orders.[15] Moreover, they will explain the implementation of Judgment SU-698.[16]

13. On the law, the Petitioners will establish that the Claimant has failed to comply with its legal obligations under the applicable regulatory framework.[17] Additionally, they will show the consistency of the *tutela* actions and court decisions related to the Bruno Creek with international and domestic law.[18] Finally, they will clarify the jurisdiction of the constitutional court and national courts in complex cases.[19]

14. The Petitioners maintain that their submissions on both factual and legal matters will help the Tribunal to resolve the dispute.

### C. Significant interest

15. The Petitioners insist that they have a significant interest in this arbitration due to the Wayuu people's special relationship with water. Further, any review of the implementation of Judgment SU-698 would necessarily affect the Communities: the Bruno Creek is of substantial importance for the survival of the Communities as it guarantees access to water, food, and medicine of the Wayuu culture, besides having a strong spiritual connection with their world view. On its part, CAJAR has a significant interest in the Bruno Creek and in ensuring compliance with the domestic court orders as well as in participating in any proceedings that could affect the enjoyment of human rights in the territories where it works and where the communities it represents are located.[20]

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[14] NDP Petition, ¶ 26.

[15] NDP Petition, ¶ 27.

[16] NDP Petition, ¶¶ 28-29.

[17] NDP Petition, ¶ 30.

[18] NDP Petition, ¶¶ 31-32.

[19] NDP Petition, ¶ 33.

[20] NDP Petition, ¶¶ 34-37.

### D. Disruption, burden or prejudice

16. The Petitioners state that, if recognized as NDPs, they will follow the Tribunal's directions for their participation in the arbitration and not take any action that would affect the normal course of the arbitration.[21]

### E. Additional considerations

17. The Petitioners point out that, in addition to the criteria examined above, in considering whether to allow NDP participation, investment tribunals have also considered whether their participation will facilitate the transparency of the process, and whether the dispute involves matters of public interest. Both these criteria are met in this case.

18. On transparency, the Petitioners submit that allowing to them to participate as NDPs will "facilitate the transparency of the process by allowing access to the proceedings to directly impacted communities".[22] It will also help create a perception of a transparent process for the public.

19. On public interest, the Petitioners submit that tribunals have recognized that a dispute involves public interest when it is likely to affect "diffuse" rights such as the right to a healthy environment. Other tribunals have accepted that there is a public interest when their decision may affect future human rights protection mechanisms.[23] Both of these factors are met in this case. The Cerrejón mine is in the department of La Guajira, an area highly vulnerable to the effects of the climate crisis. The dispute will bring out the Respondent's ability to adapt its policies and mitigate the climate crisis at the local level.

* * *

20. Considering the above, the Petitioners request the Tribunal to:

> 1. Accept this request to be recognized as non-disputing parties;
>
> 2. Recognize the Petitioners as non-disputing parties in the instant case and, as a consequence of the foregoing, to allow them to file a brief sufficiently broad to address the facts and arguments raised throughout

[21] NDP Petition, ¶¶ 43-44.

[22] NDP Petition, ¶ 45.

[23] NDP Petition, ¶¶ 47-49.

this petition. In particular, to allow a brief addressing at least the following issues:

Questions of fact:

- The importance of the Bruno Creek for the communities 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 application of the constitutional mechanism of the tutela action, and the scope and content of the relevant judgments, including Judgment SU-698 of 2017, and the orders given;

- The implementation status of the orders of Judgment SU-698 of 2017, the relationship between the different orders of the constitutional judges and the creation of inter- institutional working tables in the framework of *tutela* judgements.

Questions of law:

- The 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;

- The tutela proceedings and the court orders, including those of Judgment SU-698 of 2017, and their consistency with the State of Colombia's obligations to respect and guarantee human rights and with the guarantees for investors contained in the Treaty;

- 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.

3. Considering the difficulty for the indigenous communities to travel, the lack of signal to communicate with them, and the need to coordinate among them and with their legal representative, it is respectfully requested to take such considerations into account so that the Petitioners have sufficient time to prepare their brief. It is also clarified that this request will not present an obstacle and will not affect the requirements established in the procedural orders or calendar defined by the Tribunal. For the Tribunal's consideration, Petitioners respectfully request the following deadlines:

i. A minimum of 35 business days after July 10, 2024. This is the date set for Respondent to submit its counter-memorial on the Merits in Annex A, Scenario 1 of Procedural Order No. 1; or

ii. A minimum of 35 business days after September 30, 2024. This is the date set for Respondent to submit the counter-memorial on Jurisdiction in Annex A, Scenario 2 of Procedural Order No. 1; or

iii. A minimum of 35 business days after August 29, 2024. Date set for Respondent to submit Exhibit A, Scenario 3 of Procedural Order No. 1.

4. Allow the Petitioners access to the main arbitration documents;

5. Allow the Petitioners to submit documents, reports and evidentiary analysis related to the implementation of orders of Judgment Su-698 of 2017 before the Tribunal in connection with the present arbitration;

6. Allow the Petitioners to participate in the hearings of the case.

7. Exclude the petitioning communities and the petitioning organization from any type of procedural costs that may arise in the present arbitration dispute. [24]

21. The Tribunal will refer to the various requests that compose the NDP Petition as the "Requests".

[24] NDP Petition, pp. 22-23.

