International Centre for Settlement of Investment Disputes
(ICSID)

Glencore International AG,
Claimant,

v.

Republic of Colombia,
Respondent

ICSID Case No. ARB/21/30

Republic of Colombia's Summary of its Objection to the Tribunal's Jurisdiction

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I. INTRODUCTION

1. Pursuant to paragraph 2 of Annex B to Procedural Order No. 2, the Republic of Colombia hereby provides a summary of the objection to the Tribunal's jurisdiction it raised in its Counter-Memorial dated 11 July 2024.

2. There, Colombia objected to the Tribunal's jurisdiction over Claimant's claims for breach of the Colombia–Switzerland Bilateral Investment Treaty ("**Treaty**") with respect to the following two judicial measures (i) Judgment of the Administrative Tribunal of La Guajira dated 2 May 2016, and (ii) Judgment of the Council of State dated 13 October 2016 ("**Additional Measures**") because, contrary to Treaty Article 11, Claimant had failed to comply with the requirement under the Treaty to request amicable consultations in relation to the claims it raised in its Memorial based on such measures.

3. The sections that follow summarize Colombia's arguments and request for relief regarding: (i) the applicable terms of the Treaty and legal principles; and (ii) the reasons why, pursuant to those terms and legal principles, Claimant's claims concerning the Additional Measures fall outside the Tribunal's jurisdiction.

II. THE TREATY REQUIRED CLAIMANT TO REQUEST AMICABLE CONSULTATIONS WITH RESPECT TO ALL CHALLENGED MEASURES

4. Treaty Article 11 requires investors to request consultations with the host State concerning *each specific measure* it alleges to be inconsistent with the Treaty. In that sense, Article 11(1) provides:

> If an investor of a Party considers that **a measure** applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably. (Emphasis added)

5. For its part, Treaty Article 11(2) establishes a mandatory six-month "cooling-off" period following an investor's request for consultations:

> [A]ny such matter which has not been settled within a period of six months from the date of written request for consultations

> may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration.

6. The customary international law rules of treaty interpretation require that the consultation requirement set out in Article 11 be given full meaning and effect. Accordingly, Treaty Article 11 must be interpreted as providing that, unless (i) an investor has requested amicable consultations with respect to a *measure* that it alleges is inconsistent with the Treaty, and (ii) six months have elapsed since that request, the investor may not bring a Treaty claim with respect to that measure.

7. Confirming the above interpretation, investment treaty tribunals have concluded that: (i) amicable consultation requirements —such as that contained in Treaty Article 11— constitute conditions to the State's consent to arbitration, and therefore impose *jurisdictional* requirements; and (ii) where an investor requests amicable consultations with respect to certain measures and claims, but subsequently attempts to expand the scope of its case by asserting *additional measures* and claims, the latter measures and claims fall outside the Tribunal's jurisdiction.[1] In reaching such conclusions, tribunals have underscored the functional purpose of amicable consultation requirements, namely to allow the host State to take appropriate steps to investigate the dispute, potentially identify ways to settle the investor's claims *without* resorting to arbitration, and/or start preparing its defense.[2]

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[1] *See, e.g.,* **RL-0006**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia,* PCA Case No. 2011-17, Final Award, 31 January 2014 (Judica, Conthe, Vinuesa) ("***Guaracachi* (Final Award)**"), ¶¶ 390–392; **RL-0009**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Vicuña, Stern), ¶ 316.

[2] *See, e.g.,* **RL-0011**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020 (Kalicki, Townsend, Douglas), ¶ 198.

III. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANT'S CLAIMS CONCERNING THE ADDITIONAL MEASURES BECAUSE CLAIMANT FAILED TO REQUEST AMICABLE CONSULTATIONS REGARDING SUCH MEASURES

8. Claimant failed to comply with the consultations requirement under Treaty Article 11 in respect of the Additional Measures. The Tribunal therefore lacks jurisdiction over the claims concerning such measures.

