INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

GLENCORE INTERNATIONAL A.G., C.I. PRODECO S.A., AND SOCIEDAD PORTUARIA PUERTO NUEVO S.A.

Claimants

and

REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/19/22

AWARD

Members of the Tribunal
Mr. Bernardo M. Cremades, President
Mr. Daniel M. Price, Arbitrator
Mr. Claus Von Wobeser, Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 19 April 2024

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TABLE OF CONTENTS

GLOSSARY[1]

Arbitration Rules	ICSID Arbitration Rules in force as of 10 April 2006
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Cl. Mem.	Claimants' Memorial dated 24 May 2021
Cl. Rep.	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 11 August 2022
Cl. PHB	Claimants' Post-Hearing Brief dated 11 August 2023
Cl. SoC	Claimants' Statement of Costs dated 8 September 2023
Claimants	Glencore International A.G., C. I. Prodeco S.A., and Sociedad Portuaria Puerto Nuevo S.A.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID	International Centre for Settlement of Investment Disputes
Parties	Claimants and Respondent
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Res. Mem.	Colombia's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections dated 31 January 2022

[1] This glossary provides a compilation of key terms and their respective definitions.

Res. Rej.	Colombia's Rejoinder on the Merits and Reply on Jurisdictional Objections dated 23 December 2022
Res. PHB	Colombia's Post-Hearing Brief dated 11 August 2023
Res. SoC	Colombia's Submission on Costs dated 8 September 2023
Respondent	Republic of Colombia
Treaty	Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006 and entered into force on 6 October 2009
Tribunal	Arbitral tribunal constituted on 16 September 2020

I. INTRODUCTION AND THE PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**"), on the basis of the Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006 and entered into force on 6 October 2009 (the "**Treaty**"). The Republic of Colombia has been a party to ICSID since 14 August 1997, and the Swiss Confederation since June 14, 1968.

2. Claimants are (i) Glencore International A.G. ("**Glencore**"), a national of the Swiss Confederation; (ii) C. I. Prodeco S.A. ("**Prodeco**"), a wholly owned subsidiary of Glencore under Glencore's effective control, incorporated under the laws of the Republic of Colombia; and (iii) Sociedad Portuaria Puerto Nuevo S.A. ("**PNSA**"), a wholly owned subsidiary of Glencore under Glencore's effective control, incorporated under the laws of the Republic of Colombia, (jointly, "**Claimants**"). Respondent is the Republic of Colombia ("**Respondent**").

3. Respondent agrees to treat Prodeco and PNSA as Swiss nationals under Article 1(2)(c) of the Treaty.

4. Claimants and Respondent are collectively referred to as the "**Parties**" and individually as a "**Party**." The Parties' representatives and their addresses are listed on page (i) above.

5. This dispute relates to Claimants' allegation that Respondent breached Articles 4(1) and 4(2) of the Treaty regarding the protection and treatment of investments by requiring Claimants to pay, through tariffs, for the construction and maintenance of a piece of public infrastructure while permitting another foreign-owned company to use the same public infrastructure free of charge. Specifically, Claimants argue that Respondent: (i) failed to accord fair and equitable treatment to Claimants' investments; (ii) violated its obligation to provide most favored nation treatment to Claimants and their investments; and (iii) impaired Claimants' enjoyment of their investments through unreasonable and discriminatory measures. Claimants seek full

compensation in the amount of US$ 40.3 million in addition to pre- and post-award interest at a rate of 5.57%, compounded annually, from 12 June 2014.

II. PROCEDURAL HISTORY

6. On 11 June 2019, Claimants submitted to ICSID a Request for Arbitration, accompanied by factual exhibits C-1 to C-69.

7. On 9 July 2019, the Secretary-General of ICSID registered the Request for Arbitration, pursuant to Article 36 of the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "**ICSID Convention**") and Articles 6 and 7 of the ICSID Institution Rules.

8. On 14 October 2019, Claimants requested that the Tribunal be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention, and appointed Mr. Daniel M. Price, a US national, as arbitrator. On 18 November 2019, Respondent appointed Mr. Claus von Wobeser, a national of Mexico and Germany, as an arbitrator.

9. On 13 May 2020, the Centre informed the Parties that it had received a communication from Messrs. von Wobeser and Price forwarding the Parties' joint message of 28 April 2020 containing the Parties' agreement on a strike-and-rank process that would result in the appointment of the President of the Tribunal pursuant to ICSID Convention Article 37(2)(b), according to which the co-arbitrators would submit a list of candidates to ICSID, who would liaise with the candidates as appropriate to verify their availability and absence of conflicts to act in this case.

10. On 30 June 2020, the Centre provided the Parties with the list of candidates submitted by the co-arbitrators and confirmed that the Centre had liaised with the candidates, who had all confirmed availability, provided an *updated curriculum vitae*, confirmed their respective nationalities, and provided information each of them wished to convey to the Parties. On 7 July 2020, Claimants submitted to the Centre their strikes and ranking of the candidates. On the same date, Respondent indicated that two of the candidates did not meet the requirements agreed by the Parties and requested that

they be replaced by the co-arbitrators. On 9 July 2020, Claimants argued that there was no basis for Respondent's request and requested that ICSID reject it and require the Parties to return to striking and ranking the existing candidates. The Parties submitted further comments on 14 and 17 July 2020, respectively. On 14 August 2020, the Centre noted that further to consultations with the co-arbitrators, the observations made by the Parties were being transmitted to the two candidates for their information. On 26 August 2020, the Centre informed the Parties of the reactions by the two candidates and noted that further to consultations between the Centre and the co-arbitrators, and in accordance with the Parties' agreement on the process to appoint the President of the Tribunal, the Parties were invited to strike up to two candidates and rank all remaining candidates included in the list circulated by the Centre on June 30, 2020 in order of preference. On 2 September 2020, each Party submitted their respective strikes and ranking to the Centre. On the same date, Respondent submitted a communication noting that it had been given "no choice but to participate in this flawed procedure for selecting the President of the Tribunal, which has not been carried out in accordance with the Parties' agreement" and reserved all of its rights.

11. On 3 September 2020, the Centre informed the Parties that in accordance with the Parties' agreement on the process to appoint the presiding arbitrator, the Parties' communications had resulted in the appointment of Dr. Bernardo M. Cremades, a national of Spain, as the President of the Tribunal in this case by agreement of the Parties.

12. The Tribunal was constituted pursuant to ICSID Convention Article 37(2)(b) and is comprised of Mr. Bernardo M. Cremades (President), a national of the Kingdom of Spain, appointed by agreement of the Parties; Mr. Daniel M. Price (Arbitrator), a national of the United States of America, appointed by Claimants; and Mr. Claus von Wobeser (Arbitrator), a national of the United Mexican States and Germany, appointed by Respondent.

13. The Tribunal was deemed to have been constituted, and the proceeding to have begun, on 16 September 2020, when the Secretary-General notified the Parties that all the

arbitrators had accepted their appointments, in accordance with Rule 6(1) of the ICSID Arbitration Rules. On the same date, the ICSID Secretariat distributed copies of the signed declarations of the Members of the Tribunal in accordance with ICSID Arbitration Rule 6(2). Ms. Alicia Martín Blanco, ICSID Counsel, was appointed to serve as the Secretary of the Tribunal.

14. On 15 October 2020, Respondent filed an application pursuant to Rule 41(5) of the ICSID Arbitration Rules ("**Rule 41(5) Application**"), with accompanying exhibits RL-1 to RL-25. In its Rule 41(5) Application, Respondent argued that Claimants' claims manifestly lacked legal merit and were time-barred under Article 11(5) of the Treaty.

15. On 26 October 2020, the Tribunal held its first session and preliminary procedural consultation with the Parties by videoconference.

16. On 28 October 2020, the Tribunal issued Procedural Order No. 1 containing the Parties' agreements and the Tribunal's decisions on the procedural rules that will govern the arbitration. Procedural Order No.1 establishes, *inter alia*, that the proceedings shall be conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006, that the Tribunal was constituted in accordance with the ICSID Convention and Arbitration Rules, and that the Parties confirmed that the Tribunal was properly constituted and that no Party had any objection to the appointment of any Member of the Tribunal. Procedural Order No. 1 also establishes a timetable for the briefing of the Rule 41(5) Application as well as a timetable for the remainder of the proceeding assuming that the decision on the Rule 41(5) Application is not dispositive of the entirety of the arbitration.

17. On 16 November 2020, Claimants submitted their Observations on Respondent's Rule 41(5) Application, with accompanying factual exhibits C-70 to C-71 and legal authorities CL-1 to CL-23.

18. On 1 December 2020, Respondent submitted its Reply on its Rule 41(5) Application, accompanied by legal authorities RL-26 to RL-45.

19. On 16 December 2020, Claimants filed a Rejoinder on Respondent's Rule 41(5) Application.

20. On 15 January 2021, the Tribunal issued Procedural Order No. 2 on the Organization of the Hearing on the Rule 41(5) Application.

21. On 19 January 2021, the Tribunal and the Parties held a virtual hearing on Respondent's Rule 41(5) Application, with the following list of participants:

Arbitral Tribunal
Bernardo M. Cremades, President of the Tribunal
Daniel M. Price, Arbitrator
Claus von Wobeser, Arbitrator

ICSID Secretariat
Alicia Martín Blanco, Secretary of the Tribunal

Representing Claimants
Nigel Blackaby, Freshfields Bruckhaus Deringer
Gustavo Topalian, Freshfields Bruckhaus Deringer
Juan Pomés, Freshfields Bruckhaus Deringer
Rosario Galardi, Freshfields Bruckhaus Deringer
Joseph Spadafore, Freshfields Bruckhaus Deringer
Joe Arias-Tapia, Freshfields Bruckhaus Deringer
Rubén Castro, Freshfields Bruckhaus Deringer
José M. Álvarez Zárate, Álvarez Zárate & Asociados
Oscar Eduardo Gómez, Grupo Prodeco
Juan Lucas González, Grupo Prodeco

Representing Respondent
Eduardo Silva Romero, Dechert LLP
Catalina Echeverri Gallego, Dechert LLP
Amir Farhadi, Dechert LLP

Judith Alves, Dechert LLP
Maria Pabón, Dechert LLP
Camilo Gómez Alzate, Agencia Nacional de Defensa Jurídica del Estado
Ana María Ordóñez Puentes, Agencia Nacional de Defensa Jurídica del Estado
Elizabeth Prado López, Agencia Nacional de Defensa Jurídica del Estado
Giovanni Andrés Vega, Agencia Nacional de Defensa Jurídica del Estado

22. On 1 February 2021, the Parties submitted their agreed corrections to the transcript.

23. On 4 February 2021, the Parties submitted their respective Statements of Costs.

24. On 22 February 2021, the Tribunal rendered its Decision on Respondent's Rule 41(5) Application, denying Respondent's Application and deferring the allocation of costs to a later date.

25. On 24 May 2021, Claimants submitted their Memorial together with the following documents:

(1) Factual exhibits C-72 to C-124.

(2) Legal authorities CL-24 to CL-90.

(3) Witness Statement of Mark McManus, President and CEO of Prodeco (April 2013 to June 2019), dated 24 May 2021.

(4) First Expert Report by Daniela Bambaci and Santiago Dellepiane of Berkeley Research Group ("**First BRG Report**") dated 24 May 2021.

(5) Exhibits BRG-0001 to BRG-0046 of the First BRG Report.

26. On 23 June 2021, Respondent filed a Request for Bifurcation, together with a cover letter, factual exhibits R-1 and R-2, and legal authorities RL-46 to RL-78.

27. On 23 July 2021, Claimants filed their Response to Respondent's Request for Bifurcation, together with factual exhibits C-125 to C-128 and legal authorities CL-91 to CL-122.

28. On 23 August 2021, the Tribunal issued Procedural Order No. 3, denying Respondent's Request for Bifurcation and deferring the allocation of costs to a later date.

29. On 31 January 2022, Respondent submitted its Counter-Memorial on the Merits and Memorial on Jurisdictional Objections with the following accompanying documents:

(1) Cover letter to Respondent's Counter-Memorial, dated 31 January 2022.

(2) Factual exhibits R-3 to R-79, together with a consolidated list of factual exhibits.

(3) Legal authorities RL-79 to RL-148, together with a consolidated list of legal authorities.

(4) Witness Statement of Ms. Silvana Habib Daza dated 28 January 2022.

(5) Witness Statement of Ms. Catalina Crane Arango dated 27 January 2022.

(6) Expert Report of Dr. Min Shi, CFA of Oxera Consulting LLP, dated 31 January 2022 ("**First Oxera Report**").

(7) Exhibits OX-0001 to OX-0040 of the First Oxera Report.

30. On 20 April 2022, the Parties submitted their respective document production requests to the Tribunal.

31. On 11 May 2022, the Tribunal issued Procedural Order No. 4 containing its decisions on the Parties' respective document production requests.

32. On 1 August 2022, Claimants filed an application regarding the production of documents, to which Respondent replied on 4 August 2022, followed by observations from Claimants. The Tribunal issued its decision on Claimants' application on 6 August 2022, clarified by the Tribunal's communication of 8 August 2022.

33. On 11 August 2022, Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction, accompanied by:

(1) Factual exhibits C-54 bis, C-129 to C-194, together with a consolidated list of factual exhibits.

(2) Legal authorities CL-123 to CL-153, together with a consolidated list of legal authorities.

(3) Second Witness Statement of Mark McManus dated 11 August 2022.

(4) Second Expert Report of Daniela Bambaci and Santiago Dellepiane of Berkeley Research Group dated 11 August 2022 ("**Second BRG Report**").

(5) Exhibits BRG-0047 to BRG-0086 of the Second BRG Report.

34. On 23 December 2022, Respondent filed its Rejoinder on the Merits and Reply on Jurisdictional Objections, accompanied by:

(1) Cover letter to Respondent's Rejoinder, dated 23 December 2022.

(2) Factual exhibits R-80 to R-135, together with a consolidated list of factual exhibits.

(3) Legal authorities RL-149 to RL-218, together with a consolidated list of legal authorities.

(4) Second Witness Statement of Ms. Catalina Crane Arango dated 21 December 2022.

(5) Witness Statement of Ms. María Isabel Ulloa Cruz dated 22 December 2022.

(6) Second Expert Report of Dr. Min Shi, CFA and Mr. Robin Noble of Oxera Consulting LLP, dated 23 December 2022 ("**Second Oxera Report**").

(7) Exhibits OX-0041 to OX-0065 to the Second Oxera Report.

35. On 23 March 2023, Claimants filed their Rejoinder on Jurisdiction, together with factual exhibits C-129 *bis*, C-195 to C-198, legal authorities CL-154 to CL-155, and updated consolidated indexes for factual exhibits and legal authorities.

36. On 24 March 2023, Claimants filed an application regarding the production of documents, to which Respondent replied on 31 March 2023. The Tribunal issued its decision on Claimants' application on 14 April 2023.

37. On 17 April 2023, the Tribunal and the Parties held a prehearing organizational meeting via videoconference.

38. On 25 April 2023, the Tribunal issued Procedural Order No. 5 on the organization of the hearing.

39. On 5 to 8 June 2023, the Tribunal and the Parties held the hearing at ICSID facilities in Washington, D.C, with the following participants:

Arbitral Tribunal
Bernardo M. Cremades, President of the Tribunal
Daniel M. Price, Arbitrator
Claus von Wobeser, Arbitrator

ICSID Secretariat
Alicia Martín Blanco, Secretary of the Tribunal

Representing Claimants
Nigel Blackaby, Freshfields Bruckhaus Deringer
Caroline S. Richard, Freshfields Bruckhaus Deringer
Juan Pomés, Freshfields Bruckhaus Deringer
Nicolás Córdoba, Freshfields Bruckhaus Deringer
Rosario Galardi, Freshfields Bruckhaus Deringer
Joseph Spadafore, Freshfields Bruckhaus Deringer
Anne-Laure Villa, Freshfields Bruckhaus Deringer
Rubén Castro, Freshfields Bruckhaus Deringer
Sandra Díaz, Freshfields Bruckhaus Deringer
Hina Uddin, Freshfields Bruckhaus Deringer
Gustavo Topalian, Dechamps International Law
José M. Álvarez Zárate, Álvarez Zárate & Asociados
T-Zady Guzmán, FTI Consulting
Oscar Eduardo Gómez, Claimants
Juan Lucas González, Claimants

Claimants' Witness

Mark McManus, Fact Witness

Claimants' Experts

Santiago Dellepiane, Berkeley Research Group

Daniela Bambaci, Berkeley Research Group

Ian Friser-Frederiksen, Berkeley Research Group

Camila Sury, Berkeley Research Group

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Giovanny Vega-Barbosa, Agencia Nacional de Defensa Jurídica del Estado

Martha Lucía Zamora Ávila, Agencia Nacional de Defensa Jurídica del Estado

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Marcela María Silva Zambrano, Agencia Nacional de Defensa Jurídica del Estado

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Eduardo Silva Romero, Dechert LLP

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Ruxandra Irina Esanu, Dechert LLP

Ana María Durán, Dechert LLP

Judith Alves, Dechert LLP

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Rubén Eduardo Arrioja Mena, Dechert LLP

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Catalina Crane Arango

Silvana Beatriz Habib Daza

María Isabelle Ulloa Cruz

Respondent's Experts

Robin Noble, Oxera

Min Shi, Oxera

Dorian Beauchene, Oxera

Elisa Greene Morales, Oxera

Yuhao Zu, Oxera

40. On 15 June 2023, the Tribunal issued Procedural Order No. 6 regarding post-hearing matters.

41. On 1 July 2023, the Parties submitted their agreed corrections to the transcript.

42. On 11 August 2023, the Parties submitted their respective Post-Hearing Briefs.

43. On 8 September 2023, the Parties submitted their respective Statements of Costs.

44. The proceeding was closed on 9 April 2024.

III. FACTUAL BACKGROUND

45. This section puts forth the factual background of the dispute that gave rise to this arbitration. It does not purport to be exhaustive and is meant to provide a general chronological overview of the key facts put before the Tribunal in their proper context.

46. Since 1991, through the issuance of the Maritime Port Statute, the Colombian Ministries of Transport and Environment have overseen the planning and development of port activities at Colombia's maritime ports.[2]

47. On 20 December 2001, Colombia's National Council for Social and Economic Policy ("**CONPES**") approved CONPES 3149, a plan prepared by the Ministry of Transport,

[2] Exh. C-76.

the Ministry of Environment, the Superintendence of Ports and Transport, and the Maritime Authority to expand Colombia's port infrastructure. The plan was aimed at orienting public investments and stimulating private investments so as to promote commercial competition, port safety, technological development and works of common benefit.[3]

48. On 14 March 2005, CONPES approved CONPES 3342, a declaration that coal production in Colombia was to "*take place within the framework of the establishment of environmental policies aimed at the adoption of effective procedures in the handling of [coal]*." Specifically, CONPES 3342 called for the adoption of direct-loading mechanisms to cargo ships at port, which would mitigate the environmental risk of coal spillage.[4]

49. On 15 August 2007, the Ministry of Transport issued decree No. 3083, ordering all coal ports to install direct loading systems by 1 July 2010. Decree signatories included the Minister of Mines and Energy, the Minister of Environment, and the Minister of Transport.[5] The deadline for implementing direct loading systems was subsequently extended to 1 January 2014.[6]

50. On 20 September 2007, the Presidency of Colombia issued a communication, announcing that Prodeco's port in Santa Marta (Puerto Zúñiga, also known as Puerto Prodeco) would operate until 2009—the year of the termination of its concession.[7] This 2009 deadline was ultimately extended until 2013.[8]

[3] Exh. C-76.
[4] Exh. C-77.
[5] Exh. C-38.
[6] Exh. C-49.
[7] Exh. C-39.
[8] Exh. C-51.