## V. THE PARTIES' OBSERVATIONS

### A. The Claimant's observations

22. The Claimant objects to the NDP Petition, stating that the Petitioners do not meet the requirements of Rule 37(2), for the reasons set out below.

#### 1. Perspective, knowledge or insight

23. For the Claimant, to be admitted as an NDP, a petitioner "must" show that it can bring a perspective which the Parties cannot otherwise provide. Investment tribunals have interpreted this to mean that a petitioner must possess "either substantive knowledge or relevant expertise or experience that go beyond, or differ in some respect from, that of the disputing parties themselves".[25] This requirement is simply not met in this case.

24. With respect to the factual issues on which the Petitioners seek to brief the Tribunal, the Claimant contends that the Petitioners have failed to identify any unique perspective that they will bring within the scope of the dispute. The factual matters sought to be briefed by the Petitioners, and the Petitioners' views on those matters, have already been "extensively documented" in the Parties' submissions and evidence.[26] Further, there is nothing unique that will be brought by the Petitioners in respect of the *tutela* actions: the Respondent has made submissions on the matter, and its views are aligned with those of the Petitioners.[27]

25. As to the legal issues, the Petitioners have likewise failed to identify any unique perspective that they will bring within the scope of the dispute. Here again, the Petitioners' views on legal issues have already been addressed in the Parties' submissions and evidence.[28] Further, the Respondent's position "closely mirrors" the arguments sought to be made by the Petitioners. In any event, ICSID tribunals have been reluctant to accept NDP submissions on legal issues, because the Parties' legal teams are better suited to address

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[25] Claimant's Comments, ¶¶ 26-27, relying, among others, on *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party dated 4 March 2013 ("**Apotex**") (**CL-0082**), ¶ 31; and *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment ("CCSI") to File a Written Submission dated 21 July 2016 ("**Bear**") (**CL-0085**), ¶¶ 37-38.

[26] Claimant's Comments, ¶¶ 31-34.

[27] Claimant's Comments, ¶ 38.

[28] Claimant's Comments, ¶ 41-42.

such issues.[29] Here, both Parties are represented by experienced Colombian counsel, international counsel, and Colombian legal experts.

### 2. Scope of the dispute

26. The Claimant contends that the plain meaning of Rule 37(2), as also determined by a number of ICSID tribunals, is that to be allowed as an NDP, a petitioner "must" show that it will bring a "unique perspective"[30] to the arbitration that will assist the tribunal in the determining a factual or legal issue "within the scope of the dispute".[31] As mentioned above, the views the Petitioners seeks to bring in this arbitration have already been espoused, and the Respondent's submissions are aligned with those of the Petitioners. The NDP Petition should, therefore, be denied.

27. The Claimant adds that the Petitioners should not be allowed to make submissions on matters that are not within the scope of the dispute. For instance, the issue of whether an investor's compliance with the regulatory framework is relevant to the Tribunal's jurisdiction has not been raised by the Respondent and is therefore outside the scope of the dispute.[32] Similarly, the Petitioners seek leave to file a submission addressing international law issues pertaining to the Communities' human rights. While the Petitioners might have an interest in promoting certain views on international human rights law, such matters are beyond the scope of this dispute.

### 3. Significant interest

28. The Claimant submits that the Petitioners must show that they have "more than a 'general' interest in the proceeding".[33] They have not done so. Governmental entities, including the Ministry of the Interior, certified that no prior consultation with the Communities was required pursuant to the applicable regulatory framework in Colombia as the Communities were not located in the direct area of influence of the Bruno Creek. In fact, none of the indigenous communities that would be impacted by the diversion or that would otherwise satisfy the criteria for qualifying for consultations have sought to be recognized as *amicus curiae* in these proceedings.

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[29] Claimant's Comments, ¶¶ 43-44.

[30] Claimant's Comments, ¶ 26.

[31] Claimant's Comments, ¶ 28.

[32] Claimant's Comments, ¶ 46.

[33] Claimant's Comments, ¶ 12.

29. Further, the Claimant points out that it is only seeking compensation from Colombia, not restitution or any other relief seeking the withdrawal or reversal of the Respondent's measures, including Judgment SU-698. The Tribunal thus will not "prevent the implementation of [Judgment SU-698]" or affect the "outcome of the *tutela*" as the Petitioners contend. The Petitioners can have no interest in the compensation sought by the Claimant, let alone a general interest. [34]

30. The Claimant insists that CAJAR's request to intervene must be rejected. Its general mission to defend human, territorial and environmental rights in the territories where it works is "insufficient" to constitute a significant interest. That it relies on the Communities' interest shows that it does not have any interest of its own.[35]

#### 4. Disruption, burden, or prejudice

31. For the Claimant, granting the NDP Petition would unduly burden and unfairly prejudice it, besides disrupting the proceeding. The Claimant would be forced to spend time and costs to respond to issues that duplicate the Respondent's arguments.[36]