9. Claimant's amicable consultations request dated 30 April 2020 ("**Amicable Consultations Request**"), as well as its Request for Arbitration dated 31 April 2021, challenged a single State measure—i.e., Judgment SU-698 of Colombia's Constitutional Court. Specifically, both in its Amicable Consultations Request and in its Request for Arbitration, Claimant alleged that, by ordering that an Interinstitutional Working Group review the Bruno Stream Project's compliance with fundamental rights, Judgment SU-698 had breached the Treaty's non-impairment (Article 4(1)) and FET (Article 4(2)) standards.

10. However, in its Memorial dated 1 March 2024, Claimant impermissibly sought to expand the scope of the arbitration by challenging measures that were *not* the subject of the Amicable Consultations Request (or of its Request for Arbitration). Specifically, in its Memorial,[3] Claimant argued—for the first time—that the following measures (i.e., the Additional Measures) were inconsistent with the Treaty:

    a. The 2 May 2016 decision of the Administrative Tribunal of La Guajira, which had required Cerrejón to consult with the La Gran Parada and Paradero communities in relation to the Bruno Stream Project and had provided that such decision should have *inter comunis effect*; and

    b. The 13 October 2016 Council of State Judgment in the Second *Tutela* proceeding, which confirmed the decision of the Administrative Tribunal of La Guajira, and additionally ordered Cerrejón to consult with the La Horqueta community.

[3] Claimant's Memorial, ¶¶ 251(a), 264, 280(a), 289.

11. The Additional Measures were part of a different legal proceeding than Judgment SU-698. Unlike the latter, the Additional Measures were adopted in the Second *Tutela* Proceeding.

12. Claimant has been aware of the Additional Measures since they were adopted in 2016. However, in its Request for Amicable Consultations Claimant did not assert that the Additional Measures violated the Treaty. As noted above, Judgment SU-698 was the *sole* measure that Claimant had identified in its Request for Amicable Consultations as inconsistent with the Treaty. Accordingly, the Additional Measures were not subject to amicable consultations. As a result, Colombia was deprived of the opportunity to consider the dispute relating to the Additional Measures before confronting the corresponding claims in an arbitration context.

13. In similar situations, investment tribunals, faced with treaty provisions such as Treaty Article 11, have declined to exercise jurisdiction over claims that had not been notified to the State. Such tribunals have explained that "notification of a claim cannot be interpreted as incorporating previous potential claims that were not asserted in the notification even though they were already in existence (and known by [the claimant]) at the time of such notification."[4] The same reasoning applies in the present case, and should lead to the same conclusion.

14. While other tribunals have accepted jurisdiction over unnotified claims on the basis that they formed part of the "same subject matter" as the claims that were notified, these tribunals based their decision on treaty provisions worded differently from Treaty Article 11. For instance, in the *CMS* case,[5] the amicable consultations requirement of the relevant treaty applied to any "investment dispute."[6] Here, by contrast, the equivalent provision of the Treaty is narrower, as it requires amicable

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[4] **RL-0006**, *Guaracachi* (Final Award), ¶ 399.

[5] **CL-0012**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (Vicuña, Lalonde, Rezek), ¶ 109.

[6] **RL-0045**, Treaty between United States of America and the Argentine Republic, signed 14 November 1991, entered into force 20 October 1994, Art. VII(2).

consultations with respect to any State "measure" that the investor alleges is inconsistent with the Treaty.

15. In conclusion, pursuant to the ordinary meaning of the term "measure" in Treaty Article 11, interpreted in accordance with the applicable customary international law interpretation rules, where the investor considers that a given measure is inconsistent with the Treaty, it *must* seek amicable consultations with respect to *that specific measure*. Otherwise, the use of the word "measure" in Article 11(1) of the Treaty would be deprived of its meaning. Thus, Claimant's failure to comply with the Treaty's amicable consultations requirement cannot be cured by characterizing the Additional Measures as part of a broader dispute.

IV. REQUEST FOR RELIEF

16. For the reasons set forth in its Counter-Memorial, Colombia respectfully requests that the Tribunal dismiss Claimant's claims regarding the Additional Measures for lack of jurisdiction.