

## **Indigenous and Afro-descendant Peoples win Court Case against Multinational Mining Company**

The Zenú Indigenous and Afro-descendant communities in Cordoba, Colombia won their legal case against Cerro Matoso S.A., a ferronickel mining company owned by South32 for the violation of their fundamental rights. South32 is a company that was spun-off by the mining giant BHP Billiton (BHP) in May 2015 after BHP had mined the concession for over 30 years. Both companies are registered on the London Stock Exchange (LSE).

The Court (Decision T-733 of 2017) found the mining operations had polluted the air, soil and water. This had resulted in community members being diagnosed with serious health complaints, including **skin complaints, rheumatoid pneumoconiosis, heart problems and lung cancer**.

Iron and nickel levels in blood and urine samples of indigenous and Afro-descendant communities' living around the mine was found to be extremely high, registering at amounts considerably higher than World Health Organisations (WHO) recommended levels.



ABColumbia has followed this case closely and is pleased to see this decision by the Constitutional Court in favour of the communities right to health and to a healthy environment.

*The decision states that the mining company must provide comprehensive and permanent attention to those people who suffer illnesses related to the exploitation of nickel and ferronickel and pay collective damages to the affected communities via a special fund created for this purpose.*

We also consider that the court's insistence that the mining company develops an effective environmental impact study containing information on how it will mitigate the negative impacts on the environment and health is an exceptionally important measure.

**However, ABColumbia has been shocked by the response of the company.** South32 and BHP Billiton both continually state on their website that they support a "healthy environment".<sup>i</sup> But, instead of focusing on the implementation of the Court orders to mitigate negative environmental impacts and support the communities to get medical attention, they are putting their efforts into getting the decision overturned.

### **Further information regarding the Court Decision:**

Cerro Matoso S.A. operates an open-cut mine and smelter plant in Córdoba, close to the town of Montelíbano, northern Colombia. It is one of the world's major producers of ferronickel and nickel iron alloy, which is used to make stainless steel. BHP Billiton had been mining nickel here for over 30 years, before it spun off the subsidiary company

South32 in May 2015 and with it the control of the Cerro Matoso S.A. Mine. This mine is in the centre of the Zenú Indigenous Reserve (resguardo).<sup>ii</sup>

The Zenú Indigenous Peoples and Afro-descendant communities from the collectively owned territories of San Jose de Uré, Córdoba (northern Colombia) went to the Constitutional Court with evidence that waste emissions created by the company's ferronickel mine were seriously affecting the community's health and the environment. The lawyer in this case, José Javier de la Hoz, stated that he was defending the rights of over 3,000 people affected by the contamination from the Cerro Matoso S.A. mine.<sup>iii</sup>

### ***Cerro Matoso S.A. denied health issues related to their Mining Activities***

In 2012, *Semana* wrote that inhabitants reported dust clouds blown from the mine, which infiltrated the drinking water and irritated the eyes and skin, causing rashes and respiratory problems.<sup>iv</sup> The company were aware of the allegations of health problems when, at the BHP Billiton AGM in October 2012 in London, the company reportedly stated that, not everything was perfect in the poor community nearby and there were health issues; **however, they disputed that this was because of the mine.**<sup>v</sup>

In November 2012, BHP Billiton in a response to ABColombia regarding our questions on health issues, including that of its workers, stated '[t]hroughout its history Cerro Matoso S.A. has operated to the highest international standards of occupational health, industrial safety and industrial hygiene'. They went on to say, 'that position is supported by solid medical and scientific evidence that demonstrates there is no cause-effect relationship between having worked in CMSA [Cerro Matoso S.A.] and health issues as has been alleged.'<sup>vi</sup> They did not however, state where they had obtained this "solid medical and scientific evidence".

*"On 9 April 2018 South32 Limited (South32) announced "...Cerro Matoso S.A. operation accepted notification of the decision handed down by the Constitutional Court of Colombia in relation to alleged health and environmental impacts on the community surrounding our Cerro Matoso S.A. operation. **We are in the process of appealing the decision.**"<sup>vii</sup>*

According to Cerro Matoso S.A. SA's website: "Our commitment to health and safety, and to the environment, are central to our ongoing commitment to the sustainability of our people, communities and business."<sup>viii</sup> The disparity between this statement and the statement that it will appeal the decision of the Constitutional Court is stark.

The Court in its historic sentence ordered Cerro Matoso S.A. to pay for medical bills and to provide integrated and permeant health care to the communities affected, and to guarantee the health of the people who live nearby.<sup>ix</sup> The Court ordered the company to obtain a new environmental license, as the one it was operating under did not reflect constitutional standards.<sup>x</sup> to initiate procedures to address the environmental impacts of its operations and to decontaminate the ecosystems they have polluted (air, soil and water). The Court warned the company that failure to comply with the orders issued in the ruling or the obligations assumed in the consultative process, would result in the Administrative Tribunal of Cundinamarca, exercising its powers of constitutional protection and order the suspension of the company's extractive activities.<sup>xi</sup>

### ***Orders of the Court include:***

- **To carry out a prior consultation process** with the communities<sup>xii</sup> whereby they establish measures of environmental impact prevention, mitigation and compensation with respect to the damages that could be caused by Cerro Matoso S.A. continuing the work of extraction. When carrying this out various points were to be taken into account, including: the estimated duration of the exploration and exploitation activities of Cerro Matoso S.A. and the findings regarding environmental and health effects. Specific protection strategies should be adopted including measures to decontaminate the ecosystem (air, soil and water bodies) and restoration of the water basin, along with restoration of the productive capacity of the affected lands and recovery of the landscape, as well as, isolation of the mining complex through artificial and/ or natural barriers. The implementation of these measures will be carried out in accordance with a differential approach to the degree of proximity that each community has to the exploitation area and the industrial centre of Cerro Matoso S.A.
- **Cerro Matoso S.A.'s environmental license** is not in line with constitutional standards.<sup>xiii</sup> Therefore, the Court ordered the company to re-apply, ensuring that the new license fulfils three conditions: that it reflects the obligations agreed in the prior consultation with the communities; that it includes a range of measures to improve the environment and ecosystem around the mine operations; and that it guarantees the health of the local population who brought the legal action, as well as, ensuring that it conforms to constitutional standards in relation to environmental protection.
- **In relation to the diseases the population are suffering from**, individuals should be compensated for: the expenses incurred for clinical treatments and acquisition of medications; the loss of work capacity generated by the disease; and personal distress, pain or suffering caused. The company must also **pay collective damages to the communities affected**.
- To create within nine months of notification of the decision a Special Ethnic-development Fund for **collective reparation**.

There were also orders to various State agencies, amongst others, to the Environment and Sustainability Ministry, requiring it to regulate in a straightforward way the limits of concentration of iron and nickel in water and air and to integrate the standards from the World Health Organisations (WHO). This decision is also important because it establishes that in the future companies must use the WHO levels to measure their impact.

The Court also found that Colombia's own National Authority of Environmental Licences (ANLA) did identify the violations but did not enforce corrective measures.

In its statement, Cerro Matoso S.A. did not address the accusations of environmental wrongdoing and just said that "it is committed to contributing to the communities where it operates" and plans to appeal the decision.<sup>xiv</sup>

### ***History Cerro Matoso S.A.'s Operations in Colombia***

The Cerro Matoso S.A. nickel operation combines a lateritic nickel ore deposit with a low-cost ferronickel smelter. BHP Billiton along with other partners commenced mining at

Cerro Matoso S.A. in the 1980s. BHP raised its ownership incrementally until by 2007 it owned 99.94%. It transferred ownership to its newly created subsidiary South32 in May 2015.<sup>xv</sup> It is the world's second-largest producer of ferronickel and boasts some of the lowest production costs.<sup>xvi</sup> In just the second half of 2017, it made US\$244 million in revenue.<sup>xvii</sup> Nickel prices are predicted to rise even higher by 2020.

### **Tax Avoidance and Underpaying Royalties**

However, despite this Cerro Matoso S.A.'s track record in Colombia had not been a good one, an audit by the Comptroller General revealed that Cerro Matoso S.A. had failed to pay taxes and royalties amounting to approximately U\$ 20 million from 2008 and 2009.<sup>xviii</sup> In August 2012, the Comptroller General Sandra Morelli issued an official warning to the Minister of Mines and the president of the National Mining Agency regarding Cerro Matoso S.A.<sup>xix</sup> In her statement, Morelli refers to two previous warnings, one of which was in response to a disparity in the official figures that BHP Billiton had filed with the Colombian tax authorities. These showed that BHP Billiton had officially declared total exports of 9 billion Colombian pesos to the Colombian Government, whilst the company also filed returns that were more than twice as high, at 23 billion Colombian pesos.<sup>xx</sup> The Company, when asked about this by ABColombia in 2012, did not respond directly to this point by the comptroller, but stated that 'Cerro Matoso S.A. has paid substantial taxes and royalties under BHP Billiton's ownership totalling in excess of \$2.5 billion'.<sup>xxi</sup>

BHP Billiton made an agreement to pay USD 19.6 million to the Colombian government to cover unpaid royalties.<sup>xxii</sup> However, having agreed to pay this in 2011, a year later, and following the renewal of its mining contract until 2029, the Colombian Minister of Mines reported, "BHP Billiton is offering to pay only USD \$1.5 million - less than a 12th of its previous offer."<sup>xxiii</sup>



### **The Zenú Indigenous Peoples in the Alto San Jorge Resguardo in Córdoba**

In 2009, the Colombian Constitutional Court ruled that there were 34 Groups of Indigenous peoples at risk of cultural and physical extinction in Colombia – one of those groups are the Zenú Indigenous Peoples (a partner of ABColombia). The Court stated that *"(...) they have suffered horrendous violations of their collective and individual fundamental rights and have been the victims of breaches of International Humanitarian Law, which has resulted in collective and individual forced displacement."*<sup>xxiv</sup>

The Zenú *Resguardo* is composed of 47 communities, which are distributed across the San José de Uré, Puerto Libertador and Montelíbano. They received legal recognition of their territories in May 2014, after 14 years of petitions and procedures with the authorities.

On 27 May 2015, the Zenú Indigenous Peoples together with ABColombia, Pastoral Social (social action section) of the Dioceses of Montelíbano and SNPS organised an international delegation to the Alto San Jorge *Resguardo* to celebrate the first anniversary

of the legal constitution of the Zenú territories. This delegation included Nicola Davies, the Second Secretary at the UK Embassy in Colombia.<sup>xxv</sup> On this delegation we learnt that 46 members and leaders of the Zenú Indigenous Resguardo of Alto San Jorge between 2008 and May 2015 had lost their lives as a result of their work on land rights.

Thursday, 10 May 2018

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<sup>i</sup> <https://www.south32.net/sustainability/health-safety>

<sup>ii</sup> This was built without the prior consent of the Zenú indigenous peoples. At that time Colombia had not signed up to ILO Convention 169 and it was before changes were made to the 1991 Constitution, enshrining the right to free prior and informed consent in Colombian law.

<sup>iii</sup> Cerro Matoso debería pagar USD 400 millones a afectados: abogado de comunidades vecinas <https://www.elheraldo.co/cordoba/cerro-matoso-deberia-pagar-usd-400-millones-afectados-abogado-de-comunidades-vecinas-473584>

<sup>iv</sup> *Semana*, *Cerro Matoso: Mina Rica Pueblo Pobre*, 4 August 2012 <http://www.semana.com/nacion/cerro-matoso-mina-rica-pueblo-pobre/182119-3.aspx>

<sup>v</sup> London Mining Network, notes taken during the BHP Billiton AGM October 2012 and posted on their website: Killing Me Softly with his Song Inside Another BHP Billiton AGM at <http://londonminingnetwork.org/2012/10/killing-me-softly-with-his-song-inside-another-bhp-billiton-agm/>

<sup>vi</sup> Statement made to ABColombia by BHP Billiton on 1 November 2012

<sup>vii</sup> Cerro Matoso Litigation update, 11 April 2018 [https://www.south32.net/docs/default-source/exchange-releases/cerro-matoso-litigation-update.pdf?sfvrsn=c407bfb8\\_2](https://www.south32.net/docs/default-source/exchange-releases/cerro-matoso-litigation-update.pdf?sfvrsn=c407bfb8_2)

<sup>viii</sup> <https://www.south32.net/sustainability/health-safety>

<sup>ix</sup> Court Decision T-733 de 2017 page 436

<sup>x</sup> Court Decision T-733 page 436

<sup>xi</sup> Court Decision T-733

<sup>xii</sup> Communities of Bocas de Uré, Centro América, Guacarí-La Odisea, Pueblo Flecha, Puente Uré, Puerto Colombia, Torno Rojo y the Community Council of the Black Communities of San José de Uré

<sup>xiii</sup> Court Decision T-733 page 436

<sup>xiv</sup> <http://www.mining.com/australias-south32-appeal-damages-ruling-colombia/>

<sup>xv</sup> Cerro Matoso Nickel Mine, Colombia

<sup>xvi</sup> Cerro Matoso Nickel Mine, Colombia <http://www.mining-technology.com/projects/cerro-matoso/>

<sup>xvii</sup>

<sup>xviii</sup> <https://www.theaustralian.com.au/business/mining-energy/bhp-accused-of-unpaid-royalties-wrongful-expense-claims-in-colombia/news-story/8cd15bc436ffeca1681e3f2244080865>

<sup>xix</sup> *Semana*, *Farc atacan vehículos de petrolera en Caquetá*, 31 January 2012

<http://www.semana.com/nacion/contraloria-hace-nueva-advertencia-sobre-cerro-matoso/182086-3.aspx>

<sup>xx</sup> Between 2007 and 2010 the company paid the Colombian government 870,000 million pesos (US \$470 million) in royalties calculated from total exports of 9 billion pesos. However, the company filed returns of more than double this at 23 billion pesos (US \$12,500 million) for the same period. As a result, in 2011, Cerro Matoso S.A. was ordered to pay 35,317 million pesos (US \$20 million) to the Colombian state.

<sup>xxi</sup> Statement given to ABColombia by BHP Billiton on 1 November 2012

<sup>xxii</sup> <http://www.minesandcommunities.org/article.php?a=11170>

<sup>xxiii</sup> Colombian minister calls BHP Billiton's Matoso social investment offer "a joke" 21 August 2012, Business News Americas (2012-08-16) <http://www.minesandcommunities.org/article.php?a=11868>

<sup>xxiv</sup> Constitutional Court of Colombia, Auto 004 (26 January 2009) [1], own translation.

<sup>xxv</sup> For further information see: International Delegation Visit Zenú Indigenous Peoples <https://www.abcolombia.org.uk/5089-2/>