#### 5. Additional considerations

32. The Claimant states that, unable to show that they meet the requirements of Rule 37(2), the Petitioners have sought to rely on extraneous factors. Their argumentation cannot be sustained here either. Allowing the NDP Petition will not further transparency: the Tribunal has already taken steps to ensure transparency in this arbitration. Further, all ICSID arbitrations involve matters of public interest, that of itself does not suffice to sidestep the requirements of Rule 37(2).[37]

33. If the Petitioners are admitted as NDPs, the Claimant insists that the Petitioners' request to access documents and participate in hearings must be dismissed. Regarding access to documents, Procedural Order No. 2 ("PO2") specifies the documents which non-parties can access, namely the published summaries of the Parties' positions. The Petitioners are not

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[34] Claimant's Comments, ¶¶ 13-18, relying on *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1), Procedural Order No. 6 dated 20 December 2021 ("**Odyssey"**) (**CL-0090**); and *Angel Samuel Seda and others v. Republic of Colombia* (ICSID Case No. ARB/19/6), Procedural Order No. 7 dated 1 December 2021 (**CL-0089**).

[35] Claimant's Comments, ¶ 20, relying on *Odyssey* (**CL-0090**).

[36] Claimant's Comments, ¶ 48.

[37] Claimant's Comments, ¶ 22.

entitled to anything further.[38] If the Tribunal finds otherwise, the Claimant should be given the opportunity to comment on "the scope, conditions and/or procedure for granting such access, which should be tailored to the scope of the submission that Petitioners are granted leave to file."[39] The Petitioner's request to participate in hearings must be rejected as it is contrary to ICSID Arbitration Rule 32(2). The Parties have already agreed in Procedural Order No. 1 ("PO1") that hearings should be closed to the public.[40]

34. Considering the above, the Claimant requests that the Tribunal:

a. deny Petitioners' Application to be permitted to file a non-disputing party submission in the present arbitration;

b. deny Petitioners' request to access documents; and

c. deny Petitioners' request to participate in hearings.[41]

### B. The Respondent's observations

35. The Respondent does not object to the NDP Petition. It considers the factors under Rule 37(2) to be "neither exhaustive nor prescriptive"; the Tribunal can well allow NDP participation in the absence of one or more of them.[42]

36. In any case, for the Respondent, all relevant factors are satisfied in this case to allow the Petitioners to intervene, as set out below.

#### 1. Perspective, knowledge or insight

37. The Respondent submits that this factor requires the Petitioners to show that that their prospective submission would be of use to the Tribunal beyond the submissions and materials provided by or likely to be provided by the disputing Parties. Further, it should not be duplicative of the latter's submissions.[43]

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[38] Claimant's Comments, ¶¶ 49-50.

[39] Claimant's Comments, ¶ 54.

[40] Claimant's Comments, ¶ 55, relying, among others, on *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Procedural Order No. 2 dated 26 June 2012 (**CL-0081**), ¶ 63.

[41] Claimant's Comments, ¶ 56.

[42] Respondent's Comments, ¶¶ 6-7.

[43] Respondent's Comments, ¶ 10, relying on *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria* (ICSID Case No. ARB/20/41), Procedural Order No. 4 (Decision on Petition under ICSID Arbitration Rule 37(2)) dated 7 March 2023 ("**Eni**") (**RL-0028**), ¶ 53.

38. Here, says the Respondent, the Communities have unique, first-hand knowledge and perspective regarding many of the issues that are relevant to this dispute, and which arise from their proximity and relationship with the Bruno Creek, the La Puente pit expansion and the relevant Colombian legal proceedings, including Judgment SU-698. Besides, only the Petitioners can explain how the proposed expansion of the pit would directly affect them and only they can describe the social and cultural relationships between the Wayuu communities and the water sources in the La Guajira region.[44] For its part, CAJAR, an organization that defends human rights, has represented the Communities in all local proceedings that are at the heart of this case. It would assist the Communities in preparing their submission.[45]

39. The Respondent adds that its views are not always aligned with those of the Petitioners. For instance, the Respondent does not agree with the Petitioners that Colombia has not met its obligations to respect and guarantee the rights of indigenous communities at risk of extermination. In the circumstances, the Petitioners would make a valuable contribution to the arbitration by espousing views not currently before the Tribunal.[46]

### 2. Scope of the dispute

40. The Respondent agrees with the Petitioners that their submission would address issues within the scope of the dispute, including: (i) the cultural and spiritual relationship between the Communities and the Bruno Creek; (ii) the effect of the La Puente pit expansion on the Communities' human rights; (iii) the scope of the rights that were at issue in the *tutela* actions; and (iv) the role of the Communities in the implementation of Judgment SU-698.[47]

41. For the Respondent, the Claimant has conceded that the matters that the Petitioners seek to address would fall within the scope of the dispute. On 21 July 2024, the Claimant sought all documents exchanged between Colombia and the Petitioners concerning the present arbitration and the preparation of the NDP Petition. It cited alleged similarities in the Petition and the Counter-Memorial relating to (i) Glencore's due diligence, (ii) the consistency of Colombia's measures with its international law obligations, and (iii) the jurisprudence of the Constitutional Court, which could only mean that it did not dispute that these matters were within the scope of the dispute.

