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Amicus Brief on Rights to Information and Public Participation in Colombia

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**Honorable Justice
Cristina Pardo Schlesinger
Colombian Constitutional Court
Palace of Justice
Calle 12 # 7 - 65
Bogotá, D.C. – COLOMBIA**

**Case: No. 6.298.958
Tutela: Mansarovar Energy Colombia Ltd. v. Tribunal Administrativo del Meta
The Consulta Popular of Cumaral (Meta)**

Amicus Curiae Brief by Columbia Center on Sustainable Investment

The Columbia Center on Sustainable Investment (CCSI) respectfully submits this *amicus curiae* brief to the Honorable Court in the case of *Mansarovar Energy Colombia Ltd. v. Tribunal Administrativo del Meta*. CCSI, a joint center of Columbia Law School and the Earth Institute at Columbia University in New York City, is a leading applied research center and forum dedicated to the study, practice, and discussion of sustainable international investment.¹

I. Summary

The purpose of this brief is to highlight applicable international human rights law (“IHRL”) obligations of the State of Colombia (“the State”), which comprises the executive, legislative, and judicial branches of government. Considering that the Constitutional Court’s decision to review this tutela referred to the “novelty of the issue,”² this analysis is intended to assist the Honorable Court in grounding its consideration of *consultas populares* in the State’s obligations under IHRL and hence the Constitution of Colombia, 1991 (“the Constitution”). The brief first establishes the various bases for the international human rights of all persons to public participation and to information. The brief then describes the nature of the State’s IHRL obligations. As Art. 93 of the Constitution gives domestic priority to these obligations, the brief concludes by asserting that to the extent that the *consulta popular* of 4 June 2017 relating to seismic exploration, exploratory drilling, and hydrocarbon production within the Municipality of Cumaral (Meta) (“the *Consulta Popular*”) was conducted in accordance with the international human rights to public participation and to information, its results should be enforced by the State in line with its obligations under the Constitution and IHRL.

II. The international human rights to public participation and to information³

The State’s obligations under IHRL treaties and agreements have domestic priority pursuant to Art. 93 of the Constitution (the *bloque constitucional*). Therefore obligations regarding the international human rights deriving from treaties and agreements that the State has ratified—

¹ More information about CCSI can be found at: <http://ccsi.columbia.edu/>.

² Constitutional Court of Colombia. Judicial Order, 25 Aug. 2017.

³ Given the facts of the case, this submission does not consider the rights of indigenous and tribal peoples, and other ethnic minorities, to free, prior, and informed consent.

including the American Convention on Human Rights (“ACHR”), International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)—become binding on the State under the Constitution.

All people have international human rights to public participation and to information in the context of public decision-making regarding potential investment projects, such as projects for the extraction of hydrocarbons. The right to take part in the conduct of public affairs is explicitly codified in ICCPR and ACHR, both of which are binding on the State.⁴ It has been interpreted to include “the right of all people to be fully involved in and to effectively influence public decision-making processes that affect them,”⁵ and the right “to be consulted and to be provided with equal and effective opportunities to be involved in decision-making processes on all matters of public concern.”⁶

The right to information⁷ derives from, and is a necessary component of, the freedom of expression as set out in ICCPR and ACHR (which expressly includes “the freedom to seek, receive and impart information”)⁸ and the right to public participation, which is difficult to realize where substantial information gaps exist.⁹

Meaningful public participation and effective access to information are also necessary prerequisites for the exercise of many other human rights, including the right to the highest attainable standard of physical and mental health,¹⁰ the right to food,¹¹ the right to safe drinking water and sanitation,¹² and the right to a healthy environment,¹³ among others. One UN Special

⁴ International Covenant on Civil and Political Rights, Art. 25, Dec. 16, 1966, UN Doc. A/6316, 999 UNT.S. 171 (“**ICCPR**”) (Ratified by Colombia on 29 Oct. 1969); American Convention on Human Rights, Art. 23(1), UN Doc. 17955, 1144 UNT.S. 123 (“**ACHR**”) (Ratified by Colombia on 28 May 1973).

⁵ Office of the United Nations High Commissioner for Human Rights (“**OHCHR**”), Report on the Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them (2015) UN Doc. A/HRC/30/26, para 9. See also United Nations Committee on Economic, Social and Cultural Rights (“**CESCR**”), General Comment No. 21: Right of everyone to take part in cultural life, para 40, UN Doc. E/C.12/GC/21 (Dec. 21, 2009) (each person has the right “[t]o take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life”); Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/23/36 (11 Mar. 2013), para 39.

⁶ OHCHR, Report on Factors that impede equal political participation and steps to overcome those challenges (2014) UN Doc. A/HRC/27/29, para 89.

⁷ Human Rights Committee, General Comment No. 34 (Freedoms of Opinion and Expression), UN Doc. CCPR/C/GC/34 (2011), paras 18-19; Human Rights Council, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, UN Doc. A/HRC/30/40 (8 Jul. 2015), para 22 (“The right to information is a right in and of itself and one of the rights upon which free and democratic societies depend”); Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, UN Doc. E/CN.4/2000/63, para 42 (“the right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself.”).