51. In December 2007, the Ministry of Transport selected Ciénaga Bay as the site for a new public coal port, which would be known as Puerto Nuevo.[9] Per decree No. 3083, Puerto Nuevo would need to utilize a direct-loading system for coal exportation.[10]

52. On 17 January 2008, the Ministry of Transport issued Resolution No. 126, inviting all entities involved in the production and export of coal to participate in a bidding process for the construction of Puerto Nuevo and accompanying direct-loading system for coal.[11]

53. On 12 June 2008, Prodeco and several other coal exporters signed a memorandum of understanding between the Ministry of Transport, the Ministry of Mines, the Ministry of Environment, the National Institute of Concessions ("**INCO**") to incorporate a joint venture company for the construction of Puerto Nuevo (the "**Puerto Nuevo MOU**").[12]

54. On 25 August 2008, CONPES approved the CONPES 3540 plan on Strategy for the Optimization and Modernization of Coal Transportation Through the Maritime Ports of the Municipality of Ciénaga and Santa Marta Bay, which instructed INCO to initiate a public tender to award a concession for the construction and operation of Puerto Nuevo within the next three months.[13]

55. On 19 September 2008, Drummond Company Inc. ("**Drummond**") and Prodeco sent a letter and draft memorandum of understanding to the Ministers of Mines and Energy, the Minister of Environment, the Minister of Transport, and the Minister Counselor to the Presidency agreeing to collaborate on the construction of Puerto Nuevo. The letter, in relevant part, read:

> *In developing the guidelines set in CONPES Document No. 3540 of 25 August 2008, and from the various meetings that we have held with the government . . . we have been working jointly, as requested by the*

[9] Exh. C-78.
[10] Exh. C-38.
[11] Exh. C-40.
[12] Exh. C-84; Exh. C-86.
[13] Exh. C-85.

> *national government, on the design of the expansion of Puerto Drummond and the construction of Puerto Nuevo, with joint facilities in the marine area.*[14]

56. In January 2009, Prodeco, on behalf of all parties to the Puerto Nuevo MOU, submitted a bid to construct Puerto Nuevo. This proposal assumed that Drummond, even though it was not a party to the Puerto Nuevo MOU, would be involved in the construction of an access channel, as indicated in the letter from Prodeco to INCO dated 14 January 2009:

> *The marine area is partially located in the current area of the Drummond concession. Drummond will be in charge of developing the marine area and its cost will be distributed 50% to Drummond and 50% to Nuevo Puerto (sic). The marine area consists of a temporary pier for barges, which will allow the current loading of barges, an access pier of 3500mX13m which will connect the onshore portion with the mooring pier and ship loader, the turning basin and the navigation channel.* [15]

57. Prodeco's bid was approved on 26 February 2009 through INCO Resolution No. 135, which established the conditions for the Puerto Nuevo Concession and stated that Drummond will be involved in the construction of facilities at Puerto Nuevo:

> *Puerto Nuevo will perform, jointly with Drummond LTD, works of common benefit for the construction of the marine facilities in order to deal with the direct loading in Puerto Nuevo, and American Port Company Inc. The document also indicates that the marine facilities will be designed, built and operated by a Joint Venture between Drummond LTD and Puerto Nuevo, which must be approved by the competent authorities*.[16]

58. On 6 March 2009, INCO issued Resolution No. 151 which granted a temporary one-year authorization to Prodeco to occupy and use Puerto Prodeco while the construction for Puerto Nuevo remained underway. This authorization was conditioned on the verification by INCO that Prodeco was complying with its commitments to build Puerto Nuevo. Verifications were to occur every six months,

[14] Exh. C-87.

[15] Exh. C-88.

[16] Exh. C-90.

and if Prodeco were found to be compliant, the authorization could be renewed for another period of one year.[17]

59. Prodeco began building the port at Puerto Nuevo in 2009, after having obtained the proper environmental license to build and operate ground facilities, and pursuant to the commitments and timetable enshrined in its January 2009 bid (as approved by INCO Resolutions 135 and 151).[18]

60. Like Prodeco, Drummond was required under its own port concession agreement with the Colombian government to build direct loading facilities, including an access channel by July 2010.[19] Accordingly, Drummond and Prodeco both applied for licenses to build Puerto Nuevo's marine facilities, including an access channel, with Drummond applying in March and Prodeco in October 2009.[20]

61. In March 2010, the Ministry of Environment approved Prodeco's license, while also deciding that, for environmental reasons, the access channel Prodeco was to construct would be the sole access channel in Ciénaga Bay (the "**Access Channel**"). Shortly thereafter, the Ministry of Environment rejected Drummond's application for the construction of its own access channel, explaining that there could only be one access channel in the Ciénaga Bay for environmental reasons.[21]

62. On 28 May 2010, Drummond resumed negotiations with Prodeco regarding the Access Channel, and on 13 July 2010, Drummond challenged the licensing decision, wherein it suggests that in the absence of a license to build its own access channel, it would have to join with Puerto Nuevo in order to benefit from the Access Channel for which a license was granted.[22]

[17] Exh. C-41.
[18] Exh. C-94; Exh. C-46.
[19] Exh. R-31; Exh. C-137.
[20] Exh. C-150; Exh. C-143, Exh. R-32.
[21] Exh. R-34, Exh. C-143.
[22] Exh. C-144; Exh. C-141.

63. On 4 August 2010, INCO issued Resolution No. 333 ("**INCO 333**") granting the Puerto Nuevo Concession to PNSA, a subsidiary of Prodeco, for a period of thirty (30) years.[23] By this date, PNSA had been established to serve as a special service vehicle for the construction, maintenance, management, and operation of Puerto Nuevo.[24] INCO 333 stipulated that:

> *The access channel will be a public access channel. The investments will be made by the Port Company Puerto Nuevo S.A. in full, and the area to construct the channel must be located within the area determined by the Ministry of Environment . . . as an area of environmental impact.*[25]

64. On 11 August 2010, PNSA challenged INCO 333, requesting that INCO amend the resolution so as to include the Access Channel within the Puerto Nuevo Concession area. This amendment would grant PNSA the authority, under Article 4 of the Maritime Port Statute, to:

> *(a) enter into agreements with public and/or private ports to '. . . facilitate the common use of the adjacent marine areas, performing works such as dredging' . . . (b) to collect, in a public port service fee, the component of dredging expenses . . . and (c) to adopt fees that will cover its typical costs and expenses in accordance with the provisions of Law 1 of 1991.*[26]

65. On 11 October 2010, INCO issued Resolution No. 433 ("**INCO 433**") rejecting PNSA's challenge to INCO 333. INCO 433 noted that the concessionaire assumes the risks regarding the maritime, rail, and land access to the port, as well as the risks associated with the maintenance of the port.[27]

66. In December 2010, PNSA requested further clarification from INCO on what authorization PNSA could rely on to occupy the area required to build the Access

[23] Exh. C-46.
[24] Exh. C-97.
[25] Exh. C-46.
[26] Exh. C-100.
[27] Exh. C-101.

Channel and whether PNSA could recoup its costs.[28] INCO rejected this request on 9 February 2011.[29]

67. On 31 March 2011, PNSA and INCO signed the Port Concession Contract No. 001 between INCO and PNSA (the "**Concession Agreement**").[30] Pursuant to Article 31, the concessionaire agreed to accept the entirety of the risk associated with the construction, operation and returns of Puerto Nuevo:

> *The project shall be carried out at the expense and risk of SOCIEDAD PORTUARIA PUERTO NUEVO S.A., which herewith accepts that the entirety of the risks inherently related with its performance at its preoperative stage and the construction, operation, and return stages, including the risk inherently related with the approval of the administrative declaration of existence as a special permanent free zone for services of the port area shall be assumed by the CONCESSIONAIRE. The materialization of any risk shall not entitle the CONCESSIONAIRE to any indemnity or compensation whatsoever, and among such risks, the following shall be mentioned, although without limitation: return of the considerations paid to the Nation, the risk of studies and designs, construction, job quantities, budget, the period of performance of the work, maintenance, operation, the commercial, social, and environmental risks, the risk of lawsuits, portfolio risks, financial risks, foreign exchange risks, sovereign or political risks, property risks, fiscal risks, port safety risks, risks in terms of safety and protection of the port facilities, hygiene and industrial safety risks, and the risks of availability of the neighboring plots of land during the period of the concession.*[31]

68. On 10 August 2011, PNSA, during a public hearing with INCO, expressed the concern that "*if PNSA does not have a concession over the [Access Channel] . . . it will not be able to charge [tariffs] for the use of the [Access Channel].*"[32]

69. On 28 August 2011, Drummond sent Prodeco a draft memorandum of understanding proposing to jointly build the Access Channel and share the costs.[33] A few days later,

[28] Exh. R-103.
[29] Exh. R-104.
[30] Exh. C-48.
[31] Exh. C-48.
[32] Exh. R-86.
[33] Exh. C-153.

on 5 September 2011, the Minister of Transport, Mr. Germán Cardona, told the press that "*we are going to resolve the problem of the [Access Channel] to the future [Puerto Nuevo], and if Drummond and Glencore cannot reach an agreement, we would do it.*"[34]

70. In February 2012, the National Infrastructure Agency ("**ANI**") (the successor of INCO) confirmed to PNSA that it could recover the costs of the Access Channel through tariffs even if the Access Channel was not within the concession area.[35]

71. In September 2012, PNSA submitted for ANI's approval the draft Technical Operation Regulations ("**TORs**"), which are the port rules that apply to ships. The TORs included the four categories of tariffs included in Resolution 723 (*i.e.*, docking, use of facilities, storage and utilities) as well as a fifth "access channel" category.[36]

72. On 15 January 2013, PNSA informed the Maritime Authority that PNSA had finished dredging the Access Channel.[37]

73. On 28 February 2013, PNSA sent ANI a letter stating that allowing users of private ports in the Ciénaga Bay to use the Access Channel free of charge would result in restrictive competition practices by and for third-party beneficiaries.[38]

74. On 10 April 2013, ANI responded to PNSA's request to approve its TORs, asking PNSA to remove the reference to the access channel tariff given that there was no such tariff category under Resolution 723.[39]

75. In May 2013, PNSA approached the Ministry of Transport—specifically the Vice-Ministry of Infrastructure, Mr. Javier Hernandez—to address the competitive imbalance concerning the use of the Access Channel.[40] On 27 May 2013, Mr.

[34] Exh. C-154.
[35] Exh. R-44.
[36] Exh. R-113.
[37] Exh. C-105.
[38] Exh. R-50.
[39] Exh. R-51.
[40] Exh. C-164.

Hernandez responded via email, attaching a presentation setting various principles including the principle that "*ports may not obtain subsidies or competitive advantages (whether directly or indirectly) from the users of other ports*", and indicating that the Ministry would "*immediately proceed to work on the administrative act.*"[41] Additionally, the presentation stated that:

> *When the use of common facilities results in economic benefits for some users and burdens for others which distort normal competition conditions, those users that believe they have been impacted shall submit an economic study to the appropriate authorities (Superintendency of Industry and Commerce and the Superintendency of Ports and Transport) describing the situation and proposing alternatives to balance the free competition conditions*.[42]

76. During the second quarter of 2013, the Ministry of Mines prepared a paper summarizing the inter-institutional actions being undertaken by the Office of the President, the Ministries of Transport and Mines, among others. The paper stated that: "*we have been working to find solutions regarding: . . . [m]ethodology for charging fees for the use of the access channel.*"[43]

77. During the third quarter of 2013, the Ministry of Transport instructed the Ministry of Transport's Economic Regulation Office (the "**ERO**") to analyze potential solutions to the competitive imbalance concerning the use of the Access Channel. The resulting report (the "**2013 ERO Report**") confirmed that economic asymmetries were occurring in Puerto Nuevo and that the ERO "*must ensure that such problems are resolved and guarantee the proper functioning of the market to maximize the social benefit that it creates*."[44] Specifically, the ERO described that market failures as follows:

> *The market failures of the described situation appear in two ways, the first arises when the Ministry of Environment establishes that it is not environmentally viable for the ports adjacent to Puerto Nuevo S.A.,*

[41] Exh. C-52.

[42] Exh. C-52.

[43] Exh. C-172.

[44] Exh. C-167.

> *CNR and DRUMMOND to build their own access channels, so the three companies would have to reach agreements to use the channel already built by Puerto Nuevo S.A., as permitted by article 4 of law 1° of 1991, an agreement that was never reached; this situation can be summarized as a change in the initial rules of the game due to information asymmetries, placing Puerto Nuevo S.A. at a disadvantage since given the conditions of the contract, it is obliged to build and maintain the access channel; the second market failure occurs because the port companies are obliged to charge tariffs that cover all of their operating costs (under Law 1° of 1991); in this sense, coal exports through Puerto Nuevo S.A. will be more expensive than those made through the other ports in the area, as a direct consequence of the structure of the concession contract that requires Puerto Nuevo S.A. to assume the costs of the access channel; in short, a competitive imbalance is created as a result of the regulatory conditions*.[45]

78. Additionally, the 2013 ERO Report proposed that this tariffication issue at the port could be solved by "*charging a fee for the use of the channel to compensate Puerto Nuevo for the investment made, which could be charged by the concessionaire, a third party, or by the government, or through a modification in the concessionaire's compensation.*"[46] The Report also noted that an expert in competition and regulatory issues would need to be hired for the purpose of supporting the ERO in finding a solution to the tariffication issue at Puerto Nuevo.[47]

79. Considering this, the Ministry of Transport hired Mr. Gustavo Valbuena Quiñónes, independent consultant and former head of the Superintendency of Industry and Commerce (the "**SIC**") (2018-2022), to study the issue at the Access Channel and draft proposed regulations to resolve the issue (the "**Valbuena Report**").[48] The Valbuena Report concluded that:

> *State intervention is justified in this case in light of Article 334 of the Political Constitution . . . in order to guarantee the fair apportionment of the costs that coal exporters in Ciénaga must bear and, especially, to*

[45] Exh. C-167.

[46] Exh. C-167.

[47] Exh. C-167.

[48] Exh. C-167.

avoid inequalities in the costs borne by those who make use of the public service.[49]

Specifically, Mr. Valbuena determined that the asymmetry "*becomes problematic . . . in the context of competition between the user of the ports of Ciénaga that use the channel*" since "*the companies that export their coal through Puerto Nuevo are . . . paying [a tariff] that operates as a subsidy to the user that do not pay*."[50]

80. The Report noted that this asymmetry could "*be resolved by moving to a scenario in which all users of the maritime access channel contribute to financing the investments required for its construction and maintenance*."[51] To do this, the Valbuena Report proposed a modification of Article 2 of the Superintendency of Ports and Transport Resolution No. 723 of 1993, which provides classifications for tariffs.[52]

81. Additionally, the Valbuena Report noted that the asymmetry could be solved by having the government (i) assume the full cost of the investments in the access channel or (ii) take over maintenance costs ("**OPEX**") while capital costs ("**CAPEX**") would be recovered through a tariff. However, it noted the disadvantages of these options, namely, "*national budget constraints*", and that it "*involves the use of public resources that INVIAS may not have at this time*" and would "*require a modification of the concession*" to remove PNSA's maintenance obligations.[53]

82. Moreover, while Mr. Valbuena acknowledged that access to the channel could not be restricted under Colombian law, it made it clear that "*unrestricted access does not mean access at no cost.*"[54] The Report, further, concluded that "*the Ministry of Transport has competence to issue a resolution modifying or allowing port companies operating public ports to charge a tariff for the use of access channels*."[55]

[49] Exh. C-53.
[50] Exh. C-53.
[51] Exh. C-53.
[52] Exh. C-53.
[53] Exh. C-53.
[54] Exh. C-53.
[55] Exh. C-53.

83. Similarly, the Ministry of Mines' position paper dated 2 April 2014 stated that:

> *We consider that all vessels, without exception, using the access channel must pay a tariff . . . for the purpose of reimbursing PNSA for the investment made for the construction and maintenance of the access channel serving these vessels" because "[i]f done otherwise, it would mean inequality*.[56]

As such, The Ministry of Mines then concluded that "*the Government (Ministry of Transport) must issue applicable regulations*."[57]

84. On 2 May 2014, Prodeco submitted a formal petition (the "**Petition**") requesting that the Ministry of Transport issue a regulation pursuant to the findings of the Valbuena Report.[58]

85. On 22 May 2014, The Ministry of Transport rejected Prodeco's Petition (the "**Rejection**"), stating that "*from the perspective of the contract and the port operation, no argument can be found to justify any intervention.*"[59] The Ministry of Transport also asserted that Prodeco failed to prove the existence of asymmetry such that "*no analysis is required*" and failed to consider the tax benefits received from the Concession. The Ministry of Transport also stated that it did not have the legal mandate to act on this matter, stating that:

> *[A]ny State intervention in the economic activities and the consequent faculty to regulate in this matter requires a legal mandate, (articles 150 num. 21 and 334 of the Political Constitution), and to date there is no norm of this type that would allow the action you request, and regarding the duty to regulate, we note the [CONPES] 3744 of 15 April 2013 did not establish a public policy to fix tariffs for access channels, and therefore compliance with the norm cannot be required*.[60]

[56] Exh. C-172.
[57] Exh. C-172.
[58] Exh. C-56.
[59] Exh. C-57.
[60] Exh. C-57.

86. On 1 July 2014, Prodeco appealed the Ministry of Transport's Rejection.[61] Later that month, on 29 July 2014, the Ministry of Transport rejected Prodeco's appeal stating that:

> *With regard to possible asymmetry in the prices of coal exporters, since this matter is related to the insertion of products in the international market and in the development of this activity, the authority to consider these issues lies with, among others, the Ministry of Mines and Energy, the National Mining Agency, the Ministry of Commerce, Industry and Tourism, and the Superintendency of Ports and Transport, and of Industry and Commerce. Therefore, a copy of the petition is being forwarded to those entities for that which falls within their respective jurisdictions*.[62]

87. Despite rejecting Prodeco's Petition, on 6 August 2014, the Minister of Transport wrote to the Minister of Mines, remitting the Valbuena Report and indicating that the latter should undertake the analysis of a tariff solution for the CAPEX portion of the Access Channel costs:

> *[T]here is agreement that the Ministry of Mines will lead the discussions and analysis necessary to study the impact of excluding the initial investment (capex) from the project in order for it to be assumed proportionally by all users of the Access Channel*.[63]

88. Moreover, in October 2014, the Ministry of Mines expressed, through a briefing paper, that:

> *[I]t was important to rectify the [competitive]asymmetry that exists among the different users of the Access Channel, which was caused by the fact that the fees paid by the users of Puerto Nuevo include the cost of the Access Channel, whereas all other users of the Access Channel do not have to pay*.[64]

[61] Exh. C-58.

[62] Exh. C-59.

[63] Exh. C-175.

[64] Exh. C-176.

89. A month later, in November 2014, the Ministry of Mines similarly asserted that "*it is important to correct the imbalance that exists among the different users of the Access Channel*."[65]

90. On 4 December 2018, Prodeco and PNSA filed a complaint before the SIC concerning the alleged anticompetitive situation in the Access Channel.[66]

91. On 13 March 2020, the SIC issued Resolution 11168, in which it rejected Prodeco's and PNSA's complaint, finding that no violation of competition law had taken place.[67]

IV. REQUEST FOR RELIEF

A. CLAIMANTS' REQUEST FOR RELIEF

92. Claimants' Post-Hearing Brief set out the relief requested at Section VI. Claimants have requested the Tribunal to:

(1) Reject Respondent's jurisdictional objection;

(2) Declare that Respondent has breached Articles 4.1 and 4.2 of the Treaty;

(3) Order Respondent to compensate Claimants for their losses resulting from Colombia's breaches of the Treaty and international law for an amount of US$ 40.3 million as of 12 June 2014;

(4) Order Respondent to pay pre- and post-award interest on the amounts set out in item [3] until the date of full and effective payment, at a rate of 5.57% per annum from 12 June 2014, compounded annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(5) Declare that: (i) the award of any damages and interest is made net of applicable Colombian taxes; and (ii) Respondent may not deduct taxes in

[65] Exh. C-177.
[66] Exh. C-67.
[67] Exh. C-190.

respect of the payment of the award of any damages and interest, or in the alternative, order Respondent to indemnify Claimants with respect to any Colombian taxes imposed on such amounts;

(6) Order Respondent to pay all of the costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of the Tribunal and ICSID's other costs;

(7) Order Respondent to pay interest on the amounts set out in item [6] until the date of full and effective payment, at a rate of 5.57% per annum from the date of the Award, compounded annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation; and

(8) Award any such other relief as the Tribunal considers appropriate.[68]

B. RESPONDENT'S REQUEST FOR RELIEF

93. Respondent's Post-Hearing Brief set out the relief requested at Section 5. On jurisdiction, Respondent has requested the Tribunal to:

(1) To declare that it lacks jurisdiction over Claimants' claims; and

(2) To order:

i. Claimants to reimburse Respondent for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Respondent incurred such costs until the date of full payment; and

ii. Such other relief as the Tribunal may consider appropriate.

94. On the merits, if the Tribunal were to find it has jurisdiction over Claimants' claims, Respondent has requested the Tribunal to:

[68] Claimants' Post-Hearing Brief dated 11 August 2023, ¶ 182 ("**Cl. PHB**").