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[44] Respondent's Comments, ¶¶ 11-17.

[45] Respondent's Comments, ¶ 18.

[46] Respondent's Comments, ¶ 19.

[47] Respondent's Comments, ¶ 20.

### 3. Significant interest

42. The Respondent submits that a significant interest refers to a "concrete" interest rather than a "general, academic interest". The Communities clearly have a concrete interest as their fundamental rights were at stake in the relevant legal proceedings,[48] including the implementation of Judgment SU-698.[49] CAJAR also has a concrete interest due to its mandate from the Communities and as an organization aiming to defend human, territorial, and environmental rights.[50]

### 4. Disruption, burden or prejudice

43. The Respondent contends that neither Party would be prejudiced by allowing the Petitioners to file a single written submission on a specific set of issues. It would have no impact on the procedural calendar or the due process rights of either Party.[51]

### 5. Additional considerations

44. The Respondent agrees with the Petitioners that tribunals can consider other factors in deciding whether to allow NDPs to intervene. One such factor is "public interest in the subject-matter of the arbitration", which is present here as the measures contested in the arbitration relate to the infringement of the human rights of indigenous communities.[52]

45. Considering the above, the Respondent submits that the Petition should be granted. Further, the Petitioners' requests to access the Parties' written submissions, expert reports, and witness statements, to participate in the hearings of the case, and to be excluded from any costs order should be granted as well. By contrast, the request to file "documents, reports and evidentiary analysis related to the implementation of orders of Judgment SU-698" should be dismissed as the Parties have already made, and will continue to make, extensive submission on the implementation of Judgment SU-698.[53]

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[48] Respondent's Comments, ¶¶ 25-26.

[49] Respondent's Comments, ¶ 27.

[50] Respondent's Comments, ¶ 28.

[51] Respondent's Comments, ¶ 31.

[52] Respondent's Comments, ¶ 29.

[53] Respondent's Comments, ¶¶ 32-33.

## VI. ANALYSIS

46. The Tribunal will first set out the legal framework (A), before addressing the Requests contained in the NDP Petition (B).

### A. Legal Framework

47. Rule 37(2) (reproduced at para. 4 above) grants an arbitral tribunal the discretion to allow an NDP to participate in an arbitration by means of a written submission. In determining a request to participate, the tribunal must consult the disputing parties and examine whether the submission satisfies the listed factors. The list is not exhaustive and a tribunal may well consider "other things" that militate against allowing such participation even if the factors expressly listed in Rule 37(2) are satisfied.[54] Further, if a tribunal were to allow an NDP to participate, it must ensure that the NDP submission does not disrupt the proceedings or unfairly prejudice the disputing parties.

### B. The Requests

48. The Petitioners request the Tribunal to (1) recognize them as NDPs; (2) allow them to file a written submission on certain matters; (3) within specific time limits; (4) grant them access to "the main arbitration documents"; (5) allow them to submit "documents, reports and evidentiary analysis" on the implementation of Judgment SU-698; (6) allow them to participate in the "hearings of the case" and (7) exclude them from "any type of procedural costs".[55]

49. These requests exceed the scope of Rule 37(2), which only contemplates an NDP filing a written submission. As such, it only covers Requests (1), (2) and (3). The Tribunal addresses these Requests first and then discusses the remaining Requests ((4)-(7)).

#### 1. Recognize the Petitioners as NDPs

50. For the reasons elaborated below, the Tribunal recognizes the Communities as NDPs, but not CAJAR.

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[54] See, for *e.g.*, *Eni* (**CL-0091)**, ¶ 49.

[55] NDP Petition, pp. 22-23.

### 2. Written Submission

51. ICSID Arbitration Rule 37(2) gives the Tribunal broad discretion to allow an NDP to "file a written submission". To assess whether such a filing is appropriate, however, the provision sets out three factors for the Tribunal's consideration: the extent to which the submission would bring a "perspective, particular knowledge, or insight different from that" of the Parties (b); the extent to which the submission would assist the Tribunal in determining a factual or legal issue "within the scope of the dispute" (c); and, the extent to which the NDP has a "significant interest" in the proceeding (d). In addition, ICSID Arbitration Rule 37(2) requires the Tribunal to ensure that the NDP submission does not disrupt the proceeding or "unduly burden or unfairly prejudice" either Party (e), and that both Parties are given an opportunity to comment on the NDP submission (f). The Tribunal examines each of these items below, along with the additional considerations of transparency and public policy raised by the Parties (g). The Tribunal first sets out some general considerations before examining these issues (a).

#### (a) General considerations

52. At the outset, the Tribunal recalls that this arbitration concerns the expansion of the Cerrejón mine's La Puente pit, which involves diverting a section of the Bruno Creek. The Claimant seeks monetary compensation for what it calls an "indefinite suspension" of a "fully authorized and permitted" expansion.[56] At issue in the arbitration are certain judicial measures, including Judgment SU-698, that the Respondent alleges arose out of the need to protect the fundamental rights of certain indigenous communities, including the Communities.