⁸ ICCPR, Art. 19; ACHR, Art. 13.

⁹ Special Rapporteur on hazardous substances and wastes, op cit., UN Doc. A/HRC/30/40, para 22.

¹⁰ International Covenant on Economic, Social and Cultural Rights, Art. 12, 993 UNT.S. 3 (“**ICESCR**”) (Ratified by Colombia on 29 Oct. 1969). CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, paras 3, 11 (11 Aug. 2000) (noting that information related to the underlying determinants of health and health impacts, should be accessible).

¹¹ ICESCR, Art. 11. Special Rapporteur on hazardous substances and wastes, op cit., UN Doc. A/HRC/30/40, para 23 (“better access to information can enable the exercise of economic, social and cultural rights, including the right to the highest attainable standard of physical and mental health, the right to food, the right to safe drinking water and sanitation, and the right to a healthy environment”).

¹² CESCR, General Comment No. 15: The right to water, UN Doc. E/C.12/2002/11 (20 Jan. 2003), para 48 (“Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.”)

¹³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art. 11 (17 Nov. 1988) OAS Treaty Series No 69 28 ILM 161 (“everyone shall have the right to live in a healthy environment and to have access to basic public services”) (Ratified by Colombia on 22 Oct. 1997).

Rapporteur, noting that the extraction of oil and gas requires the use of hazardous substances,¹⁴ has asserted that all persons have a right to freely consent to, and participate in decisions concerning, being exposed to such substances.¹⁵ Where hazardous substances are used, a lack of, or gap in, information, particularly as it relates to factors affecting the environment or health, prevents meaningful public participation in decision-making.¹⁶

III. The State of Colombia's obligations regarding the international human rights to public participation and to information

The State has obligations to respect, protect, and fulfill the human rights of all persons under its jurisdiction in the context of corporate activities,¹⁷ including in the context of hydrocarbons extraction. These obligations cannot be realized without the effective participation of the rights holders—which include both individuals and groups—whose rights may be affected by an investment project. Meaningful public participation and access to information allow rights holders to take appropriate steps to ensure that their human rights are realized, including by communicating their unique perspective and knowledge of how the local environment and social dynamics may be affected by a potential investment project. It also allows states to understand how human rights may be affected by any particular activity and to prevent violations in accordance with their international law obligations.

In order to meet their obligations to respect, protect, and fulfill all applicable human rights—including rights to public participation and to information—states should ensure that consultations and opportunities for participation by rights holders start at the earliest stages of a project.¹⁸ Such processes should continue throughout the project's lifecycle on an ongoing and iterative basis, potentially taking different forms as decision-making regarding the project progresses.¹⁹

Commission on Human Rights, Human Rights and the Environment: Final report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment, 6 July 1994, UN Doc.

E/CN.4/Sub.2/1994/9, paras. 180, 203-216.

¹⁴ Special Rapporteur on hazardous substances and wastes, *op cit.*, UN Doc. A/HCR/30/40, para 4.

¹⁵ *Ibid.*, para 27. *See also* the application by CESCR of the concept of consent in the context of communities other than indigenous peoples or ethnic minorities: CESCR, Concluding observations on the initial report of Mauritania, adopted by the Committee at its forty-ninth session (10 Dec. 2012), UN Doc. E/C.12/MRT/CO/1 (“The Committee calls on the State party to ... ensure that the free, prior and informed consent *of the population* is obtained in decision-making processes on extractive and mining projects affecting them”); CESCR, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Mexico, UN Doc. E/C.12/MEX/CO/4 (9 Jun. 2006), para 28 (“The Committee urges the State party to ensure that the indigenous *and local communities* affected by the La Parota Hydroelectric Dam Project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is sought, in any decision-making processes related to these projects affecting their rights and interests under the Covenant”) (emphasis added).

¹⁶ Special Rapporteur on hazardous substances and wastes, *op cit.*, UN Doc. A/HCR/30/40, para 24.

¹⁷ CESCR, General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (10 Aug. 2017) UN Doc. E/C.12/GC/24, para 10; CESCR, Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights, UN Doc. E/C.12/2011/1 (May 20, 2011), Art. 3. *See also* OHCHR, Guiding Principles on Business and Human Rights, UN Doc. HR/PUB/11/04 (2011).

¹⁸ OHCHR, Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations, HR/PUB/15/1, para. 24 (2015).

¹⁹ *Ibid.*, 24; Special Rapporteur on Extreme Poverty, *op cit.*, UN Doc. A/HRC/23/36, para 79 (“a consultation should never be an objective in itself, but rather should be part of an ongoing process where persons living in poverty have various possibilities to exercise their right to participation, and decision-makers should be required to seriously consider the opinions expressed”).

The right to public participation entitles rights holders to effectively participate and—critically— to actually influence decision-making throughout the project’s lifecycle.²⁰ States should thus ensure that adequate time²¹ and resources²² are provided to rights holders to enable them: to access and understand information regarding the project’s potential impacts, to deliberate internally to articulate their priorities, and then to participate in decision-making regarding the project. Meaningful participation also entails two-way, culturally appropriate communication between the state and/or the company, as appropriate, and the community.²³

The right to information has been interpreted by the Inter-American Court of Human Rights to impose a positive obligation on states to provide information of public interest upon request.²⁴ The UN Human Rights Committee has also underlined that states should proactively, and not merely upon request, put into the public domain state-held information that is in the public interest.²⁵ Information of public interest includes information regarding an investment project’s environmental impacts, and information concerning “verification that a State body [such as a body tasked with regulating investment projects] was acting appropriately and complying with its mandate.”²⁶ The right to information also includes relevant information relating to a project’s impacts on the rights to health, food, safe drinking water and sanitation, and a healthy environment, among others.²⁷

Effective access to information entails that the State provide, or ensure that a relevant company provides, access to all relevant information regarding a proposed project in a way that is available, accessible and functional.²⁸

Consultations and information-sharing with affected communities regarding a project’s potential impacts should occur prior to the granting of necessary permissions for, and the negotiation of any contracts relating to, the investment project, so that the project’s human rights risks can be adequately addressed and avoided.²⁹ Participation and information-sharing processes should facilitate the involvement of all groups and should specifically account for the inclusion of individuals and groups at heightened risk of vulnerability and marginalization, such as ethnic

²⁰ Special Rapporteur on Extreme Poverty, op cit, UN Doc. A/HRC/23/36, para 39 (“participatory processes must be meaningful for those living in poverty and they should be able to exert influence over the final outcome. They should be included in all stages of the relevant decision-making processes so that they have the chance to set priorities or question the agenda in fundamental ways.”)

²¹ Ibid, para 61.

²² Ibid, para 46.

²³ Ibid, paras 60-64.

²⁴ *Claude Reyes v. Chile*, Inter-American Court of Human Rights (Ser. C) No. 151, 19 Sep. 2006. See also Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011), paras 18-19 (articulating a right for access to information held by public bodies, and noting the right is addressed in ICCPR, arts. 17, 14, 2 and 10).

²⁵ Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011), para 19; Special Rapporteur on hazardous substances and wastes, op cit., UN Doc. A/HRC/30/40, paras 32-36.

²⁶ Ibid, para 73.

²⁷ See footnotes 10 to 13, above.

²⁸ See Special Rapporteur on hazardous substances and wastes, op cit., UN Doc. A/HRC/30/40, paras 32-36 (“In order for information to be available, it must be current, reliable and generated and collected in a manner that is adequate to assess all potential negative impacts on human rights” (para 33); “In order for information to be accessible, everyone must be able to seek, obtain, receive and hold available information, subject only to an overriding, legitimate public-interest justification for non-disclosure” (para 34); “In order for information to be functional it must be fit for its intended use and must be in a form that is culturally appropriate and accessible and will enable individuals to make informed choices” (para 36)).

²⁹ Special Rapporteur on Extreme Poverty, op cit, UN Doc. A/HRC/23/36, para 39; Principles for Responsible Contracts, op cit, 24.

minorities,³⁰ and also those whose perspectives may be ignored within a community, such as women.³¹

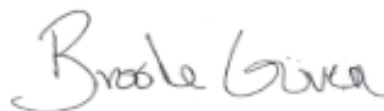
IV. *Consultas populares* are an important mechanism for the State of Colombia to comply with its IHRL obligations and hence the Colombian Constitution

The *Consulta Popular* contributed to the realization of the rights to public participation and to information in several respects. Specifically, it was a public process that encouraged the sharing of information about the likely impacts of hydrocarbon projects in Cumaral.³² It also allowed for the citizens of Cumaral to communicate with decision makers, and to influence decision-making, by articulating the overwhelming consensus among citizens that such projects should not be allowed. To the extent that the *Consulta Popular* was conducted in accordance with the international human rights to public participation and to information, the State is obligated—both under IHRL and Art. 93 of the Constitution—to comply with the *Consulta Popular*'s outcome, including by refraining from granting authorizations for, or negotiating agreements to permit, projects that the citizens of Cumaral have voted not to allow.

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³⁰ Convention on the Elimination of All Forms of Racial Discrimination, 660 UNT.S. 195, Art. 5(c) (Ratified by Colombia on 2 Sep. 1981).

³¹ Principles for Responsible Contracts, op cit, 24 (for example, “in places where men may speak for a family or group, it might be more difficult to learn about risks specific to women. Specialized approaches should be developed to understand such risks and they should be explored from the earliest stages of project execution.”)

³² Consejo de Estado de Colombia. 11001-03-15-000-2017-01198-00 (2017). Sentencia de tutela en la acción promovida por Mansarovar Energy Colombia Ltd. contra el Tribunal of the Department of Meta.