(1) Declare that Respondent complied with its international obligations under the Treaty and international law;

(2) Declare that Respondent did not breach Article 4(1) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;

(3) Declare that Respondent did not breach Article 4(2) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;

(4) Declare that, in any event, neither Glencore nor PNSA suffered harm due to Respondent's alleged breaches of the Treaty; and

(5) Declare that, in any event, should the Tribunal find that any of the Claimants suffered any harm:

   i. Claimants have not discharged their burden of proving such harm was caused by Respondent's conduct;

   ii. Even assuming that Claimants had discharged their burden of proving such harm, the tax benefit derived from PNSA's tax-advantaged zone is higher than the amount of the loss claimed, such that Claimants should not be awarded any damages;

   iii. In any event, Claimants' valuation is hypothetical and overinflated and, hence, Claimants' claims for damages should be dismissed or, at least, significantly reduced; and

(6) Even assuming that the Tribunal awarded compensation to Claimants, the amount of that compensation should be reduced by 75% to account for Claimants' own, material contribution to their alleged losses.

(7) Order Claimants to reimburse Respondent for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Respondent incurred such costs until the date of full payment; and

(8) Order such other relief as the Tribunal may consider appropriate.[69]

V. JURISDICTION

95. Prior to the Tribunal's analysis, this section puts forth the jurisdictional objections and arguments advanced by the Parties. It does not purport to be exhaustive and is meant to provide a general overview of the key jurisdictional claims put before the Tribunal in their proper context.

A. CLAIMANTS' POSITION

96. Claimants contend that they filed their Request for Arbitration, dated 11 June 2019, within the five-year statute of limitations period per Article 11(5) of the Treaty, and therefore, the Tribunal has jurisdiction to preside over this dispute.[70]

97. According to Claimants, the earliest date at which there could have been a Treaty breach was 12 June 2014, when Respondent notified Prodeco of its Rejection of Prodeco's Petition seeking a regulatory action addressing the alleged asymmetry at the Access Channel. Claimants allege that this is the date when Respondent first refused to address the anticompetitive situation in the Access Channel by issuing regulations and, thus, the first event triggering Respondent's liability under the Treaty.[71]

98. Per Claimants, the terms "dispute" and "events" under the Treaty should be interpreted in a holistic manner. Claimants note that the term "dispute" first appears in paragraph 3 of Article 11 which states that Colombia consents to "*the submission of an investment dispute to international arbitration in accordance with paragraph 2 above [i.e., Article 11(2)].*"[72]

99. Further, Claimants point out that Paragraph 2 of Article 11, in turn, does not expressly use the term "dispute." Instead, it provides that "*[a]ny such matter [i.e., "an*

[69] Colombia's Post-Hearing Brief dated 11 August 2023, ¶¶ 133-136 ("**Res. PHB**").

[70] Cl. PHB, ¶ 178.

[71] Cl. PHB, ¶ 179.

[72] Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 11 August 2022, ¶ 436 ("**Cl. Rep.**"); Exh. C-1.

investment dispute" per Art 11(3)] . . . may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration."[73]

100. In addition, Claimants highlight that the words "any such matter" in paragraph 2 refer to the terms of the first paragraph of Article 11, which states:

> *"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."*[74]

101. Claimant maintains that, in light of the above, "dispute" per Article 11(5) can only refer to the type of dispute described in Article 11(1) and 11(3)—meaning, "*an 'investment dispute' regarding 'a measure applied by [Colombia that] is inconsistent with an obligation of this [Treaty],' causing loss or damage to the investment*."[75]

102. As to "events giving rise to the dispute," Claimants rely on the tribunal in *Infinito Gold* to support their contention that the purpose of statute of limitations clauses is "*to promote legal certainty by avoiding that claimants delay bringing their claims*."[76] To this end, Claimants argue that for an investment dispute to arise under the Treaty, there must exist a disagreement "*with respect to the consistency of a Colombian measure with its obligations under the Treaty, and there must be an expression of this disagreement*."[77]

103. Claimants contend that such expression occurred with Claimants' receipt of Respondent's Rejection of Prodeco's Petition for regulatory action to address the Access Channel issue—that is, on 12 June 2014. Prior to this date, Claimants argue that Respondent had not refused to address the alleged asymmetry; on the contrary, Respondent had acknowledged the problem and the need for regulatory intervention. On 12 June 2014, however, Claimants argue that through Respondent's Rejection,

[73] Cl. Rep., ¶ 436; Exh. C-1.
[74] Cl. Rep., ¶ 436; Exh. C-1.
[75] Cl. Rep., ¶ 437.
[76] Cl. Rep., ¶ 454; Exh. CL-116.
[77] Cl. Rep., ¶ 459(b).

they first acquired knowledge that Respondent would not address the alleged competitive asymmetry through regulatory intervention.[78]

104. Regarding Respondent's assertions that Claimants first acquired knowledge of events that give rise to a dispute on 10 April 2013, through ANI's letter to PNSA confirming that Claimants would be unable to charge a tariff to all users of the Access Channel, Claimants contend that Respondent misapprehended Claimants initial request. Specifically, Claimants assert that they did not have reason to believe by 10 April 2013 that a Treaty dispute would materialize as both Parties were working to resolve the Access Channel issue. In this regard, Claimants contend that Respondent's 10 April 2013 letter to PNSA misapprehended that PNSA sought a separate access channel tariff so as to get double recovery for the cost of construction. Seeking clarification on this issue, Claimants note that they approached the Ministry of Transport, who communicated to Claimants that they would work to resolve this purported issue.[79]

105. Claimants, therefore, contend that this arbitration is timely because Claimants filed their request for arbitration within five years from the date Claimants first acquired knowledge of the events giving rise to this investment dispute under the Treaty.[80]

B. RESPONDENT'S POSITION

106. Respondent contends that Claimants' claims are time-barred under Article 11(5) of the Treaty, since the limitations period per Article 11(5) of the Treaty began as early as 10 April 2013, when ANI notified Claimants that PNSA would be unable to charge a tariff for use of the Access Channel. Moreover, Respondent argues that the latest date the limitations began was April 2014, when Drummond began using the Access Channel free of charge, and thus the alleged anticompetitive situation materialized.[81]

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[78] Claimants' Rejoinder on Jurisdiction dated 23 March 2023, ¶ 21 ("**Cl. Rej.**").

[79] Cl. PHB, ¶¶ 31-33.

[80] Cl. Rep., ¶ 466.

[81] Res. PHB, ¶¶ 17-18; Exh. C-1; Exh. R-51.

107. Respondent asserts that the language of Article 11(5) cannot be read as to allow for a distinction between disputes and investment disputes so as to delay the limitation period. Relying on the tribunal in *ATA Construction*, Respondent asserts that "*a claimant cannot solicit from the State a new decision on the same 'subject matter' in order to assert the existence of a separate 'investment dispute' and 'treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward*.'"[82]

108. Further, relying on the tribunal in *Eurogas v. Slovak Republic*, Respondent contends that Claimants "*cannot invoke the latest event in a series of related actions by the State to claim the benefit of the Treaty*."[83]

109. Respondent asserts that according to the "ordinary meaning" of Article 11(5) of the Treaty, "*the events that give rise to the dispute*" are the factual circumstances that provide a basis for a dispute. Respondent contends that such facts need not constitute a breach in and of themselves.[84]

110. Respondent, moreover, stresses that a dispute may arise when there has been a minimum of communications between the parties whereby the State opposes an investor's position directly or indirectly. In Respondent's view, such conduct includes a lack of response by the State. Notwithstanding, Respondent contends it has been consistent in its refusal to add a tariffication category in its code as to allow Claimants to charge any user of the Access Channel.[85]

111. According to Respondent, ever since INCO issued Resolution 333, on 4 August 2010, and even before, Claimants have been asking the State to address the situation where some users of the Access Channel pay for the totality of its construction and

[82] Colombia's Counter-Memorial on the Merits and Memorial on Jurisdictional Objections dated 31 January 2022, ¶ 263 ("**Res. Mem.**"); Exh. C-1; Exh. RL-70.

[83] Res. PHB, ¶ 23; Exh. RL-160.

[84] Res. PHB, ¶ 10; Exh. C-1.

[85] Res. Mem., ¶¶ 244-245; Exh. RL-80; Exh. RL-81.

maintenance costs while others use it for free. And, since then, the State has refused to do so.[86]

112. Respondent also maintains that Claimants' letter to ANI of 28 February 2013, where Claimants expressed concern for the alleged asymmetry at the Access Channel and declared that PNSA had the right to take legal action against Respondent, proves that by that date Claimants had acquired knowledge of events leading to an international dispute.[87]

113. Additionally, Respondent points to a letter from ANI to Claimants dated 10 April 2013, reiterating that PNSA would be unable to charge a tariff for use of the Access Channel, thereby refusing to address the alleged anticompetitive situation at the Access Channel. Respondent contends that by this date Claimants had considered that Respondent breached its alleged commitment to provide a regulatory solution to the alleged asymmetry at the Access Channel and that such conduct had already caused damages to Claimants.[88]

114. In any case, in Respondent's view, the latest date the limitations period began was April 2014, when Drummond began using the Access Channel free of charge. Both events occurred more than five years from the date of Claimants' Request for Arbitration of 11 June 2019. Therefore, assuming either April 2013 or April 2014 as the beginning of the limitations period, Claimants' claims are time-barred, and the Tribunal does not have jurisdiction to preside over this dispute.[89]

C. THE TRIBUNAL'S DECISION

115. The Tribunal notes that the Parties agree as to the *dies ad quem* of 11 June 2019, the date in which Claimants filed their Request of Arbitration, yet disagree as to the *dies*

[86] Res. PHB, ¶ 14.
[87] Res. PHB, ¶¶ 15-16; Exh. R-50.
[88] Res. PHB, ¶¶ 17-18; Exh. R-51.
[89] Res. PHB, ¶ 18.

a quo under Article 11(5) of the Treaty, the date "*the investor first acquired or should have acquired knowledge of the events giving rise to the dispute*."[90]

116. Article 11(5) of the Treaty provides for a five-year limitations period for disputes under the Treaty. Article 11(5) reads:

> *An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute*.[91]

117. The Tribunal considers that, pursuant to Article 31 of the Vienna Convention on the Law of Treaties, Article 11(5) needs to be contextualized in conjunction with other sections within Article 11. The relevant subsections are included below.

118. Pursuant to Article 11(1):

> *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*.[92]

119. Moreover, per Article 11(2):

> *Any 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*.[93]

120. Further, Article 11(3) reads:

> *Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in*

[90] Exh. C-1.

[91] Exh. C-1.

[92] Exh. C-1.

[93] Exh. C-1.

accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.[94]

121. The Tribunal determines that it has jurisdiction to preside over this dispute, finding that the limitations period per Article 11(5) began on 12 June 2014, when the Ministry of Transport notified Prodeco of its Rejection to Prodeco's Petition seeking regulatory action to address the alleged asymmetry at the Access Channel.[95]

122. Upon a holistic examination of Article 11, the Tribunal considers that it becomes evident that Article 11(5) pertains to the events triggering a dispute within the Treaty's purview, rather than any event potentially leading to legal proceedings beyond the Treaty's scope.

123. In the present case, the events Claimants rely on gave rise to a dispute under the Treaty only after Claimants became aware of Respondent's Rejection of their Petition; that is, when Respondent first issued a formal final decision on the matter.[96] Prior to this pivotal event, Claimants had received ample assurances from Respondent that the alleged Access Channel asymmetry would be resolved.[97] Therefore, prior to 12 June 2014, no Treaty-based dispute had yet materialized.

124. The Tribunal, further, observes that Article 11(5) employs the term "events" in the plural form, as opposed to "event" in the singular.[98] Accordingly, it is crucial to identify the moment in which a series of events tip the scale to reasonably form the basis for an investment dispute.

125. Respondent relies on two key events to establish the *dies a quo* at a date prior to 12 June 2014: (i) a 10 April 2013 letter from ANI informing Claimants that PNSA could not charge a tariff for Access Channel use and (ii) Drummond's subsequent free use

[94] Exh. C-1.
[95] Exh. C-57.
[96] Exh. C-57.
[97] *See e.g.*, Exh. C-52; Exh. C-154.
[98] Exh. C-1.

of the Access Channel starting in April 2014.[99] While these events certainly played a role in the dispute, the Tribunal considers that these events, including those preceding them, do not suffice to constitute the foundation for an investment dispute. Prior to 12 June 2014, any Treaty-based claim would not have been ripe, as the Parties were actively exploring potential solutions to the alleged market asymmetry—*i.e.*, Respondent commissioned the Valbuena Report and met with Claimants to discuss potential solutions—and Respondent had not yet conveyed to Claimant a formal decision on its Petition.

126. The Tribunal acknowledges that Article 11(5) manifests a clear and unambiguous intent to promote the prompt initiation of arbitration proceedings; however, this does not mean that Claimants must have elevated the dispute to arbitration before the Treaty had been breached.

127. The Tribunal firmly holds that Claimants should not be denied the right to seek redress when they engaged in *bona fide* discussions to resolve misunderstandings and potential concerns directly with Respondent. In this respect, the instances of communications in which Respondent expressed reservations to Claimants that they will be able to charge a tariff for the use of the Access Channel, while at the same time providing assurances that the competitive asymmetry at the Access Channel would be resolved, do not constitute a materialization of a dispute under the Treaty.

128. Given the aforementioned, the Tribunal finds that Claimants' claims are timely and the Tribunal has jurisdiction to decide this dispute.

VI. MERITS

129. The Tribunal has rejected Respondent's jurisdictional objections and must now turn to the merits of Claimants' claims. The Tribunal will first summarize the Parties' positions before analyzing the issues and setting forth the reasons for its decision.

[99] Exh. R-51.

A. CLAIMANTS' POSITION

130. According to Claimants, Respondent breached Article 4(1) and 4(2) of the Treaty by: (1) failing to accord fair and equitable treatment to Claimants' investments; (2) violating its obligation to provide most favored nation treatment to Claimants and their investments; and (3) impairing Claimants' enjoyment of their investments through unreasonable and discriminatory measures.[100]

(1) Respondent Failed To Accord Fair And Equitable Treatment To Claimants' Investments

131. Claimants contend that Respondent violated its duty to accord Claimants' investment fair and equitable treatment under Article 4(2) of the Treaty. Specifically, Claimants argue that Respondent's conduct violated the Treaty because it was arbitrary, inconsistent and lacking transparency, lacking due process, discriminatory, and contrary to Claimants' reasonable and legitimate expectations.[101]

(a) Respondent Acted Arbitrarily

132. Claimants assert that arbitrary treatment by the host state breaches the fair and equitable treatment standard. Claimants cite to the tribunal in *EDF v. Romania* to claim that measures are arbitrary where they "*inflict[] damage on the investor without serving any apparent legitimate purpose*"; are "*measure[s] taken for reasons that are different from those put forward by the decision maker*", or are "*measure[s] taken in wilful disregard of due process and proper procedure*."[102]

133. Claimants allege that the *B3 v. Croatia* tribunal provides a suitable framework for analyzing Respondent's arbitrary conduct in this case. The tribunal in *B3* held that a state's conduct is arbitrary where a state: (i) has the power to regulate a situation; (ii)

[100] Cl. PHB, ¶ 35.

[101] Cl. PHB, ¶¶ 36-37; Cl. Rep., ¶¶ 218-222, 225-227; Claimants' Memorial dated 24 May 2021, ¶¶ 136-138, 147, 152-154 ("**Cl. Mem.**").

[102] Cl. PHB, ¶ 38; Exh. CL-61.

recognizes the duty to intervene and exercises its power in that situation; and then (iii) fails to act.[103]

134. Claimants argue that Respondent acted arbitrarily because it (i) recognized that the Ministry of Transport had the power to issue regulations to resolve the competitive imbalance resulting from Drummond's free use of the Access Channel; (ii) recognized the duty to resolve the asymmetry by exercising that regulatory authority (*i.e.*, engaging an independent expert (Mr. Valbuena) to draft the relevant regulations and confirmed to Claimants that the issuance of the regulations would be imminent); and yet (iii) the Ministry of Transport inexplicably refused to exercise its regulatory powers and denied Prodeco's Petition to take those very measures it had already identified as a necessary and proportionate response to the identified asymmetry.[104]

135. Per Claimants, the government's conduct and documentary evidence unequivocally show that the government had the power to regulate the Access Channel issue, and acknowledged that it had a duty to do so.[105] In support of this contention, Claimants point to the email sent by Mr. Hernandez, the Vice Minister of Infrastructure (a senior official within the Ministry of Transport), to Claimants setting various principles including the principle that "*ports may not obtain subsidies or competitive advantages (whether directly or indirectly) from the users of other ports*", and indicating that the Ministry would "*immediately proceed to work on the administrative act*."[106] Claimants also point to the Ministry of Mines position paper issued in the second quarter of 2013, which stated that: "*we have been working to find solutions regarding: . . . [m]ethodology for charging fees for the use of the access channel*."[107]

136. Claimants argue that consistent with the Vice-Minister's email and the Ministry of Mines' position paper, the Ministry of Transport instructed the ERO to analyze

[103] Cl. PHB, ¶ 40; Cl. Rep., ¶¶ 232-233; Exh. CL-89.
[104] Cl. PHB, ¶ 44.
[105] Cl. PHB, ¶ 46.
[106] Cl. PHB, ¶ 47: Exh. C-52.
[107] Cl. PHB, ¶ 48; Exh. C-172.

potential solutions to the Access Channel issue. Claimants allege that the 2013 ERO Report not only confirmed the Ministry of Transport's power to regulate maritime transport and tariffs per Decree 087 of 2011, and unequivocally acknowledged its duty to act, but also took concrete steps towards taking the actions it deemed necessary, namely by hiring experts—*i.e.*, Mr. Valbuena (the former head of Colombia's competition authority)—to design appropriate regulations.[108]

137. Claimants also assert that the Valbuena Report of March 2014, commissioned by the Ministry of Transport, concluded that the state had a constitutional duty to intervene to resolve the asymmetry with respect to the Access Channel and that "*the Ministry of Transport has competence to issue a resolution modifying or allowing port companies operating public ports to charge a tariff for the use of access channels*."[109]

138. Claimants, further, argue that the Ministry of Mines, in its position paper of 2 April 2014, clearly endorsed the conclusions of the Valbuena Report, unequivocally acknowledging the duty to resolve the Access Channel issue, and noting that the Ministry of Transport must implement a regulatory tariff solution.[110]

139. Claimants contend that the aforementioned evidence demonstrates that by April 2014, both the Ministry of Transport and Ministry of Mines had reached the conclusion, following extensive legal and economic analysis, that the Ministry of Transport not only had the power, but also had the duty, to adopt regulations requiring all users of the Access Channel to pay a tariff for their use of the Access Channel.[111]

140. Claimants argue that, in light of the above, the logical next step would have been for the Ministry of Transport to issue the tariff regulation. However, when Prodeco requested that the Ministry do just that, it inexplicably refused to do so in terms that

[108] Cl. PHB, ¶¶ 50-51; Exh. C-167.
[109] Cl. PHB, ¶¶ 53-56; Exh. C-53.
[110] Cl. PHB, ¶ 60; Exh. C-172.
[111] Cl. PHB, ¶ 61.

directly contradicted the analysis and conclusions undertaken by the government and its experts.[112]

141. Claimants conclude that, as in the *B3* case, the Ministry of Transport's failure to address the competitive imbalance after acknowledging that it had the power to resolve it and a duty to do so, was arbitrary in breach of the Treaty's fair and equitable treatment standard.[113]

142. Relying on the tribunals in *Saluka v. Czech Republic* and *RDC v. Guatemala*, Claimants contend that Respondent also acted arbitrarily by conditioning the exercise of its powers to resolve the Access Channel issue on entirely unrelated matters, and ultimately refusing to implement the identified solutions when Claimants did not acquiesce to one of the conditions.[114]

143. Claimants allege that Respondent first sought to condition the resolution of the Access Channel issue on PNSA changing its access policy and increasing the port's capacity, which PNSA had no obligation to do. After Claimants had fulfilled these conditions, the government conditioned the implementation of a solution on Claimants assisting small coal producers in the north of the country. When Claimants were unable to fulfil that new condition because it involved undertaking a loss-making scheme, the government refused to take any further steps towards implementing the identified solutions in relation to the Access Channel and cut off all contact with Claimants in this regard.[115]

144. In sum, Claimants argue that Respondent's conduct was arbitrary and in breach of the Treaty's fair and equitable treatment standard for two reasons. First, because Respondent had the power to regulate the Access Channel issue, acknowledged it had a duty to exercise that power to resolve it, and yet refused to do so, without

[112] Cl. PHB, ¶ 63; Exh. C-57.
[113] Cl. PHB, ¶ 73.
[114] Cl. PHB, ¶¶ 74-75; Exh. CL-43; Exh. CL-71.
[115] Cl. PHB, ¶¶ 76-87; Cl. Rep., ¶¶ 167, 174-175, 195-204; Cl. Mem., ¶¶ 78-82, 88-92.

justification. Second, because Respondent arbitrarily conditioned the resolution of the Access Channel issue on unrelated matters.[116]

(b) Respondent's Conduct Was Inconsistent And Lacked Transparency

145. According to Claimants, Respondent also breached the Treaty's fair and equitable standard through its inconsistent conduct towards Claimants. Claimants cite to the tribunal in *MTD v. Chile* to claim that states have "*an obligation to act coherently and apply [their] policies consistently*."[117]

146. For example, Claimants note that in the *Saluka* case, the respondent repeatedly led the investor to believe that aid was forthcoming, then contradicted its position, only to return with conditions. In the end, no aid was ever provided. The *Saluka* tribunal specifically highlighted the inconsistent conduct of the state, "*implicitly acknowledg[ing] at least in principle that State aid was needed*", while "*expressly stat[ing]*" the same in internal documents, only for the claimants to see their "*proposal [] nevertheless rejected*", and later granted conditionally. The tribunal held that the respondent breached the fair and equitable treatment standard because its "*conduct lacked even-handedness, consistency and transparency*."[118]

147. Claimants allege that the present case is similar to *Saluka*, highlighting that over the course of several years, the Colombian government repeatedly acknowledged the asymmetry in respect of the use of the Access Channel, and the government's duty to resolve it; yet, when it was formally requested to take action to resolve the issue, the Ministry of Transport refused to do so on grounds that directly contradicted the very conclusions that it had reached on the basis of an expert report it had commissioned—that is, the Valbuena Report. Claimants contend that the Ministry of Transport's Rejection represented a complete *volte-face* to the previous course of conduct by the state evidencing a lack of transparency and consistency.[119]

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[116] Cl. PHB, ¶ 39.