53. The Petitioners are composed of two distinct groups: the Communities and CAJAR. The former is composed of two indigenous communities that allege that their rights have been and will be affected by the expansion of the La Puente pit. They were the plaintiffs in the 2016 *tutela* action that resulted in Judgement-698. The latter, CAJAR, is a human rights organization that also represented the Petitioners in the domestic court actions concerning the pit expansion.

54. The Tribunal further notes that the Petitioners wish to make a written submission on the facts and arguments mentioned in the NDP Petition, "at least" the "questions of fact" and "questions of law" identified at paragraph 34 above.[57] Some of these points overlap with one another. For instance, "the relationship between the different orders of the

[56] Claimant's Comments, ¶ 6.

[57] NDP Petition, Section IV.

constitutional judges and the creation of inter-institutional working tables in the framework of the *tutela* judgements" and "the jurisdiction of the national courts, the *tutela* judge, and specifically the Constitutional Court […] to create inter-institutional working groups". Similarly, "the *tutela* proceedings" and "the jurisdiction […] of the *tutela* judge" will likely overlap as well. Moreover, certain matters are identified as "questions of fact" when they could arguably be questions of law. This is, for instance, the case with "the relationship between the different orders of the constitutional judges and the creation of inter-institutional working tables in the framework of *tutela* judgements" which relates to the working of the Colombian legal system, not properly an issue of fact.

55. In the circumstances, the Tribunal finds it necessary to restructure the issues on which the Petitioners seek to make a submission as follows:

a. Factual issues:

(i) "[t]he 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";

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

(iii) "[t]he implementation status of the orders of Judgment SU-698 of 2017".[58]

b. Legal issues:

(iv) "[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;"

(v) "[t]he application of the constitutional mechanism of the *tutela* action";

(vi) "the relationship between the different orders of the constitutional judges and the creation of inter-institutional working tables in the framework of *tutela* judgements";

[58] NDP Petition, Section IV, p. 22.

(vii) "[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;"

(viii) "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."[59]

56. With this background, the Tribunal now proceeds to examine the relevant factors for the Petitioners to be admitted as NDPs.

**(b) Perspective, knowledge, or insight**

57. The Tribunal agrees with the determinations of other investment tribunals that, to be admitted as an NDP, a petitioner should possess knowledge, expertise or insight that goes beyond, or differs from, that of the disputing Parties.[60] It is also well-established that the NDP submission should not be duplicative of the latter's submissions.

58. Bearing in mind the issues on which the Petitioners intend to make a written submission, at this stage of the arbitration, the Tribunal considers it likely that they will bring a different perspective to the arbitration at least as far as item (i) in paragraph 55 is concerned. The Communities have strong social, cultural and environmental connections to water sources in the La Guajira region, and particularly the Bruno Creek. They are best placed to advise the Tribunal of their "world view and cultural norms […] due to the fundamental social and spiritual link the creek has with their territory";[61] "the human, social and cultural rights of the Wayuu people"[62] as well as the "knowledge of the local territory, of the Cerrejón mine and its history"[63] and the Claimant's alleged "disregard for] the […] rights of the Wayuu people".[64] They brought the *tutela* action that resulted in Judgment SU-698, which addressed their rights to water, food security and health. It is likely that their knowledge and insight will differ from that of the disputing Parties that do not have the same historical

[59] NDP Petition, Section IV, p. 22.

[60] See, for *e.g.*, *Eni* (**RL-0028**), ¶ 53; *Bear* (**CL-0085**), ¶¶ 37-38; *Odyssey* (**CL-0090**), ¶ 23.

[61] NDP Petition, ¶ 36.

[62] NDP Petition, ¶ 22.

[63] NDP Petition, ¶ 15.

[64] NDP Petition, ¶ 22.

connections. Their insights could assist the Tribunal in better understanding certain aspects of the claims before it.

59. The same reasoning applies to items (ii) and (iii) in para. 55. Here too, the Tribunal considers that the Communities' submissions could help it to fully understand the nuances of the dispute before it. After all, the Communities initiated the domestic proceedings and the *tutela* action that resulted in Judgment SU-698 at issue in this arbitration. While it is true that the disputing Parties have made submissions on these matters,[65] the Communities were involved right from the early stages with the relevant Colombian authorities. Besides, at this stage of the arbitration, the Tribunal cannot rule out that the Petitioners' perspective will differ from that of the disputing Parties given the Petitioners' position that neither the State nor Carbones complied with Judgment SU-698 and that Petitioners have not been able to effectively participate in the inter-institutional working group constituted in the wake of Judgment SU-698.

60. The situation is not the same as far as the legal issues listed at items (iv) to (viii) in para. 55 are concerned.

61. The Tribunal agrees with the hesitation expressed by other investment tribunals in allowing NDPs to make submissions on legal matters;[66] the rationale being that the disputing Parties' legal teams are best suited to address legal issues. Here, both Parties are represented by highly qualified and experienced domestic and international counsel. Unsurprisingly therefore, most of these issues have already been espoused by the Respondent in its Counter-Memorial,[67] to which the Claimant will likely respond in its forthcoming Reply on the Merits and Counter-Memorial on Jurisdiction (the "Reply").[68] Further, Colombia's legal expert, Ms. Catalina Botero, has submitted an expert report (the "Botero Expert Report") on Colombian constitutional law, the jurisdiction of the Constitutional court, the inter-institutional working group and human rights issues,[69] i.e. precisely some of the same issues on which the Petitioners now seek leave to comment. The Tribunal is thus assisted by multiple, qualified lawyers with specific knowledge and expertise of these legal matters. In the circumstances, the Tribunal is not convinced that the Petitioners could make any

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[65] See, for *e.g.*, Claimant's Memorial ("**Memorial**"), ¶ 180, footnote 389; Colombia's Counter-Memorial ("**Counter-Memorial**", ¶¶ 402(b), 411-414, 419, 423-424.

[66] See, for *e.g.*, *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia* (ICSID Case No. ARB/18/23), Procedural Order No. 10 dated 31 August 2021 (**CL-0092**), ¶ 33; *Apotex* (**CL-0082**), ¶ 31; *Bear* (**CL-0085**), ¶¶ 37-38; *Odyssey* (**CL-0090**), ¶ 23.

[67] Counter-Memorial, ¶¶ 165-166, 175, 241, 502-538, 685, 748, 879, broadly addressing issues (vi) and (vii).

[68] PO1, Annex A, Scenario 1: No Request for Bifurcation.

[69] See, for *e.g.*, Botero Expert Report, ¶¶ 64, 183-186, 227, 239-243, broadly addressing issues (iv), (v) and (viii).

contribution differing from that of the disputing Parties that would assist the Tribunal in resolving the dispute. This is especially true for the Communities, as they have not even alleged to have any legal background.

62. The Tribunal notes the Claimant's position that, on several matters, the Petitioners' perspective will likely be aligned with that of the Respondent. Even if this were to happen, it would not suffice to dismiss the NDP Petition. Indeed, as other tribunals have found,[70] it is "standard" for NDPs to advocate for interests and causes that could conflict with the positions of one of the disputing parties. The NDP mechanism does not require an NDP to be neutral, independent, or objective. No prejudice would be caused to the party whom the NDP opposes: the NDPs submission is not evidence. Moreover, the Tribunal will assess the submission bearing in mind that it comes from a party whose position is aligned with one of the disputing Parties.

63. For the sake of completeness, the Tribunal is aware that the Petitioners have questioned the Claimant's compliance with the applicable regulatory framework and its relevance to the Tribunal's jurisdiction.[71] It is not clear whether the Petitioners mention this issue by way of background or whether they intend to address it if they are allowed to file an NDP submission. Indeed, while the Petitioners mention, in general terms, that other tribunals have allowed NDPs to make submissions on the tribunal's jurisdiction, they later go on to indicate that, if allowed to do so, they will address "the Claimant's current non-compliance with the applicable legal framework" without mentioning the legal effects of a finding of non-compliance.[72] Nor is the impact of this alleged non-compliance on the Tribunal's jurisdiction listed as a "question of fact" or "question of law" on which the Petitioners would like to address the Tribunal. For the sake of clarity, the Tribunal does not find it necessary for the Petitioners to address this issue. As just mentioned, the disputing Parties are represented by qualified, experienced lawyers that are best placed to address this matter. The Petitioners are unlikely to bring forward any perspective, knowledge, or insight different from that of the disputing Parties.

64. For the foregoing reasons, the Tribunal concludes that the Petitioners will likely contribute a fresh perspective to this arbitration, but only in respect of items (i), (ii) and (iii) identified at paragraph 55 above.

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[70] See, for *e.g.*, *Huawei Technologies Co., Ltd. v. Kingdom of Sweden* (ICSID Case No. ARB/22/2), Procedural Order No. 6 dated 26 June 2024, ¶ 20.

[71] NDP Petition, ¶ 30.

[72] NDP Petition, ¶ 30.

**(c) Scope of the dispute**

65. It follows from Section (b) above that items (i), (ii) and (iii) identified at paragraph 55 above are within the scope of the dispute.

**(d) Significant interest**

66. Here again, the Tribunal agrees with the conclusions of other investment tribunals that have found that, for a petitioner to have a significant interest, it must have an interest in ensuring that a tribunal has all relevant information necessary for resolving the dispute.[73] Something more than a "general" interest is required, for instance, that the outcome of the arbitration might directly or indirectly impact the rights or principles the petitioner represents or defends.[74]

67. The Tribunal is convinced that the Communities have a significant interest in the proceeding. As already mentioned, they have a close cultural and spiritual connection with the Bruno Creek, the diversion of which forms part of the subject matter of this arbitration. While the Claimant contests the effect of the diversion on the Communities, it remains that Judgment SU-698 found that the diversion of the Bruno Creek threatened the Communities' fundamental rights to water, food safety and health.[75] At this stage of the arbitration therefore, the Tribunal cannot rule out that the Communities' rights will not be affected by the outcome of the arbitration.

68. By contrast, the Tribunal is not convinced that CAJAR has a "significant interest" in the arbitration because it is engaged in the protection of the human rights of communities in the region or because it assisted the Communities in legal actions concerning the expansion of the La Puente pit. Every environmental or human rights organization has an interest in ensuring compliance with human rights and environmental law in the areas in which it operates; something more is needed to show a "significant interest" in this proceeding beyond this general interest.[76]

69. The Tribunal thus concludes that the Communities have a significant interest, but not CAJAR.

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[73] See, for *e.g.*, *Infinito*, ¶ 36.

[74] See, for *e.g.*, *Apotex* (**CL-0082**), ¶ 38.

[75] Constitutional Court of Colombia, Judgment SU-698/17 dated 28 November 2017 (**R-0171**) (Updated Translation of Ex. C-0038), p. 152; Counter-Memorial, Section II.F.

[76] See, for e.g., *Odyssey* (**CL-0090**), ¶ 19.

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70. For the reasons set out above, only the Communities shall be admitted as NDPs. This does not mean that CAJAR cannot continue to represent the Communities in the preparation of their NDP submission.

**(e) Disruption, burden, or prejudice**

71. Mindful of its duty to "ensure that the [NDP] submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party", the Tribunal gives the following directions:

a. The submission shall be limited to the three narrow factual issues identified in Section (a) above.

b. Considering that the disputing Parties have already addressed some of these issues, the submission shall not exceed 10,000 words, including footnotes.

c. The submission may append relevant documents, provided these are not already in the record (see para. 82 below).

72. The Communities request 35 days to file their submission. The Tribunal finds this time limit reasonable, and directs the Communities to file their submission by **14 November 2024**

73. The proceedings will not be affected by such filing, which will also not prejudice the disputing Parties. The Tribunal recalls that the hearing on jurisdiction and the merits is scheduled for 10-17 November 2025, leaving ample time for the Parties to respond to a limited NDP submission. The Tribunal addresses the Parties' opportunity to comment below.

**(f) Opportunity to comment**

74. Bearing in mind that the Communities shall file their request by **14 November 2024** and that the Claimant's Reply is due on 7 November 2024, the Tribunal gives the following briefing instructions:

a. The Claimant may comment on the submission on or before **10 January 2025**.

b. The Respondent will have sufficient time to address the submission in its Rejoinder on Merits and Reply on Jurisdiction due on **7 March 2025**.

c. Additionally, both Parties can address the submission at the hearing in November 2025 if they wish to do so.

75. The Tribunal finds that these time limits give ample time for the Parties to comment on the NDP submission, further ensuring no disruption to the proceedings.

#### (g) Additional considerations

76. As mentioned, the Tribunal can well consider other factors to determine whether to accept or decline an NDP submission. It sees no reason to do so in this case. However, even if it were to do so, given that this arbitration concerns the expansion of a mining project that would allegedly have societal, cultural and environmental implications on indigenous communities or, at the very least, on the rights of individuals or entities beyond the disputing Parties, the interests of transparency and public interest would weigh towards allowing the Petitioners to intervene, provided, of course, that such intervention would assist the Tribunal to resolve the issues in dispute.

### 3. Time limit for NDP submission

77. The Petitioners request that they be allowed to submit their NDP submission within specific time limits. This request has been addressed above 2(e) above.

### 4. Access to "main arbitration documents"

78. The Petitioners further request access to "the main arbitration documents."

79. The ICSID Convention and Rules are silent on an NDPs access to the record. Further, PO2, which sets out the transparency regime applicable in this arbitration, does not address the question of whether the record, or parts thereof, should be made available to NDPs. It thus falls within the residual powers of the Tribunal to resolve this matter.[77]

80. The Tribunal recalls that the Respondent had earlier requested the publication of "pleadings, expert opinions and witness statements".[78] The Tribunal denied this request,[79] instead ordering the publication of detailed summaries of the Parties' positions on the facts and issues in dispute, as well as their requests for relief.[80]

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[77] See, for *e.g.*, *Infinito*, ¶ 42.

[78] Colombia's Transparency Submission dated 2 November 2023, ¶¶ 1 and 8. See also PO2, ¶ 17.

[79] PO2, ¶ 41.

[80] PO2, ¶ 46.

81. The Communities will make a limited submission on the three narrow factual issues identified at Section 2(a) above. The information and knowledge required for them to do so is well within their purview. The Parties' submissions or evidence would not help the Communities in preparing their submission, which is neither meant to comment on the Parties' positions nor the evidence of the case. In the circumstances, the Tribunal does not consider it necessary to allow them access to the "main arbitration documents".[81] The Communities will have access to the detailed summaries just mentioned.

82. By contrast, the Tribunal does think it would be useful for the Communities to have access to the exhibit lists that are attached to the Claimant's Memorial and to the Respondent's Counter-Memorial. The record already contains submissions filed by the Communities on the matters to be addressed in their forthcoming submission,[82] including on the implementation of Judgment SU-698.[83] Providing these lists to the Communities will allow them to assess what information is already available to the Tribunal, so that they do not duplicate it, as instructed at para. 71.c above.

### 5. Documentation on the Implementation of Judgement SU-698

83. The Petitioners seek to file "documents, reports and evidentiary analysis related to the implementation of orders of Judgment SU-698".[84] The disputing Parties agree that the record of the arbitration already extensively addresses the matter.[85] The forthcoming written

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[81] The Tribunal understands this to be a reference to "main documents" mentioned in PO1, *i.e.*, "[w]ritten pleadings, witness statements, and expert reports or opinions" (PO1, ¶ 12.3.1).

[82] See, for *e.g.*, Tutela action by the La Horqueta, Paradero, and Gran Parada communities dated 23 December 2015 (**C-122**), pp. 19, 27-29, 31-32, 40-41, 46-47; Appeal by the La Horqueta, Paradero and Gran Parada communities against Bogotá Criminal Court's judgment dated 26 January 2016 (**R-334**), pp. 13-14; Submission by representative of Wayuu communities to Bogotá Criminal Court dated 13 July 2020 (**R-286**), pp. 3-5. See also, Memorial, ¶¶ 75-76, 107-108, 121-122; Counter-Memorial, ¶¶ 246-249, 311, 316-318, footnote 716. See, for *e.g.*, Tutela action by the La Horqueta, Paradero, and Gran Parada communities dated 23 December 2015(**C-122**), pp. 17-18; Appeal by the La Horqueta, Paradero and Gran Parada communities against Bogotá Criminal Court's judgment dated 26 January 2016 (**R-334**), pp. 5-13; Paradero and La Gran Parada Communities, Submission to the Constitutional Court dated 17 May 2019 (**R-276**), pp. 4-5, 10-15; Paradero and La Gran Parada Communities, Submission to the Constitutional Court dated 1 June 2021 (**R-288**), pp. 8-11.

[83] See, for *e.g.*, Paradero and La Gran Parada Communities, Submission to the Constitutional Court dated 17 May 2019 (**R-276**), pp. 5-7; Submission by representative of Wayuu communities to Bogotá Criminal Court dated 13 July 2020 (**R-286**), pp. 5-6; Paradero and La Gran Parada Communities, Submission to the Constitutional Court dated 1 June 2021, (**R-288**), pp. 8-11; Request for Provisional Measures filed with the Constitutional Court dated 8 April 2022, (**R-298**), pp. 1-4.

[84] NDP Petition, Section III and p. 23.

[85] Claimant's Comments, ¶ 33-34 ("[T]he record of this arbitration already contains the submissions filed by Petitioners before the Colombian courts in the context of their *tutela* action as well as their statements made during the course of the multiple site visits conducted by the Constitutional Court, both before and after the issuance of

and oral submissions of the Parties will most likely address the matter as well. In the circumstances, and bearing in mind that the Communities will have access to the Parties' exhibit lists (*see* para. 82 above), the Tribunal allows the Communities to append only those documents that are strictly necessary to their forthcoming submission, and that are not already in the record.

### 6. Participation in the "hearings of the case"

84. The Petitioners request the Tribunal to "allow [them] to participate in the hearings of the case."[86]

85. ICSID Arbitration Rule 32(2) prohibits the participation of third parties in oral hearings unless the disputing Parties agree:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

86. Further, PO1 records the Parties' agreement that the hearing in the case shall be closed to the public:

> In accordance with Arbitration Rule 32(2), hearings shall be closed to the public.[87]

87. Here, the Claimant has expressly objected to the Petitioners participation in any hearing.[88] Accordingly, this request is denied.

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Judgment SU-698. This includes Petitioners' submissions and statements regarding: […] (iii) their positions on the status of implementation of Judgment SU-698."); Respondent's Comments, ¶ 33 ("[T]he documentary record in this arbitration is already extensive, and that the Parties have already submitted and will continue to submit documents on to the record regarding the implementation of Judgment SU-698, some of which may overlap with the documents that CAJAR and the Petitioner Communities may wish to submit.").

[86] NDP Petition, Section IV, p. 23.

[87] PO1, ¶ 24.7.

[88] Claimant's Comments, ¶ 55.

### 7. Exclusion from "any type of procedural costs"

88. The Tribunal does not find it necessary to impose any costs on the Communities, especially when they will be making a limited submission on three narrow factual issues, without disrupting the procedural calendar or substantially increasing the Parties' costs occasioned by addressing the submission.

## VII. ORDER

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

a. The Communities are recognized as NDPs.

b. This Order shall be notified to the Petitioners and to the Parties. At the same time, the ICSID Secretariat shall make available to the Communities the fact exhibit list attached to the Claimant's Memorial and to the Respondent's Counter-Memorial. The Communities shall use these materials exclusively for purposes of preparing their written submission and shall not communicate them to third parties or use them outside this arbitration.

c. On or before **14 November 2024**, the Communities may file a written submission (the "NDP Submission") of no more than 10,000 words (including footnotes) addressing three factual issues, namely:

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";

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".

d. The NDP Submission may append relevant documents provided they are not already in the record, as shown by the exhibit lists referred to in subparagraph (b) above.

e. The Claimant may comment on the NDP Submission on or before **10 January 2025**.

f. The Respondent may comment on the NDP Submission in its Rejoinder on Merits and Reply on Jurisdiction.

g. The Petitioners' remaining Requests are denied.

h. Costs are reserved for a later decision.

On behalf of the Tribunal,

[Signed]

Sabina Sacco
President of the Tribunal

Date: 10 October 2024