PCA Case No. 2023-37

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

SEA SEARCH-ARMADA, LLC

Claimant

and

THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA

Respondent

CLAIMANT'S RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTIONS PURSUANT TO ARTICLE 10.20.5 OF THE TPA

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20 SEPTEMBER 2023

I. INTRODUCTION

1. Claimant, Sea Search-Armada, LLC ("**SSA**"), hereby submits its Response to Respondent's Request Pursuant to Article 10.20.5 of the United States-Colombia Trade Promotion Agreement (the "**TPA**") dated 22 July 2023 ("**Colombia's Preliminary Objections**"), in accordance with Sections 3 and 4 of Procedural Order No. 1 and its annexed Procedural Calendar. This submission is accompanied by (i) an updated index of factual exhibits and legal authorities; (ii) a table of defined terms;[1] (iii) a *dramatis personae*; and (iv) a chronology of key events.

2. This dispute arises from Colombia's evisceration of SSA's rights when Colombia, by decree, usurped in 2020 all rights to the San José shipwreck that SSA (and its predecessors) had held for forty years. In December 1981, SSA's predecessor, Glocca Morra Company ("**GMC**") had discovered the San José shipwreck after years of extensive research and underwater exploration with state-of-the-art equipment. Under Colombian law, GMC's discovery in 1981, and its subsequent recognition by Colombia in 1982, made GMC the rightful owner of 50% of the treasure it had found (the other 50% belonging to the State). GMC transferred its interests in the shipwreck to its parent company, Sea Search Armada Limited Partnership ("**SSA Cayman**"), a Cayman Islands-based partnership holding the investments of a number of U.S. nationals (together Glocca Morra Company Inc., GMC and SSA Cayman are "**SSA's Predecessors**" or, individually, an "**SSA Predecessor**"). SSA Cayman and Colombian authorities began negotiating the terms of a contract to salvage the San José shipwreck and to divide the treasure on this basis, but Colombia then abruptly changed course, preferring to keep a greater share of the treasure for itself. This led SSA Cayman to pursue legal action in Colombia.

3. For the next 18 years, SSA Cayman vindicated its rights at every level of the Colombian judiciary, from the Colombian Constitutional Court ("**Constitutional Court**") to the Supreme Court ("**Supreme Court**"). In 2007, the Supreme Court affirmed in clear terms that SSA Cayman held rights to 50% of the treasure that its predecessor discovered and declared. While the Supreme Court noted that any items of "*cultural*

[1] Unless defined herein, this submission uses the same defined terms as those in its Notice of Arbitration and Statement of Claim dated 18 December 2022 ("**Notice of Arbitration**").

heritage" would not constitute "*treasure*", Colombia had never designated the San José shipwreck as "*cultural heritage.*" Quite the contrary, Colombia had always conducted itself in a manner that confirmed its understanding that almost all (if not all) of what was of value on the San José was to be treated as treasure. Indeed, it would have made no sense for GMC to otherwise obtain a license, and invest substantial human and monetary resources, to find the ship.

4. In 2008—before the TPA came into effect—SSA acquired all of SSA Cayman's assets, rights and interests with respect to the San José shipwreck. For the next 13 years, SSA continued making various efforts to salvage the shipwreck, including by engaging in discussions with Colombian authorities and initiating litigation to enforce the decision issued by the Supreme Court on 5 July 2007 (the "**2007 Supreme Court Decision**"). Once again, the Colombian judiciary continued to recognize and uphold SSA's rights against the Colombian Government. Most recently, in June 2019, the Colombian Superior Court reinstated an injunction protecting SSA's rights by preventing Colombia from unilaterally attempting to salvage the shipwreck. In response, Colombia issued Resolution No. 0085 on 23 January 2020 ("**Resolution No. 0085**"), declaring that the entirety of the San José shipwreck was an "*Asset of National Cultural Interest*" and thus none of it constituted "*treasure.*" Thus, Resolution No. 0085 fully quashed SSA's rights to the San José, the entirety of which now belongs to the Colombian State. It was for this reason, on 18 December 2022, SSA initiated the present arbitration ("**Arbitration**").

5. SSA's case is simple: by issuing Resolution No. 0085, Colombia eviscerated SSA's investment, thereby unlawfully expropriating and failing to accord SSA's investment the protections it is due under the TPA. This is what SSA set out in clear terms in its Notice of Arbitration.[2]

6. Rather than engage with SSA's case, Colombia reinvents SSA's claims and raises Preliminary Objections against them. Colombia asserts that its breach arose, not from Resolution No. 0085, but from Colombia's failure to recognize SSA's rights before the TPA came into effect or, at any rate, before Colombia issued Resolution No. 0085.[3]

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[2] *See* Notice of Arbitration, section IV (titled "*Summary of Claims*").

[3] *See* Colombia's Preliminary Objections, ¶¶ 150, 207.

While it may be Colombia's case that its pre-Resolution No. 0085 conduct breached the TPA, that is not the basis of SSA's claims in this Arbitration. It should be uncontroversial that the Tribunal must assess its jurisdiction on the basis of the measures that SSA (and not Colombia) claims have breached the TPA,[4] not the least because that is what the TPA requires.[5]

7. In any event, Colombia's earlier failures to enforce SSA's rights did not lead to their nullification. For as long as there were rights to be enforced, Colombia's Courts consistently upheld and enforced SSA's rights, including by reinstating an injunction to protect SSA's rights to the shipwreck in 2019. However, by issuing Resolution No. 0085 in January 2020, Colombia stripped away SSA's rights completely, giving rise to the present dispute.

8. Colombia's Preliminary Objections over SSA's status as a qualifying investor are likewise easily dismissed. SSA acquired all assets, rights and interests related to the San José shipwreck from SSA Cayman under an Asset Purchase Agreement ("**APA**") executed in 2008.[6] In exchange, SSA acquired its predecessor's liabilities, including the obligation to distribute proceeds from the enforcement of its rights to the original investors in the exploration and discovery of the San José shipwreck.[7] And for the next

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4 *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 337-38 ("[i]*t is for Claimants to identify the 'measures adopted or maintained by a Party' which allegedly constitute a breach of the Treaty*.").

5 *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.18.1. ("*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge* ***of the breach alleged*** *under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage*.") (emphasis added). Notably, Colombia deleted the operative term, "*alleged*," from the text of Article 10.18.1 it quotes at paragraph 201 of its submissions.

6 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.1(a)-(b) (transferring to SSA, *inter alia*, "*All rights, title and interest in and to the search area license (the "License") granted to Glocca Morra Company by the government of Colombia… and as confirmed by the Supreme Court of Colombia…as validly granting the holder thereof the right to search areas off the Coast of Colombia near Cartagena for ancient shipwrecks and sunken treasure and ownership of fifty percent (50%) of all items found and recovered as a result of such search and salvage efforts*", "*all assets, business, goodwill and rights of* [SSA Cayman]" and "[a]*ll governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals, consents and franchises (collectively, the '<u>Acquired Permits</u>'*") (emphasis in original).

7 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3 (SSA acquires, *inter alia*, "*the payment and performance obligations of* [SSA Cayman] *arising prior to the Closing Date under the Acquired Permits and the Acquired Contracts*", "*payment and performance obligations…under the Acquired Permits and the Acquired Contracts*" and

decade SSA spent considerable resources, both in capital and manhours, to enforce its rights by, among other things, attempting to salvage the San José shipwreck. Thus, Colombia's various complaints regarding the completeness and characteristics of SSA's acquisition are meritless—SSA validly acquired the relevant interests from its predecessor and its efforts to enforce them plainly constitute an investment under the TPA.

9. A fundamental problem with Colombia's Preliminary Objections is that they rely on Colombia's incomplete and distorted characterization of the relevant facts. But where the respondent's competency objections under Article 10.20.5 of the TPA require the review of facts related to the merits of a case, a claimant's factual allegations "*are to be assumed to be true for the purposes of the* prima facie *test.*"[8] This approach is required at the preliminary objection stage to "*prevent the hearing of the expedited objection turning into a mini, or even a maxi, trial*"[9] and to respect the Tribunal's obligation under Article 10.20.5 to "*suspend any proceedings on the merits*."[10] To otherwise require claimants to prove facts regarding their substantive claims at the jurisdictional stage would "*prejudge the merits of the dispute and deny the Tribunal's*

"*distribution and allocation of profits and losses to the Economic Interest Holders* [who were the partners of SSA Cayman] *pursuant to the Purchaser LLC Agreement*").

[8] **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 112 ("*The Tribunal accepts the* ***prima facie approach as the correct standard to apply to the question of whether the claimed breach would be covered by the jurisdictional scope of the BIT***.") (emphasis added); **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 148 ("*The Tribunal notes, however, that it is not invited to decide at this juncture whether a treaty breach has in fact occurred, but merely to determine prima facie whether a treaty breach could have occurred if the Claimant is able to substantiate its claim on the merits in further proceedings*. ***The Tribunal must therefore defer to the factual characterizations put forward by the Claimant unless the Respondent is able already, at this stage, to conclusively disprove them***.") (emphasis added).

[9] **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 120. *See also* **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 112 ("*Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, . . . it is clear that* ***an expedited preliminary objection is not intended to lead to a 'mini-trial.' A contrary conclusion would attribute to the CAFTA Contracting Parties a perverse intention to render investor-state arbitration even more expensive and procedurally difficult for the disputing parties, when it would seem from these provisions (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite***.") (emphasis added).

[10] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.5. *Cf.* **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 120.

jurisdiction to decide these matters at the appropriate phase of the proceedings."[11] Thus, to prevail on its objections, a respondent must "*conclusively disprove*" the facts as alleged by claimant.[12]

10. Colombia comes nowhere close to satisfying this burden. Its factual assertions instead are unsupported or flatly contradict the record, or both. For instance, Colombia insists that SSA required authorization from Colombia's maritime authority to acquire to its predecessor's rights, yet Colombia fails to cite to a single law or rule providing as much.[13] Colombia also claims that SSA's predecessor did not find the San José shipwreck—and even goes so far to claim that there was no shipwreck in the area it had reported—even though contemporaneous records, including statements from its own officials who had witnessed the discoveries, indicate otherwise.[14] Furthermore, Colombia argues that SSA's rights are limited to a single set of coordinates, even though SSA's rights were expressly reported over an area "*in the immediate vicinity*" of certain coordinates.[15] This makes obvious sense given that the shipwreck (and its contents) has a dispersion field that extends beyond a single point—both due to the fact that it blew up and because of the forces of nature acting on it over a period of 300 years. Colombia thus fails to prove the allegations on which its Preliminary Objections rely.

11. SSA's Response to Colombia's Preliminary Objections proceeds in five parts below. In **Section II**, SSA sets out the relevant factual background to correct and complete

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[11] **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 108.

[12] **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 112 ("*The ultimate result of the above presumption is that* ***the Respondent bears the burden of proof to disprove the Claimants' allegations****. This means that,* ***if the evidence submitted does not conclusively contradict the Claimants' allegations, they are to be assumed to be true for the purposes of the prima facie test.*** *This test will be applied to issues deemed merits issues in this Award*.") (emphasis added); **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 148.

[13] *See* Colombia's Preliminary Objections, ¶¶ 260-71 (citing not a single law requiring the Colombian Maritime authority to authorize the transfer of interests between private parties in an underwater discovery).

[14] *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988.

[15] **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13 ("*The main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that* ***are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N.***") (emphasis added).

Colombia's mischaracterization of key events (and SSA's case), while noting that these facts stand to be addressed more fully in the merits phase. In **Section III**, SSA sets out the standard of review under Article 10.20.5 of the TPA. In **Section IV**, SSA explains why Colombia's Preliminary Objections lack merit. In **Section V**, SSA explains why Colombia's requests for costs should be denied. And in **Section V**, SSA sets out its requests for relief.

II. BACKGROUND TO THE DISPUTE

12. Colombia's selective and distorted recitation of the facts excludes and mischaracterizes important context and documents. SSA addresses and corrects those deficiencies below.[16]

A. The San José Shipwreck

13. The history of the San José shipwreck and its substantial value are not in dispute.

14. As a brief recap, in 1708, the San José galleon, the "*capitana*,"—loaded with money, treasure and valuable private goods—led a fleet of Spanish ships from the New World back to Spain.[17] The San José's captain decided that the fleet would sail from what is now Portobelo, Panama, to Cartagena, Colombia, before continuing across the Atlantic to Spain.[18]

15. On 8 June 1708, as the San José was almost within sight of the entrance to Cartagena's harbor, its fleet encountered an English squadron, lying in wait for it with instructions to seize its treasure.[19] English naval officers knew that the Spanish fleet, and particularly the San José, was carrying significant riches.[20] Indeed, as Colombia recognizes, the San José galleon was carrying one of the "*biggest treasure*[s]" in the

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[16] For the avoidance of doubt, SSA reserves its rights to further develop the facts in the merits stage of this proceeding.

[17] *See* **Exhibit C-48**, Archivo General de Indias, Seville, Contaduria, 4734, 20 May 1708 (an accounting drawn up in Portobelo listing tax revenues which would have been placed on the Terra Firma fleet). *See also* **Exhibit C-47**, DIMAR, First Non-Intrusive Verification Campaign For The Security Of The Property Of Cultural Interest At The National Level, 2022, pp. 46-47 (reproducing this document, with notes).

[18] **Exhibit C-50,** W.L. Clowes, THE ROYAL NAVY: A HISTORY, VOL. II (Sampson Low, Marston and Company), London, 1898, pp. 373-74 (reporting that the English knew the Spanish likely knew of the English presence and were "*fully on their guard*").

[19] *See* **Exhibit C-47**, DIMAR, First Non-Intrusive Verification Campaign For The Security Of The Property Of Cultural Interest At The National Level, 2022, pp. 33, 48. *See also* **Exhibit C-99**, Tom Hartsfield, *San José: Human greed keeps the "holy grail" of shipwrecks on the ocean floor*, BIG THINK, 12 July 2022, *available at* https://bigthink.com/the-past/san-jose-galleon-shipwreck/; **Exhibit C-50,** W.L. Clowes, THE ROYAL NAVY: A HISTORY VOL. II (Sampson Low, Marston and Company), London, 1898, pp. 373-74.

[20] *See* **Exhibit C-49**, Josiah Burchette, *A Complete History of the Most Remarkable Transactions at Sea, from the Earliest Accounts of Time to the Conclusion of the Law War with France*, (J. Walthoe and J. Walthoe Jr.) London, 1720, pp. 706-07 (indicating the English knew which three ships had money on board and approximate amounts). *See also* **Exhibit C-50,** W.L. Clowes, THE ROYAL NAVY: A HISTORY VOL. II (Sampson Low, Marston and Company), London, 1898, pp. 373-75 (noting that Wager conceived the project of attacking the Spanish galleons in 1707 and knew which ships had money on them).

world,[21] including 7 million pesos, 116 steel chests full of emeralds, and 30 million gold coins.[22]

16. The fighting began at sunset on 8 June 1708. Eyewitness accounts indicate that the battle between the English and Spanish lasted about an hour and a half, occurred at close quarters and ended with the San José blowing up.[23]

17. When the smoke cleared, the San José was gone, having sunk to the depths of the Caribbean Sea, taking with it most of its crew and passengers, and all of its treasure.[24] The San José was the only ship that sunk in that battle.[25]

18. For hundreds of years after the San José's sinking, there were no attempts to recover the wreck. It was not until the late twentieth century, when submersible technology had matured sufficiently, that efforts to search for and recover the San José began in earnest.[26] It was at this time, in the late 1970s, that SSA's Predecessor became involved in the search for the wreck.

B. Colombia's Legal Regime Governing The Discovery, Reporting And Salvage Of Shipwrecks

19. In 1980, when Colombia authorized SSA's Predecessors to explore Colombian waters for the San José,[27] the Colombian legal regime was structured to incentivize the search for and location of valuable treasures. The rules governing the definition and

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21 Colombia's Preliminary Objections, ¶ 2.

22 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981; **Exhibit C-14**, Colin Simpson, *Secret Salvage of £3,000m in Gold*, THE SUNDAY TIMES, 18 July 1982.

23 *See* **Exhibit C-47**, DIMAR, First Non-Intrusive Verification Campaign For The Security Of The Property Of Cultural Interest At The National Level, 2022, pp. 33, 48 ("*After some skirmishes, when the Expedition was just 60 feet away from the San José, in the midst of cannon fire, according to historical accounts there was possibly an explosion inside* [sic] *of the Spanish captain ship, sending wood and fire flying off through the air, some debris actually grazing the English ship*"). *See also* **Exhibit C-50,** W.L. Clowes, THE ROYAL NAVY: A HISTORY (VOL. II (Sampson Low, Marston and Company), London, 1898, p. 375.

24 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981 (recreating a list of the treasure the San José carried).

25 *See* **Exhibit C-47**, DIMAR, First Non-Intrusive Verification Campaign For The Security Of The Property Of Cultural Interest At The National Level, 2022, PDF p. 49 ("*Sr. Charles Wager's Engagement with the Fleet of Spanish Men of War and Galeons off of Cartagena of 28th of May 1708 (7), where the Spanish Admiral blew up, the Rear Adml was taken, and the rest being 14 Sail made their Escape*.").

26 **Exhibit C-99**, Tom Hartsfield, *San José: Human greed keeps the "holy grail" of shipwrecks on the ocean floor*, BIG THINK, 12 July 2022, *available at* https://bigthink.com/the-past/san-jose-galleon-shipwreck/.

27 *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980.

compensation for finding sunken treasure were encapsulated in Articles 700 and 701 of the Colombian Civil Code ("**Civil Code**") as follows:

> ***Article 700***. *The discovery of a treasure is a kind of invention or discovery.*
>
> *Coins or jewels or other precious artifacts that, embellished by man, have been long buried or hidden, without memory or indication of its owner are treasure.*
>
> ***Article 701***. *Treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery.*
>
> *But the latter shall not be entitled to his share unless the discovery is fortuitous, or when the treasure has been sought with the permission of the owner of the land.*[28]

20. It was in this legal context that SSA's Predecessor, Glocca Morra Company Inc. ("**GMC Inc.**") decided to apply for permission to search for the San José in Colombian waters.

C. DIMAR Authorized GMC Inc. To Search For The San José

21. Colombia recognizes that it authorized GMC Inc. to conduct underwater exploration. However, Colombia mischaracterizes the content and scope of the permit it granted.

22. In 1979, a group of mostly U.S. investors founded GMC Inc., a U.S. company incorporated in Delaware, to search for the San José.[29] On 22 October 1979, GMC Inc. requested an underwater exploration permit from Colombia's General Directorate of the Maritime and Port Authority (*Dirección General Marítima y Portuaria* or "**DIMAR**") to search for shipwrecks within a specified area of Colombian waters.[30]

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[28] **Exhibit C-1**, Colombian Civil Code, 31 May 1873, arts. 700-701.

[29] *See e.g.*, **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980, PDF p. 1 ("[T]*he shareholders of* [GMC Inc.] *are the same shareholders of* [GMC]") (SSA's Unofficial Translation).

[30] *See* **Exhibit R-2**, Exploration Permit Request from Glocca Morra Company Inc. to DIMAR, 22 October 1979. *See also* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, p. 1 ("*WHEREAS Dr. ANTONIO JOSÉ GUTIERREZ BONILLA, in representation of the company GLOCCA MORRA COMPANY INC. requests permission for underwater exploration of the Colombian Continental Shelf in the waters of the Caribbean with the objective to establish the existence of wrecks, treasures or any other element of historical, scientific or commercial value in the areas hereafter determined and indicated on the map enclosed with the application*.") (SSA's Unofficial Translation). *See also* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, art. 1 (establishing the coordinates in which GMC Inc. was authorized to search for the San José).

Colombia accepts that DIMAR had the authority to grant such exploration permits, confirm reported findings, and enter into salvage contracts.[31]

23. After satisfying itself that GMC Inc. had provided sufficient "*documentary proof*" and "*information on the technical system to be employed in the search for the sunken wrecks which are the object of the Exploration Permit sought*," on 29 January 1980, DIMAR issued Resolution No. 0048 ("**Resolution No. 0048**") granting GMC Inc.'s requested exploration permit to search for the San José.[32] Contrary to Colombia's assertions,[33] Resolution No. 0048 makes clear that DIMAR was issuing an exploration permit to GMC Inc. for the purpose of finding the San José.[34] Specifically, DIMAR noted that while it had previously authorized other companies to search for the San José shipwreck in different coordinates, those resolutions had elapsed and DIMAR had refused to extend them, thus "*exhaust*[ing]" the "*official channels*" for the prior searchers of the San José shipwreck.[35] That is why DIMAR could now award this permit to GMC Inc.

24. Colombia also does not dispute that at the time it awarded the permit, DIMAR understood that GMC Inc. would be entitled to 50% of its discovery.[36] Moreover, as DIMAR later confirmed, GMC Inc. would hold a preferential status to negotiate terms

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[31] *See* Colombia's Preliminary Objections, ¶¶ 15-22.

[32] *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, art. 1.

[33] *See* Colombia's Preliminary Objections, ¶¶ 2, 4, 21-33.

[34] *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980.

[35] **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, PDF pp. 2-3 (Reynolds Aluminum Europe was granted a five year term in order to make explorations in search of the San José and later assigned its rights to the Panamanian company Friendship S.A. The terms expired without them reporting any findings. The resolution provided in full: "*By resolution No. 173 of 1971,* [DIMAR] *recognized the company REYNOLDS ALUMINIUM EUROPE* S.A. *as claimstaker* ***for the wreck called Capitana San José*** *.... By resolution No. 016 dated January 24, 1974,* [DIMAR] *authorized the company FRIENDSHIP S.A. to carry out underwater exploration* ***to search for the above-mentioned wreck*** *for a term of five (5) years which have now elapsed. The company FRIENDSHIP S.A. has asked* [DIMAR] *to extend the above-cited exploration term which was denied ... this way the official channels are exhausted. Upon preliminary study of the petition by the company GLOCCA MORRA COMPANY INC.* [DIMAR] *demanded that documentary proof be brought to clarify the legal interest of the petitioner as well as information on the technical system to be employed* ***in the search for the sunken wrecks which are the object of the Exploration Permit sought****, and said proof has been submitted to our satisfaction*." (emphases added) (SSA's Unofficial Translation).

[36] *See* **Exhibit C-1**, Colombian Civil Code, 31 May 1873, art. 701 ("*The treasure found in someone else's land will be divided equally between the owner of the land and the person who made the discovery. But the latter will not have the right to its portion, except when the discovery is fortuitous, or when the treasure has been sought with the permission of the owner of the land. . .*") (SSA's Unofficial Translation); *see also* **Exhibit C-15**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982.

of a salvage contract as long as GMC Inc. duly reported its find.[37]

25. Resolution No. 0048 established that GMC Inc. would conduct all exploration work "*under supervision of*" DIMAR.[38] GMC Inc. was authorized to explore in an area of approximately 22 by 15 nautical miles.[39] In exchange, GMC Inc. agreed to:[40]

(a) Comply with the resolution and applicable Colombian law, including Decree No. 2349 of 1971;

(b) "[I]*mmediately report to* [DIMAR] *all sunken wrecks found and their identification in order to safeguard the rights existing of legitimate recognized claim-holders, indicating the geographic coordinates of each wreck*";

(c) Make an application for the ship GMC Inc. intended to use for exploration;

(d) "[S]*upply transportation, per diems, lodging and board*" for the Colombian officials who would be supervising the exploration activities; and

(e) Indemnify Colombia and any other private parties for any damage caused by the exploration activities.

26. Importantly, and contrary to Colombia's insinuations,[41] nothing in Resolution No. 0048

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[37] **Exhibit C-3**, DIMAR Letter No. 00854, 20 March 1980 (". . . *in order to enter into contract with the Nation, for the salvage of shipwrecked goods, the solicitor must have obtained an exploration permit, filed a claim of the purported find, and then, by preferential manner, begin to negotiate the terms or the respective contract in accordance to the laws*") (SSA's Unofficial Translation). This was later recognized in DIMAR Resolution No. 0149, which stated: "*Of the discoveries of treasures or antiquities, the concessionaire will have the privilege of contracting with the State for their exploitation. This privilege will expire six (6) months after the end of the exploration period, except when the cause that would have prevented the contracting is attributable to the State*." (SSA's Unofficial Translation). *See also* **Exhibit C-11**, DIMAR Resolution No. 0149, 12 March 1982, art. 3.

[38] **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, PDF p. 3.

[39] **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, arts. 1 ("*The company GLOCCA MORRA COMPANY INC. is authorized to do underwater exploration in the areas hereafter set forth: . . .*"), 5 ("*The term of effectiveness of the present authorization is two (2) years.*") (SSA's Unofficial Translation).

[40] **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, art. 3.

[41] *See e.g.*, Colombia's Preliminary Objections, ¶ 260 ("*Accordingly, on 18 November 2008, when Sea Search Armada, LLC allegedly acquired ownership or control of DIMAR Resolutions No. 0048 of 1980 and No. 0354*

(or any law or regulation cited within) required GMC Inc. to notify or seek permission from DIMAR for the assignment of its rights under the permit.

D. GMC Finds The San José

27. Colombia does not contest the relevant facts advanced by SSA relating to the location and identification of the San José in December 1981.[42] Instead, Colombia challenges that this discovery was indeed of the San José, claiming that all that SSA's Predecessors found were pieces of "*root*" or rocks, not a shipwreck.[43] Colombia omits that its own officials, including selected members of the Colombian National Navy (the "**Colombian Navy**")—were onboard each SSA vessel that searched for, located and identified the San José, and provided contemporaneous accounts of these visits, confirming that they had found the San José.[44] While SSA intends to supplement these facts with its Statement of Claim, including with witness testimony, we briefly recount the key events below as they provide important context highlighting the high level of technical, historical and archaeological expertise that SSA's Predecessors employed to locate the San José, and clear contemporaneous evidence indicating that both Colombia and SSA's Predecessors believed that they had located the San José.

28. With Resolution No. 0048 in hand, beginning in 1980, GMC Inc. conducted several searches in the authorized area, using the available state-of-the-art equipment, manned and guided by a team of experts.[45]

29. To identify the target area of the search, GMC Inc. retained a team of researchers to conduct further research to determine the location of the San José and its lost treasure.[46] Among them was Dr. Eugene Lyon (now deceased), a historian and archivist on

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of 1982 pursuant to the APA, DIMAR had the sole authority, under Colombian law, to authorize the assignment of the marine exploration rights to Sea Search Armada, LLC. In other words, pursuant to Article 10.28.g of the TPA, DIMAR was the sole authority capable of conferring Sea Search Armada, LLC, with the rights previously held by SSA Cayman Islands.").

42 *See* Colombia's Preliminary Objections, Part II.3.

43 *See* Colombia's Preliminary Objections, ¶¶ 4, 114.

44 *See infra* ¶¶ 54-55.

45 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-3 (explaining Phase One of the exploration).

46 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981.

colonial-era Spanish Central America and the Indies.[47] Dr. Lyon had begun to investigate the location of the San José in the 1970s[48] and by the time GMC Inc.'s exploration efforts began, he had conducted extensive research on the San José at various archives in Spain.[49] As a result, after years of research, the GMC Inc. team of experts was able to narrow the most probable location of the San José to a reasonable search area.

30. GMC Inc. explored the licensed area using state-of-the-art sea and subsea equipment in three phases. From June to September 1980, GMC Inc. searched for the San José with the Morning Watch,[50] a surface vessel that towed a side sonar through the specified search area ("**Phase One**").[51] The side sonar surveyed approximately the entirety of the area GMC Inc. had been authorized to search in order to locate and map potential targets within the licensed area.[52] GMC Inc.'s team of experts studied the survey results to produce a list of several hundred sonar targets, which they further narrowed using geological studies, and then classified and organized into approximately 50 prime targets for future investigation.[53]

31. That same year, the founders of GMC Inc. incorporated a Cayman Islands company, Glocca Morra Company Limited Partnership ("**GMC**") to which GMC Inc. assigned its interests under Resolution No. 0048.[54] To continue its exploratory work in Colombian waters, GMC requested, and received DIMAR's "*authoriz*[ation] *to*

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47 *See* **Exhibit C-56**, John Noble Wilford, *Translated Documents Capture Ambience and Aroma of The Nina,* THE NEW YORK TIMES, 14 October 1986, PDF pp. 2-3.

48 *See* **Exhibit C-56**, John Noble Wilford, *Translated Documents Capture Ambience and Aroma of The Nina,* THE NEW YORK TIMES, 14 October 1986.

49 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981 (noting Dr. Lyon had analyzed "*the totality of the outbound cargoes from Spain to the Indies in 1706*").

50 *See* **Exhibit C-52**, Resolution No. 517, 8 July 1980, PDF p 1.

51 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 2.

52 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 2.

53 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-3.

54 *See* **Exhibit C-4**, Memorandum of Association of GMC, 21 May 1980; **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980.

perform the exploratory work [that DIMAR had] *approved for*" GMC Inc.[55]

32. From October 1980 to August 1981, GMC initiated a second exploration phase ("**Phase Two**"). During Phase Two, as Colombia acknowledges,[56] DIMAR expanded the search coordinates.[57] GMC commissioned a larger ship, the State Progress, to determine if any of the targets identified by the Morning Watch during Phase One could be sunken ships.[58] The State Progress used a lateral sonar, subsoil profiler, and a Tethered Remotely Operated Vehicle for Exploration and Collection ("**TREC**"), an unmanned, remote controlled vehicle equipped with television and photo cameras, as well as a specialized sonar for continuous scanning, a small sound manipulator, and a basket for the recovery of small objects.[59] Using its lateral sonar, GMC identified a number of potential targets for further investigation over the wide set of coordinates it was authorized to search.[60] GMC then lowered the TREC to the ocean floor approximately 25 times to gather additional data on targets of interest.[61] During these submersions, the TREC found three to six areas with wood or other foreign objects that were spread over a larger area of approximately two square nautical miles.[62] Carbon dating of these wood samples indicated that the wood was likely 300 years old.[63]

33. A third phase of exploration took place between October 1981 and February 1982

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55 *See* **Exhibit C-5**, Resolution 753, 13 October 1980.

56 *See* Colombia's Preliminary Objections, ¶ 24.

57 *See also* **Exhibit C-6**, DIMAR Resolution No. 0066, 1 February 1981, PDF p. 2. Moreover, by January 1982, the authorization granted by Resolution No. 0048 was set to expire. To continue explorations, DIMAR extended the validity of Resolution No. 0048 twice, through July 1982. *See* **Exhibit C-8**, DIMAR Resolution No. 0025, 29 January 1982; and **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982.

58 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 3.

59 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-4.

60 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-3.

61 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-3.

62 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 3-4.

63 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 9.

("**Phase Three**").[64] Given the limited recovery capabilities of the TREC, GMC commissioned a manned submarine, the Auguste Piccard, and a support surface ship, the State Wave, to conduct further investigation of its initial findings.[65] The manned submarine had sophisticated equipment, including a lateral sonar, subsoil profiler, magnetometer, underwater television, a Continuous Transmission Frequency Modulation sonar, as well as windows for visual observation.[66] The crew of the Auguste Piccard submarine included several scientific and operations personnel, including Michael Costin, an experienced oceanographer, and Helmut Lanziner, an oceanographer and pioneer in the development of electronic charting technology, who was later honored as a Member of the Order of Canada for his work in this field.[67] The submarine was piloted by Captain John Swann, a Canadian navy officer with over two decades of naval experience. The search team continued to be assisted by Dr. Lyons.

34. Throughout this process, Colombian Navy observers were on board the Auguste Piccard submarine and its support ship, the State Wave, at all times.[68] In addition, the Auguste Piccard submarine was shadowed by a Colombian Navy submarine and other mini-submarines. As a result, Colombia knew the location of the Auguste Piccard submarine and its targets at all times.

35. On 10 December 1981, the Auguste Piccard found a highly promising target in the area that GMC's historians and archaeologists had indicated would most likely contain the

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64 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 5.

65 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 2-4.

66 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 5.

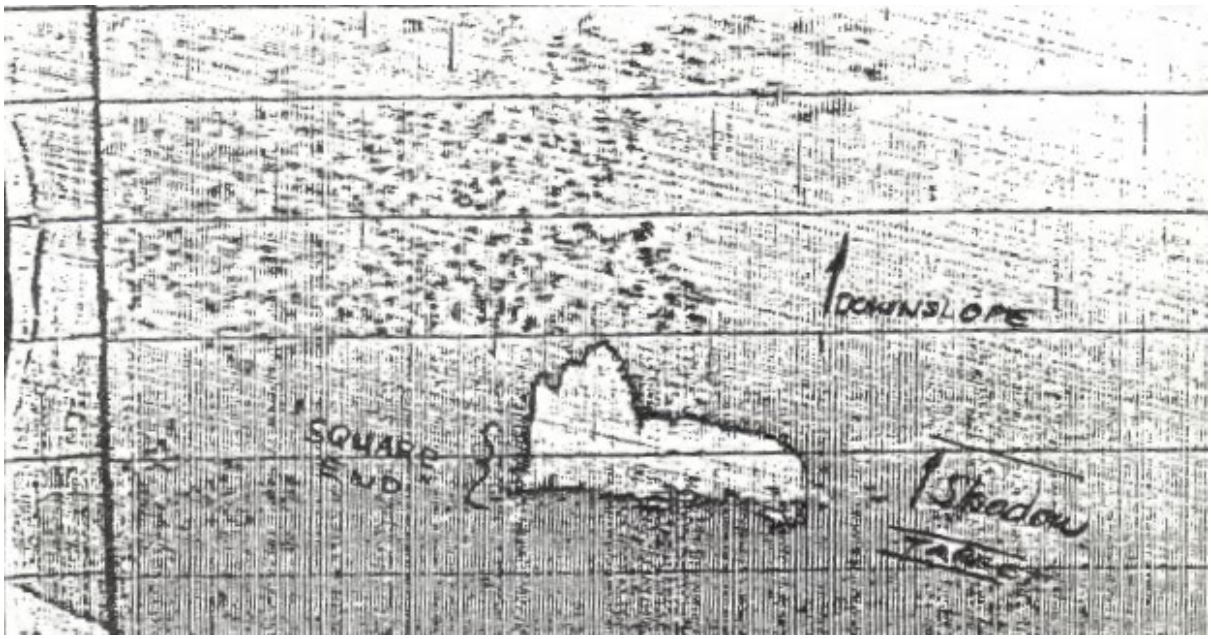
67 **Exhibit C-78**, Mr. Helmut H. Lanziner, Order of Canada, *available at* https://www.gg.ca/en/honours/recipients/146-15651 ("*A pioneer in the development of electronic charting technology, Helmut Lanziner has worked to enhance maritime navigational safety. Former chairman of Xenex Innovations and founder and former president of Offshore Systems International Limited, he has more than 25 years of experience in research and development. He has served as a Canadian delegate to many organizations, including the International Maritime Organization. The recipient of Transport Canada's 2005 Marine Safety Award, he continues to advance technological innovations to support both commercial and leisure mariners*.").

68 *See e.g.*, **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, preamble, art. 3(d); **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.

shipwreck.[69] Further investigation through sonar, magnetometers, visual observations and carbon dating, among other investigations, indicated that the finding was a shipwreck closely corresponding to the size, shape, and age of the San José.[70]

36. First, sonar readings indicated a wooden wreck of the approximate dimensions of the San José. An "*acoustic shadow*"[71] of the target revealed an image the size and shape of San José, as shown below.[72]

Image 1 – Sonar Reading of Discovery depicting the acoustic shadow[73]



37. Second, magnetometer readings showed a spike in ferromagnetic material, associated with shipwrecks, at the target.[74]

38. Third, the crew of the Auguste Piccard submarine visually inspected the target, which allowed them to see the shape of the ship and identify pieces of its debris and ballast

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69 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 10.