[117] Cl. PHB, ¶ 88; Exh. CL-39.

[118] Cl. PHB, ¶ 88; Exh. CL-43.

[119] Cl. PHB, ¶ 89; Cl. Rep., ¶¶ 226, 272, 366; Cl. Mem., ¶ 172.

148. Following this Rejection, Claimants argue that the government again changed its position, acknowledging the asymmetry in respect of the Access Channel and the need to resolve it through concerted inter-institutional working groups that met with Claimants over the course of several weeks. Claimants contend that, as in *Saluka*, the government's new position was to offer a conditional solution, which as explained above, were based on matters entirely unrelated to the Access Channel issue. Despite having repeatedly acknowledged the need to resolve the Access Channel issue and its power to do so up to May 2015, the government abruptly cut off communications and refused to implement any solution from November 2015. According to Claimants, this is the epitome of inconsistent conduct.[120]

149. Moreover, Claimants argue that Respondent's conduct was also lacking in candor and transparency, since the government's formal responses to Prodeco's Petition, through the Rejection and the response on appeal, were entirely at odd with all of the government's other conduct and statements repeatedly acknowledging the asymmetry and the duty to resolve it on public policy grounds, while taking multiple concrete steps to implement a solution, both before and after the Rejection.[121]

150. In sum, Claimants contend that Respondent's conduct was inconsistent, unpredictable and non-transparent, and resulted in the unfair and inequitable treatment of Claimants' investments in breach of the fair and equitable treatment standard under the Treaty.[122]

(c) Respondent's Conduct Lacked Due Process

151. According to Claimants, the Treaty's fair and equitable treatment standard also guarantees due process in dealings with the State, requiring administrative authorities to "*assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision*."[123]

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[120] Cl. PHB, ¶¶ 89-90.

[121] Cl. PHB, ¶ 91.

[122] Cl. PHB, ¶ 92.

[123] Cl. PHB, ¶ 93; Cl. Rep., ¶¶ 266, 343; Cl. Mem., ¶¶ 144, 164, 166, 175; Exh. CL-90.

152. Claimants argue that Respondent's conduct lacked due process for three reasons. First, Claimants assert that the Ministry of Transport's Rejection of Prodeco's Petition and their response to Prodeco's administrative appeal contradicted the Ministry's previous conclusions without providing any explanation for this contradiction. Claimants contend that this sudden and significant change in position, without adequate reasoning, constitutes a violation of due process.[124]

153. Second, Claimants maintain that the Ministry of Transport, in rejecting Prodeco's Petition, claimed that Prodeco had not provided enough evidence of an asymmetry, despite earlier findings and the Valbuena Report supporting the existence of such an asymmetry. Claimants argue that this shows that Respondent failed to "*assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision*" for the Petition, and thus failed to follow due process.[125]

154. Third, and finally, Claimants stress that the Ministry of Transport never issued a final decision concerning Prodeco's Petition, instead forwarding it to other government authorities, who in turn took no action and issued no decision, violating the most basic elements of due process.[126]

(d) Respondent's Conduct Was Discriminatory

155. According to Claimants, it is undisputed that the fair and equitable treatment standard prohibits discriminatory treatment.[127] Claimants posit that the test to determine whether the host state's conduct is discriminatory in breach of the fair and equitable treatment standard is similar to that for claims under the most favored nation standard. This means that the analysis must focus on the discriminatory effects of the measure and does not require proving an intent to discriminate.[128]

[124] Cl. PHB, ¶ 93(a).
[125] Cl. PHB, ¶ 93(b).
[126] Cl. PHB, ¶ 93(c).
[127] Cl. PHB, ¶ 94; Exh. CL-55.
[128] Cl. PHB, ¶ 94; Exh. CL-51; Exh. CL-76.

156. Therefore, for the reasons set out in Section VI.A(2) below, Claimants argue that Respondent's conduct was discriminatory in breach of the Treaty's fair and equitable treatment standard.[129]

(e) Respondent's Conduct Frustrated Claimants' Legitimate Expectations

157. Claimants also contend that the fair and equitable treatment standard protects the legitimate expectations of the investor. Per Claimants, investors may legitimately expect that a host state will: "*conduct itself vis-à-vis [investors'] investments in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even handedness and non-discrimination*."[130]

158. Claimants argue that Respondent's arbitrary, inconsistent, discriminatory and non-transparent conduct, which lacked due process, also violated Claimants' legitimate expectations regarding their investment in Puerto Nuevo and the Access Channel.[131]

(f) Respondent's Attempts To Justify Its Violation Of The Fair And Equitable Treatment Standard Have No Merit

159. Additionally, Claimants argue that Respondent's attempts to justify its measures, and establish that they do not amount to a violation of the Treaty's fair and equitable treatment standard, have no merit.[132]

160. First, Claimants argue that Respondent is wrong in alleging that the Concession precluded charging tariffs for the use of the Access Channel because (i) the Concession provides that PNSA must build the Access Channel at its "own cost and risk"; (ii) the Access Channel is not within the Concession area; (iii) Resolution 723 did not provide for separate tariffs for access channels; and (iv) Claimants assumed the risk that Drummond would be able to use the access channel for free.[133]

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[129] Cl. PHB, ¶ 95.
[130] Cl. PHB, ¶ 96; Exh. CL-64; Exh. CL-43.
[131] Cl. PHB, ¶ 97.
[132] Cl. PHB, ¶ 98.
[133] Cl. PHB, ¶ 99.

161. As a preliminary point, Claimants argue that Respondent, through these arguments, has sought to recharacterize Claimants' claim as relating to the frustration of specific legitimate expectations. Specifically, Respondent has sought to defend against the recharacterized claim by asserting that Claimants could not have had a specific expectation that Respondent would enact an access channel tariff at the time the concession was executed. However, these defenses are not responsive to Claimants' claim. Claimants' legitimate expectations claim is that Respondent would resolve Prodeco's Petition in a reasonable manner, through decision-making not tainted by improper motives or by arbitrary, inconsistent, lacking in transparency and in due process. In other words, Claimants do no claim that Respondent frustrated specific expectations generated by the government at the time of its investment.[134]

162. Claimants assert that even if they had made such a claim, it would be necessary to consider Claimants' expectations at the time they decided to invest. Claimants note that they decided to invest in Puerto Nuevo, and actually began investing in the development and construction of the port, in 2009, two years before the Puerto Nuevo Concession was signed, undertaking over US$ 100 million by the time the Concession was executed in compliance with their commitments and the obligations imposed by the Colombian government enshrined in INCO Resolutions 135 and 151 of March 2009.[135]

163. Claimants maintain that when they invested in 2009, it was understood that each port in the Ciénaga Bay would have to comply with direct-loading requirements which required dredging an access channel, pursuant to the applicable direct-loading requirements.[136] In addition, Claimants highlight that Drummond had a specific contractual obligation to build an access channel pursuant to (i) its 1992 Puerto Drummond concession contract which required, as part of "Phase II of the project", the construction of direct loading facilities, including an "access channel and turning basin"; and (ii) Resolution 1286 of July 2007 ordering Drummond to implement

[134] Cl. PHB, ¶ 101.
[135] Cl. PHB, ¶ 102.
[136] Cl. PHB, ¶ 103; Exh. C-38.

phase II of its project by July 2010 and to apply for the requisite environmental license.[137]

164. Claimants note that the ports could comply with these requirements by each building their own access channels or by entering into an agreement to jointly build and share infrastructure pursuant to Article 4 of the Maritime Port Statute. Claimants, moreover, assert that Puerto Nuevo and Puerto Drummond did in fact each apply for an environmental license to build their own access channel, while seeking to negotiate an agreement. But in March 2010, the Ministry of Environment ultimately decided that, for environmental reasons, there could only be one access channel in the Ciénaga Bay. The framework provided that, in such circumstances, PNSA and Drummond should enter into a facility sharing agreement, but that agreement did not materialize.[138]

165. Claimants, therefore, allege that by the time they signed the Puerto Nuevo Concession in March 2011, two years into an investment of hundreds of millions of dollars in port infrastructure that was critical to the continuity of Claimants' coal mining operations, the circumstances in which it had initially made its investment had changed. Claimants contend that while there was no asymmetry in respect of the Access Channel at that time, since the Access Channel had yet to be built and would only be operational over two years later, Drummond and Claimants were already in the process of negotiating a facility sharing agreement and the highest level Colombian government officials had assured Claimants that in the absence of such an agreement they would implement a solution. Accordingly, Claimants argue that there is no basis to Respondent's claim that Claimants somehow accepted the asymmetry by signing the Concession.[139]

166. Beyond this preliminary point, Claimants argue that the Puerto Nuevo Concession did not preclude charging tariffs for the use of the Access Channel. Claimants assert

[137] Cl. PHB, ¶ 103; Exh. R-31; Exh. C-137.
[138] Cl. PHB, ¶ 103; Exh. C-37; R-34.
[139] Cl. PHB, ¶ 104; Exh. C-173.

that the Concession simply did not address tariff issues governed by regulations which are subject to amendment. As such, the payment of tariffs is not a contractual issue, but a regulatory issue. In other words, tariff regulations may be changed by the Ministry of Transport without impacting the Concession. It was therefore not dispositive that Resolution 723 governing port tariffs, which was enacted at a time when Colombia's practice was to build access channels with state resources, did not explicitly provide for separate tariffs for access channels.[140]

167. Claimants, further, contend that PNSA's obligation under the Concession to build the port and the Access Channel at its own account and risk meant that PNSA must undertake the port project itself, build the port and access channel, as well as fund and bear the cost up front. However, PNSA was entitled to recover those costs through tariffs, which does not in any way detract from the obligation to undertake the investment at the concessionaire's account and risk. The way in which the investment is recovered through tariffs, however, is not addressed in the Concession Agreement. According to Claimants, there was nothing in the Concession Agreement precluding the government from amending the existing regulation to permit the charging of a separate tariff for the use of the Access Channel, as acknowledged in the Valbuena Report.[141]

168. Additionally, Claimants assert that the reports issued and commissioned by the government that reference the contractual obligation to build and maintain the Access Channel at PNSA's own account and risk also acknowledge the government's duty to act to resolve the asymmetry (*i.e.*, the 2013 ERO Report, the Valbuena Report, among others).[142]

169. Claimants, further, maintain that the fact that the Access Channel was not within the area of the Concession did not preclude charging tariffs for its use. Claimants assert that while PNSA did initially request that the Access Channel be included within the

[140] Cl. PHB, ¶ 105(a).

[141] Cl. PHB, ¶ 105(b); Exh. C-167.

[142] Cl. PHB, ¶ 105(c); Exh. C-167; Exh. C-53.

Concession area, those requests were primarily focused on concerns regarding the right to build the Access Channel, and while PNSA also mentioned tariff concerns, that was before PNSA had been told by ANI that it could recover the costs of the Access Channel through tariffs, in accordance with the Maritime Port Statute and Resolution 723 regardless of whether it was physically located inside or outside the Concession area.[143]

170. In any event, Claimants argue that the ANI and the Superintendency of Ports took the position that PNSA could not charge a separate itemized tariff relating to the Access Channel because Resolution 723 did not expressly provide for a separate access channel tariff category. As a result, Claimants understood that the component of the Puerto Nuevo tariff corresponding to the Access Channel must be bundled together with the tariff for other port services. Drummond, however, is not a consumer of those other port services—it only avails itself of Puerto Nuevo's Access Channel. Thus, regardless of whether the Access Channel was inside or outside the Concession, no separate access channel tariff could be charged without a change in regulation allowing for the disaggregation of the Puerto Nuevo port tariff. Claimants allege that per the Valbuena Report, modifying Resolution 723 would be "*relatively simple*" and would not involve a modification of the Concession Agreement.[144]

171. Second, Claimants argue that Respondent is wrong when it seeks to justify its failure to resolve the Access Channel asymmetry on the alleged basis that tariffs cannot be charged for the use of access channels as a matter of Colombian policy.[145]

172. Claimants assert that historically, and even after the privatization of the public ports sector in 1991, access channels have been built and maintained by the state using state funds. There were two consequences to this practice: (i) access channels were not included in port concession contracts (as the state assumed the obligation to build and maintain them); and (ii) since access channel works were funded by the state, users

[143] Cl. PHB, ¶ 105(d); Exh. R-44.
[144] Cl. PHB, ¶ 105(e); Exh. R-49; Exh. C-53.
[145] Cl. PHB, ¶ 107.

did not have to pay tariffs for their use. Claimants argue that this practice, however, did not mean that there was a policy against charging tariffs for access channels.[146]

173. Claimants also maintain that Respondent did not articulate this so-called policy against charging tariffs for the Access Channel until this arbitration. In fact, when the Ministry of Transport rejected Prodeco's Petition to implement a tariff, it did not mention any policy against charging tariffs for access channels. Had that policy existed, Claimants argue that it should have been the first or only response to Prodeco's Petition.[147]

174. Claimants also stress that Respondent has not identified a single document on the record mentioning an alleged policy against charging tariffs for access channels. To the contrary, a plethora of reports and papers prepared and commissioned by the government clearly show that the government did not consider that there was a policy against charging tariffs for the use of access channels. Rather, these reports took the view that public policy considerations required the government to resolve the Access Channel issue through a tariff mechanism.[148]

175. Claimants, furthermore, argue that the only policy consideration militating against charging tariffs for the use of access channels was described in papers prepared by the Ministry of Mines in 2013 and 2014. Claimants assert that the concern was that charging tariffs for the use of access channels would make Colombian coal less competitive internationally and that "c*reating a tariff exclusively for exporters using the Access Channel built by PNSA . . . will generate a competitive asymmetry among these exporters with respect to the rest of exporters using other access channels in other port areas . . . who use these access channels free of charge.*" In other words, the Ministry took the view that creating a tariff for users of the Access Channel—*i.e.*, Drummond and Prodeco—would put them at a competitive disadvantage vis-à-vis coal exporters in other parts of the country who do not pay tariffs for access channels

[146] Cl. PHB, ¶ 107(a); Exh. C-131.
[147] Cl. PHB, ¶ 107(b); Exh. C-57.
[148] Cl. PHB, ¶ 107(c); Exh. C-53; Exh. C-167; Exh. C-165; Exh. C-172.

at all. But that conclusion only serves to highlight the asymmetry affecting Prodeco, as it was the only coal exporter paying for the use of an access channel.[149]

176. Third, Claimants argue that Respondent's assertion that Claimants improperly rely on internal government documents is incorrect. In particular, Respondent alleges that Claimants rely on nothing more than internal communications that were not even disclosed to them prior to this arbitration and that these documents cannot therefore (i) create expectations, or (ii) be invoked to argue that Respondent's conduct is inconsistent. Respondent specifically refers to the May 2013 Ministry of Transport's presentation, the Ministry of Mines position paper, the 2013 and 2014 ERO Reports, the July 2014 e-mail from ANI to Prodeco, the August 2014 letter from the Minister of Transport to the Minister of Mines and the Valbuena Report. Respondent argues that these so-called internal documents should be contrasted with the "formal" decisions by Colombian authorities, such as the Ministry of Transport's Rejection.[150]

177. In this regard, Claimants note that many of the documents that Respondent labels as "internal" were, in fact, shared with Claimants. Claimants also note that once again, Respondent is mischaracterizing Claimants' claims, since Claimants are not alleging the frustration of specific expectations, and are therefore not alleging that any so-called internal documents created legitimate expectations. Claimants also maintain that they are not arguing that Respondent breached the Treaty because some of its documents are inconsistent; rather, Claimants assert that Respondent's conduct was unfair and inequitable. While Claimants do not deny that they have relied on certain internal government documents that it obtained during the course of the arbitration, they contend that there is nothing unusual about an investor proving its allegations through internal government documents in the context of an investment treaty arbitration.[151]

[149] Cl. PHB, ¶ 107(d); Exh. C-176; Exh. C-177.
[150] Cl. PHB, ¶ 111.
[151] Cl. PHB, ¶ 111(a)-(f).

178. Fourth, Claimants argue that Respondent's contention that the Ministry of Transport's Rejection was justified because Claimants have failed to discharge their burden of proving that there was a competitive asymmetry is untenable.[152]

179. In this respect, Claimants argue that the existence of the asymmetry is obvious: Puerto Nuevo's users are required to pay for using the Access Channel while Drummond does not. While Claimants recognize that Respondent used different terms to refer to this asymmetry, the Ministry of Transport, the Ministry of Mines, and experts hired by the government all acknowledged that it existed and needed to be addressed. Moreover, Claimants posit that the existence of an asymmetry requiring government redress is also demonstrated by Respondent's conduct, which following the Rejection of Prodeco's Petition, proposed to implement a partial solution to the Access Channel issue. As such, Claimants assert that the competitive asymmetry in respect of the Access Channel has amply been established.[153]

180. Fifth, Claimants allege that Respondent's argument is incorrect when they contend that the agreement under which Respondent would take over the maintenance costs of the Access Channel was not implemented because Claimants (i) never responded to the letters from INVIAS requesting technical information from PNSA and Prodeco relating to the maintenance of the channel, and (ii) did not formally initiate the process to amend the Puerto Nuevo Concession in order to avoid losing low-tax zone advantages.[154]

181. Claimants assert that contrary to Respondent's allegations, they did respond to ANI's and INVIAS' information requests of 9 and 10 September 2015, respectively. This is reflected in a letter from Mr. McManus to the Minister of Mines of December 2015, in which Mr. McManus explained that "*advances were initially made in the review of the procedure for the budgetary appropriation (in order for Invías to perform the*

[152] Cl. PHB, ¶ 112.
[153] Cl. PHB, ¶¶ 112-113.
[154] Cl. PHB, ¶ 113.

maintenance of the access channel), and in the exchange of technical information and costs related to the dredging of the same, among the ANI, Invías and PNSA."[155]

182. Claimants also assert that it is undisputed that, in November 2015, the head of the ANI, Mr. Andrade, abruptly cancelled a meeting between Claimants and the ANI to discuss the implementation of the Maintenance Agreement—specifically, to discuss the modification of the Concession Agreement—and refused to continue with its implementation. In light of this, Claimants contend that they did not formally initiate the process to amend the Puerto Nuevo Concession, as there was no point in doing so.[156]

183. Moreover, Claimants argue that Respondent's suggestion that Claimants did not initiate the amendment process because that might have led to the loss of the port's low tax zone benefits is unsupported and, in any case, makes no sense. The allegation appears to be based on the Ministry of Mines' position paper of October 2014, which does not say this.[157]

184. Furthermore, Claimants argue that there is simply no basis for Respondent's allegation that the low tax benefits for Puerto Nuevo were a *quid pro quo* for building and maintaining the Access Channel. The evidence clearly shows that: (i) Claimants committed to building and actually began to build the direct loading Puerto Nuevo port (which included an Access Channel) in 2009; (ii) this commitment was reiterated in the 2011 Concession Agreement; (iii) the Concession Agreement did not grant low tax zone benefits, to the contrary, the text of the Concession specifies that there was no guarantee that Puerto Nuevo would be granted low tax zone status; and (iv) Puerto Nuevo was only granted low tax zone status in March 2013, just two months before the port was inaugurated, when the construction was nearly complete.[158]

[155] Cl. PHB, ¶ 113(a); Exh. C-65.
[156] Cl. PHB, ¶ 113(b); Exh. C-65.
[157] Cl. PHB, ¶ 113(c); Exh. C-176.
[158] Cl. PHB, ¶ 113(d); Exh. C-48; Exh. BRG-86.

