NATIONAL AND INTERNATIONAL STATEMENT

RECOVER COLOMBIAN SOVEREIGNTY IN DEFENSE OF WATER, LIFE AND TERRITORIES

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Subject: Why urge the Colombian Government of the Global Force for Life and Territorial Planning with regard to Water to review its investment and free trade agreements? Statement for a review of the system of investment and free trade agreements.

The below-signed communities, civil society organizations and networks from Colombia, Latin America and around the world that defend life, water and territories from the predatory actions of transnational companies in the extractive industries have been convened by a coalition of national and international organizations. The profit motive of these companies translates into destruction of the territories where they operate, as well as impunity due to the existence of supranational instruments to protect them. In many cases, when local communities and social organizations manage to obtain measures to protect their territories, these companies resort to such instruments to threaten governments and influence their decisions. For this reason, as communities and organizations that defend territory, we also seek to dismantle these power structures that protect transnational corporations. In this context, if the current Colombian government has as its slogan to be a global force for life and to confront the challenges of transforming the country's dependence on extractivism, and a just transition away from fossil fuels that put at risk the sustainability of life on the planet, it must urgently address unrestricted corporate power and dismantle the system that undermines the sovereignty and obligations of States to protect human rights, human health and the environment.

One of the manifestations of this unlimited corporate power is the system of international investment agreements signed between States, which allow foreign companies to sue States before an unbalanced, unfair and inconsistent system that undermines international environmental and human rights obligations and leads to the fragmentation of international law. Through such claims, companies seek to obtain millions in compensation when states, legitimately and in compliance with their obligations, adopt changes to norms, regulations or public policies or reach judicial decisions in favor of the rights of local communities and the protection of ecosystems essential for the protection of life.

This system consists of the Investor-State Dispute Settlement (ISDS) mechanism, an instrument found in free trade agreements (FTAs), bilateral investment treaties (BITs) and other agreements, which give foreign investors the power to bypass national laws and courts of justice to bring claims directly against sovereign countries when they feel their investments have been affected.

In 2016, Colombia joined the list of Latin American countries being sued in these investment tribunals. Transnational companies in the mining, gas and oil sector resort to supranational arbitration more than any other when communities try to stop their abuses. In 2018, the country became one of the most sued countries before these tribunals. According to the Colombian Agency for the State's Legal Defense, as of the first half of 2022, there are currently 12 open arbitration processes and 7 more in pre-arbitration stage **for an estimated $2 billion US dollars[1]. The majority have arisen from the extractive sector.**

[1] See Agencia Nacional de Defensa Jurídica del Estado, *Informe de Litigiosidad a Junio 30 de 2022* https://www.defensajuridica.gov.co/gestion/informes/informes_litigiosidad_2022/Informe_litigiosidad_VF_260722.pdf

Currently, the transnational corporation Glencore, owner of the Cerrejón coal mine, is suing Colombia to try to force the government to pay a million dollar compensation for a Constitutional Court decision in favor of the Wayúu people. This decision suspended the expansion of one of the mine's open pits in La Guajira in order to protect the Bruno stream, a vital source of water for the region.

Another example of this transnational corporate abuse of power is Eco Oro, a Canadian company that sought to extract gold from the Santurbán páramo (high altitude wetlands), and that is suing Colombia for $736 million dollars because its project was brought to a halt thanks to massive protests given that it threatens one of the most important ecosystems in the country. The arbitration tribunal found Colombia had violated the terms of the Canada Colombia Free Trade Agreement, however, the amount that Colombia might have to pay the company is as of yet unknown. Two other Canadian companies have similarly sued.