70 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 11.

71 A shadow cast by an object blocking sound waves.

72 *See* **Exhibit C-106**, Sonar Reading of Discovery, 10 December 1981 (here, the white section of the reading is the acoustic shadow, as the sonar could not see through the wreck).

73 *See* **Exhibit C-106**, Sonar Reading of Discovery, 10 December 1981.

74 *See* **Exhibit C-107**, Magnetometer Graph of Discovery, 13 December 1981.

stones.[75] The nature and spread of the debris was consistent with a ship that had sunk following extensive damage, as observations of "*the piles of wood occurred in a large area that could cover an area a mile long by tens or hundreds of meters wide*."[76] These observations had been confirmed by earlier visual inspections by the TREC, which had revealed piles of wood that resembled planks used to build the San José as well as a cannon, pictured below.[77]

Image 2 – Image of Cannon Identified During Phase Two[78]

39. Fourth, analysis of wood samples from the wreck's debris indicated that it came from a ship corresponding to the age, build and size of the San José.[79] Dr. Lyon forwarded these pieces of wood to be radiocarbon dated by Beta Analytics, a third-party carbon dating laboratory.[80] The laboratory estimated the wood's date at "*1585 AD with a one*

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75 *See* **Exhibit C-108**, Drawing of Debris and Ballast Stones in Area of Discovery, December 1981.

76 **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 9.

77 *See* **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980, minutes 1:18:55-1:19:50 (in the video, the crew can be heard saying "*it's a goddam cannon!*").

78 *See* **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980, minutes 1:18:55-1:19:50.

79 *See* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, p. 1 ("*It has been reported to me that, on or about 13 December 1981, the submersible* Auguste Piccard *struck a part of the above-mentioned target mound. Evidently at that time, pieces of wood became lodged in the submersible's propeller mounting*.") (emphasis in original).

80 *See* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, p. 1 ("*I caused pieces of this wood . . . to be radiocarbon dated by Beta Analytic Inc. of Miami*."); **Exhibit C-103**, Beta

sigma error term of 50 years"[81] which, according to Dr. Lyon, "*point*[ed] *to a colonial dating for the wood and any ship that might have been built from it*."[82] The wood samples were also sent to an independent marine archaeologist who, with the help of another third-party laboratory, confirmed that the type of wood—oak—was consistent with the wood that would have been used to build the San José.[83] Finally, the measurements of the target yielded an estimated size of 143.5 feet (43.7 m) by 35 feet (10.7 m), which "*corresponds with the size of a thousand-ton ship.*"[84] The results of the analysis of the pieces of wood, including the underlying radiocarbon analysis report, were provided to DIMAR.[85]

40. In the wake of this exciting discovery, on 29 January 1982, DIMAR extended Resolution No. 0048 by three months.[86] Over the next two months, GMC conducted additional exploration and verification work to further identify and report the target, including by conducting further submarine dives for additional sonar readings, visual inspection, and additional testing of the wood samples.[87] On 22 April 1982, DIMAR once again extended Resolution No. 0048 for another three months while GMC continued additional verification.[88]

Analytic Testing Laboratory, Homepage, 14 September 2023 (last accessed), *available at* https://www.radiocarbon.com/.

81 **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 23.

82 **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982.

83 **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 ("*The two major wood pieces were then submitted to R. Duncan Mathewson, marine archaeologist for examination and forwarding to a Federal Forestry laboratory for identification and analysis. Mathewson's initial opinion was that the one sample appeared to be red cedar and the other white oak.* ***The oak sample, he stated, appeared quite similar to the white oak recovered from the 1622 vessel Santa Margarita, built in Vizcaya*** **[in]** ***about 1620. The San Joseph was also built in Vizcaya***.").

84 **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982.

85 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 23-24.

86 *See* **Exhibit C-8**, DIMAR Resolution No. 0025, 29 January 1982.

87 **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 ("*I caused pieces of this wood. . .to be radiocarbon dated. . .The two major wood pieces were then submitted to R. Duncan Mathewson, marine archeologist for examination and forwarding to a Federal Forestry Laboratory for identification and analysis.*").

88 *See* **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982, art. 1. On September 1983, GMC conducted further exploration on the area and re-localized the target on 7 September 1983.

E. GMC Reports The Discovery Of The San José And Colombia Recognizes That Discovery

41. On 18 March 1982, after a two-year search costing many millions of dollars,[89] GMC reported its discovery in its "*Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia*" (the "**1982 Report**").[90] GMC stated that it was submitting the 1982 Report pursuant to Resolution No. 0048,[91] which, as noted above, DIMAR had issued for the express purpose of finding the San José.[92] Thus, contrary to Colombia's assertions,[93] the 1982 Report indicated at the outset that it was reporting the discovery of the San José.

42. In the 1982 Report, GMC detailed its search methodology and findings. GMC reported the area of its discovery as follows ("**Discovery Area**"):

> *As indicated in Figure 9 there are* ***several large and small targets of unknown composition in an area of just one mile per half mile****. The* ***main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A"*** *and its surrounding areas that* ***are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N****.*[94]

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[89] By this time, GMC had spent over USD 6 million to support the search operation. *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 11. Note that while the 1982 Report was dated 26 February 1982, it was submitted to Colombia on 18 March 1982. *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 3 ("*On March 18, 1982, the* Glocca Morra Company *reported 'the finding of treasures pertaining to shipwrecks, indicating their location and asking to be considered as owner of all the privileges granted it by the laws in effect, including its preferential right to contract with the Colombian government for salvage of the recoverable treasures,'. . .for which it annexed the 'Confidential Report on Underwater Exploration'. . .*") (SSA's Unofficial Translation).

[90] *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982. The 1982 Report was later corroborated by the Colombian National Navy on two separate occasions: on 31 October 1983 and 29 September 1988.

[91] *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 1 ("***Through Resolution No. 0048*** *of January 29, 1980, the Director General of the Maritime and Port Authority of Department of the Navy in Colombia gave the company Glocca Morra, Inc., a Delaware Corporation, a license to conduct underwater exploration and research in an area on the Colombian coast*.").

[92] *See supra* ¶ 23.

[93] *See* Colombia's Preliminary Objections, ¶ 27 ("*It is undisputed that the 1982 Confidential Report did not mention the Galeón San José*.").

[94] **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 12-13. (emphases added).

43. The terms in which the 1982 Report described the Discovery Area are important because DIMAR and later Colombian Courts recognized Claimant's rights by express reference to the 1982 Report.[95] Notably, the 1982 Report does not describe the location of its discovery as a pinpoint. Not only was the shipwreck dispersed over a considerable area (given that the San José had blown up before sinking), but the measurement of coordinates in the early 1980s, before the advent of GPS, also carried with it a margin of error. Accordingly, the 1982 Report carefully described its finding as the area that was within the "*immediate vicinity*" of specific coordinates. That the 1982 Report identified not a pinpoint but an area is confirmed by the next steps it proposed, which were "*to carry out the identification and rescue of the shipwrecks as soon as you reach an agreement with the Maritime and Port Director General, so as to start such an operation* ***in the vicinity of Target 'A***. "[96]

44. As Colombia acknowledges, DIMAR's search authorization was set to expire by 29 April 1982,[97] that is, shortly after the issuance of the 1982 Report.[98] In the light of GMC's exciting discovery, however, on 22 April 1982, DIMAR extended the validity of Resolution No. 0048 by another three months to "*finish the exploratory period*."[99]

45. By that time, GMC had also begun to negotiate a salvage contract with Colombia. On 12 March 1982, GMC sent a letter to DIMAR with potential terms for a salvage contract for the San José.[100] GMC noted that it and its parent company, Sea Search-Armada Limited Partnership, also based in the Cayman Islands ("**SSA Cayman**"), had already invested over USD 6 million in the search (not accounting for the technical expertise

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95 *See infra* ¶¶ 46-49, 76-77, 88, 92-94.

96 **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13.

97 *See* **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982; Colombia's Preliminary Objections, ¶ 28.

98 *See* **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982; Colombia's Preliminary Objections, ¶ 28.

99 *See* **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982, p. 1.

100 *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 1 ("[W]*e would like to bring to your attention and consideration the following aspects related to the recovery of the ship 'Captain San José'*.") (SSA's Unofficial Translation). Thus contrary to Colombia's statements (*see, e.g.*, Colombia's Preliminary Objections, ¶ 29), it was clear to both Parties that the discovery and recovery of the San José was at stake (as had been made clear by the originating DIMAR resolution granting exploration rights for the San José, Resolution No. 0048. S*ee supra* ¶¶ 23, 41.

provided and time spent by the company's partners).[101] GMC's correspondence, like many other contemporaneous documents, confirms that both DIMAR and GMC believed they had located the San José. In the draft contract, GMC noted that it was writing following a meeting the day before at DIMAR's office that included a Colombian Navy admiral regarding the "*recovery of the ship 'Capitana San José'*."[102] GMC then expressly stated that it had "*located the Spanish Galleon 'San José' in the area authorized*" by Resolution No. 0048, and had raised an additional USD 5 million to salvage the shipwreck.[103] Also, in accordance with its understanding of the legal regime at the time, GMC proposed "*accept*[ing] *the proposal of the Commander of the National Navy to distribute whatever is salvaged in equal parts*."[104] The Colombian Navy's proposal was indeed consistent with GMC's understanding of Colombian law at the time pursuant to which GMC, as "*the discoverer*[,] *was entitled to one-half* [of the treasure] *and owner* [Colombia] *the other half, in light of Articles 701 and 703*."[105]

46. On 3 June 1982, through Resolution No. 0354, DIMAR recognized GMC "*as claimant of the treasures or shipwreck referred to in the*" 1982 Report ("**Resolution No. 0354**").[106] Resolution No. 0354's preamble provides that:

> *The company* [GMC] *making the announcement has undertaken exploration in various areas of the Caribbean Sea by means of several permits of this Department and has verified the said discovery by means of technical proofs, which are included in the* [1982 Report, page 13],

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[101] **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982 ("*The company Glocca Morra is an official subsidiary of the company 'Sea Search Armada a Cayman Island Limited Partnership', which has supplied the economic, technical, equipment and personal resources to the Cayman Island Limited Partnership, as well as the Submarine 'Auguste Picard'* [sic], *means with which we have located the Spanish Galleon 'San José' in an the area authorized in the aforementioned license; to this date more than US$6,000,000 have been invested in this search operation and we have an additional US$5,000,000 to advance the salvage operations*.") (SSA's Unofficial Translation).

[102] **Exhibit R-5**, Letter from GMC to DIMAR, 12 March 1982, p. 1 ("*Following the meeting held yesterday in your office, with the assistance of Mr. Vice Admiral Guillermo Uribe Pelaez 2nd Commander of the Navy, we wish to bring to your knowledge and consideration the following aspects related to the recovery of the ship 'Capitana San José'*) (SSA's Unofficial Translation).

[103] **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 1.

[104] *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 2.

[105] **Exhibit C-15**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, p. 2.

[106] **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1 (SSA's Unofficial Translation).

> *which is located in this Departments, and which is made an integral part of this Resolution.*[107]

47. Accordingly, DIMAR resolved to:

> [A]*cknowledge the Glocca Morra Company, established in accordance with the laws of the Cayman Islands (British West Antilles) as claimant of the treasures or shipwreck in the coordinates referred to in the* [1982 Report, page 13].[108]

48. Page 13 of the 1982 Report, as noted above,[109] defined the Discovery Area as follows:

> *The main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N.*[110]

49. Accordingly, Resolution No. 0354, fully "*integrat*[ed]" the 1982 Report and gave GMC rights to the Discovery Area as reported by the 1982 Report.[111] This area expressly was not limited, as Colombia now claims,[112] to pinpoint coordinates, as this would have made Resolution No. 0354 internally inconsistent. Instead, it encompassed the range of coordinates that constituted the "*immediate vicinity*" of 76°00'20"W, 10°10'19"N.[113]

50. Similarly, Colombia's post hoc statement that Resolution No. 0354 did not mention the San José is misleading.[114] Like the other DIMAR resolutions before it, Resolution No. 0354 incorporated by reference the originating permit, Resolution No. 0048,[115] which

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[107] **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, preamble (SSA's Unofficial Translation).

[108] **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1 (SSA's Unofficial Translation). *See also* Colombia's Preliminary Objections, ¶ 32.

[109] *See supra* ¶ 42.

[110] **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 12-13 (emphasis added).

[111] *See also* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, preamble (stating that the 1982 Report forms "*an integral part*" of Resolution No. 0354).

[112] *See* Colombia's Preliminary Objections, ¶¶ 66, 68, 94-99.

[113] *See supra* ¶ 42.

[114] *See* Colombia's Preliminary Objections, ¶ 32.

[115] **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982 ("*The company making the announcement has undertaken explorations in various areas of the Caribbean Sea by means of permits of this Department and*

made clear that DIMAR issued an exploration permit to GMC, Inc. to find the San José.[116] Moreover, the context makes it clear—DIMAR issued Resolution No. 0354 in response to GMC's request to begin salvage of the San José.[117]

F. GMC Assigns Its Rights To SSA Cayman, Which Pursues Further Identification Work

51. In 1983, GMC transferred all of its rights to its parent company, SSA Cayman. A Cayman Islands-based partnership, SSA Cayman's limited partners included Armada Partners (a U.S. company),[118] San Joseph Partners (a U.S. company),[119] Royal Capitana Partners (a Cayman Islands company),[120] and Sea Search Joint Venture (a Cayman Islands company),[121] while its managing partner was Armada Company (a Cayman Islands company)[122] (together "**SSA Partners**").[123] Through its Partners, SSA Cayman now held investments made by numerous of U.S. investors, including the founders of GMC Inc.[124] SSA Cayman also had a management contract with Portobello Partners Inc. (another U.S. company) to run its day-to-day operations.[125]

52. GMC requested that DIMAR recognize the transfer of its rights to SSA Cayman and

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has verified said discovery by means of technical proofs, which are included in the [1982 Report]") (SSA's Unofficial Translation).

[116] **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, preamble (noting that DIMAR had previously authorized other companies to search for "*the wreck called Capitana San José*" in other areas) (SSA's Unofficial Translation). *See also supra* ¶ 23.

[117] **Exhibit R-5**, Letter from GMC to DIMAR, 12 March 1982, p. 1 ("*Following the meeting held yesterday in your office, with the assistance of Mr. Vice Admiral Guillermo Uribe Pelaez 2nd Commander of the Navy, we wish to bring to your knowledge and consideration the following aspects related to the* ***recovery of the ship 'Capitana San José'****… Glocca Morra company is an official subsidiary of 'Sea Search-Armada a Cayman Island Limited Partnership, which has provided the financial, technical, equipment and personnel resources, as well as Submarine 'Auguste Picard'* [sic] ***means with which we have located the Spanish Galleon 'San José'*** *in the area authorized in the aforementioned license*") (emphasis added) (SSA's Unofficial Translation).

[118] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6(a), 9 April 1983.

[119] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6(a), 9 April 1983.

[120] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6(a), 9 April 1983.

[121] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6(b), 9 April 1983.

[122] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6(b), 9 April 1983.

[123] *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, art. 1.6, 9 April 1983.

[124] *See e.g.* **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, p. 1 ("*Sea Search Armada, owned and operated by several hundred American investors.*").

[125] *See* **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988, PDF pp. 10, 26.

"*authorize the assignee* [SSA Cayman] *to conduct exploration work approved for the assignor*" in prior DIMAR resolutions.[126] DIMAR granted GMC's request on 24 March 1983 by issuing Resolution No. 204.[127] DIMAR specifically permitted SSA Cayman to continue its "*underwater exploration efforts*" and ordered that the Colombian Navy and the Atlantic Naval Command (a Colombian military unit) be notified of the same.[128] Just like DIMAR's prior resolutions, Resolution No. 204 did not oblige SSA Cayman (or its successors) to seek authorization for the assignment of any ***rights*** they obtained under prior DIMAR resolutions.[129] Rather, as with the prior DIMAR resolutions, Resolution No. 204 was aimed at enabling SSA Cayman to continue its ***underwater exploration activities*** in the licensed areas.[130]

53. In the aftermath of its exciting discovery, SSA Cayman pursued further exploration and identification activities by contracting Oceaneering International, Inc. ("**Oceaneering**"), a specialized subsea engineering firm, to "*provide positioning to aid in the recovery*" of the reported target, using a microwave system and seabed transponders.[131] In September 1983, after a month-long effort, Oceaneering reported that it had "[f]*ound the wreck*",[132] "*survey*[ed] *the wreck with*" a remote-operating vehicle,[133] and ultimately that the "*target was successfully located*."[134]

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[126] *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983, preamble.

[127] *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983; Colombia's Preliminary Objections, ¶ 33.

[128] *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983, arts. 2, 7.

[129] *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983.

[130] *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983, pp. 1-2 ("*ARTICLE 1. To authorize the company GLOCCA MORRA COMPANY to assign all the privileges and obligations obtained by means of resolutions No. 0048 of January 29, 1980, 0066 of February 4, 1981, 0025 of January 29, 1982, 0249 of April 22, 1982, 0354 of June 3, 1982, and the other resolutions by which the previous ones have been successively extended until the date of this resolution, to the company SEA SEARCH ARMADA. ARTICLE 2. To authorize the company SEA SEARCH ARMADA to carry out underwater exploration tasks aimed at locating treasure or shipwrecks in Colombian jurisdictional waters of the Atlantic Ocean, in the areas described in article 1 of resolutions No. 0048 of January 29 of 1980 and 0066 of February 4, 1981.*") (SSA's Unofficial Translation).

[131] **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 3.

[132] **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 17.

[133] **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 17. *See also id.* PDF p. 18.

[134] **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 3.

54. As with all of the prior exploration efforts, a Colombian Navy official was on board Oceaneering's ship, the Heather Express, at all times[135] and was in daily contact with their superiors at DIMAR.[136] The inspector's operation report filed with DIMAR, which includes a daily log of the search efforts, leaves no doubt that they, their superiors, and the crew believed that they had found the San José.[137] As the Colombian inspector noted in his log, there was "[m]*uch optimism about a potential* ***reencounter with the San José***."[138] This enthusiasm was apparently shared by Colombia, who sent a representative of the President of Colombia, and a Rear-Admiral from Colombia's Atlantic Command, to come on board of the Heather Express to follow the operation.[139]

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[135] *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, PDF p. 3 *See e.g. also*, **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF 14 ("*Navy admiral coming on board for meeting with client*.").

[136] *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 7, 9, 10, 11, 15-21.

[137] *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 20 ("*The R.O.V. is lowered, the bottom is at 686". In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen, indicating the proximity of the San José.*") (SSA's Unofficial Translation). *See also id.* PDF pp. 9, 14, 19, 20, 23.

[138] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 6 (emphasis added) (SSA's Unofficial Translation).

[139] *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 10.

55. The inspector's log, moreover, corroborated a range of GMC's and SSA Cayman's findings, including that the crew of the Heather Express had found (i) "[a]*n object . . . that . . . simulates the appearance of a cannon*," (ii) "*a piece of wood*" of approximately 0.5 m by 10 m in size that seemed to have been "*violently*" separated, had a hole that could have been made for a "*screw or a nail*," and whose appearance "*concord*[ed]" with the wood samples retrieved by the Auguste Piccard in 1982 near the tracks left by the submarine, and (iii) a "*piece of ceramic*" that fell back to the ocean floor during attempted recovery.[140] The efforts to recover further objects from the San José were made difficult by the extreme operating conditions.[141]

G. SSA Cayman Negotiates A Salvage Contract For The San José With Colombia

56. Following Oceaneering's confirmation of the San José's location, SSA Cayman began negotiations with Colombian authorities for the salvage of the San José. The correspondence confirms that both parties understood that the shipwreck they wished to salvage was the San José, and that its recovered contents would be split on a 50/50 basis.

57. Following Resolution No. 0354 recognizing GMC as the discoverer of the shipwreck,[142] "*the National Navy and the Ministry of Defense sent the pertinent documents to the Presidency of the Republic*", "*multiple studies*" were carried out and "*the President of the Republic appointed a Commission*" to enter into "*negotiations for the conclusion of a* [salvage] *contract.*"[143] In February 1984, SSA Cayman wrote to DIMAR to finalize a salvage contract.[144] Later that month, DIMAR responded that it

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[140] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 4, 20, 22 (SSA's Unofficial Translation).

[141] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 23 ("*The conditions of the day, sea, etc. They have been difficult, problems of all levels have arisen. With the R.O.V. An attempt was made on several occasions to recover an object from the San José but in some cases they were found solidly stuck or due to their shape they fell when an attempt was made to recover them.*") (SSA's Unofficial Translation).

[142] *See supra* ¶ 46-49.

[143] **Exhibit R-7**, Letter 2541 sent by SSA Cayman Islands to DIMAR, 2 February 1984. (SSA's Unofficial Translation).

[144] *See* **Exhibit R-7**, Letter No. 2541 sent by SSA Cayman Island to DIMAR, 2 February 1984 ("*that* [DIMAR] *by means of Resolution No. 0354 of June 3, 1982, recognized* [Sea Search Armada] *as a reporter of treasures*

was considering the terms of the contract.[145]

58. In August 1984 (contrary to Colombia's current submission),[146] Director-General Maritime and Ports Rear-Admiral Gustavo Angel Mejia DIMAR's sent SSA Cayman a letter attaching the Draft Contract for the Salvage of Shipwrecked Antiques drafted by the Presidency (the "**Draft Contract**").[147] The Draft Contract makes clear that Colombia understood from the beginning that: (i) GMC's discovery included not only historical goods, but goods of economic value;[148] (ii) there was to be an "*equitable distribution*" of the goods recovered;[149] and (iii) as a default, that equitable distribution meant an even 50-50 split between SSA Cayman and Colombia.[150] The Draft Contract included an "*alternative*" sliding scale option under which SSA Cayman's share of recovery would decrease as the economic value of the goods increased.[151] The Draft Contract also recognized that the discovery could contain certain "*historic objects*," if

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or nautical species within the coordinates referred to in the technical reports that supported this petition. […] *I would like to ratify the request* […] *with the purpose of concluding the salvage contract*.") (SSA's Unofficial Translation).

145 *See* **Exhibit R-8**, Letter 415 sent by DIMAR to SSA Cayman Islands, 13 February 1984.

146 *See* Colombia's Preliminary Objections, ¶ 51. Colombia is fully aware of the Draft Contract, not only because it prepared and shared the draft with SSA Cayman, but also because it was on the record of the Colombian litigation proceedings. *See infra* n. 147.

147 *See* **Exhibit C-54**, Letter No. 231000R from DIMAR to Fernando Leyva, 23 August 1984; **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984. SSA Cayman filed a copy of Draft Contract as evidence in the court proceedings initiated in Colombian courts, which included the active participation of the Office of the President of Colombia, the Attorney General of Colombia and DIMAR itself (as explained further below, *see infra* ¶¶ 71-75). We note that in the local litigation there appears to have been a clerical error representing that the Draft Contract was sent on 22 September 1984, instead of August. *See* **Exhibit C-69**, SSA Cayman submits Clauses for a Contract Relating to the Salvage of Shipwrecked Species to the 10th Civil Court of the Circuit of Barranquilla, 3 April 1992. We understand that in September the parties were holding in person meetings and did not exchange any drafts. We also note a clerical error in **Exhibit C-16** filed with the NOA, which included a different date than that reported by SSA Cayman before the Colombian courts. We understand that the date reported contemporaneously to the Colombian courts – 23 August 1984– applies.

148 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 1, PDF p. 13 ("[T]*he object of this contract* [is] *to advance the activities conductive to the recovery* [and] *salvage of* ***all types of property of economic, historic, cultural, or scientific value*** *which is found within the zone cited in No. 4 above and which, for the purposes of this contract generally will be called 'The Goods*'.").

149 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 1, PDF p. 13 ("*It is likewise the purpose of this contract to accomplish an equitable distribution of species referred to in this clause.*").

150 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 9, PDF p. 18 ("*SHARES AND DELIVERY OF SPECIES: The rescued species once appraised will be distributed in proportions of 50% for the Contractor and 50% for the Nation. . .*") (emphasis in original).

151 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, alternative cl. 9.

the status of those objects was confirmed by experts.[152] Colombia would exclusively acquire these objects, but "*subject to the judgment of* [] *experts.*"[153] The Draft Contract, moreover, recognized that any recovery effort would require the coordinates to be determined with greater specificity, and accordingly stated that SSA Cayman's first obligation upon execution of the contract would be to present "*the exact location of the* [shipwreck]."[154]

59. In September 1983, SSA Cayman had multiple meetings with DIMAR where the parties made significant progress, such that most of the details of the salvage contract were agreed upon.[155] Only two main topics remained to be agreed: (i) the "*parameters of various secondary target sites*", and (ii) the sliding scale that would be used to apportion the value of the salvaged treasure between Colombia and SSA Cayman.[156]

60. On 2 November 1984, DIMAR offered to divide the goods to be salvaged from the San José on a sliding scale that gave SSA Cayman as low as 20% and as high as 50% of the value of the salvaged goods.[157] DIMAR requested that SSA Cayman accept its

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[152] *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, alternative cl. 9, PDF p. 18 ("*The government notwithstanding shall have the right to be awarded exclusively all the historic objects it determines subject to the judgment of the experts*.").

[153] **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 22 August 1984, alternative cl. 9, PDF p. 18.

[154] **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 22 August 1984, cl. 2, PDF p. 13.

[155] *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF pp. 1 ("*The contract appears to be significantly along the path to final completion. . .Sea Search-Armada presented its position on salvage area and various contractual matters such as operating committees, authority levels, insurance and performance bonds, reimbursement of costs, etc. . . September 21, meeting was held with Admiral Angel and DIMAR legal counsel where the Admiral reported back to Sea Search-Armada on the matters previously discussed. With the exception of not reducing some of the financial guarantees (insurance), the other contractual matters were accepted*."), 2 ("*The meetings have been held in a very constructive and open atmosphere. The DIMAR representatives have stated their schedule calls for starting the ocean salvage activities once the winter storm season passes. . .Towards that end they want to wrap up the contract fairly quickly because they recognize the length of time it will take to adequately plan the operation and mobilize the resources*.").

[156] *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF pp. 1-2.

[157] *See* **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 3 ("*The percentages of participation of the Colombian Government and the company who will make the salvage will obey the following table. Until 100 million dollars, 50% for the Nation and 50% for the contractor. Between 100 and 200 million dollars, 65% for the Nation and 35% for the contractor. Between 200 and 300 million dollars, 70% for the Nation and 30% for the contractor. Between 300 and 400 million dollars, 75% for the Nation and 25% for the contractor. Beyond 400 million dollars the participation will be constant at 80% for the Nation and 20% for the contractor*.") (SSA's Unofficial Translation).

proposal within 15 business days, so that the salvage contract could be finalized.[158]

61. Even though it was entitled to 50% of the salvaged value under the applicable law, on 9 November 1984, SSA Cayman indicated that it was prepared to agree to DIMAR's terms and asked DIMAR to send the final draft of the salvage contract.[159]

62. DIMAR, however, failed to respond to SSA Cayman's communication and never sent the final version of the proposed contract.[160]

63. Soon, the reason for DIMAR's delay became clear. While Colombia was negotiating the salvage contract with SSA Cayman, it was also attempting to change its law concerning shipwreck reporting and recovery to reduce the proceeds owed to declarants.[161] Colombia issued Presidential Decree Nos. 12 of 12 January 1984 and 2324 of 18 September 1984 (together, the "**1984 Decrees**"), which together: (i) reduced the percentage share of treasure that the finder of a shipwreck would receive from 50% of the treasure itself to 5% of the gross value of whatever was salvaged;[162] and (ii) eliminated any preferential rights to a salvage contract to the declarants of a treasure.[163]

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158 *See* **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 4 ("*The Colombian Government grants to Sea Search-Armada 15 working days from the date of this letter to confirm whether or not it will accept the terms contained in the same.*").

159 *See* **Exhibit C-20**, Letter from Sea Search Armada to DIMAR, 9 November 1984 ("*The Board of Directors has unanimously expressed that it will approve the acceptance of the terms of your letter.*").

160 *See* Colombia's Preliminary Objections, ¶ 51 ("*There is no evidence that DIMAR ever sent the final draft of a salvage contract.*").

161 *See* SSA's Notice of Arbitration, ¶ 23; Colombia's Preliminary Objections, ¶¶ 34-47.

162 *See* **Exhibit R-6**, Decree No. 12 of 1984, 10 January 1984, art. 4 ("*Should the person be recognized as a reporter* [of shipwrecked goods]*, pursuant to the legal norms in force, it will be entitled to a participation of five per cent (5%) over the gross value of what is subsequently found in the coordinates.*") (Colombia's Unofficial Translation); **Exhibit C-18**, Presidential Decree No. 2324, 18 September 1984, art. 191 ("*When it has been recognized as a declarant of such a finding, subject to current legal regulations, it will be entitled to a participation of five percent (5%) over the gross value of what is later salvaged in the coordinates.*") (SSA's Unofficial Translation).

163 *See* **Exhibit R-6**, Decree No. 12 of 1984, 10 January 1984, art. 5 ("*The granting of a permit or concession of exploration does not create a right or privilege of any kind to the concessionaire, in relation with the eventual salvage of the reported shipwrecked antiques.*") (Colombia's Unofficial Translation); **Exhibit C-18**, Presidential Decree No. 2324, 18 September 1984, art. 193 ("*The Nation, previous initial evaluation of the finding, will decide the way to advance the historical and archaeological study of the site and to carry out the rescue or recovery. If it decides to hire, it will enter into a contract for the recovery of historical and archaeological goods. . .with the following exceptions that arise from the nature of the contract: there will be no place for bidding. . .*") (SSA's Unofficial Translation).

64. As the Parties appear to agree, these legislative changes could not have any retroactive effect.[164] Accordingly, neither DIMAR nor SSA Cayman invoked them in the negotiations for a salvage contract at that time.

65. In the following years, SSA Cayman continued its good faith negotiations of a salvage contract with DIMAR. Colombia, however, began courting various States, including the U.S., Sweden, Brazil, the United Kingdom, France, Italy, Norway, and Japan, to conclude a Government-to-Government contract to "*search for and recover the Spanish treasureship* [sic] *'San José'*."[165] On 15 June 1987, for example, Colombia's Foreign Ministry reached out to the U.S. Embassy in Bogota expressing its interest in "*contracting the search, identification and the eventual underwater salvage of the Spanish colonial shipwreck, the galleon 'San José.'*"[166] Upon receiving this solicitation, the U.S. Embassy noted that "*the U.S. firm sea Search Armada . . . claims to have already spent 12 million dollars on search and to have found the San Jose under a contract with the GOC*."[167] In view of SSA Cayman's concerns, the U.S. Embassy proposed asking Colombia about the status of SSA Cayman's legal rights and of the possibility for SSA Cayman to be a bidder for the contract.[168]

66. Instead, Colombian authorities began negotiating with the Swedish Government for the retrieval of the San José. On 17 July 1988, Colombia entered into a Memorandum of Understanding ("**MoU**") with the Swedish Government for this purpose.[169] The MoU again confirms Colombia's belief that SSA Cayman's Predecessors had located the San José, as the MoU instructed the Swedish Government to initiate its search for the

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[164] *See* Notice of Arbitration, ¶ 24; Colombia's Preliminary Objections, ¶ 55.

[165] *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF pp. 1, 4.

[166] *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1 (informal translation of Colombia's note by the U.S. Embassy).

[167] *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1.

[168] *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF pp. 5-6.

[169] *See* **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988.

San José "*in the first place within the coordinates declared by Sea Search Armada.*"[170] The Swedish operator was to "*use the most precise means to determine the coordinates declared by SSA in such a manner that there is no doubt whatsoever that it is the same precise place*" including, if necessary, the use of "*international organizations for testing whether or not the shipwrecked goods are found in the declared coordinates*."[171] The Swedish government was to receive a share of 25% of the net value of the recovered goods[172] and a "*finder's fee*" of 5%, subject to expert valuation.[173] As SSA noted in its NOA, contemporaneous press reports indicate that this deal fell apart after accusations of corruption and corporate piracy against both Colombian and Swedish Government officials involved in the scheme.[174]

H. SSA Cayman Initiates Litigation Before Colombian Courts

67. After several years of good faith attempts by SSA Cayman to negotiate with Colombia, the recent public scandals involving corruption and Colombia's covert attempts to deprive SSA Cayman of its rights, the company's leadership decided to initiate legal actions to protect SSA Cayman's interests.

68. At around the same time, SSA Cayman instituted a change of leadership. In 1988, by unanimous vote, the company's partners elected a U.S. citizen, Jack Harbeston,[175] as the Managing Director of SSA Cayman. Upon Mr. Harbeston's election, SSA Cayman terminated its management contract with Portobello Partners Inc. and entered into a

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170 **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5. (SSA's Unofficial Translation).

171 **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5. (SSA's Unofficial Translation).

172 *See* **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 1 (defining payment as "*percentages over the net values recovered (total values minus historical values minus operating costs).*"). (SSA's Unofficial Translation).

173 **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, arts. 2-3.

174 *See* Notice of Arbitration, ¶ 25; **Exhibit C-21**, Michael Molinski, *Battle for Spanish Treasure Ship*, UNITED PRESS INTERNATIONAL, 3 August 1988; **Exhibit C-22**, *The Retrieval of the Galleon San José – A Scandal Is Foreseen Among High Officials*, EL SIGLO, 24 August 1988.

175 *See* **Exhibit C-90**, Jack Harbeston's Passport, 20 April 2016 (date of issue).

management contract with IOTA Partners (another U.S. firm).[176]

69. On 13 January 1989, SSA Cayman filed a lawsuit ("**Civil Court Action**") before the 10th Civil Court of the Circuit of Barranquilla ("**Civil Court**"), asking the court to confirm that under Colombian law:

(a) As GMC had been recognized by DIMAR's Resolution No. 0354 as the reporter of treasure, Colombia had no rights over any of the goods of economic, historical, cultural or scientific value that qualified as treasures and were found in the Colombian continental platform or in Colombia's exclusive economic zone, within the coordinates and surrounding areas referred to in the 1982 Report;[177]

(b) In the alternative, and if the Civil Court concluded that the goods were not located in the Colombian continental shelf or in Colombia's exclusive economic zone but instead were located in Colombia's territorial sea, then SSA Cayman had rights over 50% of the treasure while Colombia had rights over the remaining 50%;[178] and

(c) SSA Cayman had a right to salvage the shipwrecked goods and to enter into a salvage contract with Colombia on a preferential basis.[179]

70. SSA Cayman thus clearly applied for declaratory relief. SSA Cayman did not request any new or additional rights.

71. On 16 February 1989, the Colombian Attorney General responded to SSA Cayman's Civil Court Action and made a number of jurisdictional and venue-related objections. The Colombian Attorney General did not dispute the validity of DIMAR's resolutions

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176 *See* **Exhibit C-58**, Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988; **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988.

177 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF pp. 1-2 (First and Second).

178 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF p. 2 (Third).

179 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF p. 3 (Fourth and Fifth).

or their effect.[180] DIMAR and the Office of the President of Colombia also intervened in the proceedings on Colombia's behalf.[181]

72. DIMAR argued that, pursuant to its 1984 Decrees,[182] it could only recognize declarants of "*shipwreck antiquities*" not treasure, which therefore only authorized the declarant, like SSA Cayman here, to a 5% finder's fee.[183] This position, of course, directly contradicted DIMAR's own internal contemporaneous memoranda,[184] DIMAR's Resolution No. 0354 which specifically recognized GMC as a "*declarant*" of "*treasure or shipwrecked goods*"[185] and Colombia's position while negotiating a potential salvage contract with SSA Cayman that began from the basis that the declarant was authorized to recover 50% of its discovery.[186] Unsurprisingly, Colombian courts rejected DIMAR's position.[187]

73. On 6 July 1992, the Civil Court dismissed various jurisdictional objections and excluded DIMAR from the case, finding that the Colombian Attorney General's Office was the appropriate representative of Colombia in the matter.[188] On 11 November 1992, the President of Colombia replaced the Colombian Attorney General's Office as

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180 *See* **Exhibit C-62**, Colombia's Response To SSA Cayman's Civil Court Action, 16 February 1989, p. 3. *See also* **Exhibit C-63**, Colombia's Preliminary Objections To SSA Cayman's Civil Court Action, 16 February 1989.

181 *See e.g.* **Exhibit C-64**, DIMAR's Challenge Of Decision to Admit SSA Cayman's Civil Court Action, 3 March 1989; **Exhibit C-65**, DIMAR's Response To SSA Cayman's Civil Court Action, 29 March 1989; **Exhibit C-66**, DIMAR's Nullity Claim Against SSA Cayman's Civil Court Action, 22 April 1989.

182 *See supra* ¶¶ 63-64.

183 *See* **Exhibit C-67**, Colombia's Response To SSA Cayman's Re-Submitted Civil Court Action, 5 June 1990, PDF p. 2 (SSA's Unofficial Translation).

184 *See supra* ¶ 45. *See also* Notice of Arbitration, ¶ 20; **Exhibit C-15**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, p. 2.

185 See *supra* ¶¶ 46-49; **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1.

186 *See supra* ¶¶ 57-62.

187 *See infra* ¶¶ 75-76.

188 *See* **Exhibit C-70**, 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Jurisdictional Objections, 6 July 1992, PDF p. 4 ("*1.) Declare not proven the preliminary objections of 'Lack of Jurisdiction', 'Lack of Competence', 'Formal Inefficiency due to Lack of Procedural Requirements', 'Improper Accumulation of Claims' and 'Non-existence and Improper Representation of the Plaintiff. 2.) Declare partially applicable the preliminary exception of 'improper representation of the defendant', with respect to the Judicial Representation of the 'Nation', and therefore, exclude from the process the special attorney of* [DIMAR]*.*") (SSA's Unofficial Translation).

the representative of Colombia[189] and fully adopted DIMAR's arguments for the remainder of the proceedings.

74. In parallel, SSA Cayman's attorney in the litigation, Mr. Danilo Devis, agreed to act on a partial contingency basis, and was accordingly assigned 10% of SSA Cayman's interests in the San José as payment.[190] The Civil Court recognized the assignment's validity.[191] Notably, SSA Cayman's assignment of rights to Mr. Devis did not require any authorization from DIMAR;[192] nor could it, since Mr. Devis was not planning to conduct any underwater exploration in Colombian waters. Nor did Colombia challenge the assignment of rights to Mr. Devis on the basis that it had not been authorized by DIMAR.

75. It is worth noting that Colombia's conduct during these proceedings drew sharp rebuke from its own courts. Not only did the Civil Court reject Colombia's attempts to have three different agencies represent it in the proceedings, but it also later imposed sanctions on the State for failing to comply with procedural requirements. Specifically, on 27 April 1993, the President of Colombia failed to appear at a mandatory conciliation hearing that the Civil Court had already postponed due to the President's failure to appear in the original hearing.[193] The Civil Court did not find the reasons provided by the President to be satisfactory and sanctioned Colombia.[194] In parallel with the Civil

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189 *See* **Exhibit C-71**, 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Representation of Colombia, 11 November 1992, PDF p. 3 ("*1.) Admit the direct intervention of the* [President]. . .*in the present proceedings*. . .") (SSA's Unofficial Translation).

190 *See* **Exhibit C-68,** 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Mr. Danilo Devis Pereira's Rights, 16 December 1991.

191 *See* **Exhibit C-68,** 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Mr. Danilo Devis Pereira's Rights, 16 December 1991, p. 2 ("*c).-As it is observed that* [Mr. Devis] *has presented the required documents, it is pertinent to recognize him as assignee of 10% of the litigated rights of the plaintiff*. . .") (SSA's Unofficial Translation).

192 *See* **Exhibit C-68,** 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Mr. Danilo Devis Pereira's Rights, 16 December 1991, p. 2 ("*c).-As it is observed that* [Mr. Devis] *has presented the required documents, it is pertinent to recognize him as assignee of 10% of the litigated rights of the plaintiff*. . .") (SSA's Unofficial Translation).

193 *See* **Exhibit C-72**, 10th Civil Court of the Circuit of Barranquilla, Judgment Regarding President Of Colombia's Failure to Appear In Conciliation Hearing, 12 August 1993, PDF p. 1.

194 *See* **Exhibit C-72**, 10th Civil Court of the Circuit of Barranquilla, Judgment Regarding President Of Colombia's Failure to Appear In Conciliation Hearing, 12 August 1993, PDF p. 6 ("*Consequently, the defendant should suffer the corresponding procedural sanctions for its failure to attend the aforementioned hearing*. . .") (SSA's Unofficial Translation).

Court Action, on June 1993, SSA Cayman's counsel filed an action before the Constitutional Court (the final appellate court for matters involving interpretation of the Colombian Constitution) to invalidate certain provisions that sought to reduce a declarant's stake from 50% to 5% of the declared treasure ("**Constitutional Court Action**").[195] SSA Cayman sought, *inter alia*, to preclude Colombia from relying on the retroactive application of the 1984 Decrees in the Civil Court Action. SSA Cayman was successful. On 10 March 1994, the Constitutional Court declared the relevant articles of Presidential Decree Nos. 2324 unconstitutional and without effect, invalidating Colombia's attempt to radically alter the apportionment regime from 50/50 to 95/5.[196]

76. Shortly thereafter, the Civil Court also found in SSA Cayman's favor. On 6 July 1994, the Court declared ("**Civil Court Decision**"):

> [T]*hat the* ***goods of economic, historic, cultural, and scientific value that qualify as treasures belong, in common and undivided equal parts (50%), to the Colombian Nation and to Sea Search Armada****, which goods are* ***found within the coordinates and surrounding areas*** *referred to in the* [1982 Report]*, which is part of resolution number 0354 of June 3, 1982, of* [DIMAR] *that recognized that this company holds declarant's right to such goods; whether* ***these coordinates and their surrounding areas*** *are located in or correspond to the territorial sea, the continental platform, or the Exclusive Economic Zone of Colombia. . .*[197]

77. Thus, reflecting the language of the 1982 Report,[198] the Civil Court confirmed that SSA Cayman's rights were over an area surrounding the identified coordinates, not a pinpoint.

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[195] *See supra* ¶ 63.

[196] *See* **Exhibit C-24**, Colombian Constitutional Court, Case File No. D-379, Judgment No. C-102/94, 10 March 1994, PDF p. 17 ("*Declare INAPPLICABLE in their entirety the articles 188 and 191 of Decree 2324 of 1984, for exceeding the material limit set forth in the law of legislative authorization (19 of 1983). . .*") (SSA's Unofficial Translation).

[197] **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 33. (emphasis added) (SSA's Unofficial Translation).

[198] *See supra* ¶¶ 42-43.

I. Colombia Argues, For The First Time, That SSA Cayman Did Not Find The San José

78. Despite (i) granting GMC Inc. the right to search for the San José;[199] (ii) accompanying GMC Inc., GMC, and SSA Cayman on every exploration outing;[200] (ii) reviewing and certifying detailed technical reports;[201] (iii) recognizing GMC as the reporter of the shipwreck;[202] (iv) negotiating with SSA Cayman to salvage the San José;[203] and (v) naming SSA Cayman as the rights holder in various communications with foreign governments;[204] in 1994—a month after losing the Civil Court Action—Colombia issued a press release announcing that it had commissioned a supposedly independent report that apparently showed the San José was actually not in the area reported by GMC ("**Columbus Press Release**").[205]

79. Colombia spills much ink describing the contents of that report (the "**Columbus Report**"),[206] which was put together by a company called Columbus Exploration Inc. ("**Columbus**").[207] The Columbus Report has little probative value because, among other reasons described below, SSA Cayman's representatives were not invited to observe the survey or allowed to review the report's assumptions, methodology or findings. Once SSA Cayman rejected its supposed findings, Colombia rarely invoked the Columbus Report in any subsequent legal proceedings.

80. In fact, the Columbus Report does not support Colombia's assertion that the San José shipwreck is not within the Discovery Area:

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199 *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980.

200 *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, art. 3; **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.

201 *See* **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982 (incorporating the 1982 Report into the resolution).

202 *See* **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1.

203 *See supra* ¶¶ 57-62.

204 *See supra* ¶¶ 65-66. *See also* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987; **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5.

205 *See* **Exhibit R-11**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994.

206 *See* Colombia's Preliminary Objections, ¶¶ 59-62, 110, 154, 157-60, 177-78, 186, 225.

207 *See* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994.

(a) Neither the Columbus Report nor the underlying contract with Columbus mention GMC or SSA Cayman's search or findings, or indeed the 1982 Report.[208]

(b) The Columbus Report does indicate which coordinates were searched, it only says that the Colombian Government provided certain (unspecified) coordinates to Columbus.[209]

(c) Columbus discusses analysis of a wood sample but does not describe the provenance of said sample.[210] It is unclear from where Columbus procured the sample and why its purported analysis contradicted contemporaneous carbon dating analyses that had been submitted to Colombia as part of the 1982 Report, and were thus fully incorporated into Resolution No. 0354.[211] The Columbus Report provides no explanation for this discrepancy.

81. In sum, the Columbus Report does not indicate that Columbus searched the coordinates identified in the 1982 Report. Nor does it indicate that any debris it analyzed was actually found in the Discovery Area. The only document Colombia has provided that links the Columbus Report to the 1982 Report is the (self-serving) Columbus Press Release declaring that the purpose of the Columbus Report was to "*test the Hypothesis*

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[208] *See* **Exhibit R-10**, Contract No. 544/93 between Colombia and Columbus Exploration, 21 October 1993, art. 2 (explaining the "*scope of the works*"); **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 1.1, p. 3 (explaining the "*hypothesis*").

[209] *See* **Exhibit R-10**, Contract No. 544/93 between Colombia and Columbus Exploration, 21 October 1993, arts. 2(a) ("*The following is the scope of work: a. Location of anomalies that may exist at the bottom of the Caribbean Sea at a maximum depth of 700 meters, within a circumference with a radius of 1.5 Nautical Miles, whose center will be fixed based on the coordinates that* [Colombia] *will provide. . .*"), 10(d) ("*Other obligations of the contractor. . .d) Maintain absolute confidentiality about the coordinates provided by* [Colombia]. . .") (SSA's Unofficial Translation); **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 1.1, p. 3 ("*Columbus Exploration Inc. has been commissioned by the Nation with the task of developing the scientific oceanographic research in the area of the coordinates located in the Caribbean Sea, approximately 12 miles from the Rosario Islands*.") (SSA's Unofficial Translation).

[210] *See* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 4.3, p. 12 ("*On June 14, Columbus Exploration received a sample of wood that had been considered part of the hypothetical plank.*").

[211] *See supra* ¶¶ 32, 39-44.

of the discovery of the Galeón San José in the area of the 1982 coordinates."[212]

82. Moreover, other circumstances surrounding the Columbus Report call into question its reliability:

(a) Colombia commissioned the study in October 1993, in the midst of litigation with SSA Cayman.[213]

(b) No SSA Cayman employee or representative was allowed to accompany Columbus, reviewed its methodology, the search coordinates, or test the results of the study.

(c) The Columbus Report claims that Columbus analyzed with a side scan sonar not just the (unidentified) coordinates but also "*an area hundreds of times greater*" than those coordinates so that "*there were no errors regarding the coverage of the areas of the coordinates.*"[214] But 22 years later, in 2015, Colombia claimed to have found the San José shipwreck within the Discovery Area—just three nautical miles from the coordinates listed in the 1982 Report.[215] Whether Columbus was simply unable to detect shipwrecks, was searching in areas nowhere near the Discovery Area, was incompetent or otherwise, its Report is not consistent with the record.

(d) As noted above, a Colombian naval officer was aboard every SSA ship that searched for and found the San José.[216] As a result, all sonar readings, scientific surveys and analysis of wood samples were contemporaneously shared with Colombia. Yet the Columbus Report makes no attempt to reconcile these contradictory results.

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212 Colombia's Preliminary Objections, ¶ 61. *See* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994.

213 *See* **Exhibit R-10**, Contract No. 544/93 between Colombia and Columbus Exploration, 21 October 1993.

214 **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 3.3, p. 9.

215 *See infra* ¶¶ 120-121.

216 *See supra* ¶¶ 54-55.

83. On 1 August 1994, SSA Cayman wrote to the President of Colombia in response to the Columbus Press Release, noting that SSA Cayman's representatives had been denied access to all details concerning Columbus's expedition, despite making timely requests and despite the fact that there was ongoing litigation between the parties.[217] SSA Cayman noted that Colombia's actions disregarded the proceedings pending before the Colombian courts, and, in any event, the Columbus Report had no probative value:

> *We do not understand, Mr. President, why the Nation separated itself from the civil proceeding in which it is a defendant, and invested more than US$700,000 in an expert opinion that, according to the procedural law, lacks any probative value. Instead of requesting an expert report within the process, as was logically and legally appropriate, expert evidence that would ensure a favorable ruling, if through that means it demonstrated the alleged non-existence of the shipwreck in the denounced areas.*[218]

84. SSA Cayman also noted that the Columbus Report directly contradicted the Colombian Navy's contemporaneous reports from its supervision of GMC/SSA Cayman's exploration efforts, which certified the existence of a finding, describing its condition in detail and the areas reported.[219] Colombia did not respond.

J. SSA Cayman Seeks And Obtains An Injunction Order Preventing Colombia From Accessing The Discovery Area

85. Given Colombia's extrajudicial conduct, including by commissioning the Columbus Report and issuing the Columbus Press Release, SSA Cayman sought to protect its rights, as recognized by the Civil Court Decision, by requesting an injunction to protect "*the movable property of economic, historical, cultural and scientific value that has the quality of treasures*" that was the subject of the Civil Court Action.[220]

86. On 12 October 1994, the Civil Court granted SSA Cayman's request and issued an injunctive measure, covering the area described by the 1982 Report (as "*the site*

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[217] *See* **Exhibit C-73**, Letter from SSA Cayman to the President of Colombia, 1 August 1994, pp. 1-2.

[218] **Exhibit C-73**, Letter from SSA Cayman to the President of Colombia, 1 August 1994, p. 3.

[219] *See* **Exhibit C-73**, Letter from SSA Cayman to the President of Colombia, 1 August 1994, p. 2. *See supra* ¶¶ 54-55.

[220] **Exhibit C-74**, SSA Cayman Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 10 August 1994 (SSA's Unofficial Translation). *See also* **Exhibit C-75**, SSA Cayman Reply In Support Of Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 13 September 1994.

identified in the indicated coordinates or in their 'vicinity'") ("**Injunction Order**").[221] The Civil Court rejected Colombia's feigned concerns that a foreign company's access to and rights over assets in Colombian waters would breach its sovereignty or harm national interests:

> ***A seizure order issued by a judicial chamber that is an integral part of the Colombian Nation, issued in accordance with the procedural rules in force in our country, cannot be considered a violation of National Sovereignty, but rather a manifestation of that sovereign power*** *that the Nation confers to its jurisdictional bodies, even if such measure materializes with the technological assistance of foreigners, which is necessary if the corresponding technical means do not exist in Colombia, and in this regard, there is no objection from the attorney of the Nation, which together with this document attaches a report from a foreign company hired by our National Government to make a report on the area that is the object of the proceedings.*[222]

87. The Civil Court thus reiterated its recognition of SSA Cayman's rights by issuing the injunction over the area described in the 1982 Report.[223]

K. SSA Cayman Wins Appeals

88. Colombia subsequently appealed the Civil Court Decision and the Injunction Order. On 7 March 1997, the Superior Court of the Judicial District of Barranquilla ("**Superior Court**") affirmed the Civil Court Decision and the Injunction Order in full ("**Superior Court Decision**").[224]

89. Notably, earlier in the proceedings, the Superior Court, like the Civil Court below it, admonished Colombia for its abusive conduct during the proceedings in which Government officials had made veiled threats against the judges presiding over the

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[221] **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 3. (SSA's Unofficial Translation).

[222] **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 3. (emphasis added) (SSA's Unofficial Translation).

[223] *See supra* ¶¶ 42-43.

[224] *See* **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, p. 64 ("*2.) To confirm the entirety the order dated October twelfth (12th), nineteen ninety-four (1994). . . 3.) To confirm the entirety of the judgment dated July sixth (6th), nineteen ninety-four (1994). . .*"). (SSA's Unofficial Translation).

matter.[225] The Superior Court noted (in relevant part):

> *The veiled threats to which the Representative of the Public Prosecutor's Office resorts to in his brief cannot be overlooked. . .*
>
> *The quotation of these two lines*[226] *is therefore unfortunate, not at all serious and very close to disrespect, more in line with a politician seeking reelection.*
>
> *And the announcement to report "the irregular matter to the competent authorities in disciplinary matters" can only be received as a veiled threat, an undue pressure aimed at restricting the independence of the Administration of Justice (Art. 228 C.N., especially coming from a representative of the Public Prosecutor's Office.)*
>
> *Therefore, it is necessary to remind the attorney representing the Public Prosecutor's Office in these proceedings that he is also obliged to comply with the duties set forth in Article 71 of the Code of Criminal Procedure, especially those set forth in numeral 3, and that the use of means other than persuasion to influence the minds of officials and the use of threats against officials or collaborators constitute an offenses against the proper administration of justice (Article 51 Decree 196/71.).*[227]

90. In view of Colombia's egregious conduct in the domestic proceedings, members of the U.S. Congress wrote to the U.S. Department of State to express concern about the treatment of SSA Cayman as a U.S. investor:

> ***Attorneys representing the Government of Colombia and the Public Ministry in the appeal pending before the Superior Court for Barranquilla have made open, public direct threats against the Court and Judges in Court documents should they rule in favor of Sea Search Armada.***
>
> *These developments raise very serious questions concerning the actions of the Government of Colombia relative to the rights of American citizen*

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225 *See* **Exhibit C-76**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995, PDF pp. 7-8.

226 Referring to **Exhibit C-76**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995, PDF pp. 7-8 ("[T]*he transcription* [by Colombia's counsel] *of two lines by a literary figure whose name is not of interest and is not remembered now. 'There is light in the poterna and a guardian in the estate'. Poterna is a door, a secondary gate that allows access to a fortification, or a building. If light is shine on it, it is to avoid that, taking advantage of the darkness, people with bad intentions can enter, of course, with malevolent purposes. And the guardian of an estate complements the light of the gate, because his task, his work, is to reject the presence of strangers, of invaders. . .*") (emphasis added) (SSA's Unofficial Translation).

227 *See* **Exhibit C-76**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995, PDF pp. 7-8 (SSA's Unofficial Translation).

investors, without mentioning the possible impact upon future American investment in Colombia. . .

In light of these very disturbing developments, we request that the Department of State, without equivocation, intercede with the Government of Colombia in order to protect the rights of American citizens and protest the use of inappropriate political pressure and threats by the Government of Colombia against the Judges assigned to appeal of this lawsuit.[228]

L. The Colombian Supreme Court Upholds SSA Cayman's Rights

91. The Supreme Court largely affirmed the decisions of the courts below it. Colombia does not contest the main holdings of the 2007 Supreme Court Decision as set out in SSA's Notice of Arbitration.[229] In summary:

(a) The Supreme Court affirmed that the act of discovery vests the declarant with rights in the declared property.[230] The Supreme Court thus concluded that GMC's rights had vested in the shipwreck with Resolution No. 0354.[231]

(b) The Supreme Court found that GMC had validly assigned its rights to explore, discover, and partake in the declared treasure to SSA Cayman,[232] and that DIMAR did not need to authorize the transfer of

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[228] **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, PDF pp. 1-2 (emphasis added).

[229] *See* Notice of Arbitration, ¶¶ 31-38.

[230] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 157 ("*It is clear, therefore, that the right to a treasure is acquired by its discovery,* lato sensu*, and not by its material or physical apprehension (*corpus*), a concept that also includes reporting its location, applicable to discoveries that occur on land or property owned by others*."), 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract. . it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery*.") (SSA's Unofficial Translation).

[231] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 182 ("*Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets that are the subject of this judicial controversy, insofar as they of course correspond to a treasure, a circumstance guaranteed in the legal sphere with the recognition that in this sense was made by the General Maritime and Port Directorate, according to Resolution 0354 of June 3, 1982, to the* Glocca Morra Company.") (SSA's Unofficial Translation).

[232] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 63-64 ("*It must also be observed. . .second, that in Resolution No. 204 of March 24, 1983. . ., in addition to authorizing* Glocca Morra Company *to assign to* Sea Search Armada *'all rights, privileges and obligations' that it had acquired, including those arising from Resolution No. 0354 of June 3, 1982, it authorized 'the company, SEA SEARCH ARMADA, to undertake works of underwater exploration*

rights that had vested in the declarant unless the transferee intended to conduct underwater exploration.[233]

(c) The Supreme Court conducted an extensive analysis of the term "*treasure*" and held that, as reported, the shipwreck could constitute "*treasure*" within the meaning of Articles 700 and 701 of the Colombian Civil Code[234] because it was (i) manmade;[235] (ii) buried or lost for a long time;[236] and (iii) the owner was not known or could not be found at the

aimed at locating treasures or shipwreck goods in Colombia's jurisdictional waters of the Atlantic Ocean in the areas described in Article 1 of Resolution Nos. 0048 of January 29, 1980 and 0066 of February 4, 1981.'") (SSA's Unofficial Translation).

[233] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 64 ("*Viewing it in this way, it is uncontestable that no 'assignment' of 'personal credits' was verified between the plaintiff company and* Glocca Morra Company*, the perfection of which would require observing the requirements established in Article 1959 et seq., of the Civil Code, because,* strictly speaking*, the Nation, acting through DIMAR, did not make itself an obligor of those companies, but rather only granted permission for the underwater exploration aimed at locating treasures or shipwreck goods and authorized the respective replacements, recognizing the assignees as such, authorizing them to go ahead with the exploration; allowed the plaintiff to use foreign flagged ships for the purpose and even considered the plaintiff company as a 'declarant of treasures or shipwreck goods,' when later coordinating with it toward execution of the contract for recovery of the goods found*.") (SSA's Unofficial Translation). The Supreme Court also noted that Colombia was estopped from challenging the assignment as it had not challenged the assignment or SSA Cayman's standing in the Civil Court or Superior Court cases. *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 66 ("[I]*t must be added that in answering the complaint. . .the Nation did not express the least misgiving about the plaintiff's standing. On the contrary, the Office of the Inspector General of the Nation, acting in representation of the Nation, admitted that Facts 4, 5, 6, 16 and 17 were true and that it had no evidence concerning Fact 15 and would wait to see what was proven. The Nation held to this position during the processing of the two instances; it did not—either in the allegations formulated at the close of the first instance, or in the appeal of that trial court decision, or in arguing its appeal to the Superior Court—put forward any argument at all concerning the plaintiff's lack of standing and, much less, that the assignments on which it relied in the present process had not been proven*.") (SSA's Unofficial Translation).

[234] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 211 (recounting the Superior Court's decision to confirm the applicability of art. 701 of the Civil Code, which the Supreme Court did not reverse), 234.

[235] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 89 ("*Firstly,* it must be movable things that have a value and are the product of human work or task*, that is, that having been forged by man, have some economic significance in themselves considered, well, precious. . .*"), 91 ("*It is also important to highlight that the goods that constitute a treasure, as a matter of principle, must be the product of a human work, that is sons of man, that is, that their hand is reflected in them, in one way or another, as a bonus*.") (SSA's Unofficial Translation).

[236] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 97 ("*Secondly,* those assets, thus understood, must have been buried or hidden for a long time. *In the words of Don Andrés Bello, they must have been 'buried since time immemorial and found...without the help of magic'*.") (SSA's Unofficial Translation).

time of the discovery.[237] In assessing the third factor, the Supreme Court rejected Colombia's arguments that it was known, at the time of the discovery, that the shipwreck was owned by Colombia or, in the alternative, by Spain.[238]

(d) The Supreme Court distinguished the concept of "*treasure*" (which should be apportioned on a 50/50 basis) from objects of "*cultural heritage*," to which the 50/50 apportionment scheme under Articles 700 and 701 of the Colombian Civil Code did not apply. The Supreme Court agreed with the Constitutional Court's decision that "*not every sunken good is part of the national heritage, because it must be of historical or archaeological value to justify its incorporation into said heritage.*"[239] The Supreme Court refrained from stating how much of GMC / SSA Cayman's discovery was treasure because "[t]*he extraction or exhumation of the declared goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus their characteristics, features, or individuals traits are not fully known*."[240] Indeed, as far as SSA is aware, the shipwreck and its contents still remain underwater.

92. Ultimately, the Supreme Court upheld most of the Civil Court Decision, only modifying

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[237] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 107 ("*Thirdly, in order to properly speak of a treasure,* it is essential that there be no memory or trace of its owner.") (SSA's Unofficial Translation).

[238] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 169 ("*To affirm that by virtue of eminent domain, all the precious effects buried or hidden prior to the independence process, in the then Viceroyalty of New Granada, belong to the Colombian Nation would imply affirming that, in Colombia, by itself, there cannot be treasures that have been 'deposited' before independence, which conflicts with praxis, with legal reality.*"), 170-71 ("*To the foregoing, it is added that this particular accusation has as its starting point that the assets discovered were the property of the Spanish Crown, a fact that was neither affirmed by the Court, nor does it appear accredited in the process. And this is of paramount importance because if the charges in cassation—not in the judgment carried out by the first and second degree judges—are outlined by direct means, then it is not possible to disagree with the vision that the judge had about the facts. . .In any case, it should be noted that the appeal does not explain why the aforementioned assets were really and effectively owned by the Spanish Crown, because although such a statement is made in it, no support was offered to it, leaving it deprived of all support.*") (SSA's Unofficial Translation).

[239] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 230 (SSA's Unofficial Translation).

[240] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 223 (SSA's Unofficial Translation).

it in respect of the Supreme Court's recognition of items of cultural heritage as a category of goods separate from treasure. This is made clear by the Supreme Court's *dispositif*:

(a) First, the Supreme Court decided to accord "*full and unequivocal protection to the national cultural, historical, artistic, and archaeological heritage, including underwater heritage*," which are excluded objects with these characteristics from "*the declaration of ownership.*"[241]

(b) Second, the Supreme Court modified the Civil Court's Decision,[242] only with "*the understanding that the property recognized therein, in equal parts, for the Nation and the plaintiff, refers solely and exclusively to goods that, on the one hand, due to their own characteristics and features, in accordance with the circumstances and the guidelines indicated in this ruling, may legally qualify as treasure.*"[243]

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[241] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 234 (which reads in full: "***FIRST: TO PROVIDE*** *full and unequivocal protection to the national cultural, historical, artistic, and archaeological heritage, including underwater heritage. For that reason, it expressly excludes each of the goods that are or may be 'movable monuments,' according to the description and reference set forth in Article 7 of Law 163 of 1959, from the declaration of ownership set forth in the second item of the operative part of the trial court judgment, rendered in such trial by the Tenth Civil Court of the Circuit of Barranquilla on July 6, 1994. Such goods are subject to and governed by the protective system established therein, as well as by the constitutional and legal provisions that have subsequently been issued with the same specific purpose, which have granted broad, general protections*.") (emphasis in original) (SSA's Unofficial Translation).

[242] *See* **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 33. ("D*eclare that the goods of economic, historic, cultural, and scientific value that qualify as treasures belong, in common and undivided equal parts (50%), to the Colombian Nation and to Sea Search Armada, which goods are found within the coordinates and surrounding areas referred to in the* [1982 Report], *which is part of resolution number 0354 of June 3, 1982, of* [DIMAR] *that recognized that this company holds declarant's right to such goods; whether these coordinates and their surrounding areas are located in or correspond to the territorial sea, the continental platform, or the Exclusive Economic Zone of Colombia. . .*") (SSA's Unofficial Translation).

[243] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 234-35 (which reads in full: "***SECOND:*** *In accordance with the preceding ruling, the aforementioned second item of the trial court judgment is* ***MODIFIED****, with the understanding that the property recognized therein, in equal parts, for the Nation and the plaintiff, refers solely and exclusively to goods that, on the one hand, due to their own characteristics and features, in accordance with the circumstances and the guidelines indicated in this ruling, may legally qualify as treasure, as provided by Article 700 of the Civil Code and in accordance with the restriction or limitation imposed on it by Article 14 of Law 163 of 1959, among other applicable legal provisions, and on the other hand, to those goods referred to in Resolution 0354 of June 3, 1982, issued by the General Maritime and Port Directorate, that is, to those that are in 'the coordinates referred to in the 'Confidential Report on Underwater Exploration conducted by*

(c) Third, the Supreme Court upheld the remainder of the Civil Court Decision.[244]

93. Colombia claims that the 2007 Supreme Court Decision limited SSA Cayman's rights to a single set of coordinates.[245] That is incorrect. As the Supreme Court made clear, it only modified the lower court's decision to clarify that cultural patrimony goods cannot be privately claimed. The Supreme Court expressly upheld the remainder of the Civil Court Decision. This included the Civil Court's declaration that SSA Cayman was entitled to rights in the Discovery Area.[246]

94. Colombia also argues that the Supreme Court's statement that SSA Cayman has rights to the "*assets. . .only referred to those located within the specific coordinates recognized in the Confidential Report, '*without including, therefore, different spaces, zones or areas'"[247] somehow shrinks SSA Cayman's rights from the area it reported to pinpoint coordinates. Plainly, that is not what the Supreme Court stated. The Supreme Court, like Resolution No. 0354, confirmed that the 1982 Report defined the Discovery Area. As noted above, the 1982 Report refers not to a pinpoint but the "*immediate vicinity*" of the stated coordinates.[248] The Supreme Court's exclusion of "*other spaces, zones, or areas*"[249] does not exclude, as Colombia seems to posit, spaces and areas that the 1982 Report expressly included. Indeed, doing so would put Resolution No. 0354,

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the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982,' Page 13 No. 49195 Berlitz Translation Service,' which does not include other spaces, zones, or areas.") (emphasis in original) (SSA's Unofficial Translation).

244 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 235 ("***THIRD:*** *Notwithstanding the determinations adopted in the two previous points,* ***CONFIRM*** *the rest and pertinent, the aforementioned judgment of first instance.*") (emphasis in original) (SSA's Unofficial Translation).

245 *See* Colombia's Preliminary Objections, ¶ 68 ("*As can be seen, pursuant to operative paragraph 2 of the 2007 CSJ Decision, any property rights of Glocca Morry Company, as a recognized reporter, were conditioned on compliance by the relevant assets with two cumulative criteria: (i)* first*, on the assets being in the area of '*the coordinates referred to in the Confidential Report on Underwater Exploration … without including, therefore, different spaces, zones or areas*; and (ii)* second*, on the assets still being susceptible of being '*qualified juridically as a treasure*.'"*).

246 *See supra* ¶¶ 76-77.

247 Colombia's Preliminary Objections, ¶ 66.

248 *See supra* ¶¶ 42-43.

249 **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 235.

which fully integrated the 1982 Report, at odds with itself.[250]

M. SSA Acquires Its Investment In Colombia

95. As noted above, while litigation was still ongoing in Colombia, the U.S. Government sent several letters to Colombia on behalf of SSA Cayman as it was concerned with protecting the rights of the "*American investors*" who "*owned and operated*" SSA Cayman.[251] Colombian authorities had assured the U.S. Government that Colombia "*would abide by the decisions of its* [own] *Courts*" but that it would not enter into "*settlement discussions pending*" the resolution of the Civil Action.[252] With the Civil Action resolved, and SSA Cayman's rights affirmed, SSA Cayman's manager, Mr. Harbeston, decided to transfer SSA Cayman's interests to a U.S. entity.

96. On 18 November 2008, the Claimant, SSA, a U.S. registered company, acquired all of SSA Cayman's assets and liabilities pursuant to an Asset Purchase Agreement ("**APA**").[253] Under the terms of the APA, SSA Cayman, through its trustee and managing member Armada Company, agreed to "*sell, assign, transfer, convey and deliver*" and SSA agreed to "*purchase*" from SSA Cayman its "*right, title and interest*" in, *inter alia*:

> *a) All rights, title and interest in and to the search area license (the "License") granted to Glocca Morra Company by the government of Colombia in Resolution 0048 on January 29, 1980, and assigned to Seller* [SSA Cayman] *with authorization by the Colombian Maritime and Port Authority Resolution 204 dated March 24, 1983, and as confirmed by the Supreme Court of Colombia's July 5, 2007 rulings of the first and second instances as validly granting the holder thereof the right to search areas off the Coast of Colombia near Cartagena for ancient shipwrecks and sunken treasure and ownership of fifty percent (50%) of all items found and recovered as a result of such search and salvage efforts;*

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250 *See supra* ¶¶ 47-49.

251 **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, p. 1.

252 **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, p. 2 ("*The Colombian Government has stated formally to the Department of State that it would abide by the decisions of its Courts, and it has stated to Sea Search Armada that it does not wish to undertake settlement discussions pending this appeal*.").

253 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008.

> *b) all assets, business, goodwill and rights of Seller or whatever kind and nature, tangible or intangible, owned, leased, licensed, used or held for use or license by or on behalf of Seller in the operation of Seller's Business. . .*
>
> *c) All governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals, consents and franchises used or useful in connection with the operation of Seller's Business and any and all pending applications relating to any of the foregoing (collectively, the "Acquired Permits").*[254]

97. SSA Cayman's transfer of rights under the APA was broad and expressly included all rights held by SSA Cayman granted by government licenses and permits, including by DIMAR. Moreover, the parties to the APA did not consider that the rights being transferred were created by the Colombian Courts, but rather recognized that the Supreme Court "*confirmed*" such rights.

98. In exchange for the sale of all its assets, SSA undertook to "*assume and thereafter pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities*" including:

> *(i) to the extent not previously paid or performed, the payment and performance obligations of Seller arising prior to the Closing Date under the Acquired Permits and the Acquired Contracts;*
>
> *(ii) the payment and performance obligations of Purchaser arising from and after the Closing Date under the Acquired Permits and the Acquired Contracts; and*
>
> *(iii) distribution and allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement.*[255]

99. SSA Cayman's payment and performance obligations included payments to various vendors involved in the search and identification of the San José. Indeed, SSA Cayman had incurred similar obligations as a result of its investments of well over USD 11 million made in the search for and identification of the San José,[256] negotiations with

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[254] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.1(a)-(b).

[255] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.3. *See also id.* art. 1.5.

[256] *See supra* ¶¶ 29-41.

the Colombian authorities for a salvage contract,[257] and efforts to enforce SSA Cayman's rights.[258] After the APA's closing date, such obligations would continue to accrue and SSA would have to continue expending substantial capital and human resources to enforce its rights.[259]

100. Moreover, SSA undertook the obligation to distribute all proceeds obtained to the Economic Interest Holders, which were all previously partners of SSA Cayman, in portions equivalent to their rights of recovery under the SSA Cayman partnership agreement.[260]

101. In 2008, SSA became the owner of rights to the discovered treasure that had previously belonged to its predecessors, namely GMC Inc., GMC and SSA Cayman ("**SSA Predecessors**"). Accordingly, SSA took over discussions with the Colombian authorities and later initiated new litigation to recover the shipwreck in accordance with the rights recognized by the 2007 Supreme Court Decision.[261] Not once during these negotiations or the ensuing litigation (and indeed until these proceedings) did any Colombian authority question SSA's acquisition of rights under the APA.

N. SSA Initiates Legal Proceedings To Enforce Its Rights

102. The Supreme Court had unambiguously confirmed SSA's rights to the San José and cleared the path for renewed negotiations.[262] SSA accordingly reached out to Colombian authorities repeatedly to initiate a joint salvage operation.[263] However, the

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257 *See supra* ¶¶ 56-62.

258 *See supra* ¶¶ 69-77, 85-93.

259 *See infra* ¶¶ 102-110, 125-134.

260 **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1, Exhibit B; *see also* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 3.3.

261 *See infra* ¶¶ 125-134.

262 *See supra* ¶¶ 92-94.

263 *See* **Exhibit R-17**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010 ("*By precise instructions of the President of the Republic, I am responding to your communication filed in this Secretariat on 16 March 2010, through which you propose the establishment of rules and the joint recovery of the shipwreck referred to in the judgment of the Supreme Court of Justice of 5 July 2007. In your communication you inform that if you do not receive any response within 30 days, the company that you represent will understand that the Government is not interested in recovering the shipwreck in the proposed manner and, therefore, will unilaterally initiate preparations to recover what Supreme Court has declared to be your property*.").

Colombian authorities continued to drag their feet.[264] Accordingly, SSA initiated litigation proceedings in the U.S. and filed a petition before the Inter American Commission on Human Rights ("**IACHR**") to enforce its rights.

103. First, on 7 December 2010, SSA filed a complaint against Colombia in the U.S. District Court for the District of Columbia (the "**U.S. Litigation**").[265] SSA alleged that:

(a) Colombia had breached the salvage contract it was negotiating with SSA;[266] or

(b) Colombia had committed conversion by refusing to allow SSA to initiate salvage operations;[267] and

(c) The U.S. court should enforce the 2007 Supreme Court Decision as a foreign judgment.[268]

104. Colombia did not challenge SSA's authority to bring these claims or its ownership of the underlying rights.

105. Colombia erroneously claims that SSA alleged expropriation in the U.S. Litigation, conflating SSA's conversion claim under U.S. law with a claim for expropriation under international law.[269] In doing so, Colombia confuses two legally distinct rights of action. Under U.S. law, conversion is an intentional tort. Its equivalents in criminal

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264 *See, e.g.*, **Exhibit C-31**, Letter from SSA to the President of Colombia, 31 March 2011, PDF p. 1 (explaining that SSA had not been contacted by the Office of the Presidency after they had agreed to discuss the 2007 Supreme Court Decision with SSA). *See also* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 31-43 (setting out the chronology of discussions between SSA and the Colombian government, whereby SSA repeatedly reached out to the President of Colombia and other authorities to propose a joint salvage operation but was met with resistance on the grounds that Colombian authorities did not consider the 2007 Supreme Court Decision to grant SSA rights to joint salvage), pp. 22-25 (noting that Colombia's non-compliance with the 2007 Supreme Court Decision was the result of corruption).

265 *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010.

266 *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 84-89.

267 *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 90-95.

268 *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 96-102.

269 *See* Colombia's Preliminary Objections, ¶¶ 79, 162-69.

law include theft or larceny.[270] Importantly, conversion can only apply against chattels, or goods, not rights, and does not necessarily extinguish the right to title or ownership over the converted property. SSA alleged conversion before the U.S. court on the basis that Colombia was blocking SSA from salvaging the shipwrecked goods to which it had rights, including through the threat of military intervention.[271]

106. The U.S. Court ultimately rejected SSA's claims, but not on the merits. The court found that SSA's breach of contract and conversion claims were time barred under U.S. law, and that it could only enforce foreign money judgments, not declaratory judgments like the 2007 Supreme Court Decision.[272]

107. Second, on 29 March 2013 SSA filed a petition with the IACHR to enforce its rights.[273] SSA claimed violations of its rights to property[274] and judicial protection[275] under the Inter-American Convention on Human Rights. SSA did not make claims for expropriation. As in the U.S. Litigation, SSA did not complain about the existence of its rights, but rather that Colombia was preventing it from accessing its property.[276]

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[270] *See* **Exhibit CLA-7**, *Curaflex Health Servs. v. Bruni*, P.C., 877 F.Supp. 30, 32 (D.D.C.1995) (citing *Duggan v. Keto*, 554 A.2d 1126, 1138 (D.C.1989)) (finding that conversion is "'*any unlawful exercise of ownership, dominion or control over the personal property of another in denial or repudiation of his rights thereto*.'").

[271] *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 90-95.

[272] *See* **Exhibit R-19**, United States District Court for the District of Columbia, Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011.

[273] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013.

[274] *See* **Exhibit CLA-4**, American Convention on Human Rights, 22 November 1969, art. 21(1) and (2) ("*1. Every person has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the social interest. 2. No person may be deprived of his property, except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.*").

[275] *See* **Exhibit CLA-4**, American Convention on Human Rights, 22 November 1969, art. 25(1) ("*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties*.").

[276] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 24, ("[T]*he rights of the Republic of Colombia over the shipwreck and those of SSA, its co-owner, were fully determined and protected, with the force of res judicata, by the highest body of its ordinary jurisdiction*."), 26 ("*It must be kept in mind that the proceedings before the civil jurisdiction of Colombia, in which SSA's dominion over half of the treasures was declared, was a pure declaratory proceeding, which are those in which only legal certainty is sought regarding the right claimed*."), 27 ("*Therefore, the Supreme Court's ruling imposed on SSA the obligation, correlative to the declared right of ownership, to allow, or at*

108. As Colombia appears to acknowledge, the underlying causes of action in both the U.S. Litigation and the IACHR petition (which arose out of Colombia's reluctance to allow SSA access to its discovery) were addressed once the Colombian government agreed to meet with SSA to discuss joint verification.[277] On 22 December 2014, in response to a letter from SSA inviting Colombia to reinitiate discussions,[278] the Minister of Culture confirmed Colombia's intent to negotiate a mutually beneficial resolution, but stated that it would only do so if SSA withdrew its lawsuits:

> *In this regard, I would like to reiterate the position established for several years by the Colombian Government is that* ***there is no possibility of dialogue until the judicial actions of any kind are definitively terminated.*** *Therefore, it is not sufficient to request the suspension of any proceedings, as stated in the annexes to your communication, but rather that* ***such proceedings must be terminated****.*[279]

109. Hoping to find an amicable way to enforce the 2007 Supreme Court Decision, SSA took Colombia at its word[280] and withdrew both the U.S. Litigation[281] and the IACHR petition. While Colombia now appears to claim that it never intended to honor SSA's rights,[282] its correspondence with SSA at that time suggested otherwise.

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least not hinder, the exercise by SSA of the powers or faculties inherent to such ownership.") (SSA's Unofficial Translation).

277 *See* Colombia's Preliminary Objections, ¶¶ 86-89. *See also infra* ¶¶ 271-272.

278 *See* **Exhibit C-32**, Letter from the Minister of Culture to SSA, 22 December 2014 (noting that Colombia had received a letter "*stat*[ing] *the willingness of the firm Sea Search Armada to initiate dialog 'to attempt a negotiated solution to the application of the Supreme Court judgment of July 5, 2007. . .*'").

279 *See* **Exhibit C-32**, Letter from the Minister of Culture to SSA, 22 December 2014 (emphases added) (SSA's Unofficial Translation). *See also* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 38 (referring to Colombia's communication that it would wait for the results of the U.S. Litigation before proceeding to negotiate a resolution with SSA).

280 *See* **Exhibit C-33**, Letter from SSA to the Minister of Culture, 19 January 2015 ("*As it is about putting an end to a quarter of a century of judicial procedures and through dialogue agree on the application or realization of the decision that resolved the dispute. . .Sea Search Armada agrees to withdraw from the processes that are in progress before the Court of the District of Columbia and the Inter-American Commission on Human Rights, so that according to your position, with the termination of these proceedings, the aforementioned dialogues begin*.") (SSA's Unofficial Translation); **Exhibit C-34**, Letter from SSA to the President of Colombia, 20 January 2015, PDF p. 1.

281 *See* **Exhibit C-80**, SSA Withdrawal Of Its Motion To Alter Or Amend The Court's Judgment, 20 February 2015.

282 *See* Colombia's Preliminary Objections, ¶¶ 31-32 (explaining that, even after recognizing GMC as the reporter of the shipwreck, Resolution No. 0354 "*did not mention the Galeón San José much less granted property rights over it.*").

O. Colombia Claims to Find The San José Within The Discovery Area

110. On 14 May 2015, following SSA's termination of the U.S. and IACHR proceedings, the President of Colombia informed SSA that, while in the past it had not been possible to negotiate with SSA due to ongoing legal proceedings, "*in the new circumstances*" Colombia wished to "*reopen direct dialogue*" which would be led by the Minister of Culture.[283] On 19 May 2015, the Minister of Culture met with SSA representatives.[284]

111. At the meeting, Colombia informed SSA that it would only continue to negotiate if the Government was able to confirm that the shipwreck was located at the **pinpoint coordinates** listed in the 1982 Report.[285] SSA pointed out that this was inconsistent with the 1982 Report—the source of SSA's rights under Resolution No. 0354,[286] as confirmed by the 2007 Supreme Court Decision—[287]which had "*clearly established that the shipwreck was not in the coordinates* [] *indicated, but in its immediate vicinity*."[288] Indeed, as the 1982 Report expressly stated: "*target "A" and its surrounding areas that are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N.*"[289] Notwithstanding this, on 28 July 2015, the Minister of Culture cancelled all future meetings.[290]

112. Colombia alleges that SSA's letter describing this meeting somehow indicates that SSA "*acknowledged that, for years . . . it had known that there was no shipwreck in the 1982*

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283 **Exhibit C-81**, Letter from President of Colombia to SSA, 14 May 2015.

284 *See* **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015 ("*According to what was said yesterday at your office. . .*").

285 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 3.

286 *See supra* ¶¶ 42-49.

287 *See supra* ¶¶ 92-94.

288 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 3.

289 **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13.

290 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 3 ("*But out those dialogues* [sic] *only a first and only meeting was held on May 19, because on July 28 they were canceled by the Minister of Culture, when she conditioned their continuity to the verification of the existence of a fact whose non-existence is known by all. . .*") (Colombia's Unofficial Translation).

Coordinates."[291] That is disingenuous. For years, both parties knew that the shipwreck was located in the "*immediate vicinity*" of the stated coordinates.[292] Describing the May 2015 meeting, SSA simply pointed out that Colombia's position contradicted all prior resolutions and discussions, including the 1982 Report and the terms of Resolution No. 0354, which the 2007 Supreme Court Decision had recently upheld as delineating SSA's rights.[293] SSA's follow up correspondence with Colombia immediately after the meeting made this clear. In a detailed analysis of the 2007 Supreme Court Decision, SSA explained that:

(a) The 2007 Supreme Court Decision recognized that the coordinates provided in the 1982 Report were reference points to locate the shipwreck in their "*immediate vicinity*";[294]

(b) SSA was not required to provide precise coordinates under the law in force at the time it discovered the wreck which, instead, contemplated the possibility of a "*margin of error*"[295] in recognition of the limited technology available at the time SSA discovered the San José shipwreck;[296] and

(c) The 2007 Supreme Court Decision confirmed SSA's rights to the "*immediate vicinity*" or "*surrounding areas*" of the reported coordinates.[297]

113. That same month, Colombia contracted with another foreign company, Maritime Archaeology Consultants Limited ("**MAC**"), to conduct an oceanographic survey to

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[291] Colombia's Preliminary Objections, ¶ 95.

[292] *See supra* ¶¶ 56-66. *See also* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 22 August 1984; **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1 (informal translation of Colombia's note by the U.S. Embassy).

[293] *See supra* ¶¶ 92-94.

[294] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, pp. 2, 7-8.

[295] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, pp. 9-12.

[296] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, p. 10 ("*This authorization to report the "presumed" location of the discovery, with the consequent acceptance of margins of error in such reporting, is due to the fact that in 1968, when this decree was issued, there were no methods of measurement that could accurately determine the location of a shipwreck.*").

[297] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, pp. 13-15.

supposedly confirm the location of the San José.[298] The very next day Colombia wrote to SSA, noting that it would assess SSA's analysis and, in the meantime, asked SSA to specify what is considered to be a "*margin of error*."[299] Colombia now refused to indicate that the ship in question was in fact the San José, insisting that the purpose of the negotiations was to conduct a verification of the discovery.[300]

114. On 3 June 2015, SSA responded that its references to the San José did not impact its rights, and so, in the spirit of cooperation, it was willing to table that discussion pending verification of the discovery.[301] SSA proposed a meeting to discuss the Discovery Area, including the margin of error.[302] SSA followed up on 9 June 2015, explaining that various advancements in technology over the last 30 years would have an impact on the margin of error, necessitating a meeting to properly delineate the area for verification purposes.[303]

115. On 25 June 2015, the Ministry of Culture informed SSA that it was coordinating its response with the Commission on Shipwreck Antiquities (*Comisión de Antigüedades Náufragas*, the "**Antiquities Commission**"),[304] which SSA viewed as a potential delay tactic.[305]

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[298] *See* **Exhibit C-36**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 1 ("*APPROVE the pre-feasibility and AUTHORIZE Maritime Archaeology Consultants Limited - MAC- the exploration in Colombian maritime waters to identify contexts likely to contain submerged cultural heritage under the parameters established in the present resolution.*") (SSA's Unofficial Translation). *See also* **Exhibit C-43**, Ministry of Culture Resolution No. 0113, 4 March 2022 ("*WHEREAS. . . That on 29 January 2015, the Ministry of Culture received an offer from MARITIME ARCHEOLOGY CONSULTANTS LIMITED -MAC-. . . to execute the activities made reference to in article 4 of Law 1675 of 2013 in the development of a project of submerged cultural patrimony named the "San José". . .That through Resolution No. 1456 of 26 May 2015, the Ministry of Culture approved the prefeasibility presented by the Originator and authorized MARITIME ARCHEOLOGY CONSULTANTS LIMITED -MAC- to explore the Colombian maritime waters to identify areas susceptible to having submerged cultural patrimony.*") (SSA's Unofficial Translation).

[299] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.

[300] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.

[301] **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015.

[302] **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015.

[303] **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015. *See also* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 2 (following up with its request for a meeting date).

[304] *See* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 1.

[305] *See* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 1. *See also* **Exhibit C-86**, Letter from SSA to Ministry of Culture, 21 July 2015 (reiterating its request for a date to begin formal discussions to enforce the 2007 Supreme Court Decision).

116. Colombia finally responded on 28 July 2015, rejecting SSA's request for a meeting. Colombia asserted that "*it was not necessary, nor pertinent*" to hold a meeting with SSA until the verification exercise had been completed even though the very purpose of SSA's request was to discuss the parameters of that exercise.[306] Notwithstanding the Injunction Order,[307] Colombia also asserted that it was ready to conduct the verification exercise with or without SSA's consent.[308]

117. On 31 July 2015, SSA appealed to the President of Colombia to intervene in the process given the inexplicable reversal of position by the Minister of Culture.[309] The President however rejected SSA's proposal.[310]

118. On 24 August 2015 and then again on 5 October 2015, SSA reached out to the Antiquities Commission to request a meeting to discuss the matter.[311]

119. Separately, on 19 November 2015, SSA reached out again to the Minister of Culture in an effort to advance the dialogue. SSA had been made aware of discussions between Colombia and a third party to salvage the treasure, and Colombia's apparent plan to pay for the salvage with part of the treasure itself.[312] SSA reiterated that the shipwreck was located in the "*immediate vicinity*" of the coordinates reported in the 1982 Report.[313] Despite, Colombia's deliberate attempts to mischaracterize this letter,[314] SSA was

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306 **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015, p. 2.

307 *See supra* ¶¶ 86-89.

308 **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015, p. 2.

309 **Exhibit C-88**, Letter from SSA to President of Colombia, 31 July 2015.

310 **Exhibit C-89**, Letter from President of Colombia to SSA, 3 August 2015.

311 *See* **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 2; **Exhibit R-26**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 5 October 2015, p. 1.

312 **Exhibit R-27**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015, p. 1.

313 **Exhibit R-27**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015, p. 2 ("*In view of this reality, SSA reiterates what it stated in its communication of October 19, regarding its non-participation in the verification of the shipwreck at the coordinates referred to in the report filed on March 18, 1982, because since that day the discoverer left perfectly and clearly established the location of his discovery in a place different from the coordinates where the announced verification will be carried out. Therefore, it does not make sense to propose to him that, assuming his cost, he verifies the same thing that he has repeated for 33 years, that is, that his discovery is not in those coordinates but in its immediate vicinity*.")

314 *See* Colombia's Preliminary Objections, ¶ 97 ("*In this communication, Sea Search Armada, LLC expressed that it had no interest in participating in a verification of the shipwreck in the coordinates reported in 1982 since it new, from the start, that the shipwreck was not located the 1982 Coordinates*").

merely confirming what the 1982 Report plainly states (and what both Parties had agreed all along was the case): that the target is located "*in the immediate vicinity*" of the stated coordinates.[315]

120. Days later, on 27 November 2015, a third party hired by Colombia purported to discover the San José shipwreck, which Colombia announced on 5 December 2015.[316] It has since come to light that Colombia's alleged discovery lay well ***within the area identified in the 1982 Report***. Leaked reports indicate that Colombia found the San José shipwreck at coordinates of **76º 00' 20" W 10º 13' 33" N**.[317]

121. Thus, Colombia reportedly "*found*" the San José precisely where the 1982 Report said it was located: "*the main targets, in bulk and interest are* ***slightly west of the 76th meridian, just centered around target "A"*** *and its surrounding areas that are located in the* ***immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N***".[318] Indeed, the distance between Colombia's reported coordinates of the shipwreck (76º 00' 20" W 10º 13' 33" N) and the coordinates listed in the 1982 Report within whose vicinity the target was found ("76 degrees 00'20"W, 10 degrees 10'19"N") is merely ***three nautical miles***.[319] This makes sense—as the San José had sunk after it blew up during a battle,[320]

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[315] **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13.

[316] *See* **Exhibit C-37**, Statement from President Santos on the discovery of the San José Galleon, 5 December 2015 ("*At dawn on the past Friday, November 27. . .the Colombian Institute of Anthropology and History, with the help of the National Navy and international scientists, found in the vicinity of the Colombian Caribbean Coast, an archaeological site that corresponds to the Captain Ship Galleon San José.*") (SSA's Unofficial Translations).

[317] **Exhibit C-94**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, *available at* https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobierno-colombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de-dolares/ ("*76º 00' 20" W 10º 13' 33" N are the coordinates where the Government found the remains of the Spanish flag vessel, with the support of the prestigious private firm Woods Hole Oceanographic Institution(WHOI), who also worked on the discovery of the Titanic.*") (SSA's Unofficial Translation).

[318] **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 12-13 (emphasis added) (SSA's Unofficial Translation).

[319] *See* **Exhibit C-94**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, *available at* https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobierno-colombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de-dolares/ ("*The distance between the two points is around 3.24 nautical miles*.") (SSA's Unofficial Translation).

[320] *See supra* ¶¶ 16-17, 43.

a dispersion radius of a few miles would be expected. For instance, the Titanic (which did not explode) had a dispersion radius of approximately 3-by-5 miles, with a 2-by-3 mile radius of where most of the debris was concentrated.[321] At the time, however, Colombia did not release the coordinates of purported 2015 find.

122. Despite this, SSA continued trying to maintain a channel of communication with the Government and, as Colombia acknowledges, repeatedly asked to be taken to the coordinates of the alleged 2015 find.[322] On 10 December 2015, SSA asked Colombia to take it to the site of its purported new find to verify whether the shipwreck Colombia had allegedly discovered[323] was outside of the areas reported in the 1982 Report,[324] reiterating this request to the President on 1 April 2016.[325] Colombia, however, refused to honor SSA's request, and instead Colombia insisted that any confirmation process would not include the vicinity of the listed coordinates in the 1982 Report, ignoring both the plain language of the 1982 Report, its prior Resolutions, as well as the 2007 Supreme Court Decision (which had defined SSA's rights as concomitant with the area identified by the 1982 Report).[326]

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[321] *See e.g.*, **Exhibit C-79**, NBC News, *Full Titanic wreck site mapped for the first time*, 12 March 2012, *available at* https://www.nbcnews.com/id/wbna46708489 ("*Researchers have pieced together what's believed to be the first comprehensive map of the entire 3-by-5-mile (5-by-8-kilometer) Titanic debris field*."); **Exhibit C-100**, Rachel Treisman, *A remarkable new view of the Titanic shipwreck is here, thanks to deep-sea mappers*, NPR, 20 May 2023, *available at* https://www.npr.org/2023/05/20/1177056829/titanic-scan ("*Using technology developed by Magellan Ltd., scientists have managed to map the Titanic in its entirety, from its bow and stern sections (which broke apart after sinking) to its 3-by-5-mile debris field*.").

[322] *See* Colombia's Preliminary Objections, ¶¶ 100, 107-08.

[323] *See supra* ¶¶ 35-43.

[324] *See* **Exhibit C-38**, Letter from SSA to the President of Colombia, 10 December 2015 ("*In order to determine whether the discovery of the San José galleon. . .occurred in a maritime area other than the one denounced on March 18, 1982, and recognized by. . .resolution 0354 of June 3, 1982, I respectfully state that Sea Search Armada (SSA) is at your disposal for its representatives to be transferred to the site of the discovery announced on November 5, in order to verify two things: 1) if it is of that galleon; and 2) if the shipwreck is outside the maritime areas indicated as its location in the* [1982 Report]. . .") (SSA's Unofficial Translation).

[325] *See* **Exhibit R-28**, Letter from Colombia to SSA, 17 June 2016.

[326] *See* **Exhibit R-28**, Letter from Colombia to SSA, 17 June 2016. *See also See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 235 ("***THIRD:*** *Notwithstanding the determinations adopted in the two previous points,* ***CONFIRM*** *the rest and pertinent, the aforementioned judgment of first instance.*") (emphasis in original) (SSA's Unofficial Translation); **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13 ("*The main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that* ***are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N***").

123. SSA also reached out to the President of Colombia in an attempt to progress talks. On 30 November 2016, the Minister of Culture informed SSA that no shipwreck had been located in the coordinates listed in the 1982 Report. Colombia further claimed that it was in possession of "*scientific evidence*" that showed "*categorically*" that SSA did not have any rights to the San José's treasure.[327] Despite SSA's repeated requests, Colombia has never provided SSA with the supposed "*scientific evidence*" (including so far in this Arbitration). Indeed, to the extent that Colombia had in fact conducted a unilateral verification exercise, it would have violated its own Court's Injunction Order.[328]

P. The Colombian Superior Court Reaffirms SSA's Rights

124. Over the next three years, SSA continued to attempt to negotiate a resolution with Colombia and enforce its rights to the San José treasure. In the meantime, Colombia attempted to have the Injunction Order lifted,[329] presumably to allow it to recover, without SSA's participation, the San José treasure that it had recently confirmed lay within the Discovery Area identified in the 1982 Report.[330] The Superior Court, however, reaffirmed SSA's rights to the Discovery Area and upheld the Injunction Order.[331]

125. On 16 December 2016, Colombia requested that its courts lift the Injunction Order on the basis that since the Supreme Court had reached a final decision, the dispute had been resolved and the Injunction Order was no longer required.[332] The Civil Court

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[327] **Exhibit R-29**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p. 1 ("*The Colombian Government has already verified the coordinates denounced in the confidential report presented by Glocca Morra in 1982 and was able to verify that there is no trace of a shipwreck in that place. . . . the Colombian Government has the scientific evidence that allows it to categorically state that the condition established by the Colombian Supreme Court of Justice in the July 5, 2007 ruling was not met. Therefore, there is no place for any alleged rights that would allow Sea Search Armada to claim 50% of what would not be considered the Nation's Cultural Heritage of the shipwreck that could eventually be found in the coordinates established in the confidential report*.") (Colombia's Unofficial Translation).

[328] *See supra* ¶ 86.

[329] *See supra* ¶ 86.

[330] *See supra* ¶¶ 120-121.

[331] *See infra* ¶¶ 131-134.

[332] *See* **Exhibit C-91**, Colombia's Challenge Of Injunction Order Before 10th Civil Court of the Circuit of Barranquilla, 16 December 2016.

agreed with Colombia and lifted the injunction on 31 October 2017,[333] which SSA subsequently appealed.

126. At the same time, the U.S. Government continued to support SSA's efforts to enforce its rights. On 16 March 2017, the U.S. Embassy in Colombia reached out to SSA regarding SSA's "*ongoing discussions*" with Colombia over the San José.[334] The U.S. Embassy referred to SSA's proposal to conduct a new survey of the Discovery Area and to a meeting SSA held with the Minister of Culture on 15 February 2017.[335] The U.S. Embassy further informed SSA that it had written to the Minister of Culture to "*underscore* [the U.S. Government's] *view that this outcome would not only bring closure to SSA's longstanding case, but also send a positive signal to U.S. investors more broadly*" and encouraged SSA to continue its dialogue with the Colombian authorities.[336]

127. On 4 September 2017, SSA reached out to the Legal Secretary of the President of Colombia and the Antiquities Commission in an attempt to push for the joint verification of the Discovery Area in the 1982 Report.[337] Colombia, again, claims wrongly that this letter acknowledged "*that there was no shipwreck in the coordinates reported in the 1982 Confidential Report.*"[338] As stated above, this is incorrect. Rather, SSA merely clarified that the shipwreck of the San José was located in the area surrounding the coordinates listed in the 1982 Report, as the 1982 Report itself made

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333 *See* **Exhibit C-93**, Third Civil Court of the Circuit of Barranquilla, Judgment Lifting Injunction Order, 31 October 2017.

334 **Exhibit C-92**, Letter from U.S. Embassy in Colombia to SSA, 16 March 2017.

335 **Exhibit C-92**, Letter from U.S. Embassy in Colombia to SSA, 16 March 2017 ("*I understand that Sea Search Armada (SSA) has proposed to conduct a new survey of the site coordinates it originally identified in 1982, with the objective of demonstrating that the ship is, in fact, located at these coordinates. Furthermore, I understand that SSA met with the Ministry of Culture and* [DIMAR] *on February 15 and is currently negotiating with those entities on the specifics of such a visit*.").

336 **Exhibit C-92**, Letter from U.S. Embassy in Colombia to SSA, 16 March 2017.

337 *See* **Exhibit R-30**, Letter from Sea Search Armada, LLC to Colombia, 4 September 2017, PDF p. 1 ("*Whatever the position of the Commission regarding the proposal for a joint verification of the shipwreck denounced in 1982, which was presented to the Minister of Culture on July 24 and August 8, we consider the knowledge of the history and developments of a litigation that arose 35 years ago, which remains in force despite its final resolution by judgment of the Supreme Court of Justice of July 5, 2007 to be useful to the commissioners*.") (SSA's Unofficial Translation).

338 Colombia's Preliminary Objections, ¶ 103.

clear.[339]

128. On 8 August 2018, SSA reached out to the newly-elected President Iván Duque[340] to open a new dialogue.[341] SSA warned that it would take legal action should the parties fail to reach an amicable resolution.[342] After all, SSA still had rights to 50% of the treasure in the Discovery Area it had reported in 1982, and could therefore initiate litigation to enforce those rights.[343] Indeed, SSA was already involved in on-going litigation in Colombia to reinstate the Injunction Order.[344]

129. On 20 December 2018, SSA wrote to the Vice-President of Colombia.[345] SSA (i) reminded the new administration that, since December 2015, SSA's efforts to carry out a joint verification of the Discovery Area with Colombia were unsuccessful;[346] (ii) clarified that the area that Colombia "*rediscovered*" in 2015 was possible thanks to "*reserved information about its location, which was clandestinely taken from* [SSA]";[347] and (iii) offered to waive any rights to the San José if, after a joint verification, it was confirmed that the shipwreck was not in the Discovery Area.[348] Colombia states that SSA's offer to waive any rights to the shipwreck implies a

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339 *See supra* ¶¶ 41-43.

340 President Juan Manuel Santos was in power between 7 August 2010 and 7 August 2018. On 7 August 2018, President Iván Duque Márquez entered into power.

341 *See* **Exhibit R-31**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018, p. 1 ("[W]*e respectfully invite a dialogue with the participation of who are associated with the topic.*") (SSA's Unofficial Translation).

342 *See* **Exhibit R-31**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018, p. 1 ("*More than 11 years after it was issued, the decision has not only not been enforced, but no peaceful solution has been attempted regarding the disputes that have arisen from its various and successive interpretations. If such a solution is not attempted, or if an agreement is not possible, and without benefit to anyone, new, undesirable and more complex judicial confrontations will be inevitable.*") (Colombia's Unofficial Translation). *See also* Colombia's Preliminary Objections, ¶ 281.

343 *See supra* ¶¶ 76, 88, 92-94.

344 *See supra* ¶¶ 124-125. *See infra* ¶¶ 131-133.

345 *See* **Exhibit R-32**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018.

346 *See* **Exhibit R-32**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018, pp. 1-2.

347 **Exhibit R-32**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018, p. 2.

348 *See* **Exhibit R-32**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018, p. 2 ("*SSA maintains its also repeated offer to waive any claim if, as a result of that verification, the Galeón San José is not found in the maritime areas reported in 1982. But if it is found there, as it certainly will be the case, the institutional duty to guarantee the effectiveness or practical application of the Supreme Court's decision should be complied with without any further delay.*") (Colombia's Unofficial Translation).

contradiction of its prior admissions and conduct.[349] There is no such contradiction: SSA has consistently maintained that it has rights to the Discovery Area and was simply offering an amicable path forward.

130. On 12 March 2019, SSA reiterated its offer to the Vice-President of Colombia to carry out a joint verification.[350] Colombia however refused to conduct a joint verification of the Discovery Area.[351]

131. On 29 March 2019, the Superior Court reinstated the Injunction Order, upholding SSA's rights over the Discovery Area.[352] Notably, the Superior Court interpreted the 2007 Supreme Court Decision in precisely the same manner as SSA, finding that the Supreme Court only modified the declaration of ownership by SSA "*to property that can be legally qualified as treasure.*"[353] The Superior Court did not mention any other restrictions, including supposed geographic limitations, imposed by the 2007 Supreme Court Decision. The Superior Court then noted that the purpose of injunctive relief is to ensure compliance with a judicial decision, and "[t]*hus, the exercise of the injunctive relief measure was conditional upon access to the goods that are the object thereof once they were removed or salvaged*."[354] Since the goods had not been salvaged, SSA still had rights that needed to be protected, warranting the maintenance of the Injunction Order.

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349 *See* Colombia's Preliminary Objections, ¶ 107.

350 **Exhibit R-33**, Letter from Sea Search Armada, LLC to Colombia, 12 March 2019, pp. 1 ("*Sea Search Armada (SSA) would like to ratify its proposal from 20 December 2009* [sic]*, of attempting to reach a consensual solution. . .*") (Colombia's Unofficial Translation), 3 ("*And it also requests a response from the current government to its repeated proposal for a joint verification of the maritime areas denounced in 1982, with the purpose of physically proving, and with absolute certainty, that in 2015 MACS rediscovered the shipwreck discovered in 1982*.") (SSA's Unofficial Translation).

351 *See* **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.

352 *See* **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, pp. 6-7 ("[M]*aintaining the injunction in this particular situation is reasonable, proportional, necessary and adequate, given that it seeks to achieve a legitimate objective; it serves the proposed purpose and there is no other measure that is less burdensome and that guarantees the rights of the plaintiff. . .*") (SSA's Unofficial Translation).

353 **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 4 ("*Based on the foregoing, the declaration of ownership was modified to restrict it to property that can be legally qualified as treasure, excluding submerged historical, artistic and cultural patrimony*.") (SSA's Unofficial Translation).

354 **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 6.

132. The Superior Court further found that the Injunction Order's reinstatement "*has not harmed, nor is it foreseen in any way to harm, the Nation, since the right of ownership of both parties has been settled*" by the 2007 Supreme Court Decision.[355] Rather:

> ***The harm that does exist is in depriving the plaintiff of the only tool it has at its disposal to enforce the 1994 and 1997 judgments, due to the failure to perform an action that is not in its power to perform.***
>
> *Thus, maintaining the injunction in this particular situation is reasonable, proportional, necessary and adequate, given that it seeks to achieve a legitimate objective; it serves the proposed purpose and there is no other measure that is less burdensome and that guarantees the rights of the plaintiff. Thus not only is it not feasible to revoke it; it is also not feasible to modify it.*[356]

133. Accordingly, the Superior Court reinstated in full the Injunction Order, which had ordered "*the seizure of goods that have the nature of treasure, that can be removed* ***from the area determined by the coordinates*** *indicated in* [the 1982 Report]".[357] By acknowledging that SSA had rights over the area identified in the 1982 Report, and not a pinpoint as alleged by Colombia, the Superior Court affirmed SSA's interpretation of the 2007 Supreme Court Decision.

134. On 12 July 2019, SSA wrote to Colombia noting that the Superior Court had reinstated the Injunction Order, and that "[s]*ince this is a case of special characteristics, the Superior Court established in an unequivocal manner, both the location of the goods to be seized, as well as the detailed procedure for its practice*."[358] SSA noted that the seizure process would begin imminently and as Colombia had "*rejected the possibility of a consensual resolution*" the matter now lay "*in the hands of the Judge, allowing the*

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355 **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 6 (SSA's Unofficial Translation).

356 **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, pp. 6-7 (emphasis added) (SSA's Unofficial Translation).

357 **Exhibit C-26**; Superior Court of the Judicial District of Barranquilla, Judgment, 6 July 1994, p. 5 (emphasis added) (SSA's Unofficial Translation). *See also* **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 7 (resolving to "*maintain the* [Injunction Order] *declared in the order of 12 October 1994.*") (SSA's Unofficial Translation).

358 **Exhibit C-41**, Letter from SSA to the Vice-President of Colombia, 12 July 2019, p. 2 (SSA's Unofficial Translation).

institutions to act, as it corresponds in any State under the rule of law."[359]

Q. Colombia Issues Resolution No. 0085 in January 2020

135. While up to this point Colombia had merely challenged the geographic location over which SSA had rights, it had not called into question SSA's entitlement to the treasure in the Discovery Area set forth in the 1982 Report.[360] Indeed, Colombia had referred to SSA's rights on multiple occasions.[361] As a rights-holder, SSA was able to take steps to enforce those rights through dialogue or litigation. And in 2019, SSA had just secured another judicial victory in Colombia when the Superior Court recognized its rights in accordance with the company's interpretation of the 2007 Supreme Court Decision.