185. Sixth, and finally, Claimants argue that Respondent's contention that Claimants should have gone to the SIC to seek relief earlier than they did because it is the sole authority to deal with competition matters is not only wrong, but contradicts its own conduct and assertions.[159]

186. According to Claimants, the Access Channel problem arose as a result of a regulatory *lacuna* which could only be resolved through regulatory action by the administrative authority with the power to issue the necessary regulations; that is, the Ministry of Transport.[160]

187. Additionally, Claimants contend that Drummond's use of the Access Channel built by PNSA without paying a tariff did not provide a basis for submitting a complaint against Drummond to the SIC. This is because Drummond did not engage in anti-trust practices in breach of competition law. Drummond was acting lawfully and simply benefitting from a *lacuna* in the port tariff regulations which did not enable PNSA to charge Drummond a tariff for its use of the Access Channel. The anticompetitive situation resulted from regulatory conditions (as acknowledged by the Ministry of Transport's ERO and the Valbuena Report), not Drummond's conduct. There was therefore no actionable claim or complaint to be made against Drummond.[161]

188. Moreover, Claimants assert that once Respondent's authorities arbitrarily refused to provide a regulatory solution, and all amicable settlement opportunities had failed, PNSA and Prodeco filed a complaint with the SIC on 4 December 2018, prior to filing its Request for Arbitration in these proceedings six months later on 11 June 2019. The complaint denounced the conduct of the Ministry of Transport and ANI for failing to address the competitive asymmetry and requesting that the SIC order the Ministry of Transport to take the necessary corrective actions. By June 2019, Claimants had waited six months and had not received any response. In order to

[159] Cl. PHB, ¶ 114.
[160] Cl. PHB, ¶ 114(a).
[161] Cl. PHB, ¶ 114(b); Exh. C-167; Exh. C-53.

ensure compliance with the five-year limitation period under the Treaty, this arbitration was commenced on 11 June 2019. The first time that Claimants learned of the SIC's response to their complaint was in Colombia's Counter-Memorial of 31 January 2022, to which the SIC's rejection of the complaint was appended as an exhibit. That rejection, dated 30 November 2021—some two months earlier and suspiciously proximate to the original due date for Colombia's Counter-Memorial—consisted of a page and a half letter that merely stated that Claimants' request was denied on the basis of the facts described, without providing any reasons.[162]

(2) Respondent Failed To Accord Claimants' Investments Treatment No Less Favorable Than That Granted To Investments Of Investors Of A Third State

189. According to Claimants, Respondent failed to accord Claimants' investments treatment no less favorable than that granted to investments of investors of a third state, as required under the most favored nation standard in Article 4(2) of the Treaty. Specifically, Article 4(2) provides that the treatment afforded by Colombia to Swiss investments

> *"shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nations, if this latter treatment is more favorable."*[163]

190. Claimants argue that the most favored nation test in essence requires: (i) identifying an appropriate comparator, that is, investments of a third-state in a comparable situation (*i.e.*, in "like circumstances") to the investments of the foreign investor protected by the standard; and (ii) assessing whether the host state treated the investments of the investor protected by the most favored nation standard less favorably than those of the appropriate comparator, which entails an objective analysis that focuses on the "effect" of the state conduct. If Claimants establish these two requirements, then (iii) Respondent can only avoid liability if it shows that the

[162] Cl. PHB, ¶ 114(c); Exh. C-67; Exh. C-91; Exh. R-64.

[163] Cl. PHB, ¶ 116; Exh. C-1.

less favorable treatment was justified on the basis of a non-discriminatory rational government policy.[164]

191. Claimants contend that, per the tribunal in *Cargill v. Poland*, the first step of the test requires Claimants to identify investments owned by a foreign non-Swiss investor that are in "like" or "similar circumstances" to Claimants' investments. Claimants allege that while the analysis depends on the specific facts of the case, tribunals adopt a flexible approach and avoid endorsing overly-restrictive criteria limiting the identification of an appropriate comparator. Further, Claimants argue that tribunals have found that investors and investments are in "similar circumstances" or "similar situations" when, for example, they operate in the same business or economic sector, or are direct competitors. To determine whether the two investments are in like circumstances, it is only necessary to compare the characteristics of the investments that are relevant to the treatment at issue.[165]

192. Claimants, moreover, assert there is no doubt that Claimants' investments and Drummond's investments are in like or similar circumstances since (i) they are both in the business of exporting coal from Colombia, and (ii) they are in like circumstances in relation to the treatment concerning the use of the Access Channel to export their coal, which is precisely the treatment at issue in this case. While Claimants' investments are owned by a Swiss investor (Glencore), Drummond's investments are owned by an investor from the United States.[166]

193. Furthermore, Claimants allege that to determine whether investors are in "like circumstances," tribunals focus their analysis on the characteristics of the investments that are relevant to the treatment at issue.[167] Claimants assert that the terms of the

[164] Cl. PHB, ¶ 117.
[165] Cl. PHB, ¶ 118; Exh. CL-54; Exh. CL-51.
[166] Cl. PHB, ¶ 118.
[167] Cl. PHB, ¶ 119; Exh. CL-40.

Concession, which do not address the manner in which PNSA's investments are recovered through tariffs, are not relevant vis-à-vis the treatment at issue.[168]

194. With regard to the second step of the test, Claimants state that it requires them to demonstrate that the treatment afforded by Respondent to their investments is "less favorable" than the treatment afforded to the comparator's investments. Claimants argue that there is no doubt that Respondent treated Claimants' investments less favorably than those of Drummond because, by refusing to regulate the fair allocation of the costs associated with the construction and maintenance of the Access Channel among its users, Claimants' investments were required to bear, through tariff payments to PNSA, all costs associated with the Access Channel, while Drummond's investments did not have to contribute a single cent to its cost.[169]

195. Claimants also argue that Respondent seeks to empty the most favored nation standard of all content by suggesting that, in order to demonstrate "less favorable treatment", Claimants must demonstrate that there was indeed an anticompetitive situation, and that the treatment of their investments is "overall" less favorable than the treatment afforded to Drummond's investments. This is wrong as it would essentially allow states to discriminate between foreign investors so long as the impact of that discrimination is somehow offset by other differences in the investors' overall cost structures which bear no relation to the discriminatory treatment in question.[170]

196. Claimants also stress that the benefits that Puerto Nuevo users may derive from the low-tax zone have nothing to do with the treatment at issue. Otherwise, Respondent would be entitled to discriminate between foreign investors so long as the impact of that discrimination is somehow offset by other unrelated treatments in respect of the investor's overall cost structures.[171]

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[168] Cl. PHB, ¶ 121.
[169] Cl. PHB, ¶ 122.
[170] Cl. PHB, ¶¶ 123-124.
[171] Cl. PHB, ¶ 126.

197. Additionally, Claimants contend that Respondent cannot justify the less favorable treatment of Claimants' investments on any non-discriminatory rational government policy. This is because there is none prohibiting requiring users to pay tariffs remunerating the costs of building and maintaining the access channels.[172]

198. In sum, Claimants argue that Respondent has provided no plausible explanation, let alone a non-discriminatory rational government policy, for its failure to take action to resolve the Access Channel issue, which led to more favorable treatment to Drummond, a national of the United States. Therefore, Claimants contend that Respondent has violated the most favored nation standard under the Treaty.[173]

(3) Respondent Impaired Claimants' Investments Through Unreasonable And Discriminatory Measures

199. According to Claimants, Respondent impaired Claimants' investments through unreasonable and discriminatory measures in breach of Article 4(1) of the Treaty. Article 4(1) provides that Colombia must "*not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments*."[174]

200. Claimants assert that to establish a breach of Article 4(1), they must establish that Respondent's measures (i) are unreasonable or discriminatory and (ii) have impaired the management, maintenance, use, and enjoyment of their investments.[175]

201. Claimants also assert that the same test described in relation to the most favored nation standard applies in order to establish that Respondent's measures are discriminatory under this standard. Hence, for the reasons set out in Section VI.A(2) above, Respondent's measures were discriminatory.[176]

[172] Cl. PHB, ¶ 128.
[173] Cl. PHB, ¶¶ 129-130.
[174] Cl. PHB, ¶ 131; Exh. C-1.
[175] Cl. PHB, ¶ 132.
[176] Cl. PHB, ¶ 133.

202. Claimants, further, note that as for the "unreasonableness" standard, the *Glencore v. Colombia I* tribunal held, when interpreting this same Treaty provision, that "*all measures which are arbitrary are also unreasonable - but not vice-versa*," because "*[t]he set of unreasonable measures is wider than that of arbitrary measures*." As such, "unreasonable" measures include "*not only 'arbitrary measures' but also measures that are irrational in themselves or result from an irrational decision-making process*."[177]

203. Claimants argue that Respondent's measures are irrational in themselves, and resulted from an irrational decision-making process, as outlines in Section VI.A above, and are therefore unreasonable.[178]

204. With regard to the second prong of the test under Article 4(1), Claimants contend that it refers to the impairment of, *inter alia*, "*management, [. . .] use, [and] enjoyment*" of Claimants' investments. There can be no question that Respondent's failure to resolve the asymmetry in respect of the Access Channel through regulations requiring all users to contribute to the costs of the Access Channel as a consequence of Respondent's measures negatively affected and thus impaired Claimants' management, use, and enjoyment, of their investments because it caused (a) Prodeco to incur excess costs in the form of higher port tariffs because it was effectively subsidizing Drummond's use of the Access Channel; and (b) PNSA to incur losses equivalent to foregone tariffs that it would have recovered from Drummond but for Respondent's measures.[179]

B. RESPONDENT'S POSITION

205. According to Respondent, Claimants' claims are without merit for two fundamental reasons. First, Claimants' claims may only be characterized in two possible ways, and neither of which can engage Respondent's responsibility under the Treaty. On the one hand, Claimants' claims arise from a disagreement with a public policy decision

[177] Cl. PHB, ¶ 134; Exh. CL-90.
[178] Cl. PHB, ¶ 135.
[179] Cl. PHB, ¶ 136; Exh. CL-43.

concerning the financing of the Access Channel, which they freely accepted when investing in Puerto Nuevo. On the other hand, Claimants' alleged grievances form at best contractual claims and, hence, may not engage the responsibility of the State under the Treaty. It is indisputable that, in order to constitute a treaty breach, the conduct at issue must go beyond that which an ordinary contracting party could adopt.[180]

206. Second, in any case, Claimants never proved the existence of an anticompetitive situation in the Access Channel, let alone a commitment from Respondent to solve such a situation. Respondent's position in response to each and every formal request that Claimants submitted hoping to be allowed to charge a tariff for the Access Channel since 2010 has always been consistent: in exchange for the Puerto Nuevo Concession (and the benefit of a free tax advantaged zone), Claimants committed to building and maintaining the Access Channel at their own cost and risk, and recover such investment through the tariffs paid by the users of Puerto Nuevo.[181]

(1) Respondent May Not Be Held Liable Under The Treaty For Refusing To Change The Public Policies And Contractual Arrangements That Claimants Accepted When Investing In Puerto Nuevo

207. Respondent argues that the Treaty cannot impose on the State an obligation to change its public policies merely so that Claimants can increase their profit margin. This is particularly so when Claimants accepted such policies by contract in the first place. As noted by the tribunal in *Urbaser*, the fair and equitable treatment standard "*cannot make contracts better than they were, nor can it restore rights or expectations that the investor has waived or lost due to its own negligence*."[182]

208. Respondent, first, contends that it is a matter of Colombian public policy that (i) all access channels in the country are free to use regardless of how they are financed, and (ii) in this case, the Access Channel would be financed through the Puerto Nuevo

[180] Res. PHB, ¶ 27.
[181] Res. PHB, ¶ 28.
[182] Res. PHB, ¶ 32; Exh. CL-84.

Concession. Respondent argues that these policies and their consequences were clear at the outset.[183]

209. Respondent, further, maintains that while it denies that its policies are problematic, Claimants, as international investors that are deemed to be competent professionals, decided to invest in Puerto Nuevo, thereby accepting the port policies that were in place at the time or, at the very least, assuming the risk that such policies would not change. Respondent alleges that Claimants cannot use the Treaty as an insurance policy against that risk.[184]

210. Second, contrary to Claimants' allegations, Respondent argues that modifying Resolution 723 for Claimants' sole benefit would have major implications in Colombia's port policy. Respondent asserts that Regulation 723 regulates port tariffs for public ports nationwide and not only port tariffs applicable to Puerto Nuevo or in the Ciénaga Bay. Per Respondent, modifying Resolution 723 would not only affect the users of the ports located in the Ciénaga Bay, but would also imply, going forward, that access channels would no longer be public assets to be used free of charge by any vessel.[185]

211. Third, and finally, Respondent alleges that, in any event, for Claimants to be allowed to charge a tariff for the Access Channel to third parties, the Concession Agreement needed to be modified, evidencing the contractual nature of Claimants' claims.[186]

212. In sum, Respondent argues that while it denies the existence of an anticompetitive situation, even if it were to exist, the Concession Agreement is undeniably at its root. Respondent maintains that the fact that it did not modify the Concession Agreement to put Claimants in an even better financial position cannot constitute a breach of the

[183] Res. PHB, ¶ 33.
[184] Res. PHB, ¶ 34.
[185] Res. PHB, ¶¶ 37-38.
[186] Res. PHB, ¶¶ 39-45

Treaty, especially when Claimants never submitted a formal request to modify the Concession.[187]

(2) Claimants Failed To Prove The Existence Of An Anticompetitive Situation, Let Alone That Respondent Acted In An Arbitrary, Discriminatory, Or Unreasonable Manner When Rejecting Their Requests To Charge A Tariff For The Use Of The Access Channel

213. Respondent argues that for it to have breached the Treaty by failing to regulate the Access Channel situation, there must have been an anticompetitive unbalance as well as a specific legal framework in Colombian law requiring it to regulate the tariffication of the Access Channel in the first place. Per Respondent, Claimants' have simply failed to prove the existence of such duty.[188]

214. Respondent asserts that under Colombian law, competition law is chiefly concerned with competitors having equivalent access to the relevant markets.[189] Respondent argues that, in this case, Claimants have simply failed to prove that the alleged costs differential between Prodeco and Drummond somehow affected Prodeco's access to the international coal market.[190]

(a) Internal And Preliminary Documents Of The State Cannot Create An Otherwise Inexistent Obligation To Regulate

215. Respondent contends that, aware that they cannot establish the existence of an anticompetitive situation, Claimants insist that Respondent had a duty to act solely because it had allegedly confirmed the existence of such duty in internal documents. Respondent maintains that Claimants cannot create an otherwise inexistent obligation to regulate based on internal documents of the State to which Claimants were never privy prior to this arbitration.[191]

[187] Res. PHB, ¶ 46.
[188] Res. PHB, ¶¶ 48-51.
[189] Res. PHB, ¶ 52; Exh. C-142.
[190] Res. PHB, ¶¶ 53-55.
[191] Res. PHB, ¶ 56.

216. According to Respondent, under Colombian law, administrative acts must be made in writing and notified to the interested party in order to produce any legal effect. Similarly, under international law, Claimants cannot rely on decisions of the State that were not even communicated to them, and thus, could not have generated a legitimate expectation on the part of the investor.[192]

217. Respondent, further, argues that the internal documents in which Claimants rely on are part of the normal deliberation process of any government agency and are confidential under Colombian law to allow public officials to express their views freely in their decision-making processes and avoid ill-founded claims like the ones that Claimants have submitted in this arbitration.[193]

218. Per Respondent, the documents cited by Claimants could only indicate, at best, conflicting considerations in the government's internal decision-making process, which cannot constitute a breach of the Treaty. The State cannot be held responsible for individual views of one or even a couple of civil servants that were later contradicted by the State's official communication transmitting the final, formal decision to Claimants.[194]

219. Moreover, Respondent maintains that its behavior was consistent and coherent over time. Respondent alleges that every single time that Claimants submitted a formal request to the State in order to address the alleged anticompetitive situation in the Access Channel, and the State agencies had the opportunity to thoroughly review their situation, the State agencies dismissed their claims. Specifically, both the ANI and the Ministry of Transport told PNSA and Prodeco that there was no basis on which to establish a tariff for the use of the Access Channel. Among others, they reminded Claimants that PNSA had freely accepted to build and maintain the Access Channel, and to recover the corresponding investment through the tariff that it would charge to the users of Puerto Nuevo. Furthermore, they stressed that the fact that

[192] Res. PHB, ¶ 62; Exh. CL-90.
[193] Res. PHB, ¶ 66.
[194] Res. PHB, ¶ 67.

Prodeco bears the cost of the Access Channel (while Drummond does not) is not enough to establish any kind of discriminatory treatment that required the intervention of the State.[195]

(b) Respondent's Decision To Reject Claimants' Requests Concerning The Access Channel Does Not Constitute A Breach Of The Treaty

220. Respondent argues that precisely because such a duty to intervene does not exist in the present case, Respondent's consistent rejection of Claimants' requests to charge a tariff for the Access Channel cannot constitute a breach of the Treaty.[196]

221. According to Respondent, the fact that governmental authorities may have contradicted their prior conduct does not constitute *per se* a breach of the fair and equitable treatment standard.[197]

222. Respondent contends that, contrary to Claimants' assertions, the Ministry of Transport never said that it was not competent to regulate tariffs for use of the Access Channel; rather, the Ministry only said that there were other entities with competence to address Claimants' concerns.[198]

223. Respondent, further, argues that the Ministry of Transport did give ample reasons for its Rejection of Prodeco's Petition. In short, the Ministry of Transport begun stressing that the tariffs applicable to public and private ports were subject to different regimes and determined through different parameters. Thus, to determine the existence of any damage to Prodeco (due to the tariffs that it had to pay to PNSA), the Ministry had to compare the tariff structure applicable to public and private ports. And, since Prodeco had not done so, the Ministry concluded that it lacked any parameters to assess the existence of the alleged harm claimed by Prodeco. The Ministry also underlined that

[195] Res. PHB, ¶¶ 68-69; Exh. R-51; Exh. C-57.

[196] Res. PHB, ¶ 57.

[197] Res. PHB, ¶ 72; Exh. CL-39; Exh. CL-40; Exh. CL-82; Exh. CL-43.

[198] Res. PHB, ¶ 73; Exh. C-59.

Prodeco had not considered the significant benefits of accessing a tax-advantaged zone, or the preferential fees paid by PNSA as a take-or-pay user.[199]

224. Respondent, moreover, alleges that the fact that Claimants disagree with the Ministry's assessment of evidence and economic reasoning does not amount to a breach of the Treaty; much less when such reasoning was consistent with the concerns identified in the ERO Memorandum with respect to the Valbuena Report, the applicable law, and international practices.[200]

225. Per Respondent, Claimants' only argument in support of the Ministry of Transport's alleged breach of the applicable antitrust regulations is that Mr. Valbuena, a hired consultant, had concluded that the competitive asymmetry in the Access Channel was a problem that needed to be resolved through state intervention. Respondent, however, contends that it cannot be found internationally responsible for rejecting a report that is not mandatory and at odds with sound legal principles.[201]

226. In addition, Respondent argues that if Claimants truly believed that the Ministry of Transport had disregarded the applicable regulations on antitrust law, they should have filed a complaint before the SIC—Colombia's competition authority—as soon as they were notified of the Ministry's Rejection. They did not. Instead, they waited four years to file such a complaint, only to comply with the Treaty's conditions regarding the exhaustion of domestic administrative proceedings.[202]

227. Furthermore, Respondent posits that the fact that the government continued to meet with Claimants after the Ministry's Rejection was not because there was an anticompetitive situation that needed to be resolved, but because it was the government's policy to maintain cordial relations with private investors. Respondent

[199] Res. PHB, ¶¶ 75-77; Exh. C-57.
[200] Res. PHB, ¶ 78.
[201] Res. PHB, ¶ 81.
[202] Res. PHB, ¶ 84; Exh. RL-173.

contends that Claimants cannot use Respondent's good faith as an indication that their claims were accepted.[203]

228. In any case, Respondent asserts that after the ANI's Rejection of Prodeco's Petition, there is no indication that Respondent recognized the validity of any of Claimants' claims. Respondent, first, points to an internal Ministry of Mines email, dated October 2014, in which the Ministry considered that no governmental intervention was warranted due to the myriad of benefits that Prodeco received as a user of a public port.[204]

229. Second, Respondent asserts that during the working group sessions, the various State agencies that were involved confirmed that Claimants' Petition was a contractual issue and that the only way Claimants could get what they wanted was through a contract amendment.[205]

230. Third, Respondent stresses that the ANI never offered to take over the maintenance costs of the Access Channel; instead, the only commitment that the ANI acquired was to consider excluding the OPEX from the concession agreement in the context of a formal application to amend the Puerto Nuevo Concession.[206] In this regard, both the ANI and INVIAS requested technical information from PNSA and Prodeco to assess whether it was viable to pick up the OPEX of the Access Channel; however, they did not reply. More importantly, PNSA and Prodeco never submitted a formal request to modify the Concession Agreement.[207]

231. Respondent, therefore, argues that regardless of Claimants' reasons for not submitting the amendment request, Respondent's conduct cannot constitute a breach of the

[203] Res. PHB, ¶ 86.
[204] Res. PHB, ¶ 87; Exh. C-176.
[205] Res. PHB, ¶ 90.
[206] Res. PHB, ¶ 93; Exh. C-174; Exh. C-175.
[207] Res. PHB, ¶¶ 95-96.