These kinds of disputes and even the mere threat of lawsuits have demonstrated that they produce a deterring, chilling or blackmailing effect intended to subordinate the national sovereignty of the State to adopt environmental protection and climate action measures. In turn, the disputes undermine the right of communities and peoples to seek justice in the face of abuses and serious violations by large corporations that go unpunished.[2]

In this way, the system **deepens and perpetuates unequal and colonial relations as historical patterns** of discrimination and dispossession against Indigenous peoples who disproportionately suffer from projects related to foreign investment[3]. These impacts play out similarly in black, peasant and marginalized urban communities. In practice, investment treaties and the rights they grant to multinationals afford them a more privileged rank above the domestic constitutional order. This is particularly problematic in the context of the climate crisis and accelerated biodiversity loss in which decisive actions and urgent measures are required to confront irreparable damage and devastating effects from human activities. According to the warning of the 2022 Report of the Intergovernmental Panel on Climate Change, this system poses the risk of blocking the progressive elimination of fossil fuels[4]. The Special Rapporteur on human rights and the environment, David R. Boyd, has called on states to "Negotiate the **removal of Investor-State Dispute Settlement mechanisms from international trade and investment agreements** or **terminate these agreements** (because

[2] See Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: *Human rights- compatible international investment agreements* (A/76/238) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement, July 27, 2021.

[3] See Reports of the Special Rapporteur on the rights of indigenous peoples (A/70/301), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/249/09/PDF/N1524909.pdf?OpenElement, August 7, 2015, and (A/HRC/33/42), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/84/PDF/G1617884.pdf?OpenElement, August 11, 2016.

[4] See Intergovernmental Panel on Climate Change, Sixth Assessment Report: *Climate change 2022: mitigation of climate change*, https://www.ipcc.ch/report/ar6/wg3/, 2022, pg. 14-72 and pg. 14-81.

such mechanisms constrain States from taking immediate and effective action to address the climate crisis, biodiversity loss and pollution)" (emphasis added).[5]

A just transition in light of international obligations requires states to stop incentivizing the deepening of new resource extraction and to anticipate the closure of unsustainable projects. As a result, it is important to foresee the potential risk of an avalanche of new claims from transnational companies that refuse to renounce the greed that destroys lives and ecosystems in favor of their businesses, such as industrial mining, fracking and coal and oil extraction.

In Colombia, the defense of life, nature and territory has cost leaders and movements assassinations, threats and stigmatization, being the most dangerous country in the world for environment defenders. In this context, there is an urgent need to prevent the sabotage by this system of the tortuous search for justice over the abuses of multinational corporations, including socio-environmental and labour harms, paramilitary financing, threats and assassination of union leaders.

In contrast to the discretionary right of States to regulate investments, States have a mandatory obligation to act to protect human rights and to regulate the conduct of investors in the face of human rights violations or environmental harm. In this regard, previous investment arbitration awards have demonstrated that international investment agreements are not compatible with the duty of States to respect, protect and guarantee human rights under international law, even when those treaties include human rights and environmental language or carve outs.[6] In other words, Colombia cannot continue to be subject to a system that is not bound by these international obligations.

For many years, international civil society organizations have documented and denounced the way in which this system violates rights, the environment and democracy. This system has also been challenged by governments and international human rights bodies. In June 2021, the UN Working Group on Business and Human Rights presented a report[7] on the incompatibility of state obligations to protect human rights in relation to these investment treaties. As a result it recommended that States renegotiate or terminate these treaties. This report, as well as

[5] See Report of the Special Rapporteur on human rights and the environment: on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd: *The human right to clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals* (A/77/284), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/648/97/PDF/N2264897.pdf?OpenElement, August 10, 2022, para. 80(j).
[6] See IAReporter, *Analysis: Arbitrators in Eco Oro v. Colombia Environmental Mining Ban Dispute Disagree on Police Powers and Scope of Minimum Standard of Treatment in Canada-Colombia-FTA; Majority Finds MST Breach, and Decides that General Exceptions Do Not Relieve Colombia from its Duty to Pay Compensation*, https://www.iareporter.com/articles/analysis-arbitrators-in-eco-oro-v-colombia-environmental-mining-ban-dispute-disagree-on-police-powers-and-scope-of-minimum-standard-of-treatment-in-canada-colombia-fta-majority-finds-mst-breach-an/, September 16, 2021.
[7] See Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 2.

numerous other reports and investigations[8], constitute a series of diverse criticisms that have led organizations to demand that States review and withdraw from these treaties.