136. On 23 January 2020, however, Colombia eviscerated SSA's rights under Resolution No. 0354 by issuing Resolution No. 0085 declaring that the **entirety of the San José** was an "*Asset of National Cultural Interest*."[362] In other words, through this Resolution, Colombia took all of SSA's rights of recovery with respect to any part of the San José, including items that would earlier have been classified as "*treasure.*"

137. But, the basis for the Ministry of Culture's mass designation is unclear. The 2007 Supreme Court Decision had set out specific criteria to be used to determine whether an item would be classified as protected cultural heritage or claimable treasure. According to the Supreme Court, this process required an item-by-item evaluation for which the items had to be recovered from the bottom of the ocean floor.[363] But Colombia had not (and, as far as SSA is aware, still has not) done this. The timing of Resolution No. 0085, in the wake of the Superior Court's reinstatement of the Injunction Order following which the Court would have overseen its execution, is

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[359] **Exhibit C-41**, Letter from SSA to the Vice-President of Colombia, 12 July 2019, p. 3 (SSA's Unofficial Translation).

[360] *See, e.g.*, **Exhibit R-17**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010 (stating that the 2007 Supreme Court Decision did not order the recovery of the shipwreck and that the shipwreck could in fact have historical or archaeological value, and thus excluded from SSA's 50% apportionment).

[361] *See supra* ¶¶ 57-61, 111-112.

[362] **Exhibit C-42**, Ministry of Culture Resolution No. 0085, 23 January 2020, art. 1 ("*Declare the San José Galleon Wreck as an Asset of National Cultural Interest*.") (SSA's Unofficial Translation).

[363] *See supra* ¶ 91.

telling.

138. Alarmed, SSA sought additional discussions with Colombia. U.S. Senator Robert Menendez, the Chairman of the U.S. Senate Foreign Relations Committee helped to facilitate a meeting on 13 October 2021 between SSA and Colombia at the Colombian Embassy in Washington, D.C.[364] Colombia was represented by, among others, the Director General, Dr. Camilo Gómez, of Colombia's legal representatives (*Agencia Nacional de Defensa Jurídica del Estado* or "**ANDJE**"), which also represents the State in this Arbitration.[365] During that meeting, SSA requested that it be allowed to return to Colombia to salvage the discovery it had made in 1982. It even offered to transfer its ownership rights to Colombia at a reduced value, but Dr. Gómez rejected these proposals and asserted Colombia's position that SSA's ownership rights were worthless in light of Resolution No. 0085.[366]

139. At a follow up meeting on 24 June 2022,[367] Dr. Gómez stated that, in May 2022, Colombia had conducted an additional search at the precise coordinates reported in the 1982 Report and had not identified any shipwreck ("**Colombia's 2022 Report**").[368] This new search was again conducted without the participation of, or notice to, SSA. Colombia's 2022 Report thus suffers from the same credibility issues as the Columbus Report. Moreover, Colombia's 2022 Report contradicts Colombia's own officials' contemporaneous reports confirming the discovery of the San José shipwreck in the Discovery Area.[369] Despite repeated requests, Colombia steadfastly refuses SSA the

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364 *See* **Exhibit C-95**, Email from Colombia's State Department to Michael McGeary, 12 October 2021, PDF p. 2 ("*Just had a final word and the meeting is confirmed for 9:00 am tomorrow at the Colombian Embassy, located at 1724 Massachusetts Ave NW, Washington DC*.").

365 *See* **Exhibit C-95**, Email from Colombia's State Department to Michael McGeary, 12 October 2021.

366 *See* **Exhibit C-96**, Mark Regn, Notes regarding meeting with ANDJE, 13 October 2021 ("*Dr. Gomez declined stating SSA owned nothing so the GOC had no interest.*").

367 *See* **Exhibit C-97**, Mark Regn, Notes regarding meeting between U.S. Senator Robert Menendez and President Duque and second meeting with ANDJE, 10 March 2022. Note that SSA also attended with a Spanish-English interpreter, and Dr. Gómez was accompanied by a person who took notes of the meeting. *See* **Exhibit C-98**, Email from Michael Sean McGeary to Mark Regn, Jerry Roland, and Jack Harbeston, 9 June 2022.

368 *See* **Exhibit C-97**, Mark Regn, Notes regarding meeting between U.S. Senator Robert Menendez and President Duque and second meeting with ANDJE, 10 March 2022. *See also* **Exhibit R-34**, Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022.

369 *See supra* ¶¶ 27, 33-34, 45, 50-55, 84. **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF pp. 4 ("[W]*e were able to take out a*

opportunity to conduct joint verification.[370]

140. As previously discussed, the 2007 Supreme Court Decision confirmed that SSA had the right to 50% of any shipwreck treasure found in the Discovery Area.[371] The shipwreck SSA's Predecessors looked for and found was that of the San José.[372] Since 1982, SSA continuously attempted to negotiate a joint plan with Colombia to recover the treasure. While certain Colombian authorities obfuscated SSA's attempts, Colombian courts repeatedly upheld SSA's rights, including in 2019. And so, by government fiat, Colombia eviscerated SSA's rights altogether by declaring the entirety of the San José to be an "*Asset of National Cultural Interest*."[373]

141. As a direct result of Resolution No. 0085, on 17 September 2022, SSA submitted a notice of its intent to submit a claim to arbitration pursuant to Article 10.16(2) of the TPA ("**Notice of Intent**"),[374] followed by the SSA NOA on 18 December 2022.

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piece of wood that was around the area; this wood shows a long time of permanence in the ocean. . ."); 20 ("*An* ***object was found that, due to its shape, simulates the appearance of a canyon****, which is completely covered in coral and when hit by the R.O.V. we noted that it is from a constitution - solid*.") (emphasis added) (SSA's Unofficial Translation); **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 164-66 ("*In the first of such reports, additionally, it was expressed: that 'The samples of wood found and coral with metal remains . . . indicate that under the thick layer of coral of the main target, there is indeed a possible shipwreck'; that 'It was inspected and filmed with a T.V. camera. color the Galleon throughout,...'; that with the help of the 'WASP' they 'reached the bottom at the height of the mid-cover' and* ***'the Galleon was verified in its entire length... which is over 100' long, there are sediments throughout the upper flat part. The stern is well defined, clearly square or rectangular,*** *it takes time to go through it'; that 'some metallic samples' were collected, as well as 'wood', among them two of 'dark brown color, the largest could be the work of man'; that 'definitely remains of wood and metal' were found, establishing on the former that 'it is noticeable that it is worked by man' and on the latter that 'When carefully inspecting some of the recovered coral stones, it was found that two of these contain pieces of metal'; and that 'The possible canyon is located', without achieving its effective recovery due to technical problems*.") (emphasis added) (SSA's Unofficial Translation).

370 *See supra* ¶¶ 270-272.

371 *See supra* ¶¶ 91-94.

372 *See supra* ¶¶ 27-48.

373 *See* **Exhibit C-42**, Ministry of Culture Resolution No. 0085, 23 January 2020, art. 1 ("*Declare the San José Galleon Wreck as an Asset of National Cultural Interest*.") (SSA's Unofficial Translation).

374 *See* **Exhibit C-44**, Notice of Intent under the United States-Colombia Trade Promotion Agreement from SSA to Colombia, 17 September 2022.

III. FOR PURPOSES OF THIS PRELIMINARY PHASE, THE TRIBUNAL MUST DEFER TO THE CLAIMANT'S FACTUAL ALLEGATIONS CONCERNING THE MERITS OF ITS CASE

142. Colombia has requested that the Tribunal issue "*an expedited decision*" under Article 10.20.5 of the TPA declaring that the Tribunal "*lacks jurisdiction over the claim submitted to arbitration.*"[375] However, Colombia's objections turn on factual issues that are not appropriate to be resolved at this stage of the proceeding.

143. A proper interpretation of Article 10.20.5 requires the Tribunal to address Colombia's objections in a manner that promotes efficiency and cost effectiveness. These objectives are best achieved by addressing jurisdictional objections on a *prima facie* basis where, as here, they require an assessment of facts related to merits of the case. In other words, at this stage of the proceeding, any factual disputes that involve the merits ought properly to be resolved during the next phase. As discussed below, this approach is required to achieve the object and purpose of Article 10.20.5 and to comply with the applicable procedural rules.

144. The starting point for the Tribunal's analysis of Article 10.20.5 of the TPA is Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"), pursuant to which the TPA's provisions are to be interpreted and applied "*in good faith in accordance with the ordinary meaning*" of their terms, in the "*context*" in which they occur and in light of the TPA's "*object and purpose*."[376] It is generally accepted that VCLT Article 31(1) requires a treaty to be interpreted on the basis of its "*plain*

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[375] Colombia's Preliminary Objections, ¶¶ 120, 289. *See also* Colombia's Preliminary Objections, ¶ 121 ("*Due to Colombia's valid invocation of Article 10.20.5 of the TPA,* ***and unlike a request for bifurcation which is generally within the discretion of arbitral tribunals****, in this case the Tribunal is under the obligation (shall, as such term must be interpreted in accordance with the rules of treaty interpretation) to proceed as provided in said article. Therefore, once a request pursuant to Article 10.20.5 is made within 45 days after the tribunal is constituted . . . the Tribunal is obliged to 'decide on an expedited basis any objection that the dispute is not within the tribunal's competence' . . .* ") (emphasis added).

[376] **Exhibit RLA-2**, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 31(1). The U.S. is not a party to the Vienna Convention; however, it accepts that the Convention's rules on treaty interpretation are declaratory of customary international law. *See, e.g.*, **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, n. 107 (discussing the U.S. submissions in *Mondev International Ltd. v. United States of America*).

language" first.[377] The relevant "*context*" for construing any treaty terms includes the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.[378]

145. Article 10.20.5 of the TPA provides:

> *In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4* [Article 10.20.4] *and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.*[379]

146. In this case, Colombia does not appear to make any Article 10.20.4 objections,[380] and

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[377] **Exhibit CLA-36**, *The Renco Group, Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4), 18 December 2014, ¶ 176.

[378] *See generally* **Exhibit CLA-34**, *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award, 2 July 2013, ¶ 5.2.6 ("*Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty. . .*").

[379] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.5.

[380] *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.4 (*"Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26. (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment). (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor. (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute. (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.*").

the Tribunal's analysis is therefore limited to competence objections under Article 10.20.5.

147. The object and purpose of Article 10.20 is "*to provide an **efficient and cost-effective mechanism** for respondent States to assert preliminary objections to dispose of claims at an early stage in the arbitration proceedings*."[381] At the same time, respondent States may not use this procedure to stage a "*mini trial*," recast claimants' pleadings, or add another layer to the proceedings, as that would pervert Article 10.20.5's purpose.[382] Deciding factual issues definitively at this preliminary phase would also undermine the UNCITRAL Rules governing these proceedings to the extent that such facts also affect the merits of the case.

148. Specifically, Article 23(3) of the UNCITRAL Arbitration Rules (2021) vests the Tribunal with broad authority to conduct these proceedings in the most efficient and cost-effective manner (which is in line with the TPA's object and purpose). Among other things, the Tribunal has discretion to decide jurisdictional objections "*either as a preliminary question or in an award on the merits.*"[383] And in exercising that discretion, tribunals are generally guided by considerations of efficiency and fairness.[384]

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[381] **Exhibit CLA-36**, *The Renco Group, Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4), 18 December 2014, ¶¶ 214 (analyzing the object and purpose of equivalent art. 10.20.4 and its companion art. 20.10.5 in the U.S.-Peru TPA) (emphasis added), 189(b) (noting that "*the general purpose*" of art. 10.20.4 in the U.S.-Peru TPA is "*to ensure an efficient and cost-effective procedure for disposing of preliminary objections*"); **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 97 (analyzing the equivalent provision in the U.S.-Panama TPA, finding that "*Article 10.20.4 is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs*.").

[382] **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 120; **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 112; **Exhibit CLA-18**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 44.

[383] **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 23(3) ("*The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.*").

[384] *See* **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 17(1) ("*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of*

149. Colombia seems to suggest that Article 10.20.5 has somehow stripped the Tribunal of its discretion under the UNCITRAL Rules.[385] That is not the case: the Tribunal must be guided by the UNCITRAL Rules in its determination of Colombia's Article 10.20.5 objections.[386] This is why in *Bridgestone v. Panama*, the Tribunal rejected Panama's suggestion that Article 10.20.5 of the United States-Panama Trade Promotion Agreement (the "**U.S.-Panama TPA**") (equivalent to Article 10.20.5 of the TPA here) gave the Tribunal "*freestanding authority*" (and even an obligation) to make a final decision on a variety of factual issues, regardless of the extent to which this would pre-empt findings that the Tribunal would normally make on the merits and regardless of conflicts with the procedural rules that would otherwise apply to a preliminary hearing on jurisdiction.[387] The *Bridgestone* Tribunal ruled that the "*requirement to decide an objection on an expedited basis* ***must be read together with the rule or rules under which such an objection is authorized***," which "*are* ***designed to give the Tribunal the authority necessary to conduct proceedings in the most efficient and cost-effective***

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presenting its case. ***The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute***.") (emphasis added). *See also* **CLA-15**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 9 (noting that although art. 21(4) of the 1976 UNCITRAL Arbitration Rules establishes a presumption in favor of considering objections to jurisdiction, it "*does not require that pleas as to jurisdiction must be ruled on as preliminary questions*," and that "[t]*he choice not to do so is left to the tribunal's discretion*."). This reasoning applies with even greater force here, where, as indicated in *Glamis Gold*, the UNCITRAL Rules abandoned the presumption in favor of considering objections to jurisdiction as a preliminary matter. *Cf.* 1976 UNCITRAL Arbitration Rules, art. 21(4) (*"In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."*).

385 *See* Colombia's Preliminary Objections, ¶ 121 ("*Due to Colombia's valid invocation of Article 10.20.5 of the TPA,* ***and unlike a request for bifurcation which is generally within the discretion of arbitral tribunals****, in this case the Tribunal is under the obligation (shall, as such term must be interpreted in accordance with the rules of treaty interpretation) to proceed as provided in said article. Therefore, once a request pursuant to Article 10.20.5 is made within 45 days after the tribunal is constituted. . .the Tribunal is obliged to 'decide on an expedited basis any objection that the dispute is not within the tribunal's competence' . . .* ") (emphasis added).

386 *See, e.g.*, **Exhibit CLA-36**, *The Renco Group, Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20(4), 18 December 2014, ¶¶ 191, 200, 205, 219 (rejecting Peru's objections and emphasizing that under art. 10.20.4 objections (*i.e.*, alleging the insufficiency of a claim "*as a matter of law*"), a tribunal is **mandated** to decide as a preliminary issue based on assumed facts, which is distinct from "*other objections*" raised under art. 10.20.5, including a "*competence objection*[] *brought under the applicable arbitration rules*," which a tribunal has the right to decide **in its discretion** as preliminary questions pursuant to the applicable arbitration rules); **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 111-15.

387 *See* **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 111-12.

manner."[388]

150. The Tribunal here should proceed as provided by the *Bridgestone* Tribunal:

> *118. Where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction. . . .*
>
> *119.* ***Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing****. In those circumstances,* ***it is usual for the tribunal to make a*** **prima facie** ***decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.*** *It will then be open to the respondent, if its preliminary objection fails, to have a second "*bite at the cherry*" at the merits hearing on the basis of the facts that will then be determined.*
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> . . .
>
> *121. It is, however, open to the Tribunal to make a determinative finding of fact and to base a final award or decision upon this at the expedited phase if it considers this appropriate.*[389]

151. This Tribunal's authority is essential to "***prevent the hearing of the expedited objection turning into a mini, or even a maxi, trial***"[390] and is consonant with the Tribunal's

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[388] **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 114-15 (emphases added). *See also id*. at ¶ 116 (holding that "[w]*hen Panama invoked the right to request that its objections as to jurisdiction should be decided on an expedited basis pursuant to Article 10.20.5,* ***this request implicitly invoked the authority conferred on the Tribunal by Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules****. The Tribunal's authority to reach a decision on the objections on an expedited basis* ***is subject to the regime laid down in Article 41 and Rule 41****. . .*") (emphases added). Article 23 of the UNCITRAL Rules grants this Tribunal the same authority as ICSID Article 41 and Rule 41. *Cf.* **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 23 *with* ICSID Convention, art. 41 and ICSID Rules, Rule 41.

[389] **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 118-19, 121 (internal citations omitted) (emphases added). *See also* **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 110 ("[T]*o grant a preliminary objection* [under Article 10.20.4]*, a tribunal must have reached a position both as to all the relevant questions of law and all relevant alleged or undisputed facts that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case,* ***there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection***.") (emphasis added).

[390] **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 120 (emphasis added). *See also* **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4

obligation under Article 10.20.5 to "*suspend any proceedings on the merits*."[391] This is why where the determination of jurisdictional objections requires the assessment of facts that are intertwined with the merits of a case, tribunals have generally refused to decide such objections on a preliminary basis, as doing so would decidedly not serve the interests of efficiency or cost-effectiveness.[392] Accordingly, where competency objections under Article 10.20.5 require review of facts related to the merits of a case, Claimant's factual allegations "***are to be assumed to be true for the purposes of the* prima facie *test***."[393]

152. A respondent may only defeat this presumption if it is able to "***conclusively disprove***" the facts as alleged by claimant.[394] To require claimants to prove facts regarding their

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and 10.20.5, 2 August 2010, ¶ 112 ("*Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, . . . it is clear that* ***an expedited preliminary objection is not intended to lead to a 'mini-trial.' A contrary conclusion would attribute to the CAFTA Contracting Parties a perverse intention to render investor-state arbitration even more expensive and procedurally difficult for the disputing parties, when it would seem from these provisions (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite****. The procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. To that end, there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact*.") (emphasis added); **Exhibit CLA-18**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 44 ***("[T]he use of the expedited procedure as just an additional jurisdictional layer would hardly fit with the stated objective of CAFTA to create effective procedures for the resolution of disputes***.") (emphasis added).

391 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.5. *Cf.* **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 120.

392 *See, e.g.*, **Exhibit CLA-15**, *Glamis Gold, Ltd. v. The United States of America*, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c); **Exhibit CLA-32**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent's Request for Bifurcation Under Article 41(2) of the ICSID Convention, 2 November 2012, ¶¶ 30–31.

393 **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 112 (emphasis added). *See also id.* ¶ 105 ("*As for the definition of the prima facie test,* ***the Tribunal accepts that, in principle, it should be presumed that the Claimant's factual allegations are true***.") (emphasis added); **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 148 ("*The Tribunal notes, however, that it is not invited to decide at this juncture whether a treaty breach has in fact occurred, but merely to determine prima facie whether a treaty breach could have occurred if the Claimant is able to substantiate its claim on the merits in further proceedings.* ***The Tribunal must therefore defer to the factual characterizations put forward by the Claimant unless the Respondent is able already, at this stage, to conclusively disprove them***.") (emphasis added).

394 **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 112 ("*The ultimate result of the above presumption is that* ***the Respondent bears the burden of proof to disprove the Claimants' allegations****. This means that,* ***if the evidence submitted does not conclusively contradict the Claimants' allegations, they are***

substantive claims at the jurisdictional stage would "*prejudge the merits of the dispute and deny the Tribunal's jurisdiction to decide these matters at the appropriate phase of the proceedings.*"[395] This means that, **if the evidence submitted does not conclusively contradict Claimant's allegations, they are to be assumed to be true for the purposes of the *prima facie* test**.[396]

153. The cases that Colombia cites on the burden of proof comport.[397] They recognize the distinction between purely jurisdictional facts and facts that relate to the merits and highlight the need to defer certain questions until the merits phase.[398]

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to be assumed to be true for the purposes of the prima facie test. *This test will be applied to issues deemed merits issues in this Award*.") (emphasis added).

395 **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 108. *See also* **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 111 ("*At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent*."); **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 27(1) ("*Each party shall have the burden of proving the facts relied on to support its claim or defence*.").

396 *See* **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 112 (emphasis added).

397 *See* Colombia's Preliminary Objections, ¶¶ 129-31. *See also* **Exhibit RLA-10**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶¶ 43-58 (upholding jurisdiction and explaining that, where the tribunal's jurisdiction with respect to threshold requirements of the treaty or ICSID Convention turns on the existence (or absence) of certain disputed facts, "[s]*uch disputed facts must be proven at the jurisdictional stage, so that the Tribunal can make a definitive determination of its own jurisdiction. If the evidence is insufficient to ascertain the facts, the Tribunal can choose to join the jurisdictional determination to the merits stage for further development of the evidence. . .*"). The other cases relied on by Colombia are inapposite. For example, **Exhibit RLA-12**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, is an award on the merits. The jurisdictional ruling in the same case, however, adopted the *prima facie* approach. *See* **Exhibit CLA-23**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, ¶ 185 ("*To assess its jurisdiction* ratione materiae*, the Tribunal must further determine whether, if they are later established, the facts alleged by the Claimants 'fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to.'*") (internal citations omitted). As for Colombia's reliance on *Perenco v. Ecuador*, this is misplaced, as the facts in dispute in that case were purely jurisdictional facts. There, the tribunal directed the claimant to file further evidence in support of its counsel's averment that it was controlled by Mr. Perrodo's heirs. *See* **Exhibit RLA-11**, *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011, ¶¶ 105-06.

398 *See* **Exhibit RLA-8**, *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 60-61 (stating that the tribunal "*must look into the role these facts play either at the jurisdictional level or at the merits level,*" such that, "[i]*f the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level,*" but "*if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits*.").

154. For the reasons laid out below, Respondent has failed to carry its burden to disprove "*conclusively*" the non-jurisdictional facts pleaded by SSA. Therefore, to the extent that Colombia's objections rely on facts that are inconsistent with SSA's allegations, they must be denied in this preliminary phase. This applies with particular force here, where Colombia's competence objections seek to recast SSA's factual evidence and where SSA has not yet been able to adduce all of the evidence in support of its claims, which, among other things, require disclosures from Colombia at the appropriate procedural stage, and in any event could not be adequately presented within the abbreviated timeframe set out by the TPA for preliminary objections.

IV. COLOMBIA'S PRELIMINARY OBJECTIONS ARE MERITLESS

155. Colombia poses three main objections to the Tribunal's jurisdiction. Colombia asserts, first, that the Tribunal lacks jurisdiction because SSA is not a qualifying investor[399] as it has purportedly not made a qualifying investment.[400] That is not correct.

156. In response to Colombia's first objection, SSA has shown that it made an investment in 2008 by acquiring the assets, rights and obligations of its predecessor, SSA Cayman, and after that investing money and resources to attempt to salvage the San José shipwreck. Colombia's complaints in relation to the APA's execution, validity and alleged lack of investment characteristics fail for the reasons set out in **Section IV.A** below.

157. Colombia's second and third objections relate to purported temporal issues, as Colombia argues that the present dispute is time-barred because it concerns Colombia's pre-TPA actions or because the Claimant should have known about the alleged breach and resulting damage more than three years before the initiation of this Arbitration.[401] But Colombia's complaints are easily dismissed as they fail to reckon with the breaching measure that SSA has actually pled here—Resolution No. 0085 issued in January 2020—and instead rely on other actions taken by Colombia that that do not form the basis of SSA's claim here. Colombia's temporal objections are addressed in more detail in **Section IV.B** and **Section IV.C** below.

A. SSA Is A Qualifying Investor That Made A Qualifying Investment

158. Article 10.28 of the TPA defines "*claimant*" and "*investor of a Party*" as follows:

> ***claimant*** *means an* ***investor of a Party*** *that is a party to an investment dispute with another Party;*
>
> . . .
>
> ***investor of a Party*** *means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of*

[399] *See* Colombia's Preliminary Objections, Part V.1.

[400] *See* Colombia's Preliminary Objections, Part V.4.

[401] *See* Colombia's Preliminary Objections, Parts V.2-V.3.

> *another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality. . .*[402]

159. SSA is an "*enterprise*" of the United States. Article 1.3 of the TPA defines "*enterprise*" and "*enterprise of a Party*" as follows:

> ***enterprise*** *means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association;*
>
> ***enterprise of a Party*** *means an enterprise constituted or organized under the law of a Party. . .*[403]

160. Colombia does not contest that SSA is a company organized and existing under the laws of Delaware and accordingly is an "*enterprise*" of the United States.[404]

161. As an enterprise, SSA made a qualifying investment in Colombia by acquiring SSA Cayman's rights in 2008. Those rights had vested in SSA's Predecessors by Colombia's issuance of Resolution No. 0354.[405] Colombia challenges SSA's investment by (i) attempting to nitpick the APA's provisions to claim that the transaction is not complete, (ii) asserting that the investment was not accompanied by a "*contribution of capital*,"[406] (iii) claiming that SSA's acquisition of rights required additional DIMAR authorizations, and (iv) recasting SSA's investment as arising out of judicial action. None of these complaints have any basis in law or fact. Below, Claimant first sets out the legal standard for making an investment under the TPA and then addresses each of Colombia's complaints in turn.

(a) Legal Standard For An Investment

162. Article 1.3 of the TPA defines "*covered investment*" as follows:

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402 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 (emphasis added).

403 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 1: Initial Provisions and General Definitions, 15 May 2012 (entry into force), art. 1.3.

404 *See* **Exhibit C-29**, Certificate of Formation of Sea Search-Armada, LLC, 1 October 2008.

405 *See supra* ¶¶ 46-50. *See also* Notice Of Arbitration, ¶ 66.

406 *See* Colombia's Preliminary Objections, ¶¶ 246-47.

> ***covered investment*** *means. . .an* ***investment, as defined in Article 10.28*** *(Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter. . .*[407]

163. Article 10.28 of the TPA defines "*investment*" as follows:

> ***investment*** *means* ***every asset*** *that an investor* ***owns or controls, directly or indirectly****, that has* ***the characteristics of an investment****, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.* ***Forms that an investment*** *may take include:*
>
> *a) an enterprise;*
>
> *b) shares, stock, and other forms of equity participation in an enterprise;*
>
> *c) bonds, debentures, other debt instruments, and loans;*
>
> *d) futures, options, and other derivatives;*
>
> *e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
>
> *f) intellectual property rights;*
>
> *g)* ***licenses, authorizations, permits, and similar rights conferred pursuant to domestic law****; and*
>
> *h)* ***other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges****. . . .* [408]

164. The TPA contains a broad definition of investment as "*every asset*" that is capable of being owned or controlled, irrespective of whether that control or ownership is "*direct*[]" or "*indirect*[]." The sole qualification is that, for an asset to qualify as an investment, it must exhibit "*the characteristics of an investment*." In this regard, the TPA provides a non-exhaustive list of characteristics that an investment may have, such as commitment of capital or other resources, expectation of gain or profit, or assumption

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[407] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 1: Initial Provisions and General Definitions, 15 May 2012 (entry into force), art. 1.3 (emphasis added).

[408] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 (internal citations omitted) (emphases added).

of risk.[409] Tribunals analyzing similarly worded provisions have consistently found that there is "*no inflexible requirement for the presence of* all *these characteristics*."[410]

(b) Claimant Acquired All Assets, Interests, Rights Related To The Discovery Of The San José From SSA Cayman

165. Colombia makes a number of vague complaints about various provisions of the APA,[411] and avers, seemingly on this basis, but without explanation, that SSA does not "*own*" or "*control*" the investment.[412] Contrary to Colombia's insinuations, the APA is a valid and fully executed intra-company agreement that transferred SSA Cayman's vested rights in the discovered shipwreck to SSA.

166. As detailed above, in 1979, various investors founded GMC Inc., a U.S. company incorporated in Delaware, to search for the San José.[413] In 1980, DIMAR issued Resolution No. 0048 granting GMC Inc. permission to explore certain coordinates for the San José.[414] That same year, the founders of GMC Inc. incorporated a Cayman Islands company, GMC, to which GMC Inc. assigned its rights under Resolution No. 0048.[415]

167. GMC and its parent company, SSA Cayman, a limited partnership based in the Cayman Islands, spent thousands of man hours, representing substantial proprietary know how, and over USD 11 million in exploring, finding and reporting the wreck of the San José.[416] Via Resolution No. 0354, DIMAR recognized GMC "*as claimant of the*

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409 *See* **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 140 (discussing the same article under CAFTA). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 180-81.

410 **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 165 ("*The Tribunal is of the view, in agreement with most previous decisions, that there is no inflexible requirement for the presence of* all *these characteristics, but that an investment will normally evidence most of them.*").

411 *See, e.g.*, Colombia's Preliminary Objections, ¶¶ 240-52.

412 Colombia's Preliminary Objections, ¶ 241. *See also* Colombia's Preliminary Objections, ¶¶ 239-52.

413 *See supra* ¶ 22.

414 *See supra* ¶ 23.

415 *See supra* ¶ 31; **Exhibit C-5**, DIMAR Resolution No. 753, 13 October 1980.

416 *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 1. *See also* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 11-12 ("*Up to January 31, 1982, the Glocca Morra Company and its affiliates have spent more than six million ($*

treasures or shipwreck referred to in the" 1982 Report.[417] As the Colombian courts later confirmed, under the Colombian legal regime at the time, Resolution No. 0354 vested in GMC rights to the treasure that it had found and reported in the 1982 Report.[418]

168. In 1982, GMC assigned its rights under Resolution No. 0354, among others, to its parent, SSA Cayman.[419] SSA Cayman then held all the investments made by the original investors in GMC and GMC Inc., as well as capital raised for salvage efforts. In 1988, Jack Harbeston was elected as the Managing Director of SSA Cayman, and authorized SSA Cayman to pursue litigation to enforce the company's rights.[420] As detailed above, SSA Cayman initiated actions in Colombia in 1989, and ultimately in 2007, the Supreme Court reaffirmed the validity of SSA Cayman's rights to treasure as reported in the 1982 Report.[421] In other words, the Supreme Court implicitly acknowledged that the rights held by GMC could be assigned.

169. The SSA Partners were optimistic about the prospects of enforcing these rights entering a new phase in the negotiations with the Colombia. To better protect their investments, interests, and rights, the SSA Partners, all of which were either U.S. companies or largely owned by U.S. nationals,[422] decided to reorganize their interests in a U.S. entity. To that end, Armada Company, in its capacity as the managing partner of SSA Cayman was appointed "*to act as Trustee for the benefit of the Partners of SSA*" to "*dispose*[] *of the assets of SSA before formally dissolving SSA*,"[423] which included "***valuable rights, interests and assets*** *related to*" "*searching for, salvaging and marketing shipwrecks*

6,000,000) dollars in the underwater search and exploration project instituted by Resolution No. 0046. The Sea Search Armada, a limited liability company existing under the laws of the Cayman Islands, British West Indies, which is an affiliate of Glocca Morra, is prepared to spend five million ($ 5,000,000) dollars for the rescue of shipwrecks located during the search operation of Phase Three described above.").

417 **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1.

418 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 234-35.

419 *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983, art. 1.

420 *See* **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988.

421 *See supra* Sections II.H.-II.L.

422 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6.

423 **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, preamble.

and sunken treasure."[424] At the same time, the leadership of SSA Cayman established a U.S. company, the Claimant, SSA. Jack Harbeston was appointed as the Managing Director of SSA, and the board members of SSA Cayman became members of SSA.[425]

170. In 2008, through an intra-company agreement between the two affiliated entities, SSA Cayman sold "*substantially all of the assets*" to SSA.[426] As detailed above,[427] the APA constitutes a broad transfer of substantially all of SSA Cayman's assets, including, among others "[a]*ll rights, title and interest in and to the search area license. . .granted to Glocca Morra Company by the government of Colombia in Resolution 0048*", "*all the assets, business, goodwill and rights of Seller of whatever kind and nature*", "[e]*ach contract, agreement, understanding, lease, license, commitment, undertaking, arrangement or understanding*" and "[a]*ll governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals*" as well as "[a]*ll other assets of Seller of every kind and description*."[428] In exchange, SSA assumed SSA Cayman's liabilities, including an obligation to distribute any and all proceeds to the SSA Cayman Partners, who were designated Economic Interest Holders in SSA.[429]

171. Accordingly, the assignment was broad given that SSA Cayman had dissolved and any and all of its enforceable rights had to be transmitted to its successor, SSA. While certain assets were excluded from assignment, none of these relate to SSA Cayman's rights to the San José.[430] Accordingly, Colombia's vague complaints regarding the

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424 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, preamble.

425 These included David La Rocque and Jerome Baron, who were appointed as the Secretary and Chairman of the Board, respectively, in 1988. *See* **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988.

426 **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, preamble.

427 *See supra* ¶¶ 96-97.

428 **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.1.

429 *See supra* ¶¶ 98-99.

430 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.2 ("*Excluded Assets*").

sufficiency or completeness of SSA Cayman's asset transfer to SSA are meritless.[431] There is thus little doubt that SSA "*owns*" and "*controls*" the "*relevant assets*" in this case given the broad and thorough transfer of rights to it.

172. Colombia also suggests that SSA has not shown that the APA was executed or that its conditions precedent were satisfied.[432] As is clear on the face of the APA, it was validly signed and executed by the parties' authorized representatives, confirming that its closing occurred to their satisfaction.[433] Moreover, the reference to which Colombia points in the APA's chapeau—that the Parties' desire to enter into the APA "*subject to the conditions contained herein*"—refers not to any conditions precedent to execution of the contract, but simply to the terms and conditions of the contract itself (*i.e.* the obligations of each party to the contract).[434]

173. In sum, the APA fully transferred SSA Cayman's assets, rights, and interests to SSA.

(c) SSA's Acquired Assets Constitute An Investment Under The TPA

174. As detailed above, by virtue of the APA, Claimant acquired all of SSA Cayman's assets, rights and obligations relating to the investment, including, importantly, the rights to benefit from DIMAR's licenses, as affirmed by the Supreme Judicial Court. Pursuant to Article 10.28 of the TPA, SSA's acquisition under the APA are plainly "*asset*[s]" that SSA now "*owns*" and "*controls*".

175. Indeed, the assets acquired by SSA, fall within the non-exhaustive "*form*[s] *of an*

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[431] *See* Colombia's Preliminary Objections, ¶ 243 ("*First, Article 1.2 of the APA includes an express exclusion of certain assets from the agreement. Yet, there is no evidence that the relevant assets to this case were not excluded from the APA*.").

[432] *See* Colombia's Preliminary Objections, ¶¶ 241-45 ("*Article 2.1. of the APA provides that the assignment would be completed after a certain date, provided that the conditions agreed by the parties were met. Yet, there is no evidence that those conditions were met or that the assignment was ever completed*.").

[433] *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008. Specifically, Article 2.1 set the closing of the APA to take place "*two business days after the date on which all conditions to the Closing set forth in Sections 4.1 and 4.2 have been satisfied or, to the extent permitted, at such other place or time or on such other date as shall be agreed upon by the Parties*." (emphasis in original). Articles 4.1 and 4.2 list the conditions, which included conditions such as "*Compliance with Agreement*", "*Accuracy of Representations and Warranties*" and "*No Litigation*". Sections 4.1 and 4.2 also allowed the seller (SSA Cayman) and purchaser (SSA) to waive any of the conditions in their "*sole discretion*."

[434] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, chapeau. *See also* Colombia's Preliminary Objections, ¶ 240.

investment" set out in Article 10.28 of the TPA.

176. First, as set out in SSA's Notice of Arbitration,[435] pursuant to the APA, SSA "*owns*" and "*controls*" the rights vested under, *inter alia*, the following DIMAR resolutions:

(a) Resolution No. 0048 of 29 January 1980 authorizing GMC Inc. to search for shipwrecks (later broadened and extended by DIMAR Resolutions, including Nos. 0066 of 1 February 1981; 0025 of 29 January 1982; 249 of 22 April 1982); and

(b) Resolution No. 0354 of 3 June 1982 recognizing GMC as reporter of the shipwrecked treasures and artefacts and acknowledging GMC "*as claimant of the treasures or shipwreck. . .*"

177. Article 10.28(g) defines "*investment*" to include "*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law*[14,15]*. . .*" The two footnotes at the end of paragraph (g) provide:

> *14. Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment* ***depends on such factors as the nature and extent of the rights that the holder has under the law of the Party****. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law.* ***For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment****.*
>
> *15. The term "investment" does not include an order or judgment entered in a judicial or administrative action.*[436]

178. The ordinary meaning of Article 10.28 of the TPA, in its context and in the light of its purpose, thus clearly provides that contractual rights—such as those granted under the APA—and those derived from licenses or similar rights conferred pursuant to domestic

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[435] *See* Notice of Arbitration, ¶ 66.

[436] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28(g).

law were contemplated as investments.[437]

179. As the 2007 Supreme Court Decision affirmed, these resolutions and Articles 700-701 of the Civil Code vested rights in GMC to 50% of the treasure at the location referenced in the 1982 Report.[438] GMC then transferred these rights to SSA Cayman,[439] which in turn transferred them to SSA.[440] Accordingly, SSA "*owns*" or "*controls*" the rights that were vested in GMC through "*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.*"[441]

180. Second, Article 10.28(h) defines investment broadly to include "***other tangible or intangible, movable or immovable property, and related property rights****, such as leases, mortgages, liens, and pledges. . . .*"[442] The inclusion of property rights in the TPA reflects the longstanding recognition that the concept of investment includes immovable and movable rights.[443]

181. Colombian Courts have repeatedly and unambiguously recognized SSA's rights under Colombian law in connection with its discovery:[444]

(a) For example, in 1994, the Civil Court ruled that 50% of the "*goods of economic, historic, cultural, and scientific value that qualify as treasures*" in the Discovery Area "*belong*" to SSA Cayman.[445]

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[437] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 ("*investment means every asset that an investor owns or controls . . .*"). *See also* **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 164.

[438] *See supra* ¶¶ 92-94.

[439] *See supra* ¶ 52.

[440] *See supra* Section II.M. Colombia's objections to the validity of this transfer are addressed below in section IV.A.

[441] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28(g).

[442] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28(h) (emphasis added).

[443] *See, e.g.*, **Exhibit CLA-20**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), p. 125, ¶ 148 ("[T]*he concept of investment includes immovable and movable property*.").

[444] *See also supra* Sections II.H, II.J.-II.L, II.P.

[445] **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 33.

(b) When SSA Cayman had to seek an injunction to protect "*the movable property of economic, historical, cultural and scientific value that has the quality of treasures*" in 1994,[446] the Civil Court issued the Injunction Order on the area described by the 1982 Report in recognition of SSA Cayman's rights.[447] The Civil Court specifically referred to the [court's] ruling that the property in question was "*non-exclusive private property*," and as such are subject to retrieval and allocation to SSA Cayman.[448]

(c) In 2007, the Supreme Court unambiguously ruled that SSA Cayman had vested rights in the shipwreck by virtue of the DIMAR Resolutions[449] and that any treasure stemming from SSA's discovery should be divided

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446 *See supra* ¶ 85. *See also* **Exhibit C-74**, SSA Cayman Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 10 August 1994; **Exhibit C-75**, SSA Cayman Reply In Support Of Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 13 September 1994.

447 *See supra* ¶ 85. *See also* **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994.

448 **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF pp. 3-4 (finding that "*in the judgment of July sixth, the chamber reached a substantially opposite conclusion:* ***that those goods were non-exclusive private property of the nation, that they are treasures and not shipwrecked antiquities and therefore****, their recovery will not necessarily (insofar as the corresponding ruling confirms it) be the object of an administrative contract. The Nation would not be ordered to contract the Recovery with the Claimant Company or with whomever the latter might indicate; it would simply be authorizing the material seizure of such assets by the means deemed necessary for that purpose. In accordance with the provisions of paragraph 1(B) of the article of the procedural statute already cited,* ***it is appropriate to order the injunctive relief requested by the plaintiff, given that this rule expressly grants the feasibility of such injunctive measures for the material seizure of personal property whose right of ownership is the object of the proceedings, and its custody in the hands of court personnel****; the special factual circumstances that exist in these proceedings do not prevent the Court from ordering such a measure so as to make it effective when these circumstances change, either because its salvage or removal has been accomplished by the persons involved in the proceedings or by any third party not party hereto*.") (emphases added) (SSA's Unofficial Translation).

449 *See supra* Section II.L. *See also* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 157 ("*It is clear, therefore,* ***that the right to a treasure is acquired by its discovery****,* lato sensu*, and not by its material or physical apprehension (*corpus*), a concept that also includes reporting its location. . .*"), 182 ("***Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets*** *that are the subject of this judicial controversy, insofar as they of course correspond to a treasure,* ***a circumstance guaranteed in the legal sphere*** *with the recognition that in this sense was made by the General Maritime and Port Directorate, according to Resolution 0354 of June 3, 1982. . .*"), 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract. . .****it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery***.") (emphases added) (SSA's Unofficial Translation).

"*in equal parts for the Nation and the plaintiff*."[450]

(d) In 2019, when the Superior Court reinstated the Injunction Order, it noted that the SSA's rights merited protection until the shipwrecked goods had been salvaged and allocated to SSA.[451] The Superior Court also made clear that Supreme Court had finally adjudicated the dispute over SSA's rights, which included therefore SSA's rights to the entirety of the Discovery Area.[452]

182. Accordingly, SSA "*owns*" or "*controls*" "*other tangible or intangible, movable or immovable property, and related property rights*" in connection with the sunken treasure.[453]

183. SSA's acquisition of SSA Cayman's assets, rights and interests under the APA plainly has the "*characteristics of an investment*."[454] Under the APA, SSA and its predecessors in interest undertook an economic commitment involving risk that brought substantial benefit to Colombia by finding and attempting to salvage the San José shipwreck. Indeed, even after signing the APA, SSA attempted for years, both through negotiations and litigation, to bring the contents of the San José shipwreck to the surface for the benefit of both Colombia and itself.[455]

184. Colombia nonetheless alleges that SSA's investment does not include any

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[450] *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 234 (SSA's Unofficial Translation).

[451] *See supra* ¶¶ 131-132. *See also* **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 6 ("*The seizure measure in this specific case is not subject to the conclusion of the proceedings, in accordance with the provisions of the aforementioned rules in the procedural code, since—as evidenced in the order of October 12, 1994, which was confirmed in its entirety by the second instance judgment of March 7, 1997—it is subject to the removal or salvage of the submerged goods that are the object of the proceedings, which should be the actual form in which the injunction would lose its purpose, since it applies specifically to future goods.*") (SSA's Unofficial Translation).

[452] *See* **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 6 (reiterating that "*the enactment of the seizure did not depend on the end of the proceedings with the enforcement of the judgment on July 9, 2008, but on the removal and salvaging of the goods affected by the injunctive measure*") (SSA's Unofficial Translation).

[453] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28(h).

[454] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28.

[455] *See supra* Sections II.N-II.P.

"*contribution of capital.*"[456] Its argument fails both legally and factually.

185. First, contrary to Colombia's suggestion, a "*commitment of capital*" is not a requirement, but rather one of several potential "*characteristics*" an investment may possess. The TPA does not establish a unitary definition of the characteristics with which all investments must have; instead, it includes a non-exhaustive list of illustrative and non-cumulative characteristics that are typical of investments in general.[457]

186. Second, the TPA contemplates not merely "*the commitment of capital*" but also "*other resources*" as an alternative to capital.[458] Tribunals have found under other identically worded provisions that an investment exists even where the investor made no cash contributions, but instead contributed decision-making, management, and expertise.[459] Indeed, the TPA does not specify any particular dollar amount required for an investment to exist, and Colombia should not be allowed to read in an additional requirement.[460]

187. Third, there is no requirement that capital be "*contributed*" in acquiring or making an investment under the TPA, and indeed Colombia fails to cite any sources to support such a position. Unlike some other BITs, the TPA does not require a "*contribution*",

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[456] *See* Colombia's Preliminary Objections, ¶¶ 246-52.

[457] *Cf.* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 225 (discussing analogous provisions under U.S.-Peru TPA and noting that "[t]*he enumeration of these characteristics is linked by an '*or*', implying that it is not necessary that an asset possess all of these characteristics. That said, the more characteristics an asset possesses, the more its character as an investment is reinforced*.").

[458] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 ("*investment means every asset . . . that has the characteristics of an investment, including such characteristics* ***as the commitment*** *of capital* ***or other resources****, the expectation of gain or profit, or the assumption of risk.*") (emphases added).

[459] *See, e.g.*, **Exhibit CLA-53**, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, ¶¶ 206-07 (holding that claimants had sufficiently established that the general partner's investment decision-making, management and expertise constituted a commitment of "*other resources*" in the sense of Article 11.28 of the U.S.-Korea FTA even though the general partner did not make any cash contributions to the partnership and the funds used to acquire the Samsung shares originated from the limited partner's cash contributions).

[460] *See, e.g.*, **Exhibit CLA-22**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 189 ("*The Respondent's submission would require the Tribunal to qualify the express words of Article 1 by implying an additional requirement of a qualitatively adequate investment. The Tribunal sees no compelling reason for doing so. The Tribunal considers that Article 1 should be given its plain and literal meaning and that the express inclusion of 'shares' as an investment means that the acquisition of shares constitutes an investment without further inquiry.*").

but a "*commitment*" of capital.[461] Although Colombia conflates the two,[462] the Contracting Parties deliberately chose the term "*commitment*" to include promises to pay in the future. According to the Merriam-Webster dictionary, "*commitment*" is "*an agreement or pledge to do something in the future*"[463] whereas a "*contribution*" refers to "*the giving or supplying of something (such as money or time)*".[464] A "*commitment*" of capital or other resources includes promises to provide them in the future,[465] and accordingly can be made through contractual obligations.[466]

188. Fourth, and in any case, SSA's investment both "*commit*[ed]" and "*contribut*[ed]" capital and other resources.

189. From the moment it entered into the APA, SSA undoubtedly made a "*commitment of capital.*" In exchange for the valuable assets it acquired, SSA assumed the obligation to pay, "*as and when due*," SSA Cayman's "*Assumed Liabilities*,"[467] which included:

> *(i) to the extent not previously paid or performed,* ***the payment and performance obligations of Seller*** *arising prior to the Closing Date under the* ***Acquired Permits*** *and the* ***Acquired Contracts****;*

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461 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28.

462 *See* Colombia's Preliminary Objections, p. 78 ("*ii) Claimant has not shown it made a* ***contribution of capital***"), ¶¶ 246-47 ("*As a separate point, it being an explicit characteristic of the type of investment protected by the TPA, Sea Search Aramada, LLC has not proven that it made a '***contribution of capital***' in order to obtain the alleged investment . . . Claimant's actual '***contribution of capital***' could only be -theoretically- established through Sea Search Armada LLC's commitment, under the APA, to assume '*certain of Seller's liabilities*'. . .*"), 251 ("*There is no evidence that the 'Sea Search Aramada – IOTA Partners Limited Partnership Venture Management Agreement' from 1998 is an agreement requiring the* ***commitment of capital*** *as a necessary condition to obtain the DIMAR resolution of 1980 and 1982.*").

463 **Exhibit C-102**, Merriam Webster Dictionary, "commitment", 12 September 2023 (last updated), *available at* https://www.merriam-webster.com/dictionary/commitment.

464 **Exhibit C-101**, Merriam Webster Dictionary, "contribution", 4 September 2023 (last updated), *available at* https://www.merriam-webster.com/dictionary/contribution.

465 *See e.g.* **Exhibit CLA-21**, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶¶ 242-43 ("*There would be no need for actual expenses to have been incurred by the private party, the relevant criterion being the* commitment *to bring in resources toward the performance of such exploration*").

466 *See, e.g.*, **Exhibit CLA-20**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), p. 126, ¶ 149 ("*It is also well established that rights arising from contracts may amount to investments*.").

467 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3 ("*Assumption of Specified Liabilities*").

> *(ii) the payment and performance obligations of Purchaser arising from and after the Closing Date under the Acquired Permits and the Acquired Contracts; and*
>
> *(iii)* ***distribution and allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement*** [appended at Ex. B].[468]

190. SSA Cayman's payment and performance obligations were significant. As discussed above, the SSA Partners (which included investments from primarily U.S. citizens)[469] had invested well over USD 11 million and considerable technical expertise (as DIMAR[470] and Colombian Courts[471] have recognized) into exploration, discovery, and reporting of the shipwreck, and additional amounts from that time to support the enforcement of their legal rights to the discovery.[472] The SSA Partners restructured their investment in 2008 by transferring SSA Cayman's rights to SSA and themselves becoming "*Economic Interest Holders*" to whom SSA must distribute any proceeds from these transferred rights.[473] Thus by "*commit*[ing]" to distribute the proceeds from the enforcement of its rights to the SSA Partners, SSA's acquisition of the investment undoubtedly reflected a "*commitment of capital*".

191. In addition, since 2008, SSA has spent significant money, time and resources to salvage the San José shipwreck, including by pursuing litigation and discussions with

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468 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3 (emphases added).

469 *See supra* ¶¶ 65, 99.

470 *See supra* ¶¶ 23, 46.

471 *See supra* ¶ 86.

472 *See supra* Sections II.H-II.P.

473 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3. Indeed, the SSA Partners' investments did not disappear with this restricting; the investments were merely transferred, via the APA, through which SSA absorbed the rights and responsibilities arising out of the contributions of capital, thereby becoming a successor in interest to its Predecessors. *See* **Exhibit CLA-56**, *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 222-30 (finding that a legal successor relationship may be found where (i) the transaction is intra company, not arms-length; (ii) the interests of assignor and assignee are aligned; (iii) the assignee takes on the assignor's rights and liabilities; and (iv) the assignor has dissolved. All four factors are met here); **Exhibit CLA-37**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶ 198. SSA thus stepped into the shoes of its predecessor with the APA, as it inherited SSA Cayman's rights, liabilities, leadership and economic interest holders, including therefore the "*contributions of capital*" made by its Predecessors, separate and apart from its own contributions. *See also* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3.

Colombia, a clear "*contribution of capital*" and "*other resources.*"[474] Indeed, Colombia acknowledges that SSA's assumption of SSA Cayman's liabilities could constitute a "*contribution to capital*," through, *inter alia*, the assumption of the management contract with IOTA Partners.[475]

192. Claimant therefore has "*attempt*[ed] *through concrete action to make, is making, or has made an investment*" in Colombia under the APA through the "*commitment of capital*"[476] "*as and when due*" under the APA.[477] SSA has already contributed capital and other resources pursuant to this obligation.

(d) SSA Cayman's Assignment To SSA Was Valid

193. Colombia attempts to introduce a further requirement into the TPA's definition of investment by arguing that the APA did not effectively transfer rights to SSA because the company allegedly did not seek DIMAR's authorization before entering into the APA. Again, Colombia's argument has no legal or factual basis.

194. First, unlike many other treaties, the TPA does not make the assignment of the "*investment*" in question contingent on compliance with Colombian law.[478] Colombia

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474 *See supra* Sections II.N-II.P.

475 *See* Colombia's Preliminary Objections, ¶ 247 ("*Claimant's actual "contribution of capital" could only be – theoretically– established through Sea Search Armada LLC's commitment, under the APA, to assume 'certain of Seller's liabilities.'*").

476 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28.

477 **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, art. 1.3.

478 *See e.g.*, **Exhibit CLA-10**, Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, 1 February 2000 (entry into force), art. 1.1 ("*The term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State*"); **Exhibit CLA-8**, Agreement Between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments, 6 March 1995 (entry into force), art. 1(1) (defining "*investment*" as "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. . .*"); **Exhibit CLA-6,** Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, 1 November 1989 (entry into force), art. 2(2) ("[t]*he present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made*"); **Exhibit CLA-9,** Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, 29 September 1999 (entry into force), art. 1(g) ("*'investment means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws. . .*"). *See also* **Exhibit**

claims that Article 10.28(g)'s reference to "*licenses, authorizations, permits, and similar rights conferred* ***pursuant to domestic law***" adds a legality requirement by requiring prior DIMAR authorization.[479] That is wrong. The term "*conferred pursuant to domestic law*" is not a characteristic of the investment (much less a required one) under the TPA. It is instead, a condition of the validity of the underlying instrument (*i.e.* license, permit, authorization).[480]

195. Here, Colombia has not alleged—and it cannot reasonably allege in view of the decisions of its own courts in 1994, 1997, 2007 and 2019[481]—that the underlying permits are somehow deficient under Colombian law.[482]

196. Instead, Colombia tries to assail the assignment. But the TPA does not make assignment of an investment subject to domestic law or the host State's consent. The APA, moreover, is not governed by Colombian law, and it was not executed by Colombian parties. Neither does the APA subject the seller's or buyer's agreement to the instrument or its validity to any authorization by DIMAR or any other Colombian authority.

197. Even where tribunals have read an implicit legality requirement into the treaty, they

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CLA-26, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V (079/2005), Final Award, 12 September 2010, ¶ 388 (annulled on unrelated jurisdictional grounds by the Swedish courts) ("*The very wide wording of that definition does not contain any term limiting 'investment' to something created under applicable national law.*"); **Exhibit CLA-20**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), pp. 140-41, ¶¶ 199-01.

479 Colombia's Preliminary Objections, ¶¶ 70, 140, 253-54. *See* also Colombia's Preliminary Objections, ¶ 255 ("[E]*ven if it is established that Sea Search Armada, LLC complied with the conditions of the APA and that the transaction closed…the Tribunal would still lack jurisdiction over the dispute, because Claimant cannot prove that the alleged investment was conferred to it pursuant to domestic law.*").

480 *See* **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 140; **Exhibit CLA-13**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 46 (holding that the reference to the law of the host State in the BIT was "*to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal*" and finding that, in that case, "*whether one looks to the pre-contractual stage or that corresponding to the performance of the contract for services, it has never been shown that the Italian companies infringed the laws and regulations*" of Morocco).

481 *See supra* ¶¶ 76, 86, 91, 131.

482 Colombia acknowledges that Resolution No. 0048 and future DIMAR resolutions expanding and confirming the rights that vested pursuant to that resolution, were all issued pursuant to Colombian law. *See* Colombia's Objections, ¶¶ 258-62.

have found that not every technicality must be met to establish jurisdiction.[483] Rather, the alleged illegality must be serious, such as an act of fraud or corruption. Here, as explained further below, Colombia cannot even find any domestic law –let alone one whose violation could be considered serious enough to void the investment– requiring DIMAR's approval of assignment of rights vested in a discoverer of treasure. Indeed, at no point since 2008 did Colombia ever question the assignment's lawfulness.

198. Accordingly, Colombia fails to offer any legal basis to invalidate the APA based on its alleged lack of compliance with Colombian law.

199. Second, Colombia fails to offer any provision of its own law that would authorize, let alone require, any Colombian agency to approve the transfer of rights by two private, related parties, as was done under the APA.[484] That is because no such agency or requirement exists.

200. Colombia asserts, without any basis, that DIMAR had "*the sole authority*" to confer on SSA the "*rights previously held*" by SSA Cayman.[485] This is not true. DIMAR is an agency with limited authority focused on marine exploration activities.[486] Those activities ended with the discovery of the shipwreck. While DIMAR had the authority to grant rights through the recognition of the discovery—*i.e.* as it did with Resolution No. 0354—once granted, DIMAR no longer had any authority over the use or transfer of those rights. This is precisely what the Supreme Court found, stating that DIMAR "*was limited simply to exercising the specific legal powers related to oversight and control of underwater explorations and exploration 'aimed at the search for all types of treasures and antiquities located in the Nation's territorial waters or on its continental shelf', with recognition of the entity reporting the 'discovery' or*

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483 *See* **Exhibit CLA-49**, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, ¶¶ 151-56. *See also* **Exhibit CLA-39**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 396, 406-08 (setting out a test focused on the seriousness of the violation).

484 Colombia's Preliminary Objections, ¶¶ 70, 257-60.

485 Colombia's Preliminary Objections, ¶ 260.

486 *See, e.g.*, Colombia's Preliminary Objections, Appendix A – *Dramatis Personae* (defining DIMAR as "*Colombian authority in charge of* ***regulating, controlling and authorizing marine and coastal exploration, as well as the recovery of shipwrecked species***.") (emphasis added).

'finding'."[487] This was "*all independent of the effects*" of DIMAR's "*recognition*" of the discovery, which vested the discoverer (GMC) with rights to the discovery, as confirmed by the 2007 Supreme Court Decision.[488] Thus, once vested, GMC (and its assignees) could transfer their rights without seeking further DIMAR authorization.

201. Colombia's reliance on the fact that SSA's Predecessors had requested DIMAR's authorization of the assignment of marine exploration activities in the 1980s is irrelevant.[489] The reason SSA's Predecessors sought new resolutions approving assignments in the 1980s was because the assignees needed to conduct *exploration* in Colombian waters.[490] However, in 1983, after Oceaneering, acting on behalf of SSA Cayman, confirmed that it had "[f]*ound the wreck*" any further authorization from DIMAR to conduct exploration became unnecessary.[491] This is also why the Colombian court recognized SSA Cayman's lawyer's interest for his services, without any request for confirmation that the contingent assignment of that interest had been approved by DIMAR or any other Colombian authority.[492]

202. Accordingly, nothing in Colombian law requires DIMAR to authorize the transfer of vested rights from SSA Cayman to SSA.

203. Third, as explained above, the transfer of SSA Cayman's assets to SSA was part of the reorganization of the SSA Partners' investment, which is allowed under both the TPA and international investment law.[493] This was a transaction between affiliated

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[487] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 64-65.

[488] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 65.

[489] Colombia's Preliminary Objections, ¶¶ 256, 261-63.

[490] *See* **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980, PDF p. 1 (in seeking approval of the assignment from GMC Inc. to GMC, GMC Inc. reassured DIMAR that "[GMC]. . .*is a company sufficiently capable to continue with seriousness the underwater exploration*.").

[491] *See supra* ¶¶ 53-55.

[492] *See supra* ¶ 74.

[493] *See, e.g.*, **Exhibit CLA-37**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶¶ 198, 203 *("When W assigned the shares in K to A, A stepped into W shoes. A has brought a claim on the basis of an investment made by its predecessor. . .The Claimants have explained the transfer as a permissible internal corporate restructuring. The Respondent has not been able to point to any provision in the Treaty or any principle of international law which prohibits such restructuring. The corporate restructuring in this case appears closer to the transfer contemplated in Quasar de Valores v. Russia, where one of the claimants was replaced by a*

companies, and international investment law recognizes the transfer of an investment from an investor to an affiliated entity without any additional consent from the host State.[494] Claimant did not hide the restructuring from Colombia, and Colombia does not allege that the reorganization or the transfer were abusive or done in bad faith to manufacture jurisdiction. Indeed, the TPA was not even in force when the reorganization occurred in 2008.

204. Fourth, Colombia continued to recognize and negotiate with SSA as the rightful owner of the rights to the shipwreck claimed in the 1982 Report for more than 13 years.[495] Colombia never raised objections to the assignment's validity before the Colombian courts,[496] the U.S. courts,[497] or the IACHR,[498] or in the parties' negotiations thereafter.[499] Indeed, Colombia invited SSA to suspend its legal claims in exchange for a negotiated resolution.[500] And in 2019, the Superior Court recognized SSA as the rightful owner of the relevant rights when it reinstated the Injunction Order in SSA's favor.[501] It is hard to imagine that Colombia would have done so had it questioned the validity of the intercompany transfer of rights. Given Colombia's longstanding conduct

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close affiliate, rather than the decisions cited by the Respondent."); **Exhibit CLA-12**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶¶ 229-30 ("[T]*he Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.. . .The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests*.").

494 *See, e.g.*, **Exhibit CLA-44**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶ 6.70 (finding that assignment of interest made no difference to the analysis because it "*was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction*" and, therefore, "*although different in form, given the different legal personalities of KOMSA and KNI, the assignment produced no material economic, legal or commercial difference in substance.*"); **Exhibit CLA-30**, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶¶ 35-40 (rejecting respondent's objection to one claimant's standing where the corporate restructuring involved a transfer where one of the claimants was replaced by a close corporate affiliate).

495 *See supra* Sections II.N-II.Q.

496 *See supra* Section II.P.

497 *See supra* ¶¶ 103-106.

498 *See supra* ¶¶ 107-108.

499 *See supra* ¶¶ 108-141.

500 *See supra* ¶ 108.

501 *See supra* ¶ 131.

recognizing SSA as the rightful owner of the rights under the license agreements, fairness considerations should estop Colombia's newfound objections to the validity of the SSA's rights.[502]

205. Accordingly, the APA validly transferred rights to SSA.[503]

(e) Claimant's Investment Is Not Derived From The 2007 Supreme Court Decision

206. Colombia makes the baseless argument that Claimant's rights were conferred by the Colombian Supreme Court in 2007, which Colombia alleges is precluded by the TPA.[504] Colombia mischaracterizes both SSA's position, which has consistently been that its rights arise from the DIMAR resolutions, as "*confirmed*" by the 2007 Supreme Court Decision,[505] which was merely a declaratory judgment and did not create new rights.[506]

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[502] *See* **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶¶ 142-47 (rejecting Guatemala's objection where both the Government agency FEGUA and the investor FVG conducted themselves substantially as if the terms of Contract 41 had been in effect, noting that, "[e]*ven if FEGUA's actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were* ultra vires *(not 'pursuant to domestic law'), 'principles of fairness' should prevent the government from raising 'violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law*"). *See also* **Exhibit CLA-16**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 346; **Exhibit CLA-5**, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987), pp. 141-42 ("*It is a principle of good faith that 'a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted.*") (quoting England, Court of Exchequer: *Cave v. Mills* (1862) 7 Hurlstone & Norman, p. 913, at p. 927).

[503] *Cf.* **Exhibit CLA-22**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 193 (assuming the validity of the share purchase agreements "*unless and until it is established that another court or tribunal with authority has determined that the share purchase agreements are void as a matter of Czech law,*" and noting that the evidence before it shows that, "*in three decided cases, the Czech courts have held that the share purchase agreements as well as the obligation of the Claimant to pay the consideration of EUR 90 million are valid and enforceable. Therefore, this Tribunal has no basis for considering the agreements to be void. The Claimant is not precluded from contending that it made a valid investment in the Czech Republic.*"); *Cf.* **Exhibit CLA-33**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 167 (finding that "*reporting obligations concerning the registration of foreign investments, which do not entail any application for permission or approval and which are not expressed as conditions of the making of an investment, are not relevant to the question whether the investment exists.*").

[504] *See* Colombia's Preliminary Objections, ¶¶ 264, 266-70.

[505] *See* Notice of Arbitration, ¶¶ 39, 52, 67.

[506] *See supra* ¶¶ 70, 106.

207. Colombia's argument is thus pure speculation that relies on allegations about what Claimant must have believed.[507] It rests entirely on a supposed quote from a newspaper interview with Mr. Harbeston.[508]

208. Even assuming that the newspaper accurately quoted and translated Mr. Harbeston's comments, the quote is actually consistent with Claimant's position—that the Supreme Court "*declared*" SSA as the title holder, not that it vested SSA with new rights.[509]

209. Likewise, Colombia's references to the U.S. court action make no sense.[510] In that action, SSA simply stated that the 2007 Supreme Court Decision determined that SSA had rights 50% of its discovery that was treasure, and that SSA was bringing a legal action in the U.S. specifically to enforce the Colombian judgement.[511] It is unclear — and Colombia does not explain—why a 13-year old application to enforce a foreign judgment has any bearing on the nature of SSA's investment or the Tribunal's jurisdiction here.

B. Claimant's Claim Arose After the TPA Came Into Effect

210. Colombia asserts that the Tribunal lacks jurisdiction *ratione temporis* under Article 10.1.3 of the TPA because SSA's claims supposedly predate the entry into force of the TPA.[512] Colombia's objection lacks merit. Below, SSA sets out the applicable legal framework, notes that its claim arose more than 8 years after the TPA came into effect,

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[507] *See* Colombia's Preliminary Objections, ¶ 264 ("[T]*he only credible explanation, consistent with the contemporary conduct of Sea Search Armada, LLC, back in 2009, is that it did not seek DIMAR's authorization because it considered that its investment was the 2007 CSJ Decision, and not the DIMAR Resolutions*.").

[508] *See* Colombia's Preliminary Objections, ¶ 268 ("*We have the title of property by excellence, which is a judgment of the Supreme Court that, with the effect of res judicata, declared SSA as owner of half of the treasures that may be found in the shipwreck*.").

[509] **Exhibit R-15**, El Espectador "Proyectamos el Rescate por cuenta nuestra", 17 October 2009, p. 5 ("*We have the title of property by excellence, which is a judgment of the Supreme Court that, with the effect of* res judicata*,* ***declared SSA as owner of half of the treasures that may be found in the shipwreck****. This entitles us to access and dispose of what belongs to us without anyone's permission, within what is established by the 1958 Continental Shelf Geneva Convention. However, the ideal would be to salvage the shipwreck through common agreement, with previously established rules and in conformity with the guidelines established by the Supreme Court*.") (emphasis added) (Colombia's Unofficial Translation).

[510] *See* Colombia's Preliminary Objections, ¶ 269.

[511] *See* **Exhibit R-18**, Sea Search Armada's Claim against Colombia before the District of Columbia Court, Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 101 ("*In accordance with DC Stat. § 15-382, the Colombian Judgment is conclusive between the parties and is enforceable in the same manner as the judgment of a Court from a United States jurisdiction which is entitled to full faith and credit by its Court*.").

[512] *See* Colombia's Preliminary Objections, ¶¶ 142-200.

and, thus, Colombia's objections are meritless.

(a) The Applicable Legal Framework

211. The basic legal framework is set out in Article 10.1 (*Scope and Coverage*):

> *1.* ***This Chapter applies to measures*** *adopted or maintained by a Party relating to:*
>
> *a) investors of another Party;*
>
> *b) covered investments; and*
>
> *c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.*
>
> *2. A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.*
>
> *3. For greater certainty, this Chapter does not bind any Party in relation to* ***any act or fact*** *that took place or any situation* ***that ceased to exist before the date of entry into force of this Agreement****.*[513]

212. The term "*measure*[]" is a fundamental concept, because it defines the scope of the entire Chapter of the Treaty devoted to "*Investment*."[514] The TPA defines the term "*measure*" as "*any law, regulation, procedure, requirement, or practice*."[515]

213. Article 10.1.3 of the TPA reflects the principle of non-retroactivity of treaties, as codified in Article 28 of the Vienna Convention:

> *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or*

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[513] *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.1. (emphases added).

[514] *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.1.1 ("*This Chapter applies to measures adopted or maintained by a Party relating to . . . investors of another Party* [and] *covered investments*"). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 317.

[515] *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.1.3.

> *fact which took place or any situation* ***which ceased to exist before the date of the entry into force of the treaty*** *with respect to that party.*[516]

214. Pursuant to Article 10.1.3 of the TPA, the Tribunal thus has jurisdiction over "*any act or fact that* ***took place or any situation that continued to exist after*** *the Treaty entered into force*."[517]

(b) SSA's Claim Arose From Colombia's Measures Taken After The TPA Came Into Effect

215. Claimant's claim clearly meets the requirements of TPA Article 10.1.3. The TPA entered into force on 15 May 2012—the critical date for purposes of the Article 10.1.3 analysis. And all of SSA's claims arise from Resolution No. 0085, issued on 23 January 2020, nearly **8 years** after the TPA came into force. Claimant set out its claims in its NOA as follows:

> *75.* ***Colombia has unlawfully expropriated SSA's investment by issuing Resolution No. 0085 of 2020.*** *By retroactively deeming the San José as "Asset of National Cultural Interest", Colombia eviscerated almost the entirety of the value of the SSA's investment. Colombia has taken SSA's ownership rights to 50% of its discovery. Thus the value of SSA's investment has been eviscerated, as Colombia's own representative, Dr. Gómez, confirmed when he declared that Resolution No. 0085 had made SSA's ownership rights worthless.*
>
> *…*
>
> *80.* ***Colombia has breached its obligation to accord SSA FET and FPS. By issuing Resolution No. 0085*** *and rendering Claimant's investment worthless, Colombia defied SSA's legitimate expectation that its 50% ownership right to its discovery would be respected pursuant to DIMAR's authorizations and subsequent confirmation by the 2007 Supreme Court Decision. This mutual understanding was affirmed by DIMAR's legal opinion as conveyed to the Colombian President's legal counsel. Indeed, after DIMAR authorized GMC as the discoverer of the shipwreck, it entered into discussions over a salvage contract with GMC on the basis of a 50/50 apportionment regime.*

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[516] **Exhibit RLA-2**, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 28 (emphasis added). *See also* Colombia's Preliminary Objections, ¶ 143.

[517] **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 116 (emphasis added). *See also* **Exhibit RLA-4**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, art. 13 ("*An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs*.").

> *81.* ***Colombia's conduct in issuing Resolution No. 0085 was also arbitrary, unreasonable and inconsistent*** *as it contravened Colombia's position over the last four decades that the shipwreck was "treasure" and subject to a 50/50 apportionment with the discoverer. As discussed above, Colombia also issued Resolution No. 0085 without sufficient due process guarantees and for the purpose of depriving SSA of its rights to its discovery.*
>
> *82. Moreover,* ***Colombia's conduct following the issuance of Resolution No. 0085 has failed to accord SSA fair and equitable treatment*** *because it has acted arbitrarily. Ignoring its own court's embargo, Colombia has sought to access and gain rights to the shipwreck discovered by SSA.128 Acting arbitrarily by failing to follow one's own court orders breaches Colombia's FET and FPS obligations.*
>
> …
>
> *85. Colombia has breached these obligations by singling SSA out and expressly an intentionally seeking to undermine it while favoring other domestic and foreign investors. As recently as 2022, Colombia claimed to have engaged other operators to search precisely the same coordinates that had been reported in the 1982 Report.*[518]

216. As is abundantly clear from the above, SSA has not made *any* claims for relief arising out of Colombia's actions before 23 January 2020. Indeed, Colombia cannot point to any. Thus, the Tribunal's inquiry can stop here and the Tribunal can dismiss Colombia's temporal objections in their entirety.

(c) Colombia's Objections Are Meritless

217. In an attempt to obscure its objection's patent lack of merit, Colombia resorts to a variety of misguided insinuations that Claimant is asking this Tribunal to adjudicate Colombia's pre-TPA actions. Claimant is not. SSA addresses Colombia's objections below.

(1) Colombia Ignores The Date Of The Impugned Measure, Which Is The Only Relevant Date For The *Ratione Temporis* Analysis

218. Colombia argues that "*the Tribunal lacks jurisdiction* ***over any dispute*** *arising over such pre-treaty acts*."[519] A fundamental problem with Colombia's argument is that it

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[518] Notice of Arbitration, ¶¶ 75-85 (footnotes omitted) (emphases added).

[519] Colombia's Preliminary Objections, ¶ 147 (emphasis added).

disregards the TPA's wording, which excludes from the Tribunal's purview **not** "*disputes*," but "*measures*" "*which ceased to exist before*" the TPA came into force.[520]

219. Certain BITs do limit consent to arbitration to "*disputes*" arising after their entry into force. Under such provisions, the relevant inquiry for jurisdiction *ratione temporis* is indeed whether a dispute between the host State and the investor arose prior to the treaty's entry into force. For example, the Chile-Peru BIT provides that the treaty "*shall not . . . apply to* ***differences or disputes*** *that arose prior to its entry into force*."[521] Not surprisingly, the tribunal presiding over a case under the Chile-Peru BIT in *Industria Nacional de Alimentos v. Peru* (formerly *Lucchetti v. Peru*)—on which Colombia relies extensively—denied jurisdiction where the origin of the dispute in question preceded the treaty's entry into force.[522] Colombia's reliance on the line of cases that try to trace the origin of the dispute to its root causes—like *Lucchetti v. Peru*[523]—is thus entirely inapposite.[524] In any event, as discussed above, the root cause of the present dispute is the Resolution No. 0085. Claimant's case is that no expropriation occurred until then. That the parties may have had other disputes prior to this one is also irrelevant.

220. But the Treaty's temporal limitation on "*measures*" as opposed to "*disputes*" leaves no room for any doubt that the Tribunal's *ratione temporis* assessment must be pegged to the date of Resolution No. 0085—i.e., the impugned expropriatory measure upon which Claimant's case is based—and not any earlier date on which a broader dispute between

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[520] *See* Colombia's Preliminary Objections, ¶ 177 (alleging that "*the* ***dispute*** *fabricated by the Claimant as a new* ***dispute*** *is really a* ***dispute*** *based on the following central facts that took place in the pre-treaty stage*") (emphasis added). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 333 ("*Respondent's. . .argument suffers from a significant problem: it does not conform to the actual wording of the FTA's temporal exclusion clause, which does not refer to disputes, but to measures*.").

[521] **Exhibit RLA-5**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 25 (citing the relevant BIT provisions).

[522] *See* **Exhibit RLA-5**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶¶ 48, 51, 62.

[523] *See, e.g.*, Colombia's Preliminary Objections, ¶¶ 175-76 (discussing *Lucchetti's* reasoning in relation to the existence of a "*dispute*"). As noted above, the tribunal's rejection of pre-treaty disputes on *ratione temporis* grounds in that case was premised on express exclusions in the relevant language of the Chile-Peru BIT. No comparable language is found in the TPA. *See supra* ¶ 255.

[524] *See* Colombia's Preliminary Objections, ¶ 177 (alleging that "*the* ***dispute*** *fabricated by the Claimant as a new* ***dispute*** *is really a* ***dispute*** *based on the following central facts that took place in the pre-treaty stage*"—none of which is relevant under this Treaty) (emphasis added).

the parties first arose. As the tribunal in *Gramercy v. Peru* observed in relation to the U.S.-Peru FTA (which contains a provision analogous to Article 10.1 here):

> ***The relevant date for establishing temporal jurisdiction under the US-Peru FTA is thus**, by express agreement of the Contracting Parties, **not the date when an investment dispute arose, but the date when an impugned 'law, regulation, procedure, requirement, or practice' was 'adopted or maintained' by the host State**.*[525]

221. The tribunal's reasoning in *Gramercy v. Peru* applies with equal force here given the analogous treaty language. This reading is supported by the ruling in *Carrizosa v. Colombia*, also brought under the TPA, in which the tribunal rejected the same argument Colombia advances here.[526]

222. Therefore, the relevant date for the Tribunal's determination of Colombia's Article 10.1.3 objection is the date when Colombia adopted or maintained the impugned "*law, regulation, procedure, requirement, or practice*"[527]—here, 23 January 2020, when Colombia issued Resolution No. 0085.[528]

(2) Resolution No. 0085 Is An Independently Actionable Breach

223. Colombia's second argument is that even if the impugned measure post-dates the TPA's entry into force, the Tribunal should still decline jurisdiction "[i]*f the post-treaty act has not changed the* status quo."[529] Colombia asks this Tribunal to apply this "*test*",

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525 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 336 (emphases added). *See also id.* ¶¶ 333-35 (rejecting Peru's argument that the BIT limited consent to arbitration to "*disputes arising after their entry into force*" and finding *Luchetti* inapposite in this context).

526 *See* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 138 ("*The fact that the broader dispute concerning the alleged mistreatment of the Claimant's purported investment in Colombia may have arisen before the TPA's effective date does not mean that the TPA condoned Colombia's repeated mistreatment of the Claimant's investment after its entry into force. Such an outcome would not be warranted by the ordinary meaning of the terms of Article 10.1.3 of the TPA, their context, or the object and purpose of the TPA.*"). *See also id.* ¶ 139 (holding that the jurisprudence cited by Colombia in that case does not "*support the proposition that the principle of treaty non-retroactivity excludes pre-treaty disputes from the treaty's scope of application, especially in cases where the disputed conduct continues after the treaty's entry into force.*").

527 *See supra* ¶ 212(setting out definition of "*measure*" under Article 1.5 of TPA).

528 To be clear, even if the Tribunal were to look at the date the dispute arose, that would be the date that Colombia issued Resolution No. 0085, as the dispute alleged by SSA in this case arises out of Colombia's expropriation of SSA's rights effectuated by Resolution No. 0085 (and not some general dispute as per Colombia's mischaracterizations).

529 Colombia's Preliminary Objections, ¶ 182.

which has no basis in the TPA itself, because the *Berkowitz v. Costa Rica* (formerly *Spence v. Costa Rica*) tribunal supposedly adopted it.[530]

224. First, there is no such test in *Berkowitz*.[531] The *Berkowitz* tribunal held that a post-treaty act should be "*independently actionable*,"[532] not that that act had to fundamentally alter the *status quo* of the claimant's investment.[533] In *Berkowitz*, the claimants alleged that Costa Rica's decision to expropriate a number of their beachside properties violated the Dominican Republic-Central America-United States Free Trade Agreement of 2004 ("**DR-CAFTA FTA**"). While all of Costa Rica's regulatory measures predated the treaty's effective date in 2009, the judicial decisions that determined the compensation due for the alleged expropriation were taken in 2010 after the treaty came into force.[534] When interpreting Article 10.1.3 of the DR-CAFTA FTA, the tribunal reasoned that pre-treaty conduct could "*constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent.*"[535] However, for the post-treaty conduct to come under the tribunal's jurisdiction, it needed to "*constitute an actionable breach in its own right.*"[536] On this basis, the tribunal concluded that the decisions of the Costa Rican courts could be independently actionable with respect to claimants' claims regarding manifestly

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530 *See* Colombia's Preliminary Objections, ¶ 180. *See also id.* ¶¶ 181-83.

531 Colombia also submitted a prior, uncorrected version of the tribunal's interim award at **RLA-018**. For the sake of good order, Claimant submits the corrected version of the award for the record. *See* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017.

532 **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 221.

533 *See* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶¶ 217-21.

534 *See* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) 30 May 2017, ¶ 73.

535 **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) 30 May 2017, ¶ 217.

536 **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) 30 May 2017, ¶ 217.

arbitrary and/or blatantly unfair conduct[537] (but not expropriation as the expropriatory acts had occurred years earlier).[538]

225. *Berkowitz* therefore did not articulate a new test for non-retroactivity. Indeed, given that the jurisdictional aspects of that case were "*heavily fact-specific*," the *Berkowitz* tribunal expressly "*caution*[ed] [against] *any reading of this Award that would give it wider 'precedential' effects*."[539] *Berkowitz*, in fact, followed *Mondev v. USA*.[540]

226. In *Mondev*, a tribunal constituted under the North American Free Trade Agreement ("**NAFTA**") ruled that it could exercise jurisdiction over acts taken after the treaty entered into force, if those acts were "*themselves inconsistent with applicable provisions of* [the treaty]" even if the dispute arose prior to the treaty's effective date.[541] There, a Canadian real estate company impugned the taking of its property by the City of Boston, which occurred prior to NAFTA's entry into force. The investor initiated proceedings in U.S. courts to seek redress, but was ultimately unsuccessful. In the

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[537] *See* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶¶ 286, 308(2) (finding "*jurisdiction over the Claimants' allegations that, by reference to the relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or to blatant unfairness contrary to CAFTA Article 10.5*"). The Corrected Award made clear that, in light of an intervening judgment regarding another property (B1), the tribunal would consider arguments from petitioners regarding whether the tribunal has jurisdiction to hear Article 10.5 claims with respect to that property. *See id.* at ¶ 308(3). But because the claimants voluntarily withdrew their claims, the Tribunal terminated the arbitration. *See* **Exhibit CLA-42**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Procedural Order on Correction of the Interim Award and Termination of the Proceedings, 30 May 2017, ¶ 46.

[538] *See* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶¶ 255-70 (noting that the acts of dispossession in respect of each of these properties took place in 2008 and finding no jurisdiction to entertain claimants' expropriation claims, "*such conduct not being separable from the measures of direct expropriation and not amounting to an independently actionable breach for Articles 10.1.3 and 10.18.1 purposes*.").

[539] **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 166 ("*Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact*.").

[540] *See, e.g.*, **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 145 (noting that *Berkowitz* did not "*purport to modify or supplement the applicable test for non-retroactivity of treaties, notwithstanding its frequent use of the apposite but imprecise phrase 'deeply rooted'*," stating *Berkowitz* "*affirms and relies*" on the restatement of the law in *Mondev*, and agreeing with that restatement (at ¶¶ 68-70 of *Mondev*)).

[541] **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, 11 October 2002, ¶ 70. *See also* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 146.

NAFTA arbitration, the investor challenged both (i) the pre-NAFTA taking of its properties by Boston and (ii) the post-NAFTA conduct of the U.S. courts. The tribunal distinguished between the two types of claims from the temporal jurisdiction perspective in a key paragraph from which Colombia quotes selectively:[542]

> ***Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.*** *In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law.* ***Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev****. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.*[543]

227. Consequently, the *Mondev* tribunal concluded that it had jurisdiction over the claims, albeit limited to those claims "*concerning the decisions of the United States courts*."[544]

228. The *Carrizosa v. Colombia* decision, on which Respondent relies heavily, likewise does not help its position. In that case, arising under the TPA, claimant argued that Colombia's fiscal, administrative and judicial measures had resulted in the loss of its indirect shareholding interests in a Colombian financial institution.[545] In 2011 (i.e., before the TPA's entry into force), the Colombian Constitutional Court had annulled a judgment favorable to claimant, and claimant petitioned the court for a further review of its ruling. The only post-treaty act before the tribunal was the 2014 decision of the

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[542] *See* Colombia's Preliminary Objections, ¶ 192.

[543] **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70 (emphases added).

[544] **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, 11 October 2002, ¶¶ 83, 87. *See also* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 148.

[545] *See* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 7.

Constitutional Court dismissing claimant's petition to annul the earlier decision of the same court.[546] The *Carrizosa* tribunal ruled that it had no jurisdiction *ratione temporis* over the claim, finding that "*the legal effect of the 2014 Order was to leave unaltered the outcome of the 2011 Decision*."[547] As such, the only measure that post-dated the TPA's entry into force—the 2014 Order—was not an independent actionable breach in its own right as it was merely upholding a prior ruling.[548]

229. Importantly, the *Carrizosa* tribunal firmly rejected Colombia's theory (which Colombia advances yet again before this Tribunal) that the principle of non-retroactivity embodied in Article 10.1.3 "*carves out from the Tribunal's jurisdiction the present dispute as a whole, since it arose prior to the TPA's entry into force*."[549] The *Carrizosa* tribunal explained:

> ***The fact that the broader dispute concerning the alleged mistreatment of the Claimant's purported investment in Colombia may have arisen before the TPA's effective date does not mean that the TPA condoned Colombia's repeated mistreatment of the Claimant's investment after its entry into force.*** *Such an outcome would not be warranted by the ordinary meaning of the terms of Article 10.1.3 of the TPA, their context, or the object and purpose of the TPA.*[550]

230. Thus, the tribunal concluded that "*if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the tribunal's jurisdiction,*

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546 *See* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 96-98.

547 **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 156. A related issue concerned whether the annulment proceedings leading to the issuance of the 2014 order were in the nature of an extraordinary recourse (*recurso extraordinario*) under Colombian law. *See also id.* ¶ 157 ("*The mere fact that in 2014 the Constitutional Court did not annul or otherwise redress the outcome of the pre-treaty measures does not place those measures within the scope of the Tribunal's jurisdiction.*").

548 *See* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 164.

549 **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 130.

550 **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 138 (emphasis added). *See also id.* ¶¶ 139 (holding that the jurisprudence cited by Colombia does not "*support the proposition that the principle of treaty non-retroactivity excludes pre-treaty disputes from the treaty's scope of application, especially in cases where the disputed conduct continues after the treaty's entry into force.*"), 149 ("*Thus, if post-treaty conduct is in itself an actionable breach of the treaty,* ***the principle of non-retroactivity does not place such conduct outside the reach of the treaty even if the dispute to which the conduct pertains had arisen before the treaty entered into force***.") (emphasis added).

irrespective of whether such conduct may pertain to a broader pre-treaty dispute."[551]

231. Resolution No. 0085 is undoubtedly an "*actionable breach in its own right.*" Unlike in *Carrizosa*, Resolution No. 0085 did not uphold any prior administrative or judicial decision divesting SSA of its rights (nor does Colombia claim as much). On the contrary, before Resolution No. 0085 of 23 January 2020, SSA had vested rights, as confirmed by the 2007 Supreme Court Decision and reconfirmed in 2019 by the local court's reinstatement of the Injunction Order guarding SSA's rights, which Resolution No. 0085 expunged.[552] On this basis, Colombia has expropriated SSA's rights and breached other obligations under the TPA.

232. Colombia argues that its expropriation of Claimant's rights crystallized prior to 2012 such that Resolution No. 0085 is not independently actionable.[553] As a preliminary matter, Colombia's pre-TPA conduct and its impact on the value of SSA's investment are matters related to the merits (and damages) phase of this proceeding. And Colombia cannot recast SSA's claims to be about something they are not. Accordingly, the Tribunal should reject Colombia's recharacterization of the facts pleaded by SSA and dismiss Colombia's objection.[554]

233. Indeed, Colombia has come nowhere close to "*conclusively*" disproving Claimant's characterization of the relevant facts to prove its objection. Prior to the Resolution, SSA had rights that it was attempting to enforce through litigation and discussions with Colombian authorities.[555] Some of these enforcement efforts were successful, such as the 1994 Injunction Order and its reinstatement by Colombian courts in 2019.[556] Thus, contrary to Colombia's position now that it never intended to honor SSA's rights,

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[551] **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 143.

[552] While Claimant's claim is that the dispossession of its rights was effectuated by Colombia in Resolution No. 0085 and not prior to it, Claimant's position with respect to Resolution No. 0085 is in no way dependent on Colombia's interpretation of the 2007 Supreme Court Decision.

[553] *See* Colombia's Preliminary Objections, p. 52 ("*Well before the TPA's entry into force, Colombia unequivocally refused to interpret the 2007 CSJ Decision in the expansive and incorrect manner requested by Sea Search Armada, a State conduct capable of depriving the alleged Claimant's property rights of any value*"), ¶¶ 162-69.

[554] *See supra* Section III.

[555] *See supra* Sections II.N-II.P.

[556] *See supra* ¶¶ 86, 131.

Colombia's actions at the time did not foreclose SSA's enforcement of its rights.[557] It was Resolution No. 0085 that extinguished SSA's rights. Indeed, there would have been no point in Resolution No. 0085 if Claimant's rights had already been expunged.

234. Colombia argues that its supposedly "*clear, unequivocal and material*" refusal to give SSA access to its rights or to conduct a joint salvage mission prior to the TPA's entry into force means that any post-treaty conduct is "*simply a reinstatement of the repeated pre-entry into force denial of any right to access the shipwreck pursuant to the 2007 CSJ Decision*."[558] But SSA's claims do not arise from Colombia's pre-treaty (or indeed post-treaty) denial of access to the shipwreck site. SSA's claims are founded on the evisceration of its rights to 50% of the salvaged treasure, achieved only by Resolution No. 0085. Indeed, even if Colombia never allowed SSA to re-access its discovery, SSA retained legal rights to it, and would have been entitled to proceeds from its salvage. The Colombian Court recognized this in 2019, when, despite years of Colombia's refusal to allow SSA access to the site, it affirmed that SSA retained rights to its Predecessors' discovery.[559] Resolution No. 0085 has however divested SSA of all rights to its discovery, making its salvage valueless for SSA.

235. For the same reasons, Colombia's assertions regarding the U.S. and IACHR proceedings are unavailing.[560] Not only does Colombia fundamentally misconstrue the claims made by SSA there,[561] SSA instituted those proceedings to protect and enforce its rights, the existence of which were never in question in either of those proceedings. SSA's rights had, in fact, just been confirmed by the Supreme Court.[562] Moreover, SSA terminated the U.S. Litigation and IACHR proceedings in 2015 at Colombia's request as a precondition for resuming discussions with Colombia to gain access to the

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557 *See e.g., supra* ¶ 108.

558 *See* Colombia's Preliminary Objections, ¶ 160. *See also id.* p. 51 ("*Well before the TPA's entry into force, Colombia had clearly, unequivocally and materially denied Sea Search Armada, LLC any right to recover the shipwreck, including as deriving from the 2007 CSJ Decision*.").

559 *See supra* ¶ 131.

560 *See* Colombia's Preliminary Objections, ¶¶ 163-69, 172.

561 *See supra* ¶¶ 103-107.

562 *See supra* Section II.L. *See also* **Exhibit R-21**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 41 (noting that the U.S. Litigation, "*is not, nor can it be, litigating over SSA's rights over the discovered treasures, because this dominion was already declared with* res judicata *effect by the*" 2007 Supreme Court Decision).

San José.[563]

236. Colombia acknowledges that it "***has always held that said* [2007 Supreme Court Decision] *conferred Claimant limited rights* over a specific area located within specific coordinates**. *Therefore, it is irrelevant that in 2020 Colombia had declared the Galeón San José, which it found in 2015, an asset of national cultural interest.*"[564] This statement, albeit a non-sequitur, confirms that Resolution No. 0085 is independently actionable. Up until Resolution No. 0085, Colombia, by its own admission had "*always held that said decision conferred Claimant limited rights*" over GMC's discovery, which both Colombia and SSA agreed was the San José shipwreck at the time of its discovery.[565] After Resolution No. 0085, **no** part of the ship or its contents could qualify as "*treasure*"; therefore, Resolution No. 0085 served to strip SSA of all of the rights it otherwise had.[566] While Colombia now claims, in contravention of its contemporaneous assertions, that the San José shipwreck is not in the Discovered Area, its self-serving assertions are not only dubious but also unverified.[567] As such, Colombia falls well short of meeting its burden to "*conclusively*" disproving that SSA has rights to the San José shipwreck.

237. Colombia tries to avoid the inevitable conclusion that Resolution No. 0085 expunged Claimant's pre-treaty rights by arguing that the "*interaction*" between the 2007 Supreme Court Decision and other developments (like the Columbus Report and the Columbus Press Release) meant that SSA's rights had "*no value*" even before 2012.[568] That is unavailing. Even setting aside the lack of credibility of Colombia's self-serving assertions,[569] Colombia's arguments relate only to the quantum of SSA's damages, not

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563 *See supra* ¶¶ 103-106.

564 Colombia's Preliminary Objections, ¶ 173 (emphasis added).

565 *See e.g., supra* ¶¶ 53-55.

566 *See* **Exhibit C-42**, Ministry of Culture Resolution No. 0085, 23 January 2020.

567 *See supra* Section II.L.

568 *See, e.g.*, Colombia's Preliminary Objections, ¶ 157 ("*The interaction between the 1994 Columbus Report and Press Release, on the one hand, and the 2007 CSJ Decision, on the other, is clear and unambiguous: on 5 July 2007, through unequivocal State conduct of the highest authorities of the Executive and Judicial powers of the Republic of Colombia,* ***any rights SSA Cayman Islands could possibly claim to a potential shipwreck in the area of the 1982 coordinates or its contiguous areas were clearly defined and delimited, the result being that any alleged shipwreck located in the limited areas defined by the State conduct had no value***."") (emphasis added). *See also id.* ¶¶ 161, 177, 186.

569 *See supra* Section II.L, ¶ 139.

the existence of SSA's rights. Indeed, questions regarding the impact of the 2007 Supreme Court Decision, credibility of the Columbus Report (or lack thereof), and later assertions by Colombia about the apparent location of the San José, are all assessments that the Tribunal must make to determine the scope and value of SSA's rights prior to Resolution No. 0085. And that is a question for the next phase, which will include a consideration of the full evidentiary record, with the appropriate disclosures and, if needed, assistance of experts.

238. Accordingly, Resolution No. 0085 constituted an actionable breach in its own right. Colombia's prior actions may have restricted SSA's access to the shipwreck site, but did not extinguish SSA's rights over it. That was only achieved by Resolution No. 0085.

(3) The Tribunal Can Consider Pre-TPA Conduct As Context

239. Colombia appears to propose a further subsidiary (non-existent) rule that the rule on non-retroactivity requires that any post-treaty acts or facts a claimant relies on to establish a treaty breach also cannot be "*rooted in pre-treaty conduct.*"[570] This is not so.

240. Colombia's proposition has no support in the TPA, and indeed Colombia fails to provide any. Moreover, tribunals have repeatedly held that they may consider the pre-treaty factual background when assessing the merits of claims.[571] For example, in *Gramercy*—similar to Colombia's position here—Peru argued that the prohibition on retroactivity in Article 10.1.3 of the U.S.-Peru FTA applied to measures adopted after that treaty entered into force in 2009 because they were "*deeply rooted in these pre-treaty acts and facts and cannot be adjudicated independently of them*."[572] The tribunal, however, held that it was entitled to consider "*facts that predate*[d] *the* [t]*reaty as a factual predicate for subsequent breaches, without being deprived of* [its] *temporal*

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[570] Colombia's Preliminary Objections, ¶ 179.

[571] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 351-53.

[572] **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 339.

jurisdiction over that later conduct."[573] The tribunal underscored that Peru's position did not find support in the text of the treaty, which (like the TPA here) established that the Tribunal had temporal jurisdiction over "*measures adopted or maintained*" by the State after the treaty's entry into force without imposing additional limitations or conditions on the measures that the investor may challenge.[574] Therefore, "[i]*n principle, even if a post-treaty measure is somehow related to pre-treaty acts and facts, it is covered by the scope of the Treaty*."[575]

241. Further, the *Gramercy* tribunal held that the measures in question (which were adopted or maintained four, five, and eight years after the U.S.-Peru FTA's entry into force) constituted "*actionable alleged Treaty breaches in their own right, and therefore, cannot be excluded from the scope of protection of the Treaty merely because they are related to pre-Treaty acts and facts*."[576] There, the pre-treaty acts and facts going back to the 1980s were "*antecedents, which permit*[ted] *the Tribunal to understand the background of the violations of the FTA which allegedly occurred years or decades thereafter*."[577] The tribunal noted that it was not called upon to rule on the conformity of those pre-treaty acts with the treaty, and that these acts were relevant to explain the historic background and causes of the impugned measures taken after the treaty came into force.[578]

242. As SSA's Notice of Arbitration makes clear, SSA is **not** asking the Tribunal to rule on the conformity of any of Colombia's pre-treaty acts with the TPA.[579] SSA has described Colombia's pre-TPA acts and facts to provide context and help explain the historic background of the impugned measure, how SSA's relevant rights arose, and

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[573] **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 340-41.

[574] *See supra* ¶ 211.

[575] **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 342.

[576] **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 343-44.

[577] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 344.

[578] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 344.

[579] *See supra* ¶ 215.

the fact that those rights were confirmed under Colombian law.[580] Contrary to Colombia's suggestion,[581] the Tribunal is fully entitled to consider State conduct that predates the Treaty's entry into force as factual background for subsequent breaches, without being deprived of temporal jurisdiction over later conduct.[582] There is nothing in the TPA or jurisprudence to suggest that a post-treaty breach must be disconnected from pre-treaty acts or facts. That would be absurd, as a breach does not arise in the ether, but necessarily emerges from background facts and historical context.

(4) Colombia Is Not Entitled To Recast Claimant's Claim

243. At its core, Colombia's objection relies on its misguided attempt to recast SSA's claims. Colombia asserts that "*Claimant's claims are in fact based on State acts that predate the entry into force of the TPA*"[583] and offers a lengthy recasting of Claimant's claims.[584] Not only is this false for the reasons explained below, but there is also nothing in the language of the TPA or jurisprudence that allows Colombia to supplant Claimant's claims with Colombia's own (erroneous) characterization of them.

244. Tribunals have consistently maintained, like the *Gramercy* Tribunal, that "[i]*t is for*

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[580] *Cf.* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 344. *See also supra* ¶¶ 240-241.

[581] *See* Colombia's Preliminary Objections, ¶¶ 142-47.

[582] See **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 342, 344 ("[T]*he Treaty establishes temporal jurisdiction over 'measures adopted or maintained' by a State Party after the entry into force of the Treaty. The FTA does not impose additional limitations or conditions on the measures that a protected investor may challenge.* ***In principle, even if a post-treaty measure is somehow related to pre-treaty acts and facts, it is covered by the scope of the Treaty***."") (emphasis added). *See also* **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 217 ("*Pre-entry into force acts and facts cannot. . .constitute a cause of action.* ***Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc****. Pre-entry into force conduct cannot be relied upon, however, to found liability in-and-of-itself in circumstances in which liability could not properly rest on the post-entry into force breach that has been alleged and on which the Tribunal's jurisdiction was founded*") (emphasis added); **Exhibit CLA-19**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶¶ 283-84 (stating that a breach does not have to "*be based solely on acts occurring after the entry into force of the BIT.* ***The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or facts pre-dating the BIT****; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force.*") (emphasis added).

[583] *See* Colombia's Preliminary Objections, p. 47. *See also id.* ¶¶ 177-78 (discussing "*central facts*").

[584] *See* Colombia's Preliminary Objections, ¶¶ 148-69.

Claimants to identify the 'measures adopted or maintained by a Party' which allegedly constitute a breach of the Treaty."[585] For example, in *Renco v. Peru (II)*, Peru raised similar objections *ratione temporis* as Colombia in this case.[586] The Tribunal considered that the key question was whether the claimant's fair and equitable treatment and indirect expropriation claims necessarily depended on the alleged wrongfulness of Peru's conduct prior to the critical date or whether they are based on independently actionable breaches that arose after the critical date.[587] As the tribunal explained:

> [I]*n order not to pass judgment on the lawfulness of conduct predating the entry into force of the Treaty, the allegedly wrongful conduct postdating the entry into force of the Treaty must 'constitute an actionable breach in its own right'* ***when evaluated in the light of all of the circumstances, including acts or facts that predate the entry into force of the Treaty***.[588]

245. In rejecting Peru's objection, the tribunal noted that:

> [I]*t is not invited to decide at this juncture whether a treaty breach has in fact occurred, but merely to determine* prima facie *whether a treaty breach could have occurred if the Claimant is able to substantiate its claim on the merits in further proceedings.* ***The Tribunal must therefore defer to the factual characterizations put forward by the Claimant unless the Respondent is able already, at this stage, to conclusively disprove them***.[589]

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[585] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 337-38 (noting that "*Gramercy says that the measures against which it claims are the Impugned Measures (the Resoluciones TC 2013 and the Decretos 2014 and 2017) which were adopted by the Republic between four and eight years after the Treaty's entry into force*" and finding that "*Respondent's argument that these Impugned Measures fall outside the temporal scope of jurisdiction is untenable, in view of the clear wording of Art.10.1.3 of the FTA and the undisputed fact that the Impugned Measures were adopted by the Republic at least four years after the Treaty's coming into force*."). *See also* **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 223 ("*The Tribunal take Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging*").

[586] *See* **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II*), PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 114.

[587] *See* **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II*), PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 147.

[588] **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II),* PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 146 (discussing *Mondev* and *Berkowitz*) (emphasis added).

[589] **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II),* PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 148 (emphasis added).

246. The *Renco II* tribunal thus found that Peru's assertions were insufficient to deprive it of jurisdiction to examine these claims altogether.[590]

247. Similarly, here, the Tribunal must determine its jurisdiction based on SSA's claims, not Colombia's version of them. As such, the Tribunal should, in deference to Claimant's pleadings, determine *prima facie* whether Colombia's post-TPA conduct could have breached the TPA if SSA is able to substantiate its claim on the merits in further proceedings.[591]

248. As SSA's Notice of Arbitration makes clear, SSA's claims arise from Resolution No. 0085,[592] an independently actionable breach.[593] The Tribunal need not—and the Claimant is not asking the Tribunal to—consider the legality of Colombia's actions prior to its issuance of Resolution No. 0085 (contrary to Colombia's unsupported assertions).[594]

249. For the avoidance of doubt, Colombia's assertions regarding the basis of Claimant's claims are wrong. Specifically, Colombia alleges the following:

> *As described by Sea Search Armada, LLC the breach of the TPA would result from:*
>
> *i) Colombia's denial that a "treasure" exists in the coordinates reported by Glocca Morra Company back in 1982,*
>
> *ii) Colombia's denial to disclose the coordinates of the 2015 discovery, and*
>
> *iii) Colombia's refusal to recognize Sea Search Armada LLC's rights notwithstanding the relevant judicial decisions, particularly through Colombia's position that the rights recognized in the 2007 CSJ Decision, were limited to the area of the precise coordinates, and not the surrounding areas.*[595]

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590 *See* **Exhibit CLA-55**, *The Renco Group, Inc. v. The Republic of Peru (II),* PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶¶ 149-51.

591 *See supra* Section III.

592 *See supra* ¶ 215.

593 *See supra* Section IV.B(c)(2).

594 *See* Colombia's Preliminary Objections, ¶¶ 198-99.

595 *See* Colombia's Preliminary Objections, ¶ 150.

250. While it may be Colombia's position that this conduct amounted to a breach of the TPA, Claimant's claims here do not arise from them. Colombia cites only the "Background to the Dispute" section of SSA's Notice of Arbitration to make the assertions above.[596] But, as explained above, the Tribunal is entitled to consider pre-TPA facts as context. Colombia notably ignores SSA's "Summary of Claims" section, which makes clear that the only impugned measure adopted and maintained by Colombia that is the subject of this Arbitration is Resolution No. 0085.[597] Thus, the Tribunal has jurisdiction *ratione temporis* under Article 10.1.3. Colombia adopted the impugned measure, Resolution No. 0085, nearly 8 years after the TPA's entry into force. Resolution No. 0085 constitutes an actionable breach of the TPA in its own right as it designated, for the first time, the entirety of the San José as cultural patrimony.

C. Less Than Three Years Have Elapsed Since SSA First Acquired Knowledge Of Colombia's Breach and Loss

251. Colombia relies on the same set of arguments to recharacterize Claimant's claim as in relation to Article 10.1.3 above to argue that Claimant's claim is out of time.[598] Like its arguments in relation to Article 10.1.3, Colombia's second temporal objection is also meritless. Below, SSA sets out the applicable legal framework, notes that its claim arises from State action that took place after the critical date so SSA could not have known about it any earlier, and accordingly Colombia's objections are meritless.

(a) The Applicable Legal Framework

252. Article 10.18.1 of the TPA provides:

> *No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of* ***the breach alleged*** *under Article 10.16.1* ***and*** *knowledge that the claimant (for*

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596 *See* Colombia's Preliminary Objections, fn. 119.

597 *See* Notice of Arbitration, ¶¶ 75-76.

598 *Cf.* Colombia's Preliminary Objections, ¶ 207 (art. 10.18.1 objection) with ¶ 150 (art. 10.1.3 objection). *See also* Colombia's Preliminary Objections, ¶ 211 ("*Colombia has already demonstrated that any conduct that may have resulted in international liability occurred before the TPA's entry into force. But even in the event that,* quod non*, the only acts related to the dispute were the ones that took place after the entry into force of the TPA, the claims would be time barred. The record is full of documentary evidence that shows that, after the entry into force of the TPA and prior to 18 December 2019, Sea Search Armada, LLC acquired knowledge of the alleged breach and of the resulting damage*.").

> *claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has* ***incurred loss or damage****.*[599]

253. The critical date under Article 10.18.1 is the date when a claimant first acquired actual or constructive knowledge of two cumulative facts: (i) the breach allegedly committed by the host State and (ii) the existence of loss or damage caused by such breach.[600] It is not enough for the claimant to be aware of a potential breach—it must also be aware of the resulting loss or damage.[601] In that regard, arbitral tribunals have increasingly emphasized that it is not enough that the claimant suspects that it might suffer a loss—a "*degree of certainty*" is required.[602]

254. Colombia's fundamental error is that its objection under Article 10.18.1 (as with Article

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[599] **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.18.1 (emphases added).

[600] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 527-31 (reviewing jurisprudence).

[601] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 527-31; **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 211 ("*For purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred* loss *or* damage *as a result thereof. . . .While the text of Article 10.18.1 does not state in terms that the loss or damage in question must be as a consequence of the breach that is alleged, the Tribunal considers that this necessarily follows*.").

[602] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 524-25. This provision mirrors that found in Articles 1116(2) and 1117(2) of NAFTA. *See* **Exhibit CLA-48**, *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 155 ("***To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty****. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained. Thus, although Mobil knew about the 2004 Guidelines on 5 November 2004, when they were promulgated, it could not have had the requisite knowledge that it would incur loss or damage as a result of those Guidelines until the Canadian courts had finally disposed of its challenge to the Guidelines*.") (emphasis added); **Exhibit CLA-47**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶¶ 178-79 (finding that the time-bar in NAFTA Articles 1116(2) and 1117(2) did not prevent the tribunal exercising jurisdiction over the claims on the grounds that "*the Claimant did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach. Indeed, it has not been established that it did actually suffer loss in this short period. Market participants and observers expected increased price competition in the longer term, but that is a different matter. The Respondent argued that at least the reopening of Port Hawkesbury precluded the Claimant from raising its prices, but as Claimant pointed out, there is no evidence that it planned a price increase, and anyway press speculation as to possible price increases is not the same thing as an admission of loss or injury.* A fortiori *it is not enough to trigger the time limit*.").

10.1.3) ignores the TPA's clear language.[603] Colombia spends the first three pages of its discussion reviewing how the Tribunal should determine the existence of a "*dispute*" for purposes of imposing a time bar.[604] But, as explained above, Section 10 of the TPA refers **not** to "*disputes*," but to "*measures*,"[605] while Article 10.18.1 refers to the "*breach*" and "*loss or damage*".

255. It is therefore simply not true that the Tribunal "*must assess the existence of the underlying dispute*" in every case when considering the temporal limitation.[606] A tribunal's power is determined by the governing legal framework. The cases Colombia relies on are entirely inapposite,[607] as they deal with different treaty language and/or sources of the Tribunals' jurisdiction:

(a) The inter-State cases, such as the judgments of the International Court of Justice ("**ICJ**") that Colombia cites,[608] are of no relevance here. Paragraph 1 of Article 40 of the ICJ Statute of expressly requires that the "*subject of the **dispute***"[609] be indicated in the application to the court, and the ICJ will often enjoy limited jurisdiction conferred on it by the States in respect of a particular dispute. That was the case in the

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603 *See supra* ¶¶ 218-222.

604 *See* Colombia's Preliminary Objections, pp. 64-67. *See also id.* p. 64 (section V.3 heading), ¶¶ 203-05, 207-08, 211.

605 *See supra* ¶ 218.

606 Colombia's Preliminary Objections, ¶ 204.

607 *See* Colombia's Preliminary Objections, ¶ 204, fn. 162 (citing **Exhibit RLA-5**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 50; **Exhibit RLA-7**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶¶ 118-19; **Exhibit RLA-19**, *Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Limited and others*, Judgment of the High Court of the Republic of Singapore, 14 August 2017, ¶ 176).

608 *See* Colombia's Preliminary Objections, ¶¶ 203-04 (discussing **Exhibit RLA-3**, *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction Judgment, ICJ Reports 1998, 4 December 1998, ¶¶ 30-31; **Exhibit RLA-14**, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, ¶¶ 208, 211, 220; **Exhibit RLA-1**, *Mavrommatis Palestine Concessions (Greece v. U.K.)*, P.C.I.J. Series A No. 2 (1924), 30 August 1924, p. 11**; Exhibit RLA-15**, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Reports 2016, 17 March 2016, p. 33, ¶¶ 50, 72, *citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, ICJ Reports 2011, p. 84, ¶ 30).

609 **Exhibit CLA-3**, Statute of the International Court of Justice, 24 October 1945 (entry into force), p. 7, art. 40(1) (emphasis added).

Fisheries Jurisdiction Case (Spain v. Canada).[610] Similarly, the jurisdiction of the tribunal in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* was limited by the express language of the 1982 United Nations Convention on the Law of the Sea, which also refers to "*disputes*."[611] None of these cases have anything to do with temporal limitations like the one in Article 10.18.1.[612]

(b) Both *Industria Nacional de Alimentos v. Peru* (formerly *Lucchetti v. Peru*) and *Lesotho v. Swissbourgh* also considered a different question: whether the relevant BIT applied to disputes and controversies that arose before the treaty's entered into force (and not the time limitation in relation to claimant's knowledge of breach and loss). The tribunal in *Industria Nacional de Alimentos*, as discussed above, dealt with the time bar under the Chile-Peru BIT, which provides that the treaty "*shall not, however, apply to* ***differences or disputes*** *that arose prior to its entry into force*."[613] The arbitral tribunal in *Lesotho v. Swissbourgh* was bound by the language of the SADC Protocol on Finance and Investment, which expressly excluded any "***dispute****, which arose before entry into force of this Annex*."[614] Neither case is relevant to the Tribunal's Article 10.18.1 analysis.

(c) Finally, *AFC Solutions S.L. v. Colombia* is inapposite for different

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610 *See* **Exhibit RLA-3**, *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction Judgment, ICJ Reports 1998, 4 December 1998, ¶¶ 35, 62-63, 87.

611 **Exhibit RLA-14**, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, ¶¶ 165-69.

612 The same is true of the other cases Colombia cites. The Statute of the International Court of Justice had likewise focused on "*disputes*." *See* **Exhibit RLA-1**, *Mavrommatis Palestine Concessions (Greece v. U.K.)*, P.C.I.J. Series A No. 2 (1924), 30 August 1924, p. 11-12. *See also* **Exhibit RLA-15**, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Reports 2016, 17 March 2016, p. 26, ¶ 49-52 (explaining that "[t]*he existence of a dispute between the parties is a condition of the Court's jurisdiction*.").

613 **Exhibit RLA-5**, *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 25 (emphasis added). *See also* **Exhibit RLA-7**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶¶ 15, 64.

614 *See* **Exhibit CLA-50**, *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal, 27 November 2018, ¶ 158 (emphasis added).

reasons. In that case, Colombia had moved to dismiss claimant's claims under the Spain-Colombia BIT for a manifest lack of legal merit under ICSID Arbitration Rule 41(5). Article 10 of the Spain-Colombia BIT provides for a "*staggered dispute resolution process*" that includes, *inter alia*, (i) submission of a notice of the "*dispute*" ("*controversia*") and (ii) notification of a "*claim*" ("*reclamación*") at least 90 days before lodging the arbitration, and further states that no "*claim*" can be brought after the expiration of the three-year limitation period.[615] The sole question before the tribunal was whether that claimant's notice of dispute (submitted before the cut-off date) had suspended the treaty's limitation period where the request for arbitration was submitted after the limitation period had already run out. Focusing on the distinction between the terms "*dispute*" and "*claim*,"[616] the tribunal concluded that the claim was manifestly time-barred because claimant had submitted its request for arbitration after the cut-off date.[617] If anything, *AFC Solutions* highlights the importance of faithfulness to the treaty language.

256. Accordingly, Colombia's attempts to introduce extraneous temporal limitations must fail. The TPA requires simply that the claimant have or should have acquired knowledge of the breach and damages less than three years before it initiates arbitration. That clearly is the case here, where Claimant did not learn of the breach until February 2020.

(b) SSA Acquired Knowledge Of The Breach And Damages When It Learned Of Resolution No. 0085

257. The Parties agree that the critical date for Article 10.18.1 is 18 December 2019 (*i.e.*,

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615 **Exhibit RLA-16**, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022, ¶ 205.

616 **Exhibit RLA-16**, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022, ¶¶ 209-16.

617 *See* **Exhibit RLA-16**, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022, ¶¶ 232-44.

three years before SSA submitted its Notice of Arbitration on 18 December 2022).[618] Thus, SSA's claims will have complied with Article 10.18.1 if SSA acquired actual or constructive knowledge of the alleged breach and of the corresponding damage **after** the critical date. That test is fully met here.

258. On 23 January 2020, Colombia's Ministry of Culture issued Resolution No. 0085, reports of which became public by 13 February 2020.[619] As detailed above, all SSA's claims arise out of Resolution No. 0085.[620] Not only is Resolution No. 0085 the breaching measure alleged by SSA, it is also the measure that divested SSA's rights of all their value, leading to SSA's claim for damages. Accordingly, SSA could not have known that it had suffered the complete loss of the value of its rights to its discovery before the issuance and publicization of Resolution No. 0085. As SSA filed its Notice of Arbitration on 18 December 2022, less than three years after SSA knew or reasonably could have known about Resolution No. 0085, this claim satisfies Article 10.18.1's requirements.

259. Colombia does not argue that SSA had actual or constructive notice prior to 18 December 2019 that Colombia would designate the entirety of the San José as protected cultural patrimony. Indeed, Colombian authorities granted rights to SSA's Predecessors to conduct underwater exploration for the San José on the basis that the discovery would be split 50/50.[621] This was reflected in the terms of the draft salvage contract that DIMAR itself had sent to SSA's predecessor, GMC,[622] and later to the Swedish company that it considered a salvage agreement with.[623] Had Colombia considered that none of the San José could constitute divisible "*treasure*," it would not have offered such terms.

260. The 2007 Supreme Court Decision further affirmed that the San José shipwreck included treasure by granting SSA rights to "*assets that. . .due to their own*

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618 *See* Colombia's Preliminary Objections, ¶ 202.

619 *See* **Exhibit C-105**, *Colombia declara bien de interés cultural el galeón San José*, EL MUNDO, 13 February 2020, *available at* https://www.elmundo.es/cultura/2020/02/13/5e44abe821efa04f088b467e.html.

620 *See supra* ¶ 215.

621 *See supra* ¶¶ 24, 57-61.

622 *See supra* ¶¶ 57-61.

623 *See supra* ¶ 66.

characteristics and features. . .may legally qualify as treasure."[624] The Supreme Court did not find that the entirety of the San José was protected cultural heritage; indeed, such a finding would have mooted the Supreme Court's decision altogether. Rather, the Supreme Court noted that "***not every sunken good is part of the national heritage***"[625] and that it could not determine which portions of the shipwreck were treasure because "[t]*he extraction or exhumation of the reported goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus, their characteristics, features, or individual traits are not fully known*."[626] It is SSA's understanding that, to date, the San José shipwreck remains underwater.

261. Even after the 2007 Supreme Court Decision, Colombia's actions indicated that it considered the shipwreck to include treasure. For example, in 2015, Colombia contracted with another salvage company to find the San José under the terms that it would remunerate that company with 20% of the value of the items that were treasure.[627] Thus, prior to 2020, SSA expected that parts of the San José were treasure based on the relevant law as interpreted by the 2007 Supreme Court Decision.[628]

(c) Colombia's Objections Are Meritless

262. As with Colombia's Article 10.1.3 objection, Colombia's Article 10.18.1 objection relies on its own recasting of SSA's claims. But whatever Colombia wishes SSA's claims were, as noted above, the Tribunal must take SSA's claims as SSA has pled them.[629] The Tribunal should, moreover, consider the timeliness of SSA's claims on a *prima facie* basis.

263. Having regard to the ordinary meaning of the terms in Article 10.18.1 of the TPA, read

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624 **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 234-35 (SSA's Unofficial Translation).

625 **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 230 (emphasis in original) (SSA's Unofficial Translation).

626 **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 223 (SSA's Unofficial Translation).

627 *See* **Exhibit C-36**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 14.

628 *See supra* ¶ 91.

629 *See supra* Section IV.B(c)(4).

in context and in light of the TPA's object and purpose,[630] the Parties have plainly required the Tribunal to determine the timeliness of SSA's claims on the basis of "*the breach **alleged***" by SSA.[631] In other words, contrary to Colombia's ungrounded assertions, the Tribunal must take Claimant's claim as pled by Claimant, not as Colombia attempts to replead it.[632] This is especially true in the expedited preliminary objections phase where the evidentiary record is not fully developed.[633]

264. For example, in *Kappes v. Guatemala*, the respondent also tried to recharacterize claimants' pleading in a misguided attempt to show that the date of breach was actually two years earlier.[634] The tribunal refused to accept this. With respect to one project, the tribunal took "*Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging . . .*"[635] With respect to another project, where claimant's pleadings were less clear, the Tribunal acknowledged "*important factual questions for determining the timeliness*" of the FPS claim, but concluded that "*they are not questions the Tribunal can determine simply on the basis of the short initial pleading in this case*."[636] As the *Kappes* tribunal emphasized:

> *For purposes of the Preliminary Objection stage, **the important point is that Claimants insist** – despite any confusion that their Notice of Arbitration may have created – **that they are** **not pursuing** **any full protection and security claim for events prior to the agreed 'critical***

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630 *See supra* ¶ 144.

631 *See* **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.18.1. Claimant notes that Colombia deleted the operative term, "*alleged*," from the text of Article 10.18.1 it quotes at ¶ 201 of its submissions. *Compare* Article 10.18.1 *with* Colombia's Preliminary Objections, ¶ 201 (quoting the treaty text as follows: "*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the breach under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a) or the enterprise (for claims brought under Article 10.161.(b) has incurred loss or damage.*").

632 *See* **Exhibit CLA-45**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 332 (explaining that the tribunal must consider the claimant's claim as pleaded and assess whether claimant knew or should have known of the breaches as alleged by claimant before the cut-off date).

633 *See supra* Section III.

634 *See* **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 222.

635 **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 223.

636 **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 224.

> ***date'*** *of 9 November 2015. On the basis of this statement, there is no longer (if there ever was) any* 'breach alleged *under Article 10.16.1' with respect to the pre-critical date period.* ***In the view of the Tribunal, this suffices to clear the initial hurdle for the Preliminary Objections stage, which is focused on the Claimants' allegations***.[637]

265. Therefore, not only is there no textual support for Colombia's argument, but arbitral jurisprudence confirms that SSA's articulation of its claim and related facts should be given deference at the jurisdictional phase.[638] There is accordingly no basis to credit Colombia's objection here.[639]

266. However, Claimant's case, unlike that in *Kappes*, is clear. That is why Colombia tries to twist SSA's pleading to manufacture a temporal argument. Colombia spends more than 10 pages attempting to recharacterize SSA's claim,[640] yet it refers to just three paragraphs from SSA's submission—¶¶ 3 and 6 (Introduction) and ¶ 45 (Background to the Dispute).[641] Colombia conspicuously ignores the remainder of SSA's submission, including the entire section on the Summary of Claims. Colombia's indefensible cherry-picking should be enough to reject Colombia's assertions as unfounded.

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[637] **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 225 (internal citations omitted) (italics emphases in original) (bold emphases added). *See also id.* ¶¶ 226 (explaining that "*the time-bar issue is* [not] *resolved for purposes of this case – only that* ***the jurisdictional issue it presents is one that properly requires factual investigation, and cannot be resolved simply as a matter of the very first pleading***," as relevant evidence will be developed in due course, holding that "**[i]*t is simply premature, with hardly any evidence in the record, for the Tribunal to reach conclusions of fact*** *regarding* [Article 10.18.1]") (emphases added), 227 (further concluding that it would be "*premature*" to opine on the relevant doctrinal issues in investment law, as **"[d]*iscussion of legal principles is best done against the backdrop of a developed evidentiary record, and* nothing in DR-CAFTA requires the Tribunal to decide at the preliminary objections stage a particular jurisdictional objection that is intensely fact-dependent, prior to the submission of evidence regarding the relevant facts***.") (emphases added).

[638] *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 544-45 (finding that Peru's allegations mischaracterized claimants' claims and were, in any case, baseless).

[639] *See* **Exhibit CLA-45**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶¶ 329, 332-33 (explaining that, to determine when the claimant first acquired (or should have first acquired) knowledge of a specific breach or that it had suffered loss or damage, the tribunal "*must begin by identifying the date on which the alleged breach crystallized. This requires a substantive review of each of the measures complained of as well as of the measures that the Respondent considers lie at the heart of the Claimant's case (in particular, of the 2010 TCA Decision). This analysis is deeply intertwined with the merits, and the Tribunal will thus conduct it during the merits phase*.").

[640] *See* Colombia's Preliminary Objections, ¶¶ 205-37.

[641] *See* Colombia's Preliminary Objections, ¶¶ 205-06.

267. Beyond being baseless, Colombia's assertions are also wrong. As in relation to its Article 10.13 argument above,[642] Colombia alleges that "*the disputes as to the breach of the TPA would result from . . . i) Colombia's denial that a 'treasure' exists in the coordinates*" reported by SSA's Predecessor GMC, in 1982, "*ii) Colombia's denial to disclose the coordinates of the 2015 discovery*," and "*iii) Colombia's refusal to recognize Sea Search Armada LLC's rights notwithstanding the relevant judicial decisions. . .*"[643]

268. While it may be Colombia's case that these acts amount to treaty breaches,[644] they are not the source of SSA's claim here. SSA's claim arises out of Colombia's complete evisceration of Claimant's property rights, by decree, in 2020.[645] To determine SSA's knowledge of the breach and the resulting damage, the Tribunal needs to look to Claimant's actual case ("*the breach alleged under Article 10.16.1*"),[646] and not what Colombia claims its breaches are.[647]

269. SSA was of course aware of Colombia's conduct prior to Resolution No. 0085.[648] But prior to that Resolution, SSA had valuable rights, which had been confirmed by the Colombian Supreme Court.[649] While SSA was attempting to enforce its rights prior to 2020, there was no doubt about their existence, and indeed Colombia's actions over the course of 40 years indicated to SSA and its Predecessors that their rights would eventually be enforced:

(a) After issuing Resolution No. 0354, DIMAR entered into discussions with SSA Cayman for a salvage contract, including by sending it a Draft Contract in recognition of its rights.[650]

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642 *See supra* Section IV.B.

643 Colombia's Preliminary Objections, ¶ 207.

644 *See* Colombia's Preliminary Objections, ¶¶ 150, 207.

645 *See* Notice of Arbitration, ¶¶ 49, 75-76, 80-81. *See also supra* ¶ 215.

646 *See supra* ¶ 215.

647 *See* Colombia's Preliminary Objections, ¶¶ 207-10.

648 *See* Notice of Arbitration, ¶¶ 15-47.

649 *See supra* Section II.L.

650 *See supra* ¶ 58.

(b) In 1994, the Civil Court recognized SSA Cayman's rights to the shipwreck that it had discovered and reported.[651]

(c) In 1994, the Civil Court issued the Injunction Order.[652]

(d) In 1995, the Colombian Government assured the U.S. Government that it would comply with its own courts' decisions once the Civil Court Action was fully resolved.[653]

(e) In 1997, the Superior Court upheld the Civil Court Decision, recognizing SSA Cayman's right to the shipwreck that it had discovered and reported.[654]

(f) In 2007, the Supreme Court confirmed the findings of the lower courts that SSA Cayman had rights to 50% of the treasure that it had discovered and reported in the 1982 Report.[655]

(g) In 2014, Colombia's Minister of Culture confirmed Colombia's intent to negotiate a mutually beneficial solution to the dispute if SSA withdrew its proceedings before the IACHR and the U.S. courts.[656]

(h) Colombia announced it had discovered the San José in late 2015, and it was later revealed that the coordinates of its announced discovery lay just three nautical miles from the coordinates listed in the 1982 Report, well within the reported "*immediate vicinity*".[657] After Colombia's announcement, SSA made multiple requests to conduct a joint verification exercise, which it hoped Colombia would accept given its

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651 *See supra* ¶ 76.

652 *See supra* ¶ 86.

653 *See supra* ¶ 90.

654 *See supra* Section II.L.

655 *See* Notice of Arbitration , ¶¶ 31-38. *See also* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 234 ("[T]*he property recognized therein, in equal parts, for the Nation and the plaintiff. . .*") (SSA's Unofficial Translation).

656 *See supra* ¶ 108.

657 *See supra* ¶ 121.

prior offer to do so.[658]

(i) In 2019, Colombian courts reinstated the Injunction Order against Colombia, in recognition of SSA's vested rights.[659]

270. Thus, Colombia's actual conduct did not "*consistently*" deny SSA's rights. In fact, the Colombian judiciary consistently upheld SSA's rights. Colombia's own recounting of the facts confirms that, prior to 2020, the existence of SSA's rights was not in doubt. For instance, in its letter from the Minister of Culture dated 17 June 2016, Colombia specifically affirmed that SSA had rights to the area designated by the 1982 Report, as confirmed by the 2007 Supreme Court Decision.[660] This ended in 2020. As Dr. Gómez acknowledged at a meeting on 13 October 2021, Resolution No. 0085 expunged SSA's rights.[661]

271. Colombia suggests that its assertions that there was no shipwreck in the Discovery Area reported by SSA should be enough to dismiss this case on temporal grounds.[662] As explained above, Claimant's claim arises from Resolution No. 0085 retroactively declaring the entirety of the San José cultural patrimony, not Colombia's assertions

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658 *See supra* ¶¶ 122-123.

659 *See supra* ¶ 131.

660 *See* **Exhibit R-28**, Letter from the Minister of Culture to Sea Search Armada, 17 June 2016 ("*The accompaniment to Sea Search Armada that the Colombian Government is willing to provide, is without prejudice to the position of the Colombian Government with respect to* ***the possible rights of Sea Search Armada, which would be exclusively limited to those referred to by the Supreme Court of Justice in the terms and conditions indicated therein****. . . .The Supreme Court of Justice's ruling. . .****refers to possible rights over the possible shipwreck that may exist in the coordinates reported by you** *and which are established in the confidential report of 1982, without them being related to a specific shipwreck*.") (emphases added) (Colombia's Unofficial Translation). *See also* Colombia's Preliminary Objections, ¶ 218.

661 *See supra* ¶ 138.

662 *See* Colombia's Preliminary Objections, ¶ 235 ("*In short, given the cumulative requirements set forth in the 2007 CSJ Decision,* ***the clear and unequivocal State conduct denying one of these requirements (the location in the 1982 coordinates)****, makes it* ***completely irrelevant to examine the second requirement (the legal plausibility to qualify as a treasure)***."") (emphasis added). *See also id.* ¶¶ 233 ("[S]*ince . . . prior to 18 December 2019,* ***Colombia had made clear, unequivocally and explicitly that the Galeón San José was not located*** *in the 1982 Coordinates and that the 2007 CSJ Decision did not grant the property rights over the shipwreck claimed by Sea Search Armada, LLC, the alleged breach and damage materialized in full prior to the* dies a quo.") (italics in original) (bold emphasis added), 234 ("*Resolution 0085 of 23 January 2020 is completely immaterial for one simple reason: it limits its scope to the Galeón San José found by Colombia in 2015 and, as already mentioned, well before 18 December 2019 Colombia had informed Sea Search Armada, LLC that not only did it not have any right over the Galeón San José, but that no shipwreck was even located in the reported coordinates. Therefore, Resolution 0085 of 23 January 2020 has no effect on this case, as Sea Search Armada, LLC has no right and has never had any right with regards to the Galeón San José*.").

about the purported contents of the target area reported by SSA's Predecessor, GMC.[663]

272. Moreover, SSA was under no obligation to (and indeed did not) accept the validity of Colombia's claims regarding its supposed findings.[664] Indeed, Colombia's assertions utterly lack credibility. Colombia first attempted to rely on the Columbus Report it commissioned in the midst of ongoing litigation.[665] As described above, the Columbus Report was neither impartial nor scientifically founded. For instance, it failed to identify the area searched or the provenance of the samples it purportedly analyzed,[666] and it contradicted contemporaneous reports of Colombian officials who had accompanied SSA's Predecessors on their exploration outings and witnessed their discoveries first-hand.[667] Tellingly, even Colombia was reluctant to use the Columbus Report in contemporaneous litigation.[668] Colombia's rejection of SSA's repeated requests for joint verification within the 1982 Report area cast further doubt on the Columbus Report's veracity.[669] Thus, given the lack of Colombia's transparency and inconsistencies, there was no reason for SSA to take Colombia's assertions at face value.

273. Colombia also points to SSA's petition to the IACHR and litigation in U.S. courts, but for the reasons already discussed, neither helps Colombia's argument.[670] In short, SSA was attempting, through those proceedings, to enforce rights that it unquestionably had. Resolution No. 0085 however completely wiped out these rights. And, in any event, SSA dropped the U.S. and IACHR claims when Colombia conditioned negotiations to access to the shipwreck on SSA's doing so.[671]

274. Colombia now seems to suggest that it never actually intended to honor SSA's rights

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663 *See supra* ¶ 215.

664 *See supra* ¶ 83.

665 *See supra* ¶ 80.

666 *See supra* ¶ 82.

667 *See supra* ¶¶ 53-55.

668 *See supra* ¶ 79.

669 *See supra* ¶¶ 102, 127-129.

670 *See supra* ¶¶ 103-107, 235.

671 *See supra* ¶ 108.

and that SSA was misguided for taking Colombia at its word.[672] Assuming that is true, Colombia's requirement that SSA terminate its legal proceedings as a precondition for negotiations was made in bad faith. SSA cannot be expected to have foreseen that Colombia was acting in bad faith, nor should Colombia be allowed to rely on its bad faith conduct to avoid liability.

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275. Thus SSA acquired (and could not have previously acquired) knowledge of Resolution No. 0085 until after Colombia issued it in January 2020. Contrary to Colombia's assertions, Resolution No. 0085 did not reconfirm Colombia's prior position with respect to SSA's rights: it was a radical and unexpected reversal of that position.

[672] *See* Colombia's Preliminary Objections, ¶¶ 210-11.

V. COLOMBIA'S BASELESS REQUESTS FOR COSTS SHOULD BE DENIED

276. Colombia makes two requests for costs. First, it asks the Tribunal to order SSA to "*bear all the costs of this arbitration, including legal fees assumed*" by Colombia,[673] and, second, to order SSA to post "*security for costs in the amount of no less than USD 300.000 to cover a potential award of costs in favor of*" Colombia.[674] These requests are baseless and should be denied. Further, for the reasons set out below, Claimant respectfully requests that the Tribunal order Colombia to bear the full costs of this preliminary phase given the frivolous nature of Colombia's preliminary objections that have done little more than to extend the length of these proceedings by five months.

A. Costs Of This Preliminary Proceeding Should Be Awarded To SSA Under Article 10.20.6 Of The TPA

277. The Parties agree that the Tribunal has authority under Article 10.20.6 of the TPA to determine how the costs of this preliminary proceeding should be apportioned.[675] Article 10.20.6 provides:

> *When it decides a respondent's objection under paragraph 4 or 5,* ***the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection****. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.*[676]

278. Likewise, the UNCITRAL Rules gives the Tribunal the authority, "*if it deems appropriate*" to award costs in decisions other than the final decision. Article 40(1) provides:

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673 Colombia's Preliminary Objections, ¶ 289(iii). *See also id*. ¶¶ 272-87.

674 Colombia's Preliminary Objections, ¶ 290. *See also id*. ¶ 288.

675 *See* Colombia's Preliminary Objections, ¶¶ 272, 287 (discussing the Tribunal's powers under art. 10.20.6.1 of the TPA).

676 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.6 (emphasis added).

> *The arbitral tribunal shall fix the costs of arbitration in the final award and,* ***if it deems appropriate, in another decision****.*[677]

279. The Parties further agree that in determining whether an award of costs under Article 10.20.6 is warranted, the Tribunal "*shall consider whether either the claimant's claim or the respondent's objection was frivolous*."[678] Indeed, Article 10.20.6 provides for a costs award only in "*narrow circumstances*," namely if such award is "*warranted*," especially in case of a frivolous claim or objection.[679] Colombia's assertion that SSA's claims are "*blatantly frivolous*"[680] lacks any merit. If anything, the opposite is true and costs against Colombia are warranted here.

280. First, Colombia's argument essentially is that costs should be awarded against SSA for the simple reason that SSA chose to initiate this Arbitration rather than abandon its rights.[681] That is not a basis for an adverse costs order. It is a fundamental principle of international investment law that an aggrieved investor is entitled to seek relief against the host State pursuant to the terms of the governing treaty, which is precisely what SSA did when Colombia eviscerated its rights by adopting Resolution No. 0085.[682]

281. Colombia's primary complaint is that SSA should not have initiated this Arbitration because "*it has no property rights*" pursuant to the 2007 Supreme Court Decision, "*the nullification of its alleged property rights*" had already occurred in 2010/2012, and Colombia had communicated to SSA that it had no "*rights of access*" to the *San José*,

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677 *See* **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 40(1) (emphasis added). *See also* art. 40(2) (defining costs to include fees of the arbitral tribunal, reasonable travel and other expenses incurred by arbitrators, costs of expert advice, witness related expenses, legal representation costs and administrative costs).

678 **Exhibit CLA-1**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.20.6.

679 **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 175. *See also* **Exhibit CLA-28**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, ¶ 136 ("*In light of this* [Article 10.20.6 test to assess costs]*,* ***the Tribunal understands the power granted under this Article to be limited****, turning on whether the Tribunal considers Claimants claims or Respondent's preliminary objection to be 'frivolous'."*) (emphasis added).

680 Colombia's Preliminary Objections, ¶ 288.

681 Colombia also poses a series of rhetorical questions, none of which have any bearing on any of Article 10.20.5 objections made by Colombia, much less on the allocation of costs. *See* Colombia's Preliminary Objections, ¶¶ 282 ("*What new disputes could emerge if. . .*[SSA] *has no property rights . . .?*"), 283 ("*What new litigation could reasonably be brought against the State of Colombia. . . .?*"). *See also id.* ¶ 286 ("*Colombia condemns this course of action by Sea Search Armada, LLC, as its only purpose is to hold a sovereign State hostage over the threat of continuous litigation and the manufacture of allegedly new disputes.*").

682 *See* Notice of Arbitration, ¶¶ 75-76. *See supra* ¶ 215.

which was in any event "*not located*" at the reported coordinates.[683] But these are all points of disagreement between the Parties, which require a review of the full evidentiary record on the merits.

282. Second, in asking for an award of costs, Colombia has severely distorted the facts, accusing Claimant of a litany of abusive acts from "*threats of unilateral intervention in Colombian waters*" to holding Colombia "*hostage*."[684] This is absurd. If anything, the reverse is true. It was Colombia's conduct during litigation that its courts sanctioned and found abusive,[685] including Colombia's unsavory threats and pressure tactics against judicial officials, which raised red flags and triggered rebuke from the Colombian courts and even the U.S. Government.[686]

283. This is in sharp contrast to SSA's conduct. Contrary to Colombia's bluster, SSA had every right (and indeed duty) to defend its rights and investment when Colombia proved reluctant to enforce them despite the rulings of its own courts. At the same time, Claimant remained willing to find an amicable resolution and even agreed to withdraw ongoing proceedings in response to Colombia's preconditions to negotiate.[687] While Colombia now appears to suggest that it never actually intended to settle the dispute in good faith, at the relevant time Colombia had represented—and SSA believed—that a negotiated solution was forthcoming. Thus, when Colombia appeared to back away from a conciliatory position, SSA was forced to remind Colombia that the alternative to a negotiated settlement was a new round of "*new, undesirable, and more complex*" legal proceedings to protect SSA's rights.[688]

284. Colombia also selectively quotes certain SSA letters, claiming that they show that SSA knew all along that there was no shipwreck in the area that GMC had reported in 1982.[689] As explained above, SSA was merely pointing Colombia to the precise

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683 *See* Colombia's Preliminary Objections, ¶¶ 282-85.

684 *See* Colombia's Preliminary Objections, ¶¶ 273-86.

685 *See supra* ¶¶ 75, 89.

686 *See supra* ¶ 90.

687 *See supra* ¶ 108.

688 *See e.g.* **Exhibit R-31**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018, p. 1 (Colombia's Unofficial Translation), which Colombia cites in its Preliminary Objections, ¶ 281.

689 *See supra* ¶¶ 112, 127.

language of 1982 Report, which describes the target as being located in "*the immediate vicinity*" of certain listed coordinates, not at the pinpoint of the coordinates themselves.[690]

285. Third, Colombia has failed to provide *any* legal basis to demonstrate that Claimant's claims are "*frivolous*" to meet the standard for a costs award. Colombia did not identify a single case where an award was rendered against a claimant in analogous circumstances (or any circumstances, for that matter).

286. Colombia's conduct, in contrast, does warrant an award of costs. Colombia chose to bring its preliminary objections to delay these proceedings even though it knew that (i) there is no supportable legal basis for its assertions that the Tribunal lacks jurisdiction[691] and (ii) it repeatedly mischaracterized Claimant's case and the facts—at times omitting critical details—in an attempt to make them fit its theories.[692]

B. Colombia's Request For Security For Costs Has No Merit

287. Colombia also asserts that Claimant must post "*security for costs in the amount of no less than USD 300.000 to cover a potential award of costs in favor of*" Colombia.[693] It does so without providing any legal support or legal standard and without a factual justification other than a few nebulous statements contained in a single paragraph.[694] Colombia's application for security for costs (if it can even qualify as such) must be rejected.

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690 *See supra* ¶¶ 112, 127.

691 *See supra* Sections III-IV.

692 *See e.g., supra* ¶ 249 (seeking to recast Claimant's claim to manufacture a jurisdictional objection).

693 Colombia's Preliminary Objections, ¶ 290.

694 *See* Colombia's Preliminary Objections, ¶ 288.

288. First, Colombia has not even set out, much less attempted to satisfy, the legal standard for the application of security for costs because Colombia knows that it cannot meet that standard. Security for costs applications are rarely granted in investment disputes, and the threshold to award security for costs is high. Such orders have been granted only in exceptional circumstances where an "*essential interest of a party stands in danger of irreparable damage*."[695] Pursuant to arbitral jurisprudence, exceptional circumstances require that a security for costs request is both (i) necessary and (ii) urgent.[696] Colombia has made no effort to (and cannot) satisfy that exceptionality standard.

289. Second, Colombia's speculations about Claimant's inability to pay are baseless. Indeed, even an alleged lack of assets, impossibility to show available economic resources, or existence of economic risk or difficulties that affect a claimant's finances

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[695] *See* **Exhibit CLA-17**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, ¶ 57 ("*it would only be in the most extreme case - one in which an essential interest of either Party stood in danger of irreparable damage - that the possibility of granting security for costs should be entertained at all.*"). *See also* **Exhibit CLA-31**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (Annulment Proceeding), 20 September 2012, ¶ 45 ("[T]*he power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced*."); **Exhibit CLA-11**, *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999; **Exhibit CLA-14**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001; **Exhibit CLA-38**, *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Security for Costs), 11 January 2016, ¶ 59 ("*In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part*[y] *from whom the security for costs is requested*.").

[696] *See* **Exhibit CLA-43**, *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, ¶¶ 378-79 ("[T]*he controlling criteria in the review of requests for security for costs is to establish whether there are exceptional circumstances that demonstrate a high real economic risk or that there is bad faith on the party subject to security for costs.*"). In addition, tribunals consider whether an order of security for costs would be proportionate. *See, e.g.*, **Exhibit CLA-29**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), 3 May 2012, ¶ 42 (noting that "[e]*ven if there were more persuasive evidence than that offered by the Respondent concerning the Claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed. Notably, there are no provisions in the ICSID Convention or the Arbitration Rules imposing such a condition, except the advance on costs under Administrative and Financial Regulation 14(3)(d). The Claimants met this requirement on January 11, 2012. After weighing the interests of both parties, the Tribunal rejects the Respondent's Request*."); **Exhibit CLA-40**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶¶ 36, 38 ("*Tribunals also should ensure that the particular measures requested are proportionate, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them.*").

are not sufficient *per se* to warrant security for cost.[697] In contrast to *RSM v St Lucia*, a rare example where a tribunal ordered claimant to pay security for costs, Colombia cannot point to Claimant's prior proven record of non-payment of costs, including the advances on costs requested by the PCA Secretariat, any other procedural conduct, or indeed *any* evidence that Claimant is unwilling or unable to satisfy an adverse cost order.[698] Rather, the opposite is true: while SSA promptly paid the advance costs due in this Arbitration, Colombia, twice, sought extensions amounting to over a month.[699]

290. Colombia's patently deficient application for security for costs should therefore be denied. SSA reserves all rights with respect to all costs arising from this wasteful and patently meritless submission that has only prolonged these proceedings and increased SSA's costs.

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697 *See* **Exhibit CLA-38**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, ¶ 63. *See also* **Exhibit CLA-27**, *RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.19 ("*In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order.*").

698 *Compare* **Exhibit CLA-35**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 82 (emphasizing that "*Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide compelling ground for granting Respondent's request.*"). *See also* **Exhibit CLA-51**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019 (noting that claimants' payment of advance fees "*demonstrates the Claimants' willingness to shoulder the necessary financial burden to ensure the continuation of the proceedings*" and that *"Claimants have not engaged in any abuse, serious misconduct, inappropriate behavior, dilatory tactics or bad faith actions during the course of these proceedings.*").

699 *See* Email from Colombia to PCA, 18 July 2023 (applying for an extension to the payment deadline by a month); Letter from PCA, 27 July 2023 (granting Colombia's application to extend payment deadline by a month); Letter from PCA, 2 August 2023 (granting additional extension requested by Colombia to split its payment in two tranches); Letter from PCA, 4 September 2023 (confirming final tranche of advance costs had been paid by Colombia).

VI. REQUEST FOR RELIEF

291. Claimant respectfully requests that the Tribunal:

a) **REJECT** Colombia's objections pursuant to Article 10.20.5 of the TPA, requests for costs and request for security for costs;

b) **ORDER** Colombia to pay all costs of and associated with its Preliminary Objections pursuant to Article 10.20.6 of the TPA; and

c) **GRANT** such other and further relief as the Tribunal deems just and proper.

292. Claimant reserves the right to supplement, add and modify its claims and defenses, to request such additional or different relief as may be appropriate, to submit memorials, documents, exhibits, witness statements, expert reports, and other evidence elaborating its case and the relief sought in the course of these proceedings.

Respectfully submitted for and on behalf of Sea Search-Armada, LLC.

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Dated: 20 September 2023

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