Treaty when Claimants failed to initiate the respective administrative proceeding to amend the Concession Agreement.[208]

232. Additionally, Respondent stresses that Claimants have failed to establish any discriminatory treatment in breach of Article 4(2) of the Treaty. First, Respondent argues that Claimants have failed to prove that Drummond is in similar circumstances to Prodeco. According to Respondent, such an analysis requires a consideration of all relevant circumstances, including the legal regime and regulatory requirements applicable to each investment. Respondent asserts that, in this case, it is undisputed that such an analysis confirms that Prodeco and Drummond are not in similar circumstances. The fact is that while Drummond chose not to invest in Puerto Nuevo and bear the costs of the Access Channel, Claimants agreed to do this and, by doing so, received the benefits of the tax-advantaged zone and the burden of the costs of the Access Channel. Accordingly, Respondent contends Drummond and Prodeco are not in similar circumstances.[209]

233. Second, Respondent argues that, in any event, Claimants have not demonstrated that Colombia treated Prodeco less favorably than Drummond. Specifically, Respondent asserts that Claimants have failed to prove that, due to the allegedly less favorable treatment, Drummond and Claimants are prevented from competing on a level playing field in the coal market.[210]

234. Third, and finally, Respondent contends that if this Tribunal were to decide that Colombia afforded Prodeco less favorable treatment than Drummond, it should still dismiss Claimants' claim as Respondent's actions would be fully justified. In other words, Respondent argues that Claimants failed to provide that the alleged less favorable treatment was not based on some rational and objective policy. Per Respondent, here, the facts of the case leave no doubt that the alleged treatment is justified by a reasonable policy. Respondent maintains that the fact that Prodeco bears

[208] Res. PHB, ¶ 97.

[209] Colombia's Rejoinder on the Merits and Reply on Jurisdictional Objections dated 23 December 2022, ¶¶ 514-531 ("**Res. Rej.**"); Exh. RL-96; Exh. RL-93.

[210] Res. Rej., ¶¶ 533-552.

a negligible cost for the Access Channel is nothing more than a consequential effect of the State's public policy decision (accepted by Claimants) to finance the Access Channel through tariffs charged at Puerto Nuevo.[211]

235. In light of the above, Respondent argues Claimants have failed to establish discriminatory treatment in breach of Article 4(2) of the Treaty.[212]

(c) The SIC Confirmed That Colombia's Rejection Of Claimants' Requests Concerning The Access Channel Does Not Constitute A Breach Of The Treaty

236. Respondent argues that the State's refusal to address an inexistent anticompetitive situation is based on sound principles of law and a sound interpretation of the relevant facts, as confirmed by the SIC, Colombia's competition authority.[213]

237. Respondent contends that Claimants' decision to delay the SIC's involvement undermines the credibility of their competition case and lacks a reasonable explanation. Per Respondent, one can only reasonably assume that the complaint before the SIC is opportunistic, and serves the purpose of allowing Claimants to argue that they have pursued all administrative remedies in Colombia prior to this arbitration, as the Treaty requires.[214]

238. According to Respondent, the SIC's decision in response to Prodeco's and PNSA's December 2018 complaint proves that the State's consistent rejection of Claimants' requests to create an independent tariff for the use of the Access Channel does not constitute a breach of the Treaty, since there is simply no anticompetitive situation that merits State intervention.[215]

239. In sum, Respondent alleges that the SIC's decision on Prodeco's and PNSA's complaint confirm what the State consistently told Claimants over the years: there is

[211] Res. Rej., ¶¶ 552-569.
[212] Res. Rej., ¶¶ 570.
[213] Res. PHB, ¶ 57.
[214] Res. PHB, ¶ 99.
[215] Res. PHB, ¶ 100.

no basis for establishing an independent tariff for the use of the Access Channel as there is no anticompetitive situation to be redressed.[216]

C. THE TRIBUNAL'S DECISION

240. As a preliminary matter, the Tribunal considers that Claimants' claims are rooted in the Treaty, as opposed to the Concession Agreement. In the Tribunal's view, Claimants' claims in respect of an anticompetitive situation at the Access Channel are not based on the Concession Agreement.

241. The Tribunal finds that Respondent's conduct constitutes a breach of the fair and equitable treatment standard under Article 4(2) of the Treaty in two respects. First, having recognized both the asymmetry between Drummond and other users of Puerto Nuevo and its obligation to remedy the inequitable situation, Respondent's failure to do so was arbitrary. In this regard, the Tribunal finds persuasive both the argumentation and supporting factual exhibits and legal authorities adduced by Claimant at paras. 132-144, *supra*. Second, the Tribunal finds Respondent's conduct to be discriminatory. This prong of the Tribunal's finding requires some elaboration. Article 4(2) reads:

> *Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party. This treatment shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.*[217]

242. The fair and equitable treatment standard enshrined within the Treaty inherently proscribes discriminatory conduct. Notably, Article 4(2) of the Treaty establishes a substantive connection between the fair and equitable treatment standard and the most favored nation principle. Therefore, the Tribunal finds that the test for determining whether the host state's conduct constitutes discrimination in contravention of the fair and equitable treatment standard under the Treaty draws from that for most favored

[216] Res. PHB, ¶ 111.

[217] Exh. C-1.

nation claims; albeit, without requiring establishing discrimination on the basis of nationality. Further, the Tribunal determines that the crux of the analysis centers on discerning the discriminatory effects of the measure, without requiring proof of a deliberate intent to discriminate.

243. The test entails a three-fold analysis. *Firstly*, it requires the identification of an appropriate comparator—meaning, investments of an investor in like circumstances. The Tribunal considers that investors and investments are in like circumstances when they operate within the same industry, or when they stand as direct competitors.

244. In the present case, it is undisputed that both Claimants and Drummond are in the business of exporting coal from Colombia. Hence, it is manifestly clear that Drummond not only operates within the same industry but is also a direct competitor of Claimants. The Tribunal, therefore, finds that Drummond is a suitable comparator.

245. *Secondly*, the test requires an assessment to determine whether the host state treated the investments of the investor protected under the fair and equitable treatment standard less favorably than those of the identified comparator. The Tribunal considers that this evaluation requires an objective analysis.

246. The Tribunal observes that Respondent's treatment of Claimants' investments was manifestly less favorable than its treatment of Drummond's investments. This disparity arises from Respondent's refusal to regulate the fair allocation of expenses related to the construction and maintenance of the Access Channel among its users. The Tribunal finds that this resulted in Claimants having to shoulder the entire burden of these expenses, while Drummond remained entirely exempt from such financial obligations.

247. Moreover, the Tribunal notes that permitting any offsetting of this discriminatory impact through other aspects in the investors' overall costs structures, such as tax benefits, raises significant negative policy concerns and must therefore be disregarded in considering the merits. Specifically, such considerations would establish a troubling precedent, essentially condoning discrimination as long as it can

be ostensibly counterbalanced by other factors. Hence, the Tribunal determines that Claimants' investments were treated less favorably than Drummond's.

248. *Thirdly*, when the two initial requirements are met, as in the case at hand, a third prong becomes relevant, wherein the host-state is liable unless it can demonstrate that the less favorable treatment was justified based on a non-discriminatory rational government policy.

249. The Tribunal considers that Respondent has not provided a non-discriminatory rational government policy for its failure to take action to resolve the Access Channel issue and is therefore liable. Specifically, the Tribunal finds that there is no overarching governmental policy in Colombia precluding the imposition of tariffs for the utilization of access channels, and even if there were, such a policy would be discriminatory.

250. In the Tribunal's view, the historical omission of access channels within port concession agreements, along with the non-imposition of tariffs for their utilization, should not be misconstrued as indicative of a policy against the tariffication of access channels. This distinction arises from the fact that access channels were historically constructed and maintained through state funding, as opposed to the involvement of private investors, as in the present case.[218]

251. The Tribunal, further, considers that had there been a non-discriminatory rational government policy against charging tariffs for the use of access channels, Respondent's Ministry of Transport would have explicitly referenced such a policy in its Rejection of Prodeco's Petition; yet it did not.[219] Similarly, one would expect that the extensive array of papers and reports commissioned by the government on the matter of the Access Channel would have clearly articulated a policy opposing the imposition of tariffs on its use. Nonetheless, the Tribunal observes that these documents did not endorse a stance against levying tariffs for access channel utilization, but rather advanced the perspective that public policy considerations

[218] Exh. C-131.

[219] Exh. C-47.

compelled the government to address the Access Channel issue by introducing a tariff mechanism.[220]

252. The Tribunal has only identified one policy consideration that opposes the imposition of tariffs on the use of access channels, and it can be found in papers prepared by the Ministry of Mines. In particular, the Ministry was concerned that charging tariffs for the use of access channel would erode the international competitiveness of Colombian coal and would place users of the Access Channel at a competitive disadvantage compared to coal exporters in other parts of the country who enjoy tariff-free access channels. In the Tribunal's opinion, this policy consideration merely underscores the discrimination faced by Claimants, as they represent the sole coal exporters bearing the cost of using an access channel.[221]

253. Given all of the foregoing, the Tribunal finds that Respondent's conduct was both arbitrary and discriminatory in breach of the fair and equitable treatment standard under Article 4(2) of the Treaty, requiring the reparation discussed below in Section VII.C.

254. Any additional finding with respect to a breach of the Treaty would have no effect on the reparation established in this Award. Accordingly, in light of its finding of a breach of the fair and equitable treatment standard under Article 4(2) of the Treaty, the Tribunal does not address Claimants' remaining contentions.

VII. REPARATION

255. In this section, the Tribunal must establish the reparation to which Claimants are entitled to offset the effects of Respondent's international wrong on Claimants' investment. Prior to the Tribunal's decision, this section summarizes the Parties' positions. The latter does not purport to be exhaustive and is meant to provide a general overview of the key arguments put before the Tribunal in their proper context.

[220] Exh. C-53; Exh. C-167; Exh. C-165; Exh. C-172.

[221] Exh. C-176; Exh. C-177.

A. CLAIMANTS' POSITION

(1) Applicable Principles And Methodology

(a) Claimants Must Be Fully Compensated

256. Claimants contend that they are entitled to full reparation for the losses resulting from Respondent's Treaty breaches. Claimants point out that Article 11(1) of the Treaty permits an investor to claim for breaches of the Treaty if these cause "*loss or damage to him or his investment*." While the Treaty provides no compensation formula for non-expropriatory breaches, Claimants argue that customary international law provides the remedies for Respondent's unlawful acts.[222]

257. According to Claimants, customary international law clearly establishes the duty to make full reparation for internationally wrongful acts, as reflected in the decision of the Permanent Court of International Justice (the "**PCIJ**") in the *Case Concerning the Factory at Chorzów*. The PCIJ ruled as follows:

> *The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[223]

258. Claimants assert that the customary international law rules on remedies for breaches of international law are now codified in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**"), and that these provide that the primary remedies for breaches of international law

[222] Cl. Mem., ¶¶ 178-179; Exh. C-1.

[223] Cl. Mem., ¶ 180; Exh. CL-24.

include the duty to make full reparation. Claimants emphasize that ILC Article 31 encapsulates this full reparation obligation as follows:

> *(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
>
> *(2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*[224]

259. Claimants observe that ILC Article 35 goes on to establish that, when it comes to making full reparation for an internationally wrongful act, a State's primary obligation is to provide restitution. Claimants, however, claim that where restitution is impractical, as in the present case, Article 36(1) of the ILC Articles states that:

> *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*.[225]

260. Claimants, therefore, contend that a monetary award in their favor should put them in the position that they would have been in had Respondent's internationally wrongful acts never occurred. In other words, Claimants argue that they are entitled to full reparation for the damages arising from Respondent's measures in breach of the Treaty. This includes damages arising from Prodeco's lost cash flows on account of Respondent's refusal to regulate the use of the Access Channel by allowing PNSA to charge fair, equitable and non-discriminatory fees to all users of the channel, and thus restore the equality of competitive conditions in the coal export market.[226]

261. To assist with the damages calculation, Claimants instructed Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane of BRG to quantify their losses.[227]

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[224] Cl. Mem., ¶ 181; Exh. CL-19.

[225] Cl. Mem., ¶ 182; Exh. CL-19.

[226] Cl. Mem., ¶¶ 183-184; Exh. CL-24.

[227] Cl. Mem., ¶ 185.

(b) The Valuation Date And Methodology For The Calculation Of Damages

262. Per Claimants, the Treaty indicates only the valuation date applicable when calculating compensation due in the context of lawful expropriations. In other words, the Treaty is silent as to the valuation date applicable in the context of non-expropriatory breaches of the Treaty.[228]

263. Claimants highlight that on 12 June 2014, Respondent notified Prodeco that it rejected its request for the issuance of a resolution regulating the payment of fees by all user of the Access Channel. According to Claimants, this was the date giving rise to the dispute and as such triggering Respondent's liability under the Treaty. Claimants argue that in the absence of Respondent's breaches of the Treaty, this would have been the approximate date on which Respondent should have issued appropriate regulations requiring all users of the Access Channel to pay usage fees, and as such, the date on which Respondent would have calculated the applicable fees based on the information available at that time.[229]

264. In light of the above, Claimants instructed BRG to assess damages using 12 June 2014 as the valuation date (the "**Valuation Date**").[230]

265. Claimants note that Respondent opposes the Valuation Date, arguing that it appears to be a tactic to exaggerate their damages claim. Instead, Respondent suggests using the award date as the valuation date to ensure that the damages calculation is based on information available at that time.[231]

266. Claimants contend that in order to assess compensation sufficient to wipe out the consequences of Respondent's unlawful acts, it is appropriate to use an *ex ante* approach in the circumstances of this case and to select 12 June 2014 as the valuation date. Claimants affirm that the selection of this date is in line with the vast majority

[228] Cl. Mem., ¶ 187; Exh. C-1.
[229] Cl. Mem., ¶ 188.
[230] Cl. Mem., ¶ 189.
[231] Cl. Rep., ¶ 382.

of cases that have assessed damages arising from fair and equitable treatment breaches resulting from tariff measures.[232]

267. Moreover, Claimants assert that it is notable that Respondent has not undertaken its own valuation using the date of award as the date of valuation, taking into account full hindsight knowledge. Instead, Respondent and its expert undertake an assessment of damages that selectively references events subsequent to the Valuation Date, which is plagued with errors, underscoring the perils of the proposed *ex post* approach.[233]

268. First, Claimants contend that Respondent's damages assessment wrongly excludes all damages for the period after March 2020, given that, contrary to Respondent's assertions, Prodeco continued exporting coal through the Access Channel notwithstanding the closure of its Calenturitas and La Jagua mines. In addition to exporting a total of 5.9 million tonnes of coal in 2020, Prodeco also exported coal (produced by third parties) from Puerto Nuevo in 2021 and 2022. Claimants, therefore, argue that regardless of the closure of its mines, Prodeco continues to export coal through the Access Channel.[234]

269. Second, Claimants argue that Respondent's assertion that Claimants' selection of a Valuation Date of 12 June 2014 would be aimed at inflating damages is plainly incorrect. Claimants argue that the use of an *ex ante* approach in this case results in a more conservative assessment of damages.[235]

270. Third, Claimants note that BRG's damages assessment is based on the assumption that Drummond will continue to use the Access Channel until the date the Concession ends in line with its projected production for its La Loma and El Descanso mines, according to its 2012 mine plans. In this regard, Claimants contend that there is no basis in Respondent's assertions to assume that Drummond will reduce its coal

[232] Cl. Rep., ¶ 384; Exh. CL-147; Exh. CL-143; Exh. CL-144; Exh. CL-142; Exh. CL-150; Exh. CL-145.
[233] Cl. Rep., ¶ 385.
[234] Cl. PHB, ¶ 149; Cl. Rep., ¶ 387.
[235] Cl. Rep., ¶ 389.

exports or that it will divest its coal assets. The evidence instead points to extended operations at Drummond's mines.[236]

271. Ultimately, Claimants argue that tribunals often rely on projections established at a historical date, even though the projections in question do not exactly match reality. According to Claimants, this does not render the *ex ante* approach inappropriate in this case. In any event, contrary to Respondent's contentions, Claimants maintain that the use of an *ex post* approach would actually increase damages to Claimants.[237]

272. With regard to the methodology for the calculation of damages, Claimants explain that BRG concludes that an income approach, in the form of a simplified version of the discounted cash flow (the "**DCF**") method, is the most appropriate method for valuing the losses suffered by Prodeco. The DCF method involves projecting the future cash flows that the business would have received in the absence of the wrongful government conduct, and discounting them back to the Valuation Date at a rate that accounts for the opportunity costs of capital.[238]

273. Claimants contend that the DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate compensation for breaches of investment treaties.[239]

(2) Calculation Of Damages Arising From Respondent's Breaches

274. In carrying out its damages calculations, Claimants point out that BRG uses a streamlined version of the DCF method, which only assesses the impact of Respondent's breaches on the cash flow components that have been directly or indirectly impacted by those breaches. Specifically, Claimants state that BRG uses historical information until the Valuation Date and forecasts based on the best

[236] Cl. Rep., ¶¶ 392-393.
[237] Cl. Rep., ¶ 396.
[238] Cl. Mem., ¶¶ 190-191; First BRG Report.
[239] Cl. Mem., ¶ 191; Exh. CL-41; Exh. CL-68; Exh. CL-80.

available information and reasonable market expectations as of the Valuation Date for the period from the Valuation Date onwards.[240]

275. To calculate the damages arising from Respondent's breaches, Claimants assert that BRG calculates damages based on the difference between: (i) Prodeco's cash-flows in a scenario in which Respondent would have established a tariff for use of the Access Channel borne equitably by all users of the Access Channel (in proportion to the coal volumes they transport) that would generate the amounts sufficient for PNSA to recover its investments and maintenance costs associated with the Access Channel, including a reasonable rate of return (being the same rate of return included in PNSA's existing regulated tariff model approved by Respondent) (the "**Total Investments**") (this scenario, the "**But-for Scenario**"); and (ii) Prodeco's cash flows in the actual scenario expected as of the Date of Valuation, in which Prodeco alone is forced to pay all the amounts required for PNSA to recover its Total Investments (the "**Actual Scenario**").[241]

276. In order to model the But-for Scenario, Claimants point out that BRG first calculates the tariff for use of the Access Channel needed to generate the cash flows that would allow PNSA to recover its Total Investments. For such purpose, BRG assumes that a framework for calculation of the Access Channel tariff, similar to Puerto Nuevo's regulated tariff model, was in place as of the Valuation Date. On that basis, BRG calculates an Access Channel tariff that would result in the annual cash flows throughout the life of the Puerto Nuevo Concession necessary to allow PNSA to recoup its Total Investments. This results in an Access Channel tariff of US$ 0.18 per ton of coal transported through the channel.[242]

277. Claimants dispute Respondent's contention that they did not select the appropriate rate of return to calculate tariffs in the But-For Scenario. According to Claimants, in establishing the Access Channel tariff in the But-For Scenario, BRG relies on the

[240] Cl. Mem., ¶¶ 192-193; First BRG Report, ¶¶ 46-48.
[241] Cl. Mem., ¶ 194; First BRG Report, ¶¶ 11, 50-52, 60.
[242] Cl. Mem., ¶¶ 195-196; First BRG Report, ¶¶ 13, 50, 54-56.

methodology used by Colombian government authorities pursuant to Colombian regulations (namely, Resolution 723 of 1993) for the purposes of approving the existing regulated tariffs in relation to Puerto Nuevo. Those existing tariffs were calculated applying an internal rate of return of 14.63%. As such, Claimants argue that it is reasonable to assume that the Colombian authorities would have set the Access Channel tariff in a consistent manner, using a 14.63% rate. There is no reason to assume that Colombia would have departed from that clear precedent.[243]

278. Claimants, further, assert that BRG then calculated the tariff payments that each Access Channel user would make based on the coal volumes they expected to transport as of the Valuation Date. Based on this calculation, Drummond would pay some 72 percent of the total Access Channel tariff revenues.[244]

279. In the Actual Scenario, Prodeco is the sole coal exporter making payments towards PNSA's Total Investments since Drummond has not paid any fee for its use of the Access Channel.[245]

280. As regards the calculation of damages to Prodeco, Claimants explain that given Prodeco's nominal damages would have been generated at different points in time, in order to value damages at the Valuation Date, the additional projected cash flows must be discounted back to the Valuation Date using a rate that reflects the time value of money and the opportunity cost of capital.[246]

281. For such purpose, Claimants observe that BRG uses the weighted average cost of capital (the "**WACC**") of a company facing risks similar to those borne by Prodeco's activities in Colombia. In order to estimate the WACC applicable to Prodeco's activity in Colombia, BRG uses the International Capital Asset Pricing Model methodology, and arrives at a WACC figure of 8.08 percent.[247]

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[243] Cl. Rep., ¶¶ 397-399.
[244] Cl. Mem., ¶ 197; First BRG Report, ¶¶ 58-59.
[245] Cl. Mem., ¶ 198; First BRG Report, ¶ 60.
[246] Cl. Mem., ¶¶ 199-200; First BRG Report, ¶¶ 61-64, 77.
[247] Cl. Mem., ¶¶ 201-203; First BRG Report, ¶¶ 77-98.

282. Pursuant to this methodology, the main components of the WACC are the risk-free rate, the market risk premium and beta, and the country risk premium, as follows:

(1) The risk-free rate accounts for the time value of money as has been calculated by BRG, based on the 12-month average return as of the Valuation Date on a 10-year US Treasury bond, as 2.7 percent.

(2) The market risk premium (the price of risk) is the difference between the expected rate of return on the "market portfolio" and the risk-free rate. BRG estimates the market risk premium at 4.62 percent.

(3) The market risk premium is weighted by the beta coefficient, which measures a security's exposure (or the exposure of a group of securities) to general market risk. A security's beta is normally calculated by regressing the security's returns against the market portfolio's return. BRG estimates a beta for Claimants' investments in Colombia of 1.05.

(4) The country risk premium is the incremental return demanded by investors for an investment in a country or location where the investment is exposed to greater risk than in a more stable economy. A standard approach to measure the overall country risk is the sovereign debt approach, often measured by JP Morgan's Emerging Markets Bond Index (the "**EMBI**"). BRG uses Colombia's one-year historical average EMBI as of the Valuation Date, which equals 1.74 percent.[248]

283. Claimants note that BRG discounts the projected future net cash flows back to the Valuation Date using the WACC of 8.08 percent and arrives at damages to Prodeco arising from Respondent's breaches of the Treaty of US$ 40.3 million.[249]

284. Claimants dispute Respondent's assertion that BRG erroneously discounts Prodeco's cash flows, which Respondent claims are estimated in real terms, using Prodeco's

[248] Cl. Mem., ¶ 202; First BRG Report, ¶¶ 77, 80, 83-93.

[249] Cl. PHB, ¶ 177; Cl. Rep., ¶ 420; Second BRG Report, ¶¶ 10, 22.

WACC estimated in nominal terms. Per Respondent, this is incorrect because cash flows expressed in real terms do not consider expected inflation, while the WACC expressed in nominal terms does. Claimants argue that Respondent's criticism lacks merit, since Prodeco's cash flows are, in fact, estimated in nominal terms, just like the nominal WACC.[250]

(3) Claimants Are Entitled To Compounded Interest At A Commercial Rate That Ensures Full Reparation

(a) Pre- And Post-Award Interest Are Necessary To Ensure Full Reparation

285. Claimants argue that they are entitled to compounded interest at a commercial rate that ensures full reparation. Claimants maintain that compensation for delayed payment or interest is a component of full compensation under customary international law. Claimants contend that a state's duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation. Additionally, Claimants point out that, pursuant to the ILC Articles, where interest is awarded, it should run "*from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled*." Claimants argue that this encompasses both pre- and post-award interest.[251]

286. Claimants assert that since the payment of interest is an integral element of reparation, the purpose of an award of interest is the same as that of an award of damages for breach of an international obligation: the interest awarded should place the victim in the economic position it would have occupied had the state not acted wrongfully.[252]

[250] Cl. Rep., ¶¶ 401.

[251] Cl. Mem., ¶ 206; Exh. CL-19; Exh. CL-27; Exh. CL-29; Exh. CL-30; Exh. CL-31; Exh. CL-46; Exh. CL-49.

[252] Cl. Mem., ¶ 207; Exh. CL-19; Exh. CL-25; Exh. CL-27; Exh. CL-35; Exh. CL-48.

287. Claimants, therefore, argue that the requirement of full reparation must inform all aspects of an interest award, including the appropriate rate of interest, whether interest should be simple or compound and the periodicity of compounding.[253]

(b) Pre- And Post-Award Interest Should Be Awarded At A Commercial Rate

288. Claimants state that in relation to lawful expropriation, Article 6 of the Treaty states that compensation shall include interest at a commercial rate, as follows:

> *The amount of compensation shall include interest at a normal commercial rate from the date of dispossession until the date of payment, shall be settled in a freely convertible currency, be paid without delay and be freely transferable*.[254]

289. Claimants point out that when interpreting such provision in Article 6 of the Treaty, the tribunal in *Glencore International and CI Prodeco v Colombia* held that "*although the rule refers to expropriation it can be extended by analogy to compensation for violations of other provisions of the BIT*."[255]

290. Against this backdrop, Claimants instructed BRG to identify a normal commercial rate with which to adjust the damages incurred by Prodeco as of the Valuation Date. Claimants point out that BRG concluded that Prodeco's cost of debt, which it calculates at 5.57 percent, is a commercially reasonable rate.[256]

291. Claimants argue that Respondent baldly asserts that the Tribunal should grant pre- and post-award interest at a risk-free rate equivalent to the yield of US Treasury bills for one year, solely because other tribunals have done so. Claimants point out that Respondent provides no explanation as to how the granting of risk-free rate interest

[253] Cl. Mem., ¶ 208; Exh. CL-48.
[254] Cl. Mem., ¶ 209; Exh. C-1.
[255] Cl. Mem., ¶ 210; Exh. CL-90.
[256] Cl. Mem., ¶ 211; First BRG Report, ¶ 65.

is consistent with the principle of full reparation or is a "normal commercial rate." For the reasons put forth below, Claimants assert that it is not.[257]

292. First, Claimants contend that a risk-free rate would not achieve full reparation because Prodeco's cost of debt is significantly higher than the United States' cost of debt reflected in one-year US Treasury bills.[258]

293. Second, Claimants assert that Respondent's proposed risk-free rate is inconsistent with Article 6 of the Treaty. In Claimants' view, there is no basis to assume that the applicable interest to compensation involving unlawful conduct of the host State should be different from, and indeed lower than, the interest applicable in case of lawful expropriation.[259]

294. Claimants, further, assert that Respondent's alternative argument that Prodeco's cost of debt is not a "normal commercial rate" of interest because it is specific of a company operating in the coal mining sector, and thus different to the cost of borrowing of investors in other sectors of the Colombian economy, is also misconceived. Claimants maintain that by its very nature, damages caused to different investors by Respondent's breaches of the Treaty will be different; therefore, Article 6 must be read to account for those differences.[260]

295. Third, Claimants stress that there is a dearth of support for Respondent's proposed interest rate. In fact, only one of the seven awards cited by Respondent in support of its position, actually granted pre- and post-award interest at a rate equal to the yield of US Treasury bills.[261]

296. Ultimately, Claimants contend that Respondent incorrectly argues that Prodeco has not proven that its actual cost of debt is 5.57%. According to Claimants, Prodeco's financial statements show clearly that it borrowed money from its credit facilities

[257] Cl. Rep., ¶ 407.
[258] Cl. Rep., ¶ 408; Second BRG Report, ¶ 92.
[259] Cl. Rep., ¶ 409; Exh. C-1.
[260] Cl. Rep., ¶ 411.
[261] Cl. Rep., ¶ 412; Exh. RL-142.

with Barclays Bank at a rate of LIBOR plus 4%, which over the relevant period was roughly equivalent to BRG's costs of debt calculation of 5.57%.[262]

(c) Interest Should Be Compounded To Ensure Full Reparation

297. Claimants, furthermore, argue that the only way to fully compensate Glencore and Prodeco is to compound the pre-award and post-award interest rates.[263] Claimants contend that tribunals have frequently noted that compound interest is necessary to give effect to the rule of full reparation. This is because compound interest ensures that a respondent state is not given a windfall as a result of its breach, as compounding recognizes the time value of the claimant's losses. It also "*reflects economic reality in modern times*" where "*[t]he time value of money in free market economies is measured in compound interest*."[264]

298. On this basis, Claimants maintain that interest awarded to Glencore and Prodeco should be subject to reasonable compounding. In Claimants' view, the appropriate periodicity of the compounding in this case is annual, as typically held in investment case law.[265]

299. Per Claimants, Respondent's arguments that interest should not be compounded because awarding compounded interest is not a principle of international law and that Colombian law would prohibit the compounding of interest are unpersuasive. Specifically, Claimants argue that this case is governed by international law, not Colombian law. International law requires that the principle of full reparation be applied. Claimants, further, point out that in 2013, the late Judge Crawford, who was the Special Rapporteur for the ILC Articles, acknowledged the evolution of the case law and that compound interest was now understood to be necessary to ensure full reparation. Claimants affirm that, in fact, compound interest is routinely awarded by

[262] Cl. Rep., ¶ 414; BRG-72.

[263] Cl. Mem., ¶ 212; Exh. CL-48; Exh. CL-45.

[264] Cl. Mem., ¶ 213; Exh. CL-44; Exh. CL-50; Exh. CL-55; Exh. CL-47; Exh. CL-46; Exh. CL-49; Exh. CL-70; Exh. CL-72; Exh. CL-48; Exh. CL-53; Exh. CL-62.

[265] Cl. Mem., ¶ 214; Exh. CL-39; Exh. CL-65; Exh. CL-81.

international tribunals both in respect of pre- and post-award interest, and compound interest is no longer the exception to the rule.[266]

300. Taking the abovementioned into account, Claimants point out that the total damages, using an interest rate equal to Prodeco's cost of debt of 5.57% compounded annually, equals US$ 62.8 million.[267]

(4) The Award Should Be Made Net Of All Applicable Colombian Taxes

301. According to Claimants, the US$ 62.8 million amount has been prepared net of Colombian taxes. Consequently, any taxation by Respondent of the eventual award in this arbitration would result in Glencore and Prodeco effectively being taxed twice for the same income, and would subvert the purpose of the award. Per Claimants, this principle has been recently confirmed by the tribunal in *Glencore International and CI Prodeco v. Colombia* and several other tribunals have followed the same approach, precisely to ensure fully compensation for breaches of the host state. Claimants, therefore, argue that any award in this arbitration should be made net of all applicable Colombian taxes.[268]

B. RESPONDENT'S POSITION

(1) Claimants' Damages Claim Does Not Comply With International Law And Is Overinflated

302. According to Respondent, Claimants have put forth a frivolous case, premised on an anticompetitive situation between Drummond and Prodeco which they presume exists and has caused them harm. Specifically, Respondent contends that Claimants' damages claim is frivolous in two ways.[269]

303. First, Respondent asserts that Claimants' damages expert, BRG, did not verify whether a competition asymmetry in fact existed between Prodeco and Drummond,

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[266] Cl. Rep., ¶¶ 416-419; Exh. CL-136; Exh. CL-65; Exh. CL-74; Exh. CL-60; Exh. CL-39; Exh. CL-65; Exh. CL-81; Exh. CL-49.

[267] Cl. Rep., ¶ 420; Second BRG Report, ¶¶ 20-22.

[268] Cl. Mem., ¶¶ 217-218; Exh. CL-90; Exh. CL-83; Exh. CL-73; Exh. CL-85; Exh. CL-46.

[269] Res. PHB, ¶ 112.

despite such asymmetry being at the heart of Claimants' case. Instead, BRG's entire quantification of damages relies on an alleged asymmetry, misinterpreting the evidentiary record. Respondent contends that a holistic analysis of the costs structures of the relevant market actors is necessary before any conclusion can be reached as to whether competition has been disturbed. Respondent, further, notes that neither Claimants nor BRG have carried out such an analysis.[270]

304. Second, Respondent argues that even assuming that Prodeco suffered a cost disadvantage relative to Drummond, the economic value of such harm is entirely offset by the benefit to Claimants of PNSA's lower tax zone. Respondent notes that, based on BRG's calculations, Claimants contend that Respondent's purportedly unlawful failure to permit PNSA to charge a tariff to all users of the Access Channel has caused them harm amounting to US$ 40.3 million. However, under the Concession Agreement, PNSA benefits from a lower tax zone which yields economic benefits to Claimants amounting to, at least, US$ 85 million as of 12 June 2014. Respondent stresses that neither Claimants nor BRG have even sought to address this fact.[271]

305. In light of the above, Respondent claims that Claimants have failed to prove, with certainty, the existence of the harm for which they seek compensation. Per Respondent, this is dispositive of their damages claim. Further, Respondent contends that Claimants' claim also fails to meet the fundamental requirements of international law for an award of damages, and should, accordingly, be dismissed. In particular, Respondent asserts that Claimants have not shown that Respondent's alleged unlawful conduct has been the direct and proximate cause of personal harm to each of them. Moreover, Respondent argues that Claimants' quantification of damages is based on an incorrect application of the full compensation standard, and is unsound.[272]

[270] Res. PHB, ¶ 113.

[271] Res. PHB, ¶ 114; First Oxera Report, ¶ 1.28, 2.21.

[272] Res. PHB, ¶ 115.

306. First, Respondent asserts that, even if the Tribunal were to find that Respondent's failure to permit PNSA to charge a tariff for the use of the Access Channel was unlawful, this would be insufficient grounds to conclude that Claimants should be awarded the US$ 40.3 million that they claim as damages. Respondent contends that it is black letter law that Claimants must first show Respondent's purported Treaty breaches have been the direct and proximate cause of the harm for which they seek compensation in this proceeding. Respondent maintains that Claimants' and BRG's blind reliance on a purported competitive asymmetry falls short of any such causation enquiry.[273]

307. Moreover, Respondent argues that, in any event, Prodeco freely caused its subsidiary PNSA to enter into the Concession Agreement, knowing full well that it would bear the cost and risk associated with the construction and operation of the Access Channel, and that any recovery of the corresponding investment would be carried our through the tariffs charged for port services. Respondent contends that Prodeco's contribution to the occurrence of the harm that it claims to have suffered must be reflected through the reduction, by 75%, of the amount of any damages that the Tribunal might award Claimants.[274]

308. Second, Respondent asserts that the Treaty and international law require that Claimants prove that each of them has suffered harm personally as a result of Respondent's allegedly unlawful conduct. Respondent argues that Claimants are unable to discharge their burden of proof.[275]

309. As regards PNSA, Respondent notes that Claimants' main case was based on a calculation of damages as of 12 June 2014, using only information and projections available as of that date (*i.e.*, an *ex ante* approach). Respondent argues that on

[273] Res. PHB, ¶ 116; Exh. RL-122.
[274] Res. PHB, ¶ 116.
[275] Res. PHB, ¶ 117; Exh. C-1; Exh. CL-82.

Claimants' *ex ante* case, PNSA has not suffered any damage as it is recovering its Total Investments through the tariffs that it charges to the users of Puerto Nuevo.[276]

310. Regarding Prodeco, Respondent points out that Claimants contend that it has suffered harm as a result of PNSA not being permitted to charge a tariff to all users of the Access Channel, because it is the only user contributing, through its payment of port tariffs to PNSA, towards the recovery of the Total Investments. Respondent underscores that even though Claimants are best-placed to know exactly how much Prodeco allegedly paid to PNSA for the use of the Access Channel, Claimants did not disclose this amount, and, instead, instructed BRG to estimate it. To that end, BRG determined the amount of tariff that, in the But-For Scenario, Drummond allegedly would have paid for its use of the Access Channel, and concluded that Prodeco's overpayment (and, hence, loss) would be equal to Drummond's underpayment. Respondent argues that this methodology is unreliable and unsound, given that it does not reflect how much Prodeco actually overpaid (if indeed, Prodeco has overpaid, rather than suffering a purely hypothetical harm).[277]

311. As regards Glencore, Respondent argues that it suffers no harm that is separate or distinct from the harm allegedly suffered by its subsidiaries. In other words, Glencore has not been personally harmed in any way.[278]

312. Third, and finally, Respondent notes that Claimants instructed BRG to calculate damages to Prodeco as of 12 June 2014, on the assumption that, on that date, Respondent would have implemented a mechanism enabling PNSA to charge a tariff to all user of the Access Channel. Respondent argues that this *ex ante* methodology is unsound for, at least, four reasons.[279]

313. One, Respondent contends that Claimants' methodology is based on a deliberate incorrect application of the full reparation standard. According to Respondent, the

[276] Res. PHB, ¶ 118; Res. Rej., ¶¶ 597-602; Res. Mem., ¶ 436.
[277] Res. PHB, ¶ 120.
[278] Res. PHB, ¶ 121.
[279] Res. PHB, ¶ 122.

goal of full reparation set by the PCIJ in the *Factory at Chorzow* case is best served by considering actual data, instead of relying on projections generated many years ago, especially when such projections have proven to be unreliable. Thus, consistent with the full reparation standard, Claimants should have instructed BRG to carry out a valuation at a date closest to the award, and taking into consideration all information available up to that date.[280]

314. Respondent asserts that Claimants did not do so. To the contrary, Claimants instructed BRG to carry out a valuation as of 12 June 2014, modelling damages until the end of the concession period. Per Respondent, the effect of this instruction is an overinflation of the amount of damages claimed, in deliberate disregard of the fact that Prodeco has ceased extracting coal from Calenturitas and La Jagua in March 2020, and relinquished both mines to the State for reasons unrelated to the present dispute. Respondent, therefore, argues that BRG's approach is so speculative and unreliable that it results in Prodeco claiming damages for a period of time during which it has not and will not suffer any harm.[281]

315. Two, Respondent points out that Claimants instructed BRG to assume, for the purposes of their damages calculation, that Respondent would have put in place a tariff mechanism allowing PNSA to charge for the use of the Access Channel. Respondent argues that there is no evidence that Respondent would have proceeded in this manner, even assuming that an anti-competitive situation existed as between Prodeco and Drummond and required resolving. To the contrary, Respondent considered and repeatedly rejected this option. Instead, other alternatives could have been put in place to remedy the alleged anti-competitive situation.[282]

316. Three, Respondent highlights that the cornerstone of BRG's damages calculation is the assumption that the tariff that PNSA would be permitted to charge the users of the Access Channel would be set in such a manner as to grant PNSA a return of

[280] Res. PHB, ¶¶ 123-124; Res. Rej., ¶ 660; Res. Mem., ¶ 479; Exh. CL-24; Exh. RL-134; Exh. RL-216; Exh. CL-69.

[281] Res. PHB, ¶ 125.

[282] Res. PHB, ¶ 126.

14.63% on its Total Investments. Respondent contends that there is no basis to assume that PNSA would be entitled to such a return. In particular, Respondent argues that the fact that, in 2013, the Colombian regulator deemed PNSA's proposed return of 14.63% as appropriate to set the regulated tariffs does not, and should not, automatically mean that the same rate of return is an appropriate starting point to calculate the counterfactual Access Channel tariff.[283]

317. Four, Respondent argues that BRG's calculations incorporate unreliable inputs both as regards the capital (CAPEX) and the operating (OPEX) expenses pertaining to the Access Channel, with the same aim of inflating even further the compensation sought. By way of example, the CAPEX on which BRG rely includes an amount of over US$ 18 million, corresponding to "KINA costs," a category of costs for which no reasonable justification or support has been provided. Likewise, BRG's OPEX figures are derived from a purported 2013 "business model," which is a one-page Excel table with hard-coded figures, and incomplete and selective cost amounts the currency of which is not even specified. Respondent maintains that neither Claimants nor BRG have provided any further explanation or context that would vest the so-called 2013 business plan with any sort of probative value.[284]

318. Given the aforementioned, Respondent argues that Claimants' claim does not fulfil the requirements of international law for an award of damages, given that it is based on an unsound methodology and uses entirely speculative inputs. [285]

(2) Claimants' Claim For Interest Is Inconsistent with International And Colombian Law And Overly Inflated

319. Respondent, additionally, contends that Claimants' claim for interest is inconsistent with international and Colombian law, and overly inflated. In this regard, Respondent, first, argues that if the Tribunal were to award interest on any compensation to Claimants, such interest should be at a risk-free rate equivalent to

[283] Res. PHB, ¶ 128.
[284] Res. PHB, ¶ 130.
[285] Res. PHB, ¶ 131.

the 1-year yield of US Treasury Bills, as adopted by numerous tribunals. Moreover, Respondent disputes Claimants' contention that a risk-free rate would not achieve full reparation because awarding interest at a rate lower than Prodeco's cost of debt would fail to compensate Claimants for their opportunity cost of borrowing. According to Respondent, Claimants have not even claimed (must less demonstrated) that, as part of the harm directly caused to them by Respondent's alleged unlawful conduct, Prodeco would have been forced to borrow funds.[286]

320. Second, Respondent asserts that Claimants artificially inflate the total amount of their damages claim by incorrectly claiming pre-award interest at a risked rate allegedly equivalent to, but in fact higher than, Prodeco's cost of debt. Respondent notes that Claimants assert that the Tribunal should apply Article 6 of the Treaty, and order interest at a "normal commercial rate." In this respect, Claimants equate such normal commercial rate with Prodeco's cost of debt, which BRG purportedly calculate to be 5.6%. Respondent contends that Claimants' position suffers from serious flaws, given that there is no basis to apply Article 6 of the Treaty in the present case, where Claimants have not articulated a claim for expropriation. Respondent underscores that Claimants' only semblance of support for the contrary position is their allegation that the tribunal in the first arbitration initiated by Glencore and Prodeco against Colombia did apply that provision, extending it by analogy. Respondent contends that that tribunal went beyond its mandate and that this Tribunal should not follow in its footsteps. Respondent, moreover, asserts that even if BRG calculated Prodeco's actual cost of debt, that concept is not a normal commercial rate but rather a parameter specific only to Prodeco, which measures the cost at which Prodeco finances itself on the market.[287]

321. Third, Respondent argues that if the Tribunal were to award interest, in accordance with both international and Colombian law, such interest should be simple. Respondent asserts that Claimants improperly seek to reverse the burden of proof by arguing that Respondent has not shown that compound interest would be

[286] Res. Rej., ¶¶ 689-696; Exh. CL-140; Exh. CL-74; Exh. CL-47; Exh. CL-41.
[287] Res. Rej., ¶¶ 700-701; Exh. C-1; Exh. CL-90.

inappropriate. Per Respondent, it is Claimants who must show, and have not, that compound interest is applicable in the circumstances, failing which simple interest should apply. Respondent, further, disputes Claimants' contention that the practice of awarding compound interest as necessary to fulfil the full reparation principle is *jurisprudence constante*, citing to several tribunals that have awarded simple interest in the last decade.[288]

322. In addition, Respondent contends that, under Colombian law, the compounding of interest is prohibited, which Claimants do not dispute. Respondent asserts that numerous investment treaty tribunals have taken domestic law into account in their decision on interest, refusing to award compound interest on the grounds that this was prohibited under the law of the host state. Respondent, moreover, underscores that in accordance with Article 42(1) of the ICSID Convention

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

Accordingly, Respondent asserts that there is no reason why the Tribunal should not take into account Colombia's law's prohibition of compound interest in the present case.[289]

323. In conclusion, Respondent argues that Oxera's corrections to BRG's methodology, taking the above into account, are reasonable and lead to an amount of damages of approximately US$ 9.4 million, plus interest at a simple risk-free rate equivalent to the 1-year yield of US Treasury Bills. Respondent asserts that, per Oxera, this constitutes the upper limit of any damages to which Claimants may be entitled in this arbitration.[290]

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[288] Res. Rej., ¶¶ 703-705; Exh. RL-117; Exh. CL-29; Exh. CL-65; Exh. CL-152; Exh. RL-145; Exh. RL-117.
[289] Res. Rej., ¶¶ 706-707; Exh. RL-144; Exh. RL-146; Exh. RL-147.
[290] Res. PHB, ¶ 131.

C. THE TRIBUNAL'S DECISION

324. In Section VI.C, the Tribunal has reached the conclusion that Respondent engaged in arbitrary and discriminatory conduct against Claimants in breach of the fair and equitable treatment standard under Article 4(2) of the Treaty. The Tribunal must now determine the appropriate reparation for Claimants' loss.

325. The Parties are in mutual agreement that the governing legal standard to be employed by this Tribunal is unequivocally that of full reparation for the injury caused. This principle, firmly established since the PCIJ's decision in *Chorzów Factory*, and codified in the ILC Articles, is a cornerstone of customary international law, and imposes an obligation to apply it even in cases where the treaty underlying the dispute does not expressly prescribe indemnification obligations.[291]

326. Article 11(1) of the Treaty affords investors the prerogative to seek redress for Treaty violations if said violations result in "*injury or harm to the investor or their investment*." Further, the Treaty clearly outlines a compensation formula for lawful expropriations in Article 6; however, it is silent on how to calculate damages for non-expropriatory breaches.[292] Similar to the tribunal's perspective in *Glencore v. Colombia I*, this Tribunal addresses it by recourse to customary international law and by analogously extending the compensation formula pertaining to lawful expropriations to other Treaty violations.[293]

327. The rules governing reparation for violations of international law are codified in the ILC Articles. Pursuant to Article 31, the injury caused by internationally wrongful acts must give rise to full reparation. Moreover, as specified in Articles 35 and 36, where restitution is impractical, compensation becomes the preferred form of reparation.[294]

[291] Exh. CL-24; Exh. CL-19.

[292] Exh. C-1.

[293] Exh. CL-90.

[294] Exh. CL-19.

328. The Tribunal considers that restitution is impractical in the present case. Therefore, the Tribunal must determine a monetary award in Claimants' favor that would put them in the position they would have been had Respondent's internationally wrongful acts never occurred.

329. Before delving into the Parties' proposed quantum methodologies and respective damages calculations, it is essential for the Tribunal to address three preliminary issues raised by Respondent. *Firstly*, the Tribunal considers that whether the benefits of PNSA's lower tax zone entirely offset any cost disadvantages experienced by Prodeco in relation to Drummond does not change the Tribunal's determination of the damages owed to Claimants as a consequence of Respondent's breach of the Treaty.

330. *Secondly*, the Tribunal acknowledges that Claimants bear the burden of establishing that Respondent's Treaty breaches are the direct and proximate cause of the harm for which they are seeking compensation in this proceeding. As elaborated in Section VI.C, Claimants suffered a harm due to Respondent's failure to regulate the equitable allocation of expenses related to the construction and maintenance of the Access Channel among its users. The Tribunal firmly believes that the harm suffered by Claimants unquestionably stems from Respondent's actions, or more precisely, the lack thereof. Therefore, the Tribunal finds that Claimants have convincingly met this burden.

331. *Thirdly*, the Tribunal observes that the Treaty and international law require that each Claimant establish personal harm due to Respondent's unlawful actions. In the present case, however, Claimants are all part of an intricate corporate structure, where as long as any link within the corporate chain experienced harm, Claimants can demand compensation. Simply put, the key factor is that at least one Claimant experienced harm.

332. In the Tribunal's view, it is evident that PNSA did not experience any personal harm as a result of Respondent's discriminatory conduct. However, the same cannot be said for Prodeco, which bore the sole responsibility for the costs associated with

maintaining the Access Channel, and for Glencore, by virtue of being the parent company and sole owner of Prodeco. Hence, the Tribunal finds that Prodeco and Glencore have satisfied this burden.

333. Moving on to the Parties' proposed quantum methodologies and respective damages calculations, the Tribunal is inclined to express that it is not entirely persuaded by the approach presented by either Party. While the Tribunal deems that an *ex ante* approach with a valuation date on 12 June 2014 (*i.e.,* the date giving rise to the dispute, i.e., when the Ministry of Transport notified Prodeco of its Rejection to Prodeco's Petition seeking regulatory action to address the alleged asymmetry at the Access Channel as elucidated in Section V.C) is not without merit,[295] it determines that an *ex post* approach, incorporating all information available from 12 June 2014 up to the date of the award, is the more preferable option. This preference arises from the fact that projecting damages solely based on the information and reasonable market expectations as of 12 June 2014, may not align precisely with reality and could potentially lead to an overestimation of the claimed damages.

334. In the Tribunal's view, this is precisely what happened here: Claimants have overestimated their damages calculations. Accordingly, Claimants' damages calculations warrant the need for downward adjustments.

335. *Firstly*, the Tribunal deems it necessary to factor in Claimants' decline in coal exports through the Access Channel post-March 2020. This decline is incontrovertible and occurred after Prodeco ceased to extract coal from the Calenturitas and La Jagua mines and relinquished both mines to the State.

336. *Secondly*, the Tribunal considers it necessary to address the reliability of several components within Claimants' damages calculation, as they appear to be based on speculative assumptions that tend to inflate the estimated damages. In particular, Claimants' methodology assumes that Respondent would have implemented a tariff

[295] Exh. C-57.

mechanism specifically allowing PNSA to levy charges for the use of the Access Channel, completely disregarding potential alternative solutions.

337. Additionally, Claimants have presumed that such a tariff would have been established in a manner guaranteeing PNSA a 14.63% return on its investment. While the Tribunal recognizes the source of this figure (*i.e.*, the Colombian regulator's approval of PNSA's proposed 14.63% return for regulated tariffs in 2013), it believes that it does not automatically imply that the same rate of return could be extrapolated for the hypothetical counterfactual scenario.

338. *Thirdly*, and finally, the Tribunal deems it fair to further reduce Claimants' damages calculations taking into account their own actions. The Tribunal observes that when PNSA entered into the Concession Agreement, it was evident that there was a regulatory gap regarding the fair allocation of the costs associated with the construction and maintenance of the Access Channel. As such, however reasonable Claimants' expectations of the State rectifying this issue, it is apparent that they assumed a degree of risk.

339. Given the aforementioned, the Tribunal adjusts Claimants' damages at US$ 9.4 million, excluding interest. This amount not only meets the standard of full reparation but is also acknowledged and accepted by Respondent and its expert in para. 323 *supra*.

340. As regards the award on interest, Article 6 of the Treaty provides that compensation for lawful expropriation shall include "*interest at a normal commercial rate*."[296] As discussed above, this can be extended by analogy to compensation for breaches of other Treaty standards.[297]

[296] Exh. C-1.

[297] Exh. CL-90.

341. The Tribunal finds that Prodeco's cost of debt at 5.6%, is a commercially reasonable rate,[298] as it closely mirrors the widely accepted LIBOR rate, a benchmark for calculating variable interest rates in a commercial setting.

342. The Tribunal, moreover, deems that simple interest represents the appropriate form of compensation in this case. The reasons are twofold. *Firstly*, the Tribunal acknowledges the prohibition of interest compounding under Colombian law, a factor which Claimants do not dispute and that must be duly considered pursuant Article 42(1) of the ICSID Convention.[299]

343. *Secondly*, the Tribunal strongly affirms that the mere fact that certain arbitral tribunals have previously awarded compounded interest does not establish it as a principle of international law governing full reparation.[300] In the Tribunal's view, the determination of whether interest should include the capitalization of unpaid interest should be made on a case-by-case basis. In this particular case, such an approach is not justified, as it would be unduly punitive, given the Tribunal's consideration of Claimants own conduct.

344. The Tribunal, further, considers that interest shall begin to accrue on the date this Award is issued (*dies a quo*) and shall end on the date payment becomes effective (*dies ad quem*). The Tribunal firmly believes that such an approach is not only reasonable based on Claimants' comparative fault, but also fully serves the compensatory objective inherent in interest awards.

345. Finally, as regards the taxation of any amount awarded, the Treaty explicitly outlines that compensation for expropriation should meet the criteria of being "*prompt, effective and adequate*." Moreover, it emphasizes that such compensation "*shall be settled in freely convertible currency, be paid without delay and be freely transferrable*."[301] The Tribunal has already noted that while this rule pertains directly

[298] Cl. Mem., ¶¶ 209-211; Cl. Rep., ¶¶ 407-415.

[299] Res. Rej., ¶¶ 706-707; Exh. RL-144; Exh. RL-146; Exh. RL-147.

[300] *See e.g.*, Exh. CL-152; Exh. RL-117; Exh. RL-145.

[301] Exh. C-1.

to expropriation, it can also be applied by analogy to cases involving violations of other provisions within the Treaty.

346. As a preliminary point, it is vital to recognize that Respondent, being a sovereign State, has the authority to levy taxes on assets or payments located in or originating from its territory. Hence, Respondent could reduce the compensation that Claimants ultimately receive.

347. The Tribunal, therefore, considers that, in order to guarantee full reparation for Respondent's international wrong, the amount awarded to Claimants by this Tribunal shall be net of Colombian taxes. In other words, Respondent may not deduct taxes in respect of the awarded amount and would have to indemnify Claimants for any Colombian taxes imposed thereon.

348. In sum, the Tribunal decides that Claimants are entitled to US$ 9.4 million, plus simple interest at a rate of 5.6%, accruing from the date of this Award until the date of payment. Moreover, the amount awarded to Claimants shall be net of Colombian taxes, and Respondent shall indemnify Claimants with respect to any Colombian taxes in breach of such principle.

VIII. COSTS

349. Rule 47(1)(j) of the Arbitration Rules establishes that:

> *The award shall be in writing and shall contain . . . any decision of the Tribunal regarding the cost of the proceeding.*

350. The Parties submitted their statement of costs on 8 September 2023. None of the Parties challenged the items or the amount claimed by the counterparty.

A. CLAIMANTS' POSITION

351. Claimants request that the Tribunal order Colombia to bear Claimants' costs in their entirety. Specifically, Claimants seek reimbursement of the following costs:

(1) the ICSID lodging fee as well as the advances paid for the fees and expenses of the members of the Tribunal and ICSID's administrative fees;

(2) the legal fees of Claimants' counsel in this arbitration, namely Freshfields Bruckhaus Deringer US LLP, Dechamps International Law, and Alvare, Zárate & Asociados, along with associated disbursements;

(3) the fees and costs of Claimants' independent valuation experts BRG;

(4) the fees and costs of consultants that provided hearing services to Claimants, namely consultants from FTI Consulting, Inc (who provided trial director services during the hearing) and Evoke Legal, LLC (who provides visual graphic representation services); and

(5) the travel costs and expenses incurred by Claimants' witness and party representatives.[302]

352. The details of Claimants' costs are shown in the tables below, which are divided into (i) costs incurred in relation to Respondent's Rule 41(5) Application, which was rejected by the Tribunal on 22 February 2021; costs incurred in relation to Respondent's Request for Bifurcation, which was rejected by the Tribunal on 23 August 2021; (iii) costs incurred in relation to the rest of the proceedings; and (iv) costs related to the Tribunal fees and expenses and ICSID administrative charges.[303]

Rule 41(5) Application	
Legal fees	US$ 626,311.54
Sub-Total	*US$ 626,311.54*

Request for Bifurcation	
Legal fees	US$ 214,002.35
Sub-Total	*US$ 214,002.35*

[302] Claimants' Statement of Costs dated 8 September 2023, ¶ 1 ("**Cl. SoC**").

[303] Cl. SoC, ¶ 2.

Main Proceedings	
Legal fees	US$ 8,636,132.14
Disbursements	US$ 164,156.03
Experts' fees and costs	US$ 447,099.42
Other expenses (FTI Consulting, Inc/Evoke Legal LLC)	US$ 74,551.98
Sub-Total	*US$ 9,321,939.57*

Tribunal fees and expenses and ICSID administrative charges	
ICSID Lodging fee	US$ 25,000.00
ICSID Advance payments	US$ 475,000.00
Sub-Total	*US$ 500,000.00*

TOTAL	US$ 10,662,253.46

B. RESPONDENT'S POSITION

353. Respondent requests the Tribunal to order Claimants to:

(1) Reimburse Respondent the entirety of the expenses and costs incurred in this arbitration, amounting to US$ 3,922,934.70 as per the appended statement; and

(2) Pay Respondent simple interest on costs at the risk-free rate, or alternatively at another commercially reasonable rate, from the date of the award, until the date of full payment.[304]

354. Respondent provides the following breakdown:[305]

[304] Colombia's Submission on Costs dated 8 September 2023, ¶ 2 ("**Res. SoC**").

[305] Res. SoC, Appendix.

Legal and Expert Fees	
Legal fees	
Agencia Nacional de Defensa Jurídica del Estado	US$ 70,274.00
Dechert LLP	US$ 2,659,054.51
Expert fees	
Oxera Consulting LLP	US$ 659,344.19
Total Legal and Expert Fees	***US$ 3,424,672.70***
Administrative Costs	
ICSID costs	
First call for funds 2020	US$ 150,000.00
Second call for funds 2021	US$ 150,000.00
Third call for funds 2023	US$ 175,000.00
Total Administrative Costs	***US$ 475,000.00***
Expenses	
Travel, accommodation, and food expenses	
Agencia Nacional de Defensa Jurídica del Estado and witnesses	US$ 23,262.00
Total Expenses	***US$ 23,262.00***

TOTAL	US$ 3,922,934.70

C. THE TRIBUNAL'S DECISION

355. Article 61(2) of the ICSID Convention stipulates that:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

356. Neither the Arbitration Rules nor the Treaty provide any explicit guidelines regarding the distribution of costs and expenses. The Tribunal, therefore, possesses broad discretion in determining how these shall be apportioned.

357. Guided by the Parties' procedural conduct toward an expeditious and cost-effective arbitration and acknowledging that both Parties have behaved with the appropriate decorum expected in such proceedings, the Tribunal decides that the Parties shall share the costs of the arbitration, including arbitrator fees and expenses as well as ICSID's administrative fees and direct expenses, on an equal basis. Additionally, each Party shall bear its own costs—that is, legal and expert fees—and expenses related to the proceedings. As no money changes hands, a decision on the matter of interest is unnecessary.

358. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Bernardo Cremades	534,165.28
Claus von Wobeser	252,788.36
Daniel M. Price	127,250.00
ICSID's administrative fees	220,000.00
Direct expenses	159,796.05
Total	**1,293,999.69**

359. The above costs have been paid out of the advances made by the Parties in equal parts.[306] As a result, each Party's share of the costs of arbitration amounts to USD 646,999.84.

[306] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

360. In sum, the Parties shall share the administrative costs and expenses of the arbitration, including arbitrator fees, on an equal basis. Additionally, each Party shall bear its own costs and expenses in relation to this arbitration.

IX. AWARD

361. For the reasons set forth above, the Tribunal unanimously rules as follows:

(1) DISMISSES Respondent's jurisdictional objections and DECLARES that the Tribunal is competent to adjudicate Claimants' claims grounded on breach of Articles 4(1) and 4(2) of the Treaty.

(2) DECLARES that Respondent's failure to resolve the Access Channel issue constitutes arbitrary and discriminatory conduct in breach of the fair and equitable treatment standard under Article 4(2) of the Treaty.

(3) ORDERS Respondent to compensate Claimants the sum of US$ 9.4 million, plus simple interest at a rate of 5.6%, accruing from the date of this Award until the date of payment.

(4) DECLARES that the payment of the sum awarded to Claimants pursuant to paragraph (3) above must be net of Colombian taxes, and ORDERS Respondent to indemnify Claimants with respect to any Colombian taxes in breach of such principle.

(5) DECLARES that the Parties shall share the administrative costs and expenses of the arbitration, including arbitrator fees, on an equal basis. Additionally, each Party shall bear its own costs and expenses related to the proceedings.

(6) DISMISSES all other claims, objections and defenses.

[Signature]

Mr. Daniel M. Price
Arbitrator

Date: 19 April 2024

Mr. Claus Von Wobeser
Arbitrator

Date:

Mr. Bernardo M. Cremades
President of the Tribunal

Date:

[Signature]

Mr. Daniel M. Price
Arbitrator

Date:

Mr. Claus Von Wobeser
Arbitrator

Date: 19 April 2024

Mr. Bernardo M. Cremades
President of the Tribunal

Date:

Mr. Daniel M. Price
Arbitrator

Date:

Mr. Claus Von Wobeser
Arbitrator

Date:

[Signature]

Mr. Bernardo M. Cremades
President of the Tribunal

Date: 19 April 2024