These reports and investigations have demonstrated that the signing of International Investment Agreements does not guarantee greater foreign investment. Neither does the review and withdrawal from these agreements drive investments away.[9] On the contrary, these agreements and the arbitration mechanism they include are a detriment to public finances given that these disputes usually involve millions or even billions of dollars, in addition to legal and interest costs. There is also evidence that these arbitrations deter government decisions to implement public policies in favor of human rights and the environment, and interfere with national justice systems, harming access to justice and redress for communities affected by such private investments.[10]

Further, the system is one-way, meaning that only corporations can sue states. In these cases, affected communities are excluded from the litigation. Companies demand exorbitant compensation, often suing for future lost profits. For all these reasons, **various governments in the Global South and North have renegotiated or terminated investment treaties**, including Pakistan, Ecuador, Bolivia, India, Indonesia and South Africa. In May 2020, twenty-three (23) member states of the European Union signed an agreement to terminate the International Investment Agreements between them. In addition, various European States have announced their departure from the Energy Charter Treaty due to its incompatibility with international climate obligations (Poland, Spain, Germany, France, Slovenia, Luxembourg and the Netherlands).[11] In addition, ISDS was eliminated between Canada and the US in the renegotiated Free Trade Agreement between Canada, the U.s. and Mexico that went into effect in 2020.

[8] See, for example, Extraction Casino https://miningwatch.ca/publications/2019/5/2/extraction-casino-mining-companies-gambling-latin-american-lives-and (May, 2019); Parallel Justice https://www.tni.org/es/publicaci%C3%B3n/justicia-paralela?translation=en (Jun, 2021)

[9] See Pohl, J., *Societal benefits and costs of International Investment Agreements*, https://www.sipotra.it/wp-content/uploads/2019/03/Societal-benefits-and-costs-of-International-Investment-Agreements.-A-CRITICAL-REVIEW-OF-ASPECTS-AND-AVAILABLE-EMPIRICAL-EVIDENCE.pdf , 2018. In the context of renewable energy, see E3G Briefing Paper, *Clean investments shun Investor-State Dispute Settlements Spurring cross-border private investment in renewables*, https://e3g.wpenginepowered.com/wp-content/uploads/E3G-Briefing-Spurring-Global-Private-Investment-in-Renewables.pdf, 2021.

[10] See Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on ecological crisis climate justice and racial justice (A/77/2990), https://www.ohchr.org/en/documents/thematic-reports/a77549-report-special-rapporteur-contemporary-forms-racism-racial, October 25, 2022; Also see Public Services International (PSI) & the Transnational Institute *Parallel Justice: How the investment protection system undermines judicial independence in Latin America* https://www.tni.org/files/publication-downloads/justiciaparalela_eng.pdf, March 2021.

[11] See Friends of the Earth Europe *Stop the Energy Charter Treaty* https://friendsoftheearth.eu/energy-charter-treaty/ . It is important to add that on November 24th, the European Parliament adopted with a large majority a resolution that calls on the Commission and the Member States to start preparing a coordinated exit from the ECT and an agreement excluding the application of the sunset clause between willing contracting parties.

For these reasons, we request that the government:

1. Initiate a comprehensive review of the Investment and Free Trade Agreements that contain Investor-State Dispute Settlement, in order to urgently denounce, renegotiate or terminate all existing International Investment Agreements with the aim of eliminating the ISDS mechanism. In this week, it is possible to recover state sovereignty to regulate in the interest of the environment and the Colombian people, to defend the independence and role of the judicial system, and to respect the self-determination of Indigenous peoples and other communities seeking justice and accountability for environmental damages and violations of their rights.
2. Withdraw from the ICSID Convention and promote the use of the national justice system for the resolution of investor-State disputes.
3. Refrain from signing new treaties with investment protection clauses and the ISDS mechanism.
4. Decree a moratorium before re-signing or ratifying more international investment agreements.
5. Focus its efforts on creating binding mechanisms for corporate accountability and responsibility, strengthening obligations for closure plans, environmental restoration and comprehensive reparations for victims of corporate abuses by transnational corporations. Similarly, the government of the Global Force for Life should take a lead role in the negotiation of the **UN Binding Treaty on Business and Human Rights** to force transnational corporations to be held accountable for the harms they cause and to repair the damage in accordance with the proposals of Indigenous peoples, Afro-descendants and peasant communities to decide over what happen on their territories.

SIGNED: