In the matter of an arbitration under the UNCITRAL Rules (2021)

SEA SEARCH-ARMADA, LLC
Claimant

and

THE REPUBLIC OF COLOMBIA
Respondent

PCA Case No. 2023-37

Colombia's Reply to Claimant's response to Colombia's submission pursuant to Article 10.20.5 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America

20 October 2023

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GLOSSARY OF RELEVANT TERMS

Defined Term / Abbreviation	Description
Defined Terms of Colombia's Submission	
10th Civil Court of Barranquilla	10th Civil Court of Barranquilla Circuit
1982 Confidential Report	Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia dated 26 February 1982
1994 Judgment	Judgment from the 10th Civil Court of Barranquilla dated 6 July 1994
1994 Press Release	Press Release issued by the Colombian Government on 7 July 1994
1994 *Secuestro* Decision	*Secuestro* Decision from the 10th Civil Court of Barranquilla dated 12 October 1994
2007 CSJ Decision	Decision from the Colombian Supreme Court of Justice dated 5 July 2007
ACHR	American Convention on Human Rights
APA	Assets Purchase Agreement between Armada Company, acting on behalf of SSA Cayman Islands and Sea Search Armada, LLC dated 18 November 2008
Civil Action	Civil lawsuit filed by SSA Cayman against the Nation/DIMAR on 13 January 1989
Columbus Report	Final report submitted by Columbus Exploration on 4 August 1994
CSJ	Colombian Supreme Court of Justice
Court of Appeals	United States Court of Appeals for the District of Columbia
DC District Court	United States District Court for the District of Columbia
Decree No. 2349	Decree No. 2349 of 1971
Decree No. 12	Decree No. 12 of 1984
Decree No. 2324	Decree No. 2324 of 1984
Decree No. 1512	No. 1512 of 2000
Decree No. 1516	Decree No. 1516 of 2002
Decree No. 5057	Decree No. 5057 of 2009
DIMAR	Colombia's General Maritime and Ports Directorate
GMC Inc.	Glocca Morra Company Inc.
Hypothesis	Hypothesis of the discovery of the "Galeón San Jose" in the area of the 1982 coordinates
IACHR	Inter–American Commission on Human Rights

ICJ	International Court of Justice
Resolution 0048	Resolution 0048 of 1980
Resolution 753	Resolution 753 of 1980
Resolution 066	Resolution 066 of 1981
Resolution 0025	Resolution 0025 of 1982
Resolution 0249	Resolution 0249 of 1982
Resolution 0354	Resolution 0354 of 1982
Resolution 204	Resolution 0204 of 1983
SSA Cayman Islands	Sea Search Armada Cayman Islands
Superior Court of Barranquilla	Superior Court of the Judicial District of Barranquilla
"Treaty" or "TPA"	Trade Promotion Agreement between the Republic of Colombia and the United States of America
Defined Terms of Colombia's Reply to Claimant's Response	
Claimant's Response	Claimant's Response to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA
Colombia's Article 10.20.5 Submission	Colombia's Submission pursuant to Article 10.20.5 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America
Resolution No. 0085	Resolution 0085 of 2020
SSA LLC	Sea Search Armada LLC
Galeón San José or Galeón	Galeón San José
ACHR	American Convention on Human Rights

I. INTRODUCTION

1. According to Section 3.1 and Annex 1 of Procedural Order No. 1, the Republic of Colombia hereby submits its Reply to Claimant's Response to Colombia's Article 10.20.5 Submission (hereinafter, "**Claimant's Response**" or "**Response**").[1]

2. In its Response, Claimant goes to great length to divert the Tribunal's attention from the simple analysis it should perform at this stage of the proceedings: determining whether it has jurisdiction over this case. However, the task of the Tribunal is simple and can be comfortably exercised within the expedited procedure enshrined in Article 10.20.5 of the TPA.

3. Although the Galeón San José contains the biggest treasure in the history of humanity, this case is not truly about the discovery of the Galeón San José. In fact, Glocca Morra Company never provided a single piece of evidence supporting their claim that they had found the Galeón. Decisively, the 1982 Confidential Report filed by Glocca Morra Company did not even mention the key words "Galeón San José".

4. How can it be explained that a private company finds the biggest treasure in the history of humanity and fails to report it? The answer is simple: because it did not find it.

5. The evidence in the record shows that, since 7 July 1994, based on scientific evidence, Colombia conclusively determined and publicly announced that Glocca Morra Company did not find the Galeón San José in 1982.

6. The circumstances surrounding the 1982 Confidential Report are even more telling. As agreed by the parties, Glocca Morra Company filed the 1982 Confidential Report just days before the expiration of its exploration permits.[2] It is evident that Glocca Morra Company was desperate to preserve exploration rights, even though it could not prove it had identified any particular shipwrecked species, let alone the Galeón San José.

7. This case should end here.

[1] Claimant's Response is dated 20 September 2023, but was filed on 21 September 2023.
[2] Colombia's Article 10.20.5 Submission, ¶ 28; Claimant's Response, ¶ 44.

8. However, Claimant and its alleged predecessor, SSA Cayman Islands, started a campaign based on what is commonly known in Colombia as the biggest lie ever told: that Glocca Morra Company found the Galeón San José.

9. Unsurprisingly, since the 1982 Confidential Report did not report the discovery of the Galeón San José, on 5 July 2007 the CSJ emphasized that the Civil Action initiated by SSA Cayman Islands to enforce the alleged rights deriving from the 1980s' DIMAR resolutions were not concerned with the Galeón San José.

10. Against the clear and objective wording of the 2007 CSJ Decision, Claimant initiated subsequent litigation before US Courts and the IACHR based on the false premise that Colombia had granted it property rights over the Galeón San José. Although this is not true, it is decisive for jurisdictional purposes. In those proceedings, Claimant placed the date of crystallization of the alleged unlawful expropriation and several instances of arbitrariness and discrimination well before the date of entry into force of the TPA, and well beyond the triggering date for the 3-year time limitation period. **Claimant's admissions allow the Tribunal to comfortably dismiss this case at this stage.**

11. SSA LLC has invoked the 2008 APA to sustain that it owns the DIMAR resolutions as a protected investment. However, it has manifestly failed to prove that it invested in Colombia to secure the qualifying asset. This is precisely what Article 10.28 of the TPA requires for an investor to invoke the exceptional benefits in Section 10 of the TPA: to prove that it possesses the alleged investment as a consequence of having invested. **Claimant's manifest failure to prove that it invested to secure DIMAR's resolutions allows the Tribunal to comfortably dismiss this case at this stage.**

12. Finally, Claimant has admitted that DIMAR's authority over underwater exploration remains active insofar as further exploration is required. Since both the 1982 Confidential Report and the 2008 APA recognize that further exploration was required, SSA LLC could not have been conferred SSA Cayman Islands' exploration rights without DIMAR's approval. Accordingly, in flagrant violation of Article 10.28(g) of the TPA, the alleged investment was not conferred pursuant to domestic law. **This allows the Tribunal to comfortably dismiss this case at this stage.**

13. To render this case more complex, Claimant presents a lengthy and distracting discussion of factual and merit-related issues irrelevant to Colombia's early dismissal request under Article 10.20.5 of the TPA. Moreover, Claimant's

digressions distort the facts and present contradictory arguments. Respondent must, much to its regret, correct the factual record.[3]

14. Claimant surprisingly submits that all the Tribunal must do to assess the invocation of Article 10.20.5 of the TPA is to accept as true its self-serving and grossly misleading characterization of the facts of the dispute. What Claimant suggests is that Respondent is barred from questioning any misrepresented facts. Claimant's position further implies that the Tribunal is devoid of any power of analysis and must decide based solely on Claimant's narrative, even if it grossly misrepresents and mischaracterizes reality.

15. In analyzing the facts of the dispute as presented by Claimant the Tribunal should proceed with caution. SSA LLC has litigated for over 30 years before different local, foreign and international venues, attempting to force the Republic of Colombia to recognize rights over the Galeón San José that Claimant does not have and has never had. In its unsuccessful attempts, Claimant has repeatedly changed its narrative to accommodate the facts and their timing to evade the applicable statute of limitations in the corresponding forums. In response, for over 30 years, Colombia has consistently denied that Glocca Morra Company found the Galeón San José. Accordingly, no property rights can be claimed by any company based on the 1982 Confidential Report.

16. Claimant now appears before this Tribunal with an artificial factual and legal construction to claim that Resolution No. 0085 is the measure that fully eviscerated its property rights. Claimant presents Resolution No. 0085 as the act that affected its non-existent rights because, once more, Claimant must accommodate its narrative to avoid the statute of limitations.

17. Colombia insists that the only possible explanation for the absurdity of this claim is Claimant's abusive attempt to use both the TPA and the Investor-State arbitration system to access the coordinates where the Galeón San José is really located. This is unacceptable. The international jurisdiction should not be abused to bypass States' essential security interests.

18. In light of the above, the Tribunal should dismiss this case at this stage.

[3] The fact that the Reply does not address each and every aspect discussed in Claimant's Response should be interpreted as an acceptance by Colombia of the characterization's made by Claimant. Colombia will only address the facts and legal arguments that are relevant to the proceedings under Article 10.20.5, reserving its right to expand its analysis if appropriate.

19. Respondent's Reply is divided in VI Sections. **Section I** contains the Introduction. **Section II** contains Colombia's response to Claimant's gross misrepresentation of the relevant facts. **Section III** responds to Claimant's allegation regarding Article 10.20.5 of the TPA. **Section IV** contains Colombia's response to Claimant's allegation in respect to Colombia's preliminary objections. **Section V** responds to Claimant's allegation in respect to Colombia's security for costs request. **Section VI** contains Colombia's prayer for relief.

II. CLAIMANT'S FACTUAL ACCOUNT IS GROSSLY MISREPRESENTED AND REQUIRES CORRECTION

20. As explained in **Section III**, the expedited procedure under Article 10.20.5 of the TPA does not entail an obligation to defer to Claimant's self-serving mischaracterization of the relevant facts. Therefore, Colombia's Reply begins with a summary of the key facts that will rectify the selective misrepresentations contained in Claimant's Response. This will benefit the Tribunal by clarifying the record for the purpose of deciding the pleading under Article 10.20.5 of the TPA.

21. Given the limited nature of the expedited proceeding under Article 10.20.5 of the TPA, this section is restricted to the factual issues that are relevant for the Tribunal when deciding on Respondent's preliminary objections. Therefore, even though Claimant's Response is full of factual allegations that are irrelevant to decide on Respondent's preliminary objections, Colombia will only address the facts that are relevant at this stage of the proceeding.[4] Importantly, that Colombia does not address those factual allegations in no way implies an admission of its veracity or accuracy.

A. GMC INC. NEVER REQUESTED, AND THUS DIMAR NEVER AUTHORIZED IT, TO SEARCH FOR THE GALEÓN SAN JOSÉ

22. Claimant has now come to assert that in 1980 Colombia authorized GMC Inc. to explore Colombian waters specifically in search "*for the San José.*"[5] According to Claimant, DIMAR issued Resolution 0048 "*granting GMC Inc.'s requested exploration permits to search for the San Jose*",[6] adding that Resolution No. 0048

[4] The fact that this Submission does not address each and every aspect discussed in Claimant's Response should not be interpreted as an acceptance by Colombia of the characterizations made by Claimant. Colombia reserves the right to expand its analysis of the facts at the appropriate time in the event that any claim survives the Expedited Proceeding.
[5] Claimant's Response, ¶¶ 19-23.
[6] Claimant's Response, ¶ 23.

"*makes clear that DIMAR was issuing an exploration permit to GMC Inc. for the purpose of finding the San José.*"[7]

23. This assertion is repeated throughout Claimant's Response.[8] Claimant's narrative intends to show that, from the beginning, GMC Inc. was specifically authorized to search for, and allegedly found, the Galeón San José. However, this is not only a misleading characterization of the relevant facts, but one that has no evidentiary support.

24. As already stated in Colombia's Article 10.20.5 Submission[9], on 22 October 1979, GMC Inc. submitted a request to DIMAR seeking authorization to carry out "*marine exploration works in the Colombian Continental Shelf in the waters of the Atlantic Ocean, with the purpose of establishing the existence of shipwrecked, species, treasures or any other element of historical, scientific or commercial value.*"[10] As can easily be seen, GMC Inc. did not mention nor requested authorization to search for the Galeón San José.

25. Following GMC Inc.'s request, DIMAR issued Resolution No. 0048, which, in its operative section, "*authoriz[ed] Glocca Morra Company Inc. to carry out underwater exploration activities in the following areas […].*"[11] Hence, contrary to Claimant's assertions,[12] Resolution No. 0048 did not authorize the company to explore Colombian waters in search for the Galeón San José. Resolution No. 0048 merely designated certain areas in which the company was authorized to develop underwater exploration activities.[13]

26. Claimant's farfetched assertions disregard the facts and evidence on record, and do not account for what was requested by GMC Inc. in 1979, nor what was effectively authorized by DIMAR in 1980. The fact that GMC Inc. was supposedly founded "*to search for the San José*"[14] is completely immaterial: DIMAR was never requested to issue an authorization to specifically search for the Galeón San José, and therefore it could not have and did not issue such authorization. The operative paragraph in Resolution No. 0048 does not lie.

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[7] Claimant's Response, ¶ 23.
[8] Claimant's Response, ¶¶ 19, 20, 22, 23, 29, 41, 50, 78.
[9] Colombia's Article 10.20.5 Submission, ¶ 22.
[10] **Exhibit R-002,** Exploration Permit Request from Glocca Morra Company Inc. to DIMAR, 22 October 1979.
[11] **Exhibit C-2,** DIMAR Resolution No. 0048, 29 January 1980, Art. 1.
[12] Claimant's Response, ¶¶ 19, 23, 41, 50.
[13] Colombia's Article 10.20.5 Submission, ¶ 22.
[14] Claimant's Response, ¶ 22.

27. GMC Inc. did not request authorization to search for the Galeón San José in particular. Accordingly, Resolution No. 0048 did not authorize explorations to search for the Galeón San José. That is why Resolution No. 0354 simply recognized Glocca Morra Company as a reporter of treasures or shipwrecked species, without even mentioning the Galeón San José. The operative paragraph in Resolution No. 0354 does not lie.

28. Claimant was just one amongst many companies that sought permission to explore the Colombian Caribbean waters, which, as was noted later in the 2007 CSJ Decision, contains close to a thousand shipwrecked species.[15]

29. It is thus clear that Claimant grossly misrepresented the relevant facts, as part of its desperate attempt to mislead the Tribunal to establish jurisdiction.

B. THE 1982 CONFIDENTIAL REPORT, FILED WITH DIMAR, DID NOT REPORT THE FINDING OF THE GALEÓN SAN JOSÉ

30. Claimant argues that, through the exploration works developed pursuant to DIMAR's authorizations, it allegedly discovered the Galeón San José.[16] Moreover, it posits that its supposed discovery was reported to Colombia through the 1982 Confidential Report.[17]

31. Claimant surprisingly alleges that "*Colombia does not contest the relevant facts advanced by SSA relating to the location and identification of the San José in December 1981.*"[18] Claimant contends that, rather, "*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*."[19]

32. In Colombia's Article 10.20.5 Submission it was noted that "*[i]t is undisputed that the 1982 Confidential Report did not mention the Galeón San José.*"[20] Since,

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[15] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 226, footnote 71 ("Note that, in accordance with what is stated by UNESCO, "It is estimated that more than 3 million unlocated shipwrecks are scattered on the ocean floor. The 'Dictionary of Disasters at Sea', for instance, enumerates the shipwrecks of 12,542 merchant, passenger and war ships, which occurred in 1824 and 1962, are listed. Information folder, UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001, CLT/CH/INS/06/12, p. 3, to which it is added that, according to calculations on the matter, **nearly a thousand vessels rest submerged in Colombian waters, which makes any reference to this topic even more difficult, in the event that it was intended to be made**"). (Emphasis added) (Independent translation).
[16] Claimant's Response, ¶¶ 27-40.
[17] Claimant's Response, ¶¶ 41-50.
[18] Claimant's Response, ¶ 27.
[19] Claimant's Response, ¶ 27.
[20] Colombia's Article 10.20.5 Submission, ¶ 27.

in fact, the 1982 Confidential Report did not mention the Galeón San José, one would have expected Claimant to accept this point as settled. Instead, Claimant takes issue with this statement.

33. Claimant posits that, "*GMC stated that it was submitting the 1982 Report pursuant to Resolution No. 0048, which, as noted above, DIMAR had issued for the express purpose of finding the San José*",[21] concluding that "*contrary to Colombia's assertions, the 1982 Report indicated at the outset that it was reporting the discovery of the San José*."[22] As already mentioned, a plain reading of DIMAR Resolution No. 0048 clearly shows that it was not issued to authorize GMC Inc. to search for the Galeón San José, as it merely designated certain areas in which the company was authorized to develop underwater exploration activities. This is what Article 1 of the operative part of Resolution No. 0048 objectively shows.[23]

34. One must bear in mind that Glocca Morra Company never supplemented the 1982 Confidential Report to expressly note that it had found the Galeón San José. It is at the very least surprising that, considering such an "*exciting discovery*",[24] as Claimant describes it,[25] the formal document supporting Glocca Morra Company's alleged rights as a reporter failed to use the only 3 words that matter: Galeón San José.

35. Finally, the circumstances of the filing of the 1982 Confidential Report are also even more telling. As agreed by the parties, Glocca Morra Company filed the 1982 Confidential Report just days before the expiration of its exploration permits.[26] It is evident Glocca Morra Company was desperate to preserve exploration rights, even though it could not prove it had identified any particular shipwrecked species, let alone the Galeón San José. Claimant it is very aware of the effects of expiration.[27]

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[21] Claimant's Response, ¶ 41.
[22] Claimant's Response, ¶ 41.
[23] **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")
[24] Claimant's Response, ¶¶ 44, 53.
[25] Claimant's Response, ¶ 40.
[26] Colombia's Article 10.20.5 Submission, ¶ 28 and Claimant's Response, ¶ 44.
[27] Claimant's Response, ¶ 23.

C. THE 1982 CONFIDENTIAL REPORT AND THE CONDUCT OF CLAIMANT'S ALLEGED PREDECESSORS SHOW THAT FURTHER EXPLORATION FOR THE PURPOSES OF IDENTIFICATION HAS ALWAYS BEEN NECESSARY.

36. The 1982 Confidential Report, which, as already mentioned, does not refer to the Galeón San José, concluded that:[28]

> Glocca Morra Co. believes from an operational point of view **that the next step in the plan for a successful conclusion of the venture, will be either a submersion team, backed with a full support team, or a submersible (?) tied up with a man, that could be brought to the site of the shipwreck. Sea Search Armada is willing to assist with the substantial additional capital needed to carry out the identification and rescue of the shipwreck as soon as you reach an agreement with the Maritime and Port Director General**, to start such an operation in the vicinity of target 'A'. (Emphasis added) (Independent translation)

37. This quote clearly shows that the 1982 Confidential Report determined that further marine exploration and substantial capital investments were required for the purposes of identifying whatever had been supposedly found in the reported area.

38. The fact that further exploration activities were required is undisputed.[29] This is precisely why, as recognized by Claimant,[30] on 29 April 1982 DIMAR issued Resolution No. 0249 granting a three-month extension in order to "*finish the exploratory period.*"[31] It is also why, as recognized by Claimant,[32] Glocca Morra Company requested DIMAR not only to authorize the transfer of its rights to SSA Cayman Islands, but to "*authorize the assignee [SSA Cayman Islands] to conduct exploration work approved for the assignor [Glocca Morra Company].*"[33]

39. Claimant's alleged predecessors' own actions reveal that the alleged discovery of the Galeón San José was far from a certainty and that further exploration for the purposes of identification was needed. In fact, by Claimant's own

[28] **Exhibit C-10,** Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982, p. 13.
[29] Claimant's Response, ¶ 43, 52.
[30] Claimant's Response, ¶¶ 40, 44.
[31] **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982, p. 1.
[32] Claimant's Response, ¶¶ 52.
[33] **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983, p. 1.

admission,[34] further research and exploration was required in accordance with the APA.[35]

40. Contrary to Claimant's allegations, the recognition of Glocca Morra Company as a reporter of treasures or shipwrecked species through Resolution 0354 is insufficient to vanish DIMAR's authority over the matter. Since underwater exploration has always been still needed, Claimant has always been still required to request DIMAR's authorization to carry out any underwater exploration activities whether it was for the Galeón San José or any other shipwreck.

D. COLOMBIA HAS NEVER RECOGNIZED THAT GLOCCA MORRA COMPANY ALLEGEDLY DISCOVERED THE GALEÓN SAN JOSÉ.

41. Although it is undisputed that the 1982 Confidential Report did not even mention the discovery of the Galeón San José, Claimant argues that Colombia supposedly recognized the alleged discovery, because Colombian officials were onboard the vessels that allegedly searched for, located and identified the Galeón San José:[36]

> (…) 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 the visits, confirming that they had found the San José.

42. In its Response, Claimant goes to great lengths to describe Glocca Morra Company's exploration works.[37] This lengthy description is completely irrelevant at this stage of the proceeding, and only serves Claimant's purpose of diverting the Tribunal's attention from the only truly relevant and uncontroverted fact for the present purpose: that the 1982 Confidential Report did not even mention the Galeón San José and Colombia has never recognized the alleged discovery of the Galeón San José by Glocca Morra Company.

43. In any case, Claimant's allegation lacks factual basis.

44. Claimant relies on DIMAR Resolution 517 of 1980[38] to support the claim that a Colombian official was onboard the Morning Watch, a vessel used for exploration activities from June to September 1980.[39] However, contrary to Claimant's

[34] Claimant's Response, ¶¶ 98-99.
[35] See **Section IV.A.**
[36] Claimant's Response, ¶¶ 27, 34, 54-55.
[37] Claimant's Response, ¶¶ 27-55.
[38] Claimant's Response, ¶ 34. **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.
[39] Claimant's Response, ¶ 30.

assertions, DIMAR Resolution 517 of 1980 does not prove that a Colombian official was in fact onboard the exploration vessel, as it merely served the purpose of designating the inspector that would eventually oversee the exploration activities authorized in favor of GMC Inc. This Resolution specifically orders the following:[40]

> DESIGNATE as Inspector of the underwater exploration work authorized to GLOCCA MORRA COMPANY INC. and on board the U.S.-flagged motor vessel "MORNING WATCH" the following Officer of the National Navy (…)

45. Moreover, DIMAR Resolution No. 517 of 1980 does not support Claimant's assertion that its predecessors searched for, located or identified the Galeón San José. In fact, it does not even mention the Galeón San José. On the contrary, DIMAR Resolution 517 of 1980 simply re-emphasized, in broad and general terms, that GMC Inc. was authorized to carry out underwater exploration, not to search for the Galeón San José as Claimant falsely suggests:[41]

> Whereas:
>
> That by Resolution 0415 of May 29 of the current year, the company GLOCCA MORRA COMPANY INC. was authorized to carry out underwater exploration operations with the purpose of locating shipwrecked species in jurisdictional waters of the Atlantic Ocean with the motor vessel "MORNING WATCH" of American flag for a term of six (6) months counted as of May 30 of the current year.

46. Furthermore, Claimant argues that Colombia supposedly recognized the alleged discovery of the Galeón San José, given that "*Colombian Navy observers were on board the Auguste Piccard submarine and its support ship, the State Wave at all times.*"[42] To support this argument, Claimant relies on Resolution No. 0048 and Resolution 517 of 1980. However, none of these documents support this allegation; Resolution 0048 was issued for the purpose of authorizing GMC Inc. to carry out underwater exploration in certain areas; and Resolution 517 of 1980 merely designated the inspector that would eventually oversee the underwater exploration activities developed by GMC Inc. through the "Morning Watch" vessel. None of these resolutions have anything to do with the Auguste Piccard as Claimant suggests.

47. Finally, Claimant argues that "*a Colombian Navy official was on board Oceaneering's ship, the Heather Express, at all times and was in daily contact*

[40] **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.
[41] **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.
[42] Claimant's Response, ¶ 34.

with their superiors at DIMAR."[43] Based on the Report from the Inspector onboard the Heather Express, a vessel hired by SSA Cayman Islands, Claimant misleadingly concludes that this document "*leaves no doubt that they, their superiors, and the crew believed that they had found the San José*."[44] According to Claimant, the "enthusiasm" from Colombia with regards to the alleged discovery of the Galeón San José explains why it "*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*."[45] However, this is not what the Inspector Report Claimant relies on reveals.

48. Contrary to Claimant's assertions, the Inspector's Report, dated 29 September 1988, 5 years after the expedition, does not conclude that the Galeón San José had been discovered.[46] Instead, the Report simply describes the general purpose of the explorations, including to extract, if possible, a sample of the remains of a shipwreck which SSA Cayman Islands believed to be the San José:[47]

> (…) carrying out explorations and if possible extract a sample of the remains of a shipwreck found within the authorized area, which **they believe** to be the San José (emphasis added).

49. What the Inspector's Report reveals, if anything, is that SSA Cayman Islands simply believed, not that it was convinced, that it had found the Galeón San José in that area. What is more important, that belief did not come from the Colombian Navy Official, as Claimant misleadingly suggests, but from the company itself. This exhibit does not contain any recognition of having discovered the Galeón San José as Claimant suggests.

50. Claimant went on to argue that this expedition serves as evidence that Glocca Morra Company had found the Galeón San José, since "*a piece of wood*",[48] "*an object that due to its shape simulates the appearance of a cannon*",[49] and "*what*

[43] Claimant's Response, ¶ 54.
[44] Claimant's Response, ¶ 54.
[45] Claimant's Response, ¶ 54.
[46] Claimant's Response, ¶¶ 54-55, referring to **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1
[47] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF p. 1.
[48] Claimant's Response, ¶ 55, referring to **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF p. 4.
[49] Claimant's Response, ¶ 55, referring to **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Directo
r, 29 September 1988, PDF p. 20.

seems to be a piece of ceramic"[50] were found. What Claimant suggests is that, after merely finding a piece of wood; an object that simulates the appearance of a cannon; and what seems to be a ceramic, it had absolute certainty that it had discovered an XVIII century galleon carrying a treasure of 7 million pesos, 116 steel chests full of emeralds and 30 million gold coins.[51] It is hard to understand how these findings could lead to affirm with certainty that it had discovered a galleon that was carrying one of the biggest treasures in the world.

51. In addition to this, after examining the piece of wood recovered, a scientific investigator onboard expressed that "*the piece has the same construction of a piece of galleon located in Portovelo Panama which is contemporary to the San José.*"[52] This, far from being a recognition on the fact that the piece of wood belonged to the Galeón San José, shows that the area was filled with shipwrecks, thus the recovered piece of wood could belong to any of the numerous shipwrecks in the area, and not the Galeón San José.

52. In the end, the Inspector's Report merely concluded that the operation proved very difficult, not that the Galeón San José had been discovered:[53]

> 4. CONCLUSIONS
>
> The operation proved to be very difficult and required high technology. As the wreck is located between 710 and 750 feet deep, it is important to carry out any work or rescue by a system other than using saturation divers, which in a way is a guarantee of safety.

53. Therefore, despite the alleged presence of the Colombian Navy onboard some of Glocca Morra Company's vessels, the discovery of the Galeón San José was never recognized by any Colombian official as Claimant suggests. What the evidence shows is that Glocca Morra Company was simply developing underwater explorations for shipwrecked species in Colombian waters. Colombia did not and has never recognized the alleged discovery of the Galeón San José by Glocca Morra Company.

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[50] Claimant's Response, ¶ 55, referring to **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF p. 22.
[51] Claimant's Response, ¶ 15.
[52] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF p. 23.
[53] **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, PDF pp. 4-5.

54. Again, Claimant grossly misrepresents the relevant facts for the purpose of misleading the Tribunal from the jurisdictional issues at hand.

E. COLOMBIA NEVER NEGOTIATED A SALVAGE CONTRACT FOR THE RECOVERY OF THE GALEÓN SAN JOSÉ WITH GLOCCA MORRA COMPANY OR SSA CAYMAN ISLANDS

55. Claimant has come to argue that, after its alleged discovery of the Galeón San José in 1982, SSA Cayman Islands began negotiating with Colombian authorities for salvaging the Galeón San José.[54]

56. This is hardly convincing since, as shown, it is undisputed that the 1982 Confidential Report did not even mention the Galeón San José.

57. Moreover, relying on correspondence from that time, Claimant asserts that "*both parties understood that the shipwreck they wished to salvage was the San José.*"[55] This is also unsupported. The record shows that on 2 February 1984 SSA Cayman Islands wrote to DIMAR for the purpose of finalizing a salvage contract "*in the areas assigned to it*"[56] by DIMAR's resolutions. In response to this, later that month DIMAR stated that it was studying the terms of reference with regards to the interest in "*a possible salvage contract of a shipwrecked antiquity located in the maritime areas of the country.*"[57] Nowhere do these two letters even mention the existence, let alone the purpose of salvaging the Galeón San José as Claimant suggests.

58. Claimant relies on a letter dated 12 March 1982, allegedly predating the 1982 Confidential Report, in which Glocca Morra Company put into consideration of the National Navy Command certain "*aspects*" related to the recovery of the Galeón San José.[58] This fact not only fails to disprove the fact that the 1982 Confidential Report did not mention the discovery of the Galeón San José, but makes all the more surprising and unacceptable that, in that key document Glocca Morra Company had failed to report the finding of the Galeón San José. In any case, Claimant's letter does not support the contention that DIMAR was negotiating the recovery of the Galeón San José, nor that the basis for such negotiation was the unreported finding of the Galeón San José by Glocca Morra

[54] Claimant's Response, ¶ 56.
[55] Claimant's Response, ¶ 56.
[56] **Exhibit R-007**, Letter No. 2541 sent by SSA Cayman Islands to DIMAR, 2 February 1984.
[57] **Exhibit R-008**, Letter 415 sent by DIMAR to SSA Cayman Islands, 13 February 1984.
[57] Claimant's Response, ¶ 58.
[58] **Exhibit R-005**, Communication from Glocca Morra Company to DIMAR, 12 March 1982.

Company. This letter did not provide any evidence of having discovered the Galeón San José nor that Colombia had recognized that discovery.

59. Claimant also relies on a draft contract allegedly from August 1984.[59] While the evidence disproves the date assigned to this draft,[60] the most important aspect of this document is that it does not even mention the Galeón San José.[61] If Colombia was allegedly negotiating with Claimant's predecessors for salvaging the Galeón San José, why did the text of the draft contract not reflect this purpose?

60. The record shows that on 2 November 1984 DIMAR sent a letter to SSA Cayman Islands clarifying that it only had the privileges granted by the law to a reporter, and that it was simply another bidder in the process.[62] Through this communication, DIMAR also granted SSA Cayman Islands 15 business days to confirm its acceptance with the terms contained in the letter, stating that the draft "*would be the basis for the formalization of the* ***possible contract***" (emphasis added).[63] As DIMAR stressed then, SSA Cayman Islands was just another bidder with no right to any contract according to Colombian law; the alleged contract was just a "*possibility*"; and there is no evidence that the final version of this "*possible contract*" was ever even sent.[64] More importantly, the only reference made to the Galeón San José in that letter is, in passing, to recall that it was writing in response to SSA Cayman Islands' communication "*with respect to the participation of the salvaged items and the areas of exploration* ***of the possible location*** *of the Galleon San Jose (…)*" (emphasis added).[65] This falls manifestly short from being a recognition of Glocca Morra Company's alleged discovery of the Galeón San José or the fact that Colombia was supposedly negotiating a salvage contract regarding that specific shipwreck. Colombia has consistently and unequivocally expressed that, by that moment, the Galeón San José had not been discovered. Glocca Morra Company was

[59] Claimant's Response, ¶ 58.
[60] Claimant alleges, without evidence to support this, that **Exhibit C-54**, which is a letter from DIMAR to Fernando Leyva from 23 August 1984 about "the Minutes of the Contract for the Archaeological Study and Recovery of Shipwrecked Antiquities", actually refers to a document under a different name. That is, **Exhibit C-16bis**, which is a project from the President's Office to GMC Cayman Islands, regarding the "Clauses for a contract for the salvage of a shipwrecked species".
[61] **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984.
[62] **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, p. 2.
[63] **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, p. 2.
[64] Claimant's Response, ¶ 58. Even agreeing to Claimant's alleged narrative, *quod non*, Claimant suggests that the **Exhibit C-16bis**, which it argues is from 23 August 1984, contains the terms of the contract, not taking into account **Exhibit C-19**, from 2 November 1984, from which it can easily be deducted that no final draft was sent by that time.
[65] **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, p. 1.

merely presenting a Hypothesis that needed further search, exploration and verification.

F. COLOMBIA'S EFFORTS TO LOCATE THE GALEON SAN JOSÉ IN 1987 REFLECT ITS VIEW THAT GLOCCA MORRA COMPANY HAD NOT FOUND THE GALEÓN SAN JOSÉ IN 1982

61. It was precisely because the Galeón San José had not been located by that moment that, years later, in 1987, Colombia contacted different parties "*to search for and recover the Spanish treasureship [sic] San José.*"[66] As the evidence shows, Colombia contacted the Government of the United States expressing its interest in "*contracting the search, identification and the eventual underwater salvage of the Spanish colonial shipwreck, the Galleon San Jose.*"[67]

62. By that moment, the location of the Galeón San José was so uncertain that Colombia stated it "*will neither guarantee nor assume responsibility for the existence, nature, and identity of either the searched object or the salvage profit*."[68] However, given that the area was known for containing a great number of shipwrecks, it determined that "*if the project is not successful, the GoC will give priority to the contractor to obtain permission to explore other nearby areas where there are indications of other shipwrecks*."[69]

63. Unlike the negotiations with SSA Cayman Islands in the early 1980's, which did not even mention the Galeón San José, in the late 1980's Colombia did contact different States for the specific purpose of searching, identifying, and salvaging the Galeón San José. Therefore, Claimant's assertion that SSA Cayman Islands, from the start, was negotiating with Colombian authorities for the salvage of the Galeón San José is simply not true. The reason is simple: if both parties would have intended to negotiate the salvage of the Galeón San José, they would have expressly negotiated the salvage of the Galeón San José.

64. By that moment, the discovery of the Galeón San José was, in its best, a mere Hypothesis that required more exploration and verification; it was thus far from being a certainty or a fact capable of granting any right as Claimant suggests.

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[66] **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1.
[67] **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1.
[68] **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 2.
[69] **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 2.

That explains why Colombia entered into a Memorandum of Understanding with the Swedish Government instructing it to identify the area of the search "*in the first place within the coordinates declared by Sea Search Armada*."[70] It also explains why, years later, Colombia signed Contract No. 544 with Columbus Exploration, for the purpose of developing an oceanographic investigation to test the Hypothesis of the discovery of the Galeón San José in the area reported in the 1982 Confidential Report, even if such Hypothesis was not even mentioned in the report.

G. COLOMBIA EXPRESSLY DENIED THAT THE GALEÓN SAN JOSÉ HAD BEEN DISCOVERED BY GLOCCA MORRA COMPANY BY ADOPTING THE CONTENT OF THE 1994 COLUMBUS REPORT

65. As noted in Colombia's Article 10.20.5 Submission, on 21 October 1993 Colombia signed Contract No. 544 with Columbus Exploration for the purpose of developing an oceanographic investigation in the coordinates established in the 1982 Confidential Report.[71] Upon request by the Republic of Colombia, Columbus Exploration was tasked with testing the Hypothesis of the finding of the Galeón San José through an *in situ* study, bathymetric sounding, and an examination of the word sample that was presented as part of the target.[72]

66. On 7 July 1994 the Colombian Government issued the 1994 Press Release,[73] through which it adopted the report made by Columbus Exploration.[74] The Columbus Report concluded that no shipwreck was located in the coordinates reported in 1982 by Glocca Morra Company "*or near them*", revealing that the search was not only developed in the exact coordinates.[75]

67. Claimant recognizes that SSA Cayman Islands was fully aware of the 1994 Press Release.[76] However, Claimant then goes to great lengths to highlight the alleged little probative value of the Columbus Report.[77] Ultimately, Claimant argues that

[70] **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5.
[71] Colombia's Article 10.20.5 Submission, ¶ 57.
[72] **Exhibit R-012**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, pp. 15-16.
[73] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994, pp. 2-3. Colombia's Article 10.20.5 Submission, ¶ 58.
[74] Claimant's Response, ¶¶ 78-80. Claimant recognizes that the 1994 Press Release was issued by the Colombian government, yet it refers to it as the "Columbus Press Release".
[75] **Exhibit R-012**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, p. 2. Colombia's Article 10.20.5 Submission, ¶ 62.
[76] Claimant's Response, ¶¶ 78, 83.
[77] Claimant's Response, ¶¶ 79-83.

the Columbus Report "*directly contradicted the Colombian Navy's contemporaneous reports from its supervision of GMC/SSA Cayman's exploration efforts*."[78] Claimant moreover argues that the Columbus Report has little probative value.[79]

68. The alleged deficiencies of the Columbus Report are irrelevant to decide on Colombia's jurisdictional objections. What is relevant, and in fact undisputed by Claimant, is that, through the 1994 Press Release, Colombia adopted as its own the conclusions reached by Columbus Exploration: that no shipwreck was located in the reported areas and therefore there were no traces of the Galeón San José.

69. Accordingly, by 1994, assuming, *quod non*, that Glocca Morra Company had property rights over the Galeón San José, its alleged rights as well the alleged violation of SSA Cayman Islands' legitimate expectations would have unequivocally taken place.

70. The alleged violation took place almost 30 years ago. This should mark the end of the discussion.

H. No Colombian court has ever recognized SSA LLC, nor its alleged predecessors, any property right over the Galeón San José

1. Colombia's domestic courts did not vest SSA Cayman Islands with property rights over the Galeón San José

71. Claimant's assertions are premised on the baseless allegation that Colombia's domestic courts vested SSA Cayman Islands with rights over the Galeón San José.[80] Again, this is not only false and misleading, but has no evidentiary support.

72. As stated by the 10th Civil Court of Barranquilla, SSA Cayman Islands resorted to the Civil Action to obtain a declaration of property rights over goods that could qualify as treasures, located within the coordinates indicated in the 1982 Confidential Report. Accordingly, the subject of said proceedings were described by the 10th Civil Court of Barranquilla in the following terms[81]:

[78] Claimant's Response, ¶ 84.
[79] Claimant's Response, ¶¶ 79-82.
[80] Claimant's Response, ¶ 102.
[81] **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, p. 1.

> To obtain, against the Nation, the recognition of 50% or the Totality of the right of property over the assets of economic, historical, cultural or scientific value that possess the quality of treasures that are located in the coordinates and contiguous areas referred to in the "Confidential Report on Underwater Exploration" in the Caribbean Sea of Colombia, dated 16 February 1982, submitted by the company Glocca Morra Company, which makes integral part of resolution number 0354 of 3 June 1982 of the General Maritime and Ports Directorate that recognized the rights of the reporter to said company. (Independent translation)

73. It is clear from the subject of the Civil Action, as described by the 10th Civil Court of Barranquilla, that SSA Cayman Islands did not request a declaration of property over the Galeón San José. Therefore, neither the 10th Civil Court of Barranquilla nor the CSJ could have "*unambiguously confirmed SSA's rights to the San José*",[82] as Claimant wrongfully contends.

74. In fact, when deciding on SSA Cayman Islands' request for an injunction ordering the seizure of the goods located in the area described in the 1982 Confidential Report, the 10th Civil Court of Barranquilla clarified that the Civil Action did not concern the Galeón San José, nor its location. Said court expressly stated that:[83]

> […] **this process is not about the rescue, finding or discovery of the shipwreck site or the remains of the so-called 'Galeón San José'** or whether or not it is located in the reported coordinates or in its surroundings or in a foreign site or different from that indicated by those coordinates, it was, instead, a matter of establishing, in accordance with Colombian legal norms, if the report of the discovery of assets made by Glocca Morra Company and accepted by the Colombian nation (through resolution 0354 of 1982), grant this foreign company and its assignees property rights over the assets (treasures) found at the reported site, regardless of whether they are the remains of the aforementioned galleon or any other ship. (Independent translation)

75. Likewise, the 2007 CSJ Decision emphasized that there was no evidence that the report made by Glocca Morra Company -as well as the rights derived from it- were referred to a shipwreck, much less to the San José:[84]

> [T]here is no evidence in the record that proves that the report made before the DIMAR by the Glocca Morra Company, whose rights it later transferred to the plaintiff, and to which the present controversy is referred, actually corresponds to a specific or precise shipwrecked vessel and, **much less, that it is inexorably or unfailingly the "Galeón San José"**, in order to, with

[82] Claimant's Response, ¶ 102.
[83] **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, p. 2.
[84] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 226.

> that understanding, resort to the historical precedent of its mythical sinking and, in this way, deduce that all of the assets reported, subject to that specific reason, are of historical importance and integrate, necessarily and correlatively, the "cultural heritage of the nation". (Emphasis added) (Independent translation)

76. The 2007 CSJ Decision further stressed that, "*Glocca Morra Company reported the discovery of treasures corresponding to shipwrecks, without circumscribing such statement to a specific ship*"[85], noting that, in line with this, DIMAR Resolution 0354 recognized Glocca Morra Company as a reporter of treasures or antiquities, "*without referring to a specific shipwreck either*."[86]

77. Therefore, Claimant's contention according to which the 2007 CSJ Decision unambiguously confirmed SSA Cayman Islands' rights to the Galeón San José is another baseless attempt to claim rights that have been consistently and unequivocally denied by Colombia.

78. Also, the 2007 CSJ Decision did not uphold the 1994 Judgment "*only modifying it in respect of the Supreme Court's recognition of items of cultural heritage as a category of goods separate from treasure*."[87] The CSJ further underscored that the property rights recognized in the judgments of first and second instance were referred only and exclusively to the goods that qualified as treasures located within the coordinates indicated in the 1982 Confidential Report without including different spaces, zones or areas:[88]

> With respect to those assets, in relation to which the declaration of ownership made by the *a quo* is limited, as indicated, it is also necessary to specify that they correspond only to those referred to in Resolution 0354 of June 3, 1982, issued by the General Maritime and Port Directorate, that is, to those which are located in "the coordinates referred to in the 'Confidential Report on Underwater Exploration carried out by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982' Page 13 No. 49195 Berlitz Translation Service", **without including, therefore, different zones, spaces or areas**. (Emphasis added) (Independent translation)

79. Unlike the 10th Civil Court of Barranquilla and the Superior Court of Barranquilla, the CSJ explicitly excluded from the declaration of ownership in SSA Cayman Islands' favor goods or assets located in "*different zones, spaces or areas*",

[85] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 227.
[86] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 227.
[87] Claimant's Response, ¶ 92.
[88] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 233.

statement which certainly undermines Claimant's assertion. The CSJ's remark was certainly justified considering that the inaccuracies in the 1982 Confidential Report -which explicitly acknowledged that further exploration was required to confirm SSA Cayman Islands' alleged finding- could not be construed to warrant indefinite rights to Glocca Morra Company and its assignee.

80. The terms on which the 2007 CSJ Decision upheld the 1994 Judgment not only deny that the CSJ "*only modified the lower court's decision to clarify that cultural patrimony goods cannot be privately claimed*",[89] but also that in 2019 "*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'*."[90]

81. Claimant's assertion constitutes a gross misrepresentation of the 2019 Superior Court Decision and, notably, intends to mislead the Tribunal into thinking that said court affirmed SSA Cayman Islands' rights according to Claimant's own -and misguided- reading of the 2007 CSJ Decision.

82. The reference to the 2007 CSJ Decision made in the 2019 Superior Court's Decision was for the sole purpose of determining whether the Ministry of Culture was entitled or not to request the lifting of the 1994 *Secuestro* Decision.[91] A comprehensive reading of the 2019 Superior Court's Decision indisputably reveals that it did not intend to determine, clarify or settle the extent of SSA Cayman Islands' rights as declared by the 2007 CSJ Decision, but rather to determine whether the lifting of the 1994 *Secuestro* Decision was justified or not. Therefore, contrary to Claimant's assertion, the Superior Court could not -and in fact did not- recognize SSA Cayman Islands' rights in accordance with its interpretation of the 2007 CSJ Decision.[92]

2. The CSJ never determined that "*DIMAR did not need to authorize the transfer of rights that had vested in the declarant unless the transferee intended to conduct underwater exploration*."

83. In a futile attempt to justify the lawfulness of its alleged investment, Claimant, again, misrepresented the findings in the 2007 CSJ Decision by stating that the

[89] Claimant's Response, ¶ 93.
[90] Claimant's Response, ¶ 131.
[91] **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, pp. 3-4.
[92] Claimant's Response, ¶ 91.

CSJ found that "*DIMAR did not need to authorize the transfer of rights that had vested in the declarant unless the transferee intended to conduct underwater exploration.*"[93] As shown below, the CSJ's analysis was circumscribed to whether SSA Cayman Islands was lawfully entitled to initiate the Civil Action and no consideration was made as to the conditions under which an authorization by DIMAR was required for the transfer of rights.

84. As corroborated by the excerpt of the 2007 CSJ Decision quoted by Claimant in footnote 232, the CSJ merely acknowledged the fact that, through Resolution 204, Glocca Morra Company assigned SSA Cayman Islands "*all the rights, privileges and obligations*" it had acquired, including those arising from Resolution No. 0354 of 3 June 1982 and that, for the purposes of initiating the Civil Action, the requirements provided for in Article 1959 of the Civil Code were not applicable:[94]

> 2.2. Putting things this way, **it is incontestable that no "assignment" of "personal credits" was verified between the plaintiff and the Glocca Morra Company, the perfection of which would require observing the requirements established in articles 1959 et seq., of the Civil Code**, because, stricto sensu, the Nation, through the DIMAR, did not become a debtor of said companies, but only granted permission for underwater exploration, aimed at locating treasures or shipwrecked species, in addition to authorizing the respective substitutions, recognizing to the assignees as such, to the point that empowered them to advance the exploration […]. (Emphasis added) (Independent translation)

85. This finding by the CSJ was based on the fact that, through Resolution 204, DIMAR authorized Glocca Morra Company to assign SSA Cayman Islands all of its rights, privileges and obligations obtained by means of previous DIMAR resolutions.[95] These considerations are certainly not applicable to the transfer of rights from SSA Cayman Islands to SSA LLC, which was not authorized by DIMAR and determines the lack of a protected investment "*conferred pursuant to domestic law*" in the terms of Article 10.28(g) of the TPA.

[93] Claimant's Response, ¶¶ 133, 135.
[94] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 62-64.
[95] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 63.

I. COLOMBIA HAS NEVER ADMITTED THAT THE TRANSFER OF RIGHTS FROM SSA CAYMAN ISLANDS TO SSA LLC WAS PROPERLY MADE, AS IT REQUIRED AUTHORIZATION FROM DIMAR

86. To elude the undisputable fact that SSA Cayman Island was required to seek DIMAR's authorization to assign its exploration rights to SSA LLC,[96] Claimant now alleged that DIMAR's authority ceased once the discovery of the Galeón San José was made. Claimant alleged that Colombia "*fails to cite to a single law or rule*" that supports its allegation "*that SSA required authorization from Colombia's maritime authority to acquire to its predecessor's rights.*"[97]

87. Moreover, Claimant asserts that the fact that SSA LLC's alleged predecessors had requested DIMAR's authorization for the assignment of marine exploration activities in the 1980s is irrelevant. This, given the fact that, unlike SSA LLC, "*the assignees needed to conduct exploration in Colombian waters.*"[98] According to Claimant, "*nothing in Colombian law requires DIMAR to authorize the transfer of vested rights from SSA Cayman to SSA.*"[99]

88. To begin, Claimant and Respondent agree that DIMAR is the relevant Colombian authority with the power to authorize underwater exploration.[100] Claimant also concedes that DIMAR's authority only ceases to exist "*with the discovery of the shipwreck.*"[101]

89. Although Claimant has come to allege that DIMAR's authority ceased once the discovery of the Galeón San José was made, as already mentioned, it is objectively discernible that the 1982 Confidential Report not only did not report the discovery of the Galeón San José, but explicitly expressed the need for further exploratory work and capital investment for the purpose of identification.[102] Therefore, DIMAR's authority never ceased to exist, and its

[96] Claimant's Response, ¶ 200. "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."
[97] Claimant's Response, ¶ 10.
[98] Claimant's Response, ¶ 201.
[99] Claimant's Response, ¶ 202.
[100] Colombia's Article 10.20.5 Submission, 15-25. Claimant's Response, ¶¶ 21-26.
[101] Claimant's Response, ¶ 200 ("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").
[102] **Exhibit C-10**, Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982, pp. 5-6.

authorization was still required, should SSA LLC intend to carry out further marine exploration in search of the Galeón San José.

90. Furthermore, Claimant alleges after Resolution No. 0354 recognized Glocca Morra Company as a reporter of treasures, "*DIMAR no longer had any authority over the use or transfer of those rights.*"[103] This is not only incorrect but contradicts Claimant's own conduct.

91. As noted in Colombia's Article 10.20.5 Submission,[104] on 24 March 1983, upon request by Glocca Morra Company, DIMAR issued Resolution No. 204, authorizing it to transfer the rights granted in Resolutions No. 0048, 0066, 0025, 0249 and 0354 to SSA Cayman Islands.[105] This means that, by that moment, Glocca Morra Company and SSA Cayman Islands were convinced that even after DIMAR Resolution No. 0354 was issued, any assignment of rights required DIMAR's authorization.[106] The fact that Resolution No. 0354 had allegedly vested the relevant rights on Glocca Morra Company is immaterial with respect to DIMAR's continuous authority regarding underwater exploration.

92. In addition to this, it should be noted that Claimant's Response contains the allegation that Colombia is somehow estopped from invoking in these proceedings the fact that DIMAR never authorized the transfer of rights from SSA Cayman Islands to SSA LLC.[107]

93. To begin, it is worth clarifying that Colombia was never required to raise such TPA-based argument in its interactions with SSA LLC. Thus, it is immaterial that Colombia had not alleged a requirement contained in Article 10.28(g) of the TPA in the judicial proceedings in Colombia or in the United States,[108] or in its correspondence with SSA LLC.

94. In Colombia, only SSA Cayman Islands, and not SSA LLC, acted as plaintiff in the civil proceedings that led to the 2007 CSJ Decision. The record shows that the assignment of rights from Glocca Morra Company to SSA Cayman Islands was previously authorized by DIMAR, upon express request from Glocca Morra Company.

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[103] Claimant's Response, ¶ 200.
[104] Colombia's Article 10.20.5 Submission, ¶ 33.
[105] **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983.
[106] **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983.
[107] Claimant's Response, ¶¶, 104, 204.
[108] No reference is made to the proceedings before the IACHR because, although a Petition was filed by SSA LLC, Colombia never had the opportunity to submits its defense on admissibility.

95. Subsequently, there was no judicial proceeding or correspondence in which it was in fact necessary to challenge SSA LLC's standing, especially considering that SSA LLC did not show any interest in resuming underwater exploration activities pursuant to DIMAR resolutions, thereby rendering unnecessary for Colombia to raise such matter.

96. Claimant argues that the alleged discovery was the reason why the "*Colombian court recognized SSA Cayman Islands' lawyer's interest for his services, without any request for confirmation.*"[109] This is completely misleading. Claimant erroneously confuses the Superior Court of Barranquilla's recognition of litigation and procedural rights in favor of SSA Cayman Islands' lawyer in the Civil Action[110], with the transfer of the rights arising from DIMAR's resolutions, which is absolutely inappropriate.

97. At this point it is worth noting once again that Colombia consistently denied SSA LLC's alleged property rights over the Galeón San José on the basis that it was not located in the coordinates reported in the 1982 Confidential Report. Moreover, Colombia denied Claimant's request for a joint verification on the basis that no such right had been granted in the 2007 CSJ Decision.[111] Accordingly, it was completely unnecessary to argue that DIMAR had not authorized the transfer of the marine exploration rights. When Colombia expressed its willingness to discuss the possibility of joint verification, it limited such possibility to the exact coordinates reported in the 1982 Confidential Report.[112]

98. Accordingly, unlike these proceedings, which are being conducted pursuant to the TPA, there was simply no need for Colombia to invoke the requisite contained in Article 10.28(g) in any other forum.

J. AS EARLY AS 2010, CLAIMANT HAD ALREADY ALLEGED EXPROPRIATION WITHOUT COMPENSATION, ARBITRARINESS AND DISCRMINATION BEFORE THE DC DISTRICT COURT

99. Claimant's Response briefly refers to the US Civil Action before the DC District Court as an alleged response to Colombia having allegedly ignored SSA LLC's

[109] Claimant's Response, ¶ 201.
[110] **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 10.
[111] **Exhibit R-017**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010, pp. 1-2.
[112] **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015.

request for a joint salvage operation.[113] According to Claimant, "*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.*"[114] Colombia is said to have "*confuse[d] two legally distinct rights of action*" since "*[u]nder U.S. law, conversion is an international tort*" whose "*equivalents in criminal law include theft or larceny.*"[115] Claimant submits that "*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.*"[116] It concludes by stating that "*SSA alleged conversion before the U.S. court on the basis that Colombia was blocking SSA from salvaging the shipwreck goods to which it had rights, including through the threat of military intervention.*"[117]

100. Contrary to Claimant's statement, the US Civil Action not only contains a clear allegation of expropriation of Claimant's unproven property rights over the Galeón San José[118] –considering that the 2007 CSJ Decision never recognized any property rights over that shipwreck– but also an allegation of flagrant arbitrariness.[119] That SSA LLC raised an alleged expropriation without compensation of property rights over the Galeón San José and a case of arbitrariness as early as 7 December 2010 is decisive for Colombia's jurisdictional objection *ratione temporis*. Moreover, several false statements by SSA LLC before the DC District Court, some of which were noticed by said court, are relevant in assessing Claimant's request to defer to its characterization of the relevant facts.[120]

101. As noted in Colombia's Article 10.20.5 Submission, on 7 December 2010[121] SSA LLC filed the US Civil Action alleging a breach of contract and an expropriation

[113] Claimant's Response, ¶ 102; **Exhibit R-17**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010; **Exhibit C-31**, Letter from SSA to the President of Colombia, 31 March 2011, PDF p. 1.
[114] Claimant's Response, ¶ 105
[115] Claimant's Response, ¶ 105.
[116] Claimant's Response, ¶ 105.
[117] Claimant's Response, ¶ 105. Reference is made to **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
[118] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF, pp. 18 and 20, ¶¶ 23 and 25-26, pp. 21-22, ¶¶ 28- and 30, p. 47, ¶77. pp. 49-50, ¶¶ 88 and 94.
[119] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF, pp. 18 and 20, ¶ 23 and 25, pp. 45-46 ¶75.
[120] Claimant's Response, ¶ 6.
[121] Colombia's Article 10.20.5 Submission, ¶¶ 6, 74.

of its ownership rights, consequently claiming damages in the amount of USD 17,000,000,000.[122]

102. In the US Civil Action, SSA LLC described a series of actions supposedly aimed at expropriating its alleged property rights over the Galeón San José. The series of actions included the attempt to modify the existing legislation,[123] a measure allegedly coordinated by the then Legal Secretary of the Colombian Presidency, Mrs. Lilliam Suarez,[124] and the instructions of the President of Colombia to unequivocally deny SSA LLC any property rights, particularly on the basis of the two-fold criteria contained in the 2007 CSJ Decision.[125] By that time, SSA LLC had already anticipated recourse to the *fora* offered by international law and expressly noted that an expropriation had already taken place.[126]

103. These facts unequivocally lead to the conclusion that, as early as 7 December 2010, Claimant was of the view that its purported property rights over the Galeón San José had already been expropriated without compensation, and that several supposed instances of arbitrariness -namely, corruption, threats on the

[122] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF p. 50.
[123] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 26 ("26. **1986:** President Bettencour (sic) sent to the parliament a bill drafted by his Legal Secretary, Lilliam Suarez. The bill was enacted as Law 26. **Its purpose was to expropriate SSA's properties** in the guise of a legal act. Following enactment, Law 26 was applied retroactively to SSA, although such an action was clearly in violation of Colombia's constitution." (Emphasis added).
[124] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 23 ("23. **September 21, 1984**: While Lilliam Suarez was working behind the scenes to **expropriate** SSA's rights, her co-conspirators in the GOC kept SSA busy with the pretense to a contract negotiation to recover the San Jose. After several months of delays the GOC officially offered contract terms it expected SSA to refuse. SSA's share was reduced from 50% to 35%. SSA's protestations were stonewalled. **The GOC's bad faith offer** in light of its own legal research, which was known to SSA, became a serious concern, particularly given the GOC stalling tactics that had extended the negotiations for months. SSA worried the GOC would take SSA's entire share, in the manner of a Banana Republic. Under such duress, SSA formally accepted in writing the GOC offer of a 35-65 split. The accord was reached September 21, 1984").
[125] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 25. ("**April 27, 2010:** The Legal Secretary to the President replied to SSA's proposal '***on the specific instruction of the honorable President of the Republic***,' with four arguments **and a threat to use military force** if SSA attempted to access its property" (emphasis added)).
[126] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 25 ("25. **June 10, 1985**: Fearful of Executive and Legislative actions **to expropriate its property**, SSA sent another letter urging the GOC to sign the contract which both parties had agreed to months earlier." (Emphasis added)"); 77 (77. **July 20, 2010** (on or about): The Minister of Culture, representing the Antiquities Administration (under her jurisdiction) delivered to the Parliament the bill to be enacted as the first step **in the transfer of SSA's expropriated assets to political cronies of President Uribe**." (Emphasis added – emphasis in dates and "do" in the original)

use of force- had taken place to achieve this purpose-.[127] Moreover, SSA LLC initiated the US Civil Action under the premise that its rights were protected not only by domestic law, but also by international law.[128]

104. The two counts presented by SSA LLC in the US Civil Action (Count 1: Breach of Contract and Count 2: Conversion) reveal that Claimant already considered that its alleged property rights over the Galeón San José had already been expropriated without compensation.

105. Regarding the breach of contract, Claimant alleged that "*Colombia has refused to permit SSA to initiate salvage operations at the site and is therefore misappropriating SSA's property valued in the amount of $4 billion to $17 billion.*"[129] Here, the DC District Court recalled that, in the District of Columbia, "*the statute of limitations for breach of contract is three (3) years, and it begins to run at the time of the breach*."[130] Therefore, even presuming the veracity of the factual allegations presented by Claimant and construing them in its favor, the DC District Court nonetheless considered that its breach of contract claim was untimely. As will be discussed below, this decision was rendered despite SSA LLC's attempts to evade the jurisdictional requirement of the statute of limitations.

106. With regards to the count of conversion, Claimant argued that "*[b]y its actions Colombia has intentionally exercised dominion and control over SSA's chattels which intentional dominion and control by Colombia so seriously interferes with SSA's right to control the chattels that SSA is provided of its chattels*."[131] Again, DC District Court concluded that the claim was to be dismissed considering the three-year statute of limitations. Importantly, the DC District Court emphasized that SSA LLC's case was that Colombia had acquired the property unlawfully, in which case "*a conversion claim accrues immediately*."[132]

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[127] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 27, 56, 72.
[128] Claimant's Response, ¶¶ 102-109.
[129] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 83.
[130] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 5.
[131] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 94.
[132] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 7.

107. As noted in Colombia's Article 10.20.5 Submission, although SSA LLC claimed that the conversion was the result of the Colombia's 2324 Decree,[133] in which case the statute of limitations for the conversion claim expired in 1987, Claimant also alleged –as part of its pattern to recharacterize measures with a view to overcome time limitation periods– that its claim was timely because it was "*based on the Defendant's action since the [CSJ's] decision in 2007.*"[134]

108. In addition, Count III of Claimant's Civil Action before the DC District Court concerned the recognition and enforcement of the 2007 CSJ Decision.[135] After describing the evolution of the civil proceedings before Colombian courts, SSA LLC requested the DC District Court to "*render judgment in its favor in the amount of $17 billion compensatory damages.*"[136]

109. Here, the DC District Court recalled that SSA LLC had invoked the District's Uniform Foreign-Money Judgment Recognition Act, which allows for the enforcement of a foreign-money judgment in the same manner as the judgment of a sister jurisdiction, as long as the judgment of the foreign State grants or denies the recovery of a sum of money.[137] The DC District Court recalled SSA LLC's allegation that "*the Colombian Supreme Court's holding that SSA and Colombia each own half of the San Jose treasures is a money judgment entitling to 50% of the value, which has been estimated as between $4 billion and $17 billion.*"[138] Notwithstanding the above, the DC District Court conclusively and convincingly rejected SSA LLC's enforcement request, stating that the 2007 CSJ Decision "*did not order that SSA be paid a 'sum of money'.*"[139] In that sense, the record shows that on Claimant's own admission and as already determined by the DC District Court, SSA Cayman Islands was not recognized any sum of money in the 2007 CSJ Decision.

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[133] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 7.
[134] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 8.
[135] **Exhibit R-018**, 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.
[136] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 102.
[137] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 8-9.
[138] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 9.
[139] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶¶ 9-10.

110. In the end, what this recount shows is that in the US Civil Action, SSA LLC had already alleged that a misappropriation of property rights, which amount to an expropriation without compensation had occurred.

111. Although Colombia's preliminary objections are based, among other circumstances, on the fact that Claimant placed the date of occurrence of the alleged expropriation without compensation and arbitrariness as early as 2010, it bears relevance to remind the Tribunal that this is not the first time SSA LLC seeks to -unsuccessfully- distort the factual matrix to support its claims.

112. In the US Civil Action, SSA LLC sought to escape the application of the statute of limitations by manipulating the date of occurrence of the relevant breach. It expressly stated that its claim had been "*timely because it is 'based on the Defendant's actions since the [Colombian Supreme Court's] decision in 2007.*"[140] Despite this, the DC District Court, in a decision confirmed later on by the Court of Appeals,[141] declared that both Count 1 and Count 2 were covered by the relevant statutes of limitations, emphatically stating that "*[p]laintiff cannot skirt around the fact that the allegations through the rest of the Complaint show that the conversion, if it occurred, began in 1984.*"[142] This reveals that it is not the first time that SSA LLC has been willing to invent and reinvent whatever narrative in order to recast its claims.

K. CLAIMANT ALLEGED AN EXPROPRIATION WITHOUT COMPENSATION AND ARBITRARINESS BEFORE THE IACHR.

113. Claimant's Response briefly refers to the petition before the IACHR, in response to Colombia having allegedly ignored SSA LLC's request for a joint salvage operation.[143] Claimant submits that it "*did not make claims for expropriation*" before the IACHR and that 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*."[144] Claimant's position is that it filed the Petition before the IACHR "to enforce its rights", in particular, by claiming "*violations of its rights*

[140] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, p. 8.
[141] **Exhibit R-020**, United States Court of Appeals for the District Columbia Circuit, Decision, 8 April 2013.
[142] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶ 8.
[143] Claimant's Response, ¶ 102.
[144] Claimant's Response, ¶ 107.

to property and judicial protection under the Inter-American (sic) Convention on Human Rights."[145]

114. Contrary to Claimant's allegation, the petition contains unequivocal evidence that, as early as 15 April 2013, SSA LLC was of the view that by 26 November 2012 Colombia had already expropriated its alleged property rights without granting any compensation, and that it had acted arbitrarily.

115. Before the IACHR, SSA LLC argued that "the assault to the property of SSA initiated with the issuance of decree law 2324 of 1984, whose articles 188 and 191 modified the article 701 of the Colombian civil code in relation to the shipwrecked antiques, by reducing from 50 to 5% the participation of the discoverer."[146]

116. After describing the Civil Action filed on 13 January 1989, as well as the constitutional action against the 2324 Decree,[147] SSA LLC held that the six-month limitation period established in Article 46.1.a of the ACHR should not start from 5 July 2007[148] (date of the 2007 CSJ Decision) since it had only been a declaratory ruling and not one imposing on Colombia the obligation to pay a specific compensation.[149] Rather than that, SSA LLC argued that the six-month statute of limitation period was to be considered "*since 26 November 2012, day in which the Republic of Colombia notified its definitive decision not to subject to the Supreme Court Decision*",[150] not only because the domestic remedies were

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[145] Claimant's Response, ¶ 107

[146] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶18. "el asalto a la propiedad de SSA se inició con la expedición del Decreto Ley 2324 de 1984, cuyos artículos 188 y 191 reformaron el artículo 701 del código civil colombiano en cuanto a las antigüedades náufragas, reduciendo del 50 al 5% la participación del descubridor." (Independent translation).

[147] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 19-20.

[148] "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment." **Exhibit RLA-025**, American Convention of Human Rights, Article 46.1.a.

[149] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 26. "26. It must be taken into account that the proceeding conducted before the civil jurisdiction of Colombia, where the dominion of SSA over half of the treasures was declared, was a purely declarative process, which is one of those in which all it is sought is legal certainty over the claimed right. It not being a declarative process to impose a sanction, it was no imposed nor could be imposed on the defendant and defeated Nation, the compliance with any consideration that should be satisfied within any term, as is natural in this type of processes." (Independent translation).

[150] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 26. "se cuentan a partir del 26 de noviembre de 2012, día en el cual la República de Colombia notificó su decisión definitiva de no someterse a la sentencia de su Corte Suprema."

exhausted on that date, but because "***the confiscation of the treasures over which the decision had declared the dominion of SSA was perfected***"(emphasis added).[151]

117. Hence, as noted in its petition before the IACHR, as early as 2013, SSA LLC unequivocally expressed that on 26 November 2012 the breach of its right to property right had already been perfected. This is confirmed by SSA LLC's own elucidation of the applicable international law, as stated in its petition, in which it expressly argued that a State may incur in State responsibility by failing to comply with a judicial decision.[152]

118. Importantly, in substantiating the alleged violation of its right to property under Article 21 of the ACHR, SSA LLC held that:[153]

> [S]uch extreme resistance to the exercise of such powers by the holder of the right of dominion, **implies the confiscation of the property without the payment of a just compensation**. And implies the correlative violation of this other commitment acquired by the Colombian State through Article 21 of the American Convention on Human Rights which provides that: "No one shall 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." (Emphasis added)

119. Thus, SSA LLC not only argued that the definitive confiscation without compensation of its treasures had already taken place but, decisively, that on 26 November 2012 it was notified of said confiscation without compensation:[154]

> [S]aid answer from 26 November 2012 was the notification of the definitive purpose of the Republic of Colombia of not complying with the judgment of its Supreme Court. **This necessarily implies, in addition, the notification of the definitive confiscation of its treasures, without the payment of compensation**.

120. In addition to this, SSA LLC's elaboration also clarifies that, as early as 2013, it was of the view that Colombia had acted arbitrarily. In its petition before the IACHR, SSA LLC argued that although after an interview on 11 June 2011 there seemed to be a change of attitude in favor of compliance with the 2007 CSJ

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[151] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 26.
[152] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, p. 2.
[153] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 36.
[154] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.

Decision on behalf of the State,[155] corruption would have once again changed the course of action, leading to 26 November 2012, when "***the Republic of Colombia definitively rejected its access to the shipwreck, in any form***" (Emphasis added).[156] Furthermore, SSA LLC argued that Colombia had acted in bad faith in expressing the alleged definitive confiscatory decision:[157]

> The bad faith in this last and definitive manifestation of rebellion against the judgment of the Supreme Court, is evidenced it one takes into account that the judgment was issued on 5 July 2007, and the lawsuit before the Federal Court of Appeals of the District of Columbia was filed on 6 December 2010, **3 years and 5 months after**, during which no judicial process was conducted. And in all this time the Republic of Colombia refused to even dialogue with SSA about the possibility of a joint rescue of the common property. (Independent translation) (Emphasis in the original)

121. Finally, it is worth noting that, although Colombia's preliminary objections are based, among other circumstances, on the fact that Claimant placed the date of occurrence of the alleged expropriation without compensation and arbitrariness as early as 2012, it bears relevance to remind the Tribunal that this is not the first time SSA LLC seeks to -unsuccessfully- distort the factual matrix to support its claims and avoid the statute of limitations.

122. On one hand, it shall be recalled that before the DC District Court, SSA LLC sought to escape the application of the statute of limitations by manipulating the date of occurrence of the relevant breach, stating that the claim had been timely because it was based on the 2007 CSJ Decision.[158] Contradicting its previous assertions, SSA LLC argued before the IACHR that the six-month statute of limitation period began on 26 November 2012, date on which the Republic of Colombia notified its definitive decision not to subject itself to the 2007 CSJ Decision.[159]

123. On the other hand, while before the DC District Court SSA LLC argued that it had "*reached an agreement*" with Colombia regarding the distribution percentages

[155] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.
[156] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.
[157] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.
[158] See **Section II.J** above.
[159] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, p. 10.

over the recovered treasures,[160] it later recognized before the IACHR that the contract had not been perfected.[161]

124. Again, this reveals that it is not the first time that SSA LLC has been willing to invent and reinvent whatever narrative in order to recast its claims. Therefore, it is not surprising that, in the context of the present Arbitration, Claimant has repeatedly mischaracterized and misrepresented the relevant facts, seeking to somehow claim jurisdiction under the TPA.

125. **Appendix B** portrays the ways in which Claimant has deliberately modified the date of the alleged breaches before different international fora in an attempt to unduly establish jurisdiction. Moreover, **Appendix C** portrays that, despite this attempt, Claimant has substantially presented the same claims before the different international forums. This is SSA LLC's final attempt to re-litigate its case by conveniently misrepresenting the relevant facts.

L. COLOMBIA CLEARLY AND UNEQUIVOCALLY INFORMED CLAIMANT THAT IT HAD NO RIGHTS OVER THE GALEÓN SAN JOSÉ, AS NO SHIPWRECK WAS LOCATED IN THE COORDINATES REPORTED IN THE 1982 CONFIDENTIAL REPORT.

126. As already mentioned, well before the TPA's entry into force, Colombia unequivocally informed SSA LLC predecessors that the Galeón San José was not located in the areas reported in the 1982 Confidential Report and, as such, that it had no rights over that specific shipwreck. Moreover, Colombia directly informed SSA LLC of the same unaltered historical position.

127. In letter dated 24 March 2010, in response to one of Claimant's letters from 24 March 2010, the Legal Secretary of the Office of the Colombian Presidency restated previous communications from 18 February 2008 and 16 May 2008, and informed SSA LLC that the 2007 CSJ Decision did not order "access to the shipwreck":[162]

> 1. Nowhere does the mentioned Supreme Court Decision order claimant to have "access to the shipwreck" as the petitioner claims, but on the contrary, at page 21 the H. Supreme Court Of Justice establishes, with regards to the recovery of the reported assets, that this petition "has not yet had concretion

[160] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 10.
[161] **Exhibit R-021**, Sea Search Armada, LLC'S Petition against Colombia before the IACHR, 15 April 2013, ¶ 17.
[162] **Exhibit R-017**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010, pp. 1-2.

> or definition of any kind, nor does it concern this controversy -neither directly nor indirectly-", the ruling does not order any recovery as it is claimed.
>
> 2. On the other hand, [the Government] does not share your opinion that there are no assets that are part of the cultural heritage of the Nation in the shipwreck, but on the contrary, and as can be deduced from the same ruling, in the case of a shipwreck with historical or archaeological value, their goods are national heritage subject to the regime of "movable monuments", according to the description and reference enshrined in the law.

128. After the TPA's entry into force, Claimant continued to submit multiple letters to different Colombian authorities claiming supposed rights over the Galeón San José.

129. Claimant alleges that "*[f]or years, both parties knew that the shipwreck was located in the 'immediate vicinity' of the stated coordinates.*"[163] This statement is false. As already explained, Colombia has never recognized that Claimant or its alleged predecessors discovered the Galeón San José.[164] The ongoing conversations between Colombia and SSA LLC had nothing to do with the Galeón San José.

130. This position was clearly communicated to SSA LLC by the Ministry of Culture, which, in a letter dated 27 May 2015, informed that:[165]

> First of all, I would like to point out **the erroneousness of the reference in your brief, and the multiple mentions of the "Galean San Jose", given that the Colombian Government has been emphatic and reiterative in stating that what is at issue is the verification in situ of the coordinates referred to in the aforementioned [2007 CSJ] decision, without being able to assert the existence of a specific shipwreck** (emphasis added).

131. Despite this unequivocal manifestation from Colombia, SSA LLC continued filing multiple letters before the Colombian authorities. In just one month, June 2015, SSA LLC filed three letters before the Ministry of Culture.[166]

[163] Claimant's Response, ¶¶ 112, 119.
[164] See **Section II.2** above.
[165] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.
[166] **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015; **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015; **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015.

132. On 25 June 2015, the Ministry of Culture informed SSA LLC that it was scheduling a meeting with the Commission on Shipwreck Antiquities, after which it would answer Claimant's letters:[167]

> In a letter received yesterday, Dr. Juan Manuel Vargas Ayala, Head of the Legal Advisory Office of the Ministry, informs that the Commission of Shipwrecked Antiquities is being summoned, after which a response will be given to the communication dated 9 June.

133. This, far from being a "*potential delay tactic*" as Claimant falsely states,[168] shows Colombia's willingness to provide appropriate responses to Claimant's countless communications. Colombia has always been responsive, providing clear answers to SSA LLC's numerous letters.

134. On 28 July 2015 Colombia responded Claimant's previous communications expressing that it was "*willing to facilitate the verification of the area determined in the coordinates established in the Supreme Court's Ruling, according to the 1982 Confidential Report that is an integral part of Resolution 0354 of 1982 issued by DIMAR.*"[169] In addition to this, the Ministry of Culture also informed that "*Sea Search Armada shall take the necessary steps to obtain the authorizations from DIMAR and the Ministry of Culture so that by October at the latest this procedure can be carried out*."[170] By this point it was clear that Colombia agreed to a verification expedition in the area expressly delineated by the 2007 CSJ Decision.

135. While SSA LLC continued its overwhelming tactic of sending countless letters to different Colombian authorities,[171] on 5 December 2015 the President of Colombia publicly announced the discovery of the Galeón San José.[172] **For the first time**, Colombia recognized the discovery of the Galeón San José, which was not made by Claimant or its predecessors.

136. Based on an unverified news report, which supposedly leaked the location of the Galeón San José, Claimant has come to allege that this discovery "*lay well within*

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[167] **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p.1.
[168] Claimant's Response, ¶ 115.
[169] **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015.
[170] **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015.
[171] **Exhibit C-88**, Letter from SSA to President of Colombia, 31 July 2015; **Exhibit R-27**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015; **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015; **Exhibit R-26**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 8 October 2015).
[172] **Exhibit C-37**, Statement from President Santos on the discovery of the San José Galleon, 5 December 2015.

the area identified in the 1982 Report",[173] and thus "*Colombia reportedly 'found' the San José precisely where the 1982 Report said it was located.*"[174] This, apart from being false and poorly supported, is in fact irrelevant, given that since 1994 Colombia had clearly adopted the Columbus Report denying the discovery of the Galeón San José in 1982.

137. In the aftermath of the discovery of the Galeón San José, SSA LLC continued its efforts to carry out a verification expedition,[175] but without seeking to establish exploratory rights via DIMAR.

138. On 4 January 2016, SSA LLC argued that, given Colombia's interpretation of the 2007 CSJ Decision, it had breached its alleged rights, leaving it with no option but to seek to recover what in their view belonged to them:[176]

> Although it is true that despite the innumerable appeals to accept a peaceful and consensual application of the Supreme Court's decision that resolved the dispute over the ownership of the shipwreck, the Nation insists on its contempt and its de facto ways. And as its commitment to third parties is already of public knowledge, it will not correct its conduct regarding said judgment.

139. Furthermore, on 5 February 2016 the Ministry of Culture rejected SSA LLC's unfounded accusations, took note of the fact that it recognized that no shipwreck was located in the reported coordinates, and asked it to refrain from its continuous and exhausting letters on this issue:[177]

> Your letter of 18 January is inadmissible. If you have accusations to make about the actions of this Ministry, please present them to the judicial authorities.
>
> We take careful note of your express statement that there is no shipwreck in the coordinates reported by you in the confidential report referenced by the Supreme Court of Justice in its decision of 5 July 2007.
>
> Your statements are not new; we are already aware of them and I request you to refrain from continuing with an unnecessary epistolary exchange.

140. Given SSA LLC's insistence, on 17 June 2016 Colombia reiterated its position, expressing that it was willing to authorize and accompany SSA LLC to the area

[173] Claimant's Response, ¶ 120.
[174] Claimant's Response, ¶ 121.
[175] **Exhibit C-38**, Letter from SSA to the President of Colombia, 10 December 2015.
[176] **Exhibit R-035,** Letter from SSA to the Ministry of Culture, 4 January 2016.
[177] **Exhibit R-036**, Letter from the Ministry of Culture to SSA, 5 February 2016.

determined in the 2007 CSJ Decision and restating that, despite Claimant's false assertions, this decision had not granted any rights over the Galeón San José:[178]

> **The Supreme Court of Justice's ruling is clear, it does not admit interpretations and no alleged rights over the Galeón San José can be inferred from it, as you claim.**
>
> **It 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**. (emphasis added)

141. Colombia did not "ignore[e] 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)", as Claimant states.[179] On the contrary, it was acting precisely in accordance with the 2007 CSJ Decision.

142. On 30 November 2016, the Ministry of Culture once again reaffirmed its longstanding position that no shipwreck was located within the area reported in 1982, and categorically stated that the condition established in the 2007 CSJ Decision to acquire any property rights had not been met:[180]

> For this reason, **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.
>
> Moreover, although the Colombian Supreme Court of Justice was absolutely clear in affirming that the rights of Sea Search Armada were limited to the coordinates reported in the confidential report "without including, therefore, spaces, zones or diverse areas", **we can affirm without any doubt that in the areas described in the graph provided in the confidential report, there is no vestige of any shipwreck either**. (Emphasis added)

143. By this moment Colombia's position was clear: (i) Glocca Morra Company did not discovere the Galeón San José; (ii) the litigation that resulted in the 2007 CSJ Decision did not concern the Galeón San José; (iii) the 2007 CSJ Decision established that any right SSA Cayman Islands could claim was subject to finding

[178] **Exhibit R-028**, Letter from Colombia to SSA, 17 June 2016, p. 2.
[179] Claimant's Response, ¶ 122.
[180] **Exhibit R-029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p.1

assets in the area reported in 1982 that were susceptible of qualifying as a treasure; and (iv) given that one of these conditions was not met, as no shipwreck was located within the area established in the area reported in 1982, SSA LLC had no property rights.

144. Despite the clear, unequivocal, and reiterative position communicated by Colombia, SSA LLC continued its attempts to claim alleged rights to which it was not entitled to.

145. On 4 September 2017, after expressly acknowledging that it agreed with Colombia that "*no shipwreck exists in the precise coordinates described in the 1982 report*",[181] SSA LLC once again expressed its disagreement with Colombia's interpretation of the 2007 CSJ Decision, indicating that:[182]

> (…) the Ministry of Culture has the right to interpret the Supreme Court's decision, and specifically its operative part, as it sees fit. Just as SSA has the right to consider such interpretation as a challenge to logic, law, and common sense and to interpret it differently, in harmony with its considerations.

146. However, on January 5 2018 the Ministry of Culture was emphatic and unequivocally informed SSA LLC that: (i) neither in the 1982 Confidential Report nor in the lawsuit filed before the Colombian courts was there a reference to having specifically discovered the Galeón San José; (ii) the 2007 CSJ Decision determined the rights that could correspond to SSA LLC over a hypothetical shipwreck located within the reported areas, without referring to any specific shipwreck; and (iii) that SSA LLC had no right over the Galeón San José:[183]

> Likewise, your assertions that both Sea Search Armada and the Colombian State declared themselves discoverers of the San José Galleon, one in 1982 and the other in 2015, are astonishing. This since **neither in the report of the discovery reported in 1982, nor in the lawsuit that initiated the judicial process before the Colombian ordinary jurisdiction it was asserted that the alleged shipwreck reported by the Glocca Morra Company and subsequently assigned to Sea Search Armada, corresponded to the San José Galleon**. On the contrary, the Supreme Court of Justice was explicit in asserting that [the proceeding] was about the rights that could correspond to Sea Search Armada over the shipwreck found in the reported coordinates, without attributing them to a specific shipwreck.
>
> [...]

[181] **Exhibit R-030**, Letter from Sea Search Armada, LLC to Colombia, 4 September 2017, PDF p. 18.
[182] **Exhibit R-030**, Letter from Sea Search Armada, LLC to Colombia, 4 September 2017, PDF p. 20.
[183] **Exhibit R-037**, Letter from the Ministry of Culture to Sea Search Armada, LLC , 5 January 2018.

> **It is not understood how it can be argued and claimed that the Sea Search Armada has any right over the San José Galleon**. (emphasis added)

147. Again, by this moment, Colombia's position was clear, and Claimant had complete knowledge of it: Colombia expressly denied Sea SSA LLC any property rights over the Galeón San José. Moreover, on 28 February 2018 the Ministry of Culture informed SSA LLC that the coordinates from the 1982 Confidential Report were not used for the discovery of the Galeon San José.[184]

148. Notwithstanding Colombia's previous clear and unambiguous representations, SSA LLC continued its attempts to claim alleged rights to which it was not entitled to. On 8 August 2018, it addressed a letter to the newly elected President of Colombia threatening with new legal actions if no solution was reached regarding the 2007 CSJ Decision:[185]

> More than 11 years after the judgment was issued, not only has it not been enforced, but no attempt has been made to find a peaceful solution to the differences that have arisen due to its various and successive interpretations.
>
> If such a solution is not attempted, or if no agreement is possible, new, undesirable and more complex judicial confrontations will be inevitable regarding such judgment.

149. From that moment onwards, the requests were further addressed to the Vice-President of Colombia.[186]

150. On 17 July 2019, the Vice-President of Colombia, in a clear and unambiguous letter reminded SSA LLC that it had no right whatsoever over the Galeón San José, thereby quashing –once again– the expectation of any right or claim that Claimant could still have after more than 30 years of unequivocal and reiterated denials by Colombia that Glocca Morra Company had found the Galeón San José. Due to its importance and conclusiveness, this communication is worth quoting again:[187]

> 1. The ruling of 5 July 2007 issued by the Supreme Court of Justice written by Justice Carlos Ignacio Jaramillo within the file 08001-3103-010-1989-09134-01, **limited the right of Sea Search Armada to those assets [1] that have the character of treasure in the terms of article 700 of the Civil Code and [2] that are located in the specific coordinates reported by**

[184] **Exhibit R-038**, Letter from Sea Search Armada to the Minister of Culture, 28 February 2018.
[185] **Exhibit R-031**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018, p. 1.
[186] **Exhibit R-032**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018, p.1
[187] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, pp. 1-2.

Glocca Morra in 1982, without including rights over different spaces or areas, as stated in the second point of the resolutive part:

"(…) the property there conferred, in equal parts, in favor of the Nation and the claimant, is referred only and exclusively to the assets that, on one side, by their characteristics and own features, in conformity with the circumstances and directions indicated in this decision, are still susceptible of being qualified juridically as a treasure, in the terms of Article 700 of the Civil Code and the restriction or limitation that placed upon it article 14 of Law 163 of 1959, among other applicable legal provisions and, on the other side, to the assets referred to by Resolution 0354 of 3 June 1982, issued by the General Maritime and Ports Directorate, namely, those, that are found **in 'the coordinates referred to in the 'Confidential Report on Underwater Exploration carried out by the Company' GLOCCA MORRA in the Caribbean Sea, Colombia 26 February 1982' Page 13 No. 49195 Berlitz Translation Service.', without including, therefore, different spaces, zones or areas.**

2. Regarding the verification of the coordinates reported in 1982, such a task was already carried out within the framework of contract No. 544 of 1993, the results of which led to the conclusion that in the site of the coordinates reported by Glocca Morra Company (today Sea Search), **there is NO shipwreck, much less any trace of the Galeón San José. Only a piece of wood was found at the site, which, after being examined, led to the conclusion that it did not belong to any shipwreck**.

In light of the above, Sea Search Armada (SSA) has no right over the Galeón San José or its content because it is not located at the coordinates reported by that company.

[…]

3. According to the Dimar certification attached to this document, **the coordinates reported by Maritime Archaeology Consultants Switzwerland (MACS) do not correspond to those reported by Glocca Morra Company and do not overlap with these coordinates**". (Emphasis added) (Independent translation)

151. If all previous communications had not been clear enough, the 17 June 2019 letter was crystal clear: the Republic of Colombia does not and has never recognized any right over the Galeón San José in favor of SSA LLC.

152. Claimant has intentionally avoided to take issue with this crucial piece of evidence in its Response. In fact, it is telling how Claimant's Response contains only 12 words in respect to the 17 June 2019 letter.[188]

[188] Claimant's Response, ¶ 130, ("Colombia however refused to conduct a joint verification of the Discovery Area").

153. Claimant's deliberate attempt to undermine the importance of this letter speaks volumes. As will be discussed later,[189] Claimant is unable to show how its claims somehow survived the three-year limitation period after the Vice-President of the Republic of Colombia, as the highest authority on the matter, reminded SSA LLC what had been clearly and unequivocally informed for decades: that it had no rights over the Galeón San José as no shipwreck was located in the areas reported in 1982.

M. Resolution No. 0085 is immaterial as it refers to the Galeón San José to which Claimant has no right.

154. Claimant's Response is –as expected– full of references highlighting the artificially constructed relevance of Resolution No. 0085 of the Ministry of Culture, whereby the Galeón San José was declared an Asset of National Cultural Interest. However, the record is conclusive in showing that Resolution No. 0085 is irrelevant and immaterial for this case since, well before the TPA's entry into force, Colombia had unequivocally denied any property rights over the Galeón San José based on the 1982 Confidential Report.

155. Resolution No. 0085, issued on 23 January 2020, "*[d]eclare[d] the Shipwreck of the Galeón San José as an Asset of National Cultural Interest.*"[190] This Resolution admits no interpretation: it limits its scope specifically to the Galeón San José, which Colombia had publicly reported to have discovered in 2015 by a third party.

156. As broadly explained based on the evidence in the record, well before that date, and in fact, since 1994, Colombia had definitively denied it any property rights over the Galeón San José based on the 1982 Confidential Report.[191]

157. Moreover, as already noted, Colombian judicial authorities, including the CSJ, were clear in determining that the Civil Action commenced by Claimant's predecessors had nothing to do with the Galeón San José.[192] Neither the 2007 CSJ Decision, nor the *Secuestro* decisions, could have created any property rights over the Galeón San José, as the civil actions they derived from were not related to that specific shipwreck. This helps to show that Resolution No. 0085 is irrelevant and immaterial with regards to Claimant's alleged rights, as SSA

[189] See **Section IV.D.**
[190] **Exhibit C-42**, Ministry of Culture Resolution No. 0085, 23 January 2020, art. 1.
[191] See **Section IV.C.2**; see also sections **II.A** – **II.L.**
[192] See **Section II.H.**

LLC has known for decades, and in fact alleged before various international instances, that Colombia supposedly fully eviscerated its property rights over the Galeón San José without compensation, and through State conduct amounting to arbitrariness.

158. If this wasn't enough, Claimant further alleges that during a meeting held on 13 October 2021, Camilo Gómez, then Director General of the *Agencia Nacional de Defensa Jurídica del Estado*, "*asserted Colombia's position that SSA's ownership rights were worthless in light of Resolution No. 0085.*"[193] Not only is this assertion not true, but SSA LLC's own evidence does not support this claim. The notes provided by Claimant merely state that "*Dr. Gomez declined stating SSA owned nothing so the GOC had no interest.*"[194] There was no mention of Resolution No. 0085 for the simple reason that it bears no relevance with regards to SSA LLC. For decades, Colombia had consistently informed Claimant that it did not have any rights over the Galeón San José.

N. THE FACT THAT PRIOR TO RESOLUTION NO. 0085 COLOMBIA HAD NOT PREVIOUSLY DESIGNATED THE GALEÓN SAN JOSÉ AS CULTURAL HERITAGE, WHETHER TRUE OR NOT, IS IRRELEVANT FOR THE PRESENT DISPUTE.

159. Finally, Claimant has come to allege that "*Colombia had never designated the San José shipwreck as 'cultural heritage' and that, on 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*." In Claimant's words, in no other way would it have made sense for GMC Inc. "to obtain a license, and invest substantial human and monetary resources, to find the ship."[195]

160. As previously noted, in the present case and for present purposes, it is absolutely immaterial whether or not Colombia had previously designated the Galeón San José as part of its cultural heritage.

161. In any case, the record clearly shows that GMC Inc. did not request DIMAR's authorization to specifically search for the Galeón San José, and that neither Resolution No. 0048 nor Resolution No. 0354 recognized exploration rights or the status of reporter of treasures particularly in respect to the Galeón San José. Even had such resolutions recognized any specific rights in regards to the Galeón

[193] Claimant's Response, ¶ 138.
[194] **Exhibit C-96**, Mark Regn, Notes regarding meeting with ANDJE, 13 October 2021.
[195] Claimant's Response, ¶ 3.

San José, such State conduct would not have amounted to a renunciation of the State's right to designate the Galeón San José a cultural heritage. Moreover, it is absolutely irrelevant to know the reasons why back in the 1980s, GMC Inc. would have an interest in searching for treasures in Colombia's seabed and jurisdictional waters.

162. For the final time, the Respondent wishes to remind the Tribunal that Colombia has consistently denied any claims to the Galeón San José since 1994, based on the 1982 Confidential Report. Additionally, the Civil Proceedings that took place before the Colombian courts did not pertain to the Galeón San José specifically, as the 1982 Confidential Report did not provide any factual or legal grounds for a claim over the shipwreck.

163. As can be seen, what Claimant is asking this Tribunal to do is to accept as true the mischaracterization of the facts; ignore 30 years of unsuccessful litigation before multiple venues; ignore that Claimant has repeatedly changed its position as to the date on which the alleged violations occurred; and ignore the fact that Claimant has contradicted itself repeatedly. All of this is part of Claimant's desperate attempt to escape the inevitable conclusion, that this Tribunal lacks jurisdiction. This claim is part of this treasure hunter's final attempt to recharacterize a very old claim, now before an international investment tribunal.

164. To further assist the Tribunal, Colombia provides **Appendix D** with the chronology of key facts.

III. THE TRIBUNAL IS ENTITLED TO DECIDE ON COLOMBIA'S PRELIMINARY JURISDICTIONAL OBJECTIONS UNDER ARTICLE 10.20.5 OF THE TPA.

165. Article 10.20.5 reads as follows: [196]

> 5. 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 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 therefore**, 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. (Emphasis added)

166. In turn, Article 23(3) of the UNCITRAL Arbitration Rules states that an arbitral tribunal may rule on a plea that the arbitral tribunal does not have jurisdiction as a preliminary question or as an award on the merits in the following way:[197]

> 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. (Emphasis added)

167. Claimant asserts that Colombia suggests that Article 10.20.5 of the TPA somehow strips the Tribunal of its discretion under the UNCITRAL Arbitration Rules.[198] This is not true.

168. Article 10.20.5 of the TPA directs the Tribunal to decide on an expedited basis any objection that the dispute is not within the tribunal's competence.[199] To do so, the Tribunal shall suspend any proceedings on the merits[200] and issue a motivated decision or award on the objections.[201] During this expedited procedure, the Tribunal's discretion to decide remains intact, having the possibility to issue a decision or an award on the jurisdictional objections. Hence,

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[196] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), Article 10.20.5., PDF, p. 21.
[197] **Exhibit CLA-2**, Arbitration Rules of the 2021 United Nations Commission on International Trade Law, Article 23(3)., PDF, p. 18-19.
[198] Claimant's Response, ¶ 149.
[199] Colombia's Article 10.20.5 Submission, ¶¶ 122, 127.
[200] Colombia's Article 10.20.5 Submission, ¶¶ 123, 127.
[201] Colombia's Article 10.20.5 Submission, ¶¶ 124, 127.

there is no contradiction between Article 10.20.5 of the TPA and Article 23(3) of the UNCITRAL Arbitration Rules as Claimant seems to suggest.[202]

169. A completely different matter is that, in light of the objective record, the Tribunal already has at its disposal all the necessary evidence to decide on Colombia's preliminary objections, and to issue an award in its favor.

170. Since the alleged contradiction between the TPA and the UNCITRAL Rules is settled, Respondent will show that (A) Claimant's request to address Colombia's preliminary objections on a *prima facie* basis is unwarranted, (B) the Tribunal is not required to accept all Claimant's factual allegations as true, and (C) Article 10.20.5 of the TPA does not relieve Claimant from its burden to fully establish the jurisdiction of the Tribunal.

A. CLAIMANT'S REQUEST TO ADDRESS COLOMBIA'S PRELIMINARY OBJECTIONS ON A *PRIMA FACIE* BASIS IS UNWARRANTED.

171. Claimant incorrectly asserts that "*Colombia's objections turn on factual issues that are not appropriate to be resolved at this stage of the proceedings*."[203] Claimant then posits that, when a decision over preliminary objections "*require*[s] *an assessment of facts related to the merits of the case*", the objectives of efficiency and cost effectiveness pursued by Article 10.20.5 of the TPA can be best achieved "*by addressing jurisdictional objection on a prima facie basis*."[204]

172. Claimant's request is completely unwarranted since Respondent's preliminary objections, as well as the facts supporting or contextualizing said preliminary objections, are completely independent from the merits.

173. To be clear, Respondent submits that:

(i) Claimant is not a protected investor under Article 10.28 of the TPA, because it cannot show it actively and personally invested to secure the alleged qualifying investment, nor can it show that in invested in Colombia's territory for said purpose.

[202] Claimant's Response, ¶¶ 142-154.
[203] Claimant's Response, ¶ 142.
[204] Claimant's Response, ¶ 143.

(ii) In any event, Claimant does not possess a qualifying investment under Article 10.28(g) or Article 10.28(h) of the TPA.

(iii) All of Claimant's allegations concern Colombia's pre-TPA conduct, as expressly recognized by Claimant before the DC District Court and the IACHR.

(iv) In any event, all of Claimant's claims are time barred because it knew or at least should have known of the relevant breaches and loss or damages well before the 3-year limitation period provided for in the TPA.

174. As can be seen, none of Colombia's preliminary objections require a decision on the merits of the case, nor has Colombia advanced any fact that delves into the merits of the case. Accordingly, Claimant's request to address Colombia's preliminary objections on a *prima facie* basis should be dismissed as completely unwarranted.

B. ARTICLE 10.20.5 OF THE TPA DOES NOT REQUIRE COLOMBIA NOR THE TRIBUNAL TO ASSUME ALL CLAIMANT'S FACTUAL ALLEGATIONS AS TRUE.

175. Claimant's request to address Colombia's preliminary objections on a *prima facie* basis is not innocent or futile, but rather part of Claimant's desperate attempt to escape the inevitable conclusion that this Tribunal lacks jurisdiction and shall grant Colombia's early dismissal request.

176. Indeed, as part of a pattern already shown by SSA LLC before international forums, Claimant is willing to go to great lengths to grossly misrepresent, manipulate or even deviate from previously accepted factual narratives, as long as needed to escape the relevant statutes of limitations. In this sense, Colombia cannot escape to underline that Claimant has grossly misrepresented the record **both** in respect to the factual allegations that are pertinent to the decision of the Tribunal, and with respect to those concerning the merits. For obvious reasons, Colombia will take issue with the former but not with the latter.

177. Importantly, it is amply admitted that Article 10.20.5 of the TPA does not impose an obligation over Colombia or the Tribunal to presume Claimant's factual allegations as true.[205]

[205] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.20.5.

178. As a threshold matter, unlike Article 10.20.4 of the TPA, Article 10.20.5 of the TPA does not require Respondent or the Tribunal to initially assume Claimant's factual allegations as true.

179. The difference between Articles 10.20.4 and 10.20.5 of the TPA was addressed by the tribunals in *Renco v. Perú, Pac Rim v. El Salvador,* and *Chevron and TexPet v. Ecuador (I)*, when examining clauses with the same wording.

180. In *Renco v. Peru,* the Tribunal drew a distinction between a competence objection brought under the applicable arbitration rules, and an objection authorized by Article 10.20.4, stating that:[206]

> As the above exposition of Articles 10.20.4 and 10.20.5 demonstrates, the Treaty draws a clear distinction between three different categories of procedures for dealing with preliminary objections. Thus:
>
> (1) The principal ("shall address and decide") clause in Article 10.20.4 refers to objections alleging the insufficiency of a claim as a matter of law which a tribunal is mandated to decide as a preliminary issue based on assumed facts.
>
> (2) The subordinate ("without prejudice") clause in Article 10.20.4 preserves a tribunal's right to decide "other objections" (including competence objections) as preliminary questions pursuant to the applicable arbitration rules.
>
> (3) Article 10.20.5 provides for a special expedited procedure, at a respondent's option, for dealing with preliminary objections under both (1) and (2).

181. Furthermore, the Tribunal concluded that:[207]

> In the Tribunal's view, the use of the words "other objections" in the subordinate clause of Article 10.20.4 must be seen to be a reference to objections that are *other than*, meaning *different from*, the objections referred to in the article's primary clause. If Article 10.20.4 objections included objections to competence, there would plainly be no need to describe competence objections as " *other* objections." **Therefore, in order to invest logic and meaning in the provision as a whole, the Tribunal considers that competence objections must be understood to fall outside the scope of Article 10.20.4 objections.** (Emphasis added)

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[206] **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.

[207] **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, ¶ 195.

182. Accordingly, the presumption of truthfulness in Article 10.20.4 does not extend to jurisdictional objections under Article 10.20.5. of the TPA.

183. Considering that the presumption of truthfulness of Claimant's facts only applies objections raised under Article 10.20.4 of the TPA, in *Pac Rim v. El Salvador* the tribunal delimited the scope of such presumption by concluding that:[208]

> "it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection."

184. In Chevron v. Ecuador, the tribunal stated that "*[a]s 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.*"[209] The tribunal further concluded that "*[t]his presumption, however,* ***is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT***."[210] (Emphasis added). Furthermore, the tribunal determined that "*[i]f, from this evidence, the Tribunal finds that facts alleged by the Claimants are shown to be false or insufficient to satisfy the prima facie test,* ***jurisdiction would have to be denied.***"[211] (Emphasis added)

185. It becomes clear that neither Respondent nor the Tribunal are required to assume Claimant's factual allegations as true under the expedited procedure of Article 10.20.5 of the TPA. Even in a *prima facie* test, the Tribunal is not required to assume all Claimant's factual allegations as true.

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[208] **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, ¶ 90.
[209] **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, ¶ 105.
[210] **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, ¶ 109.
[211] **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, ¶ 110.

C. CLAIMANT HAS FAILED TO MEET ITS BURDEN TO ESTABLISH JURISDICTION WITHIN THE EXPEDITED PROCEDURE UNDER ARTICLE 10.20.5 OF THE TPA.

186. As a threshold matter, Claimant is required to establish the tribunal's jurisdiction.[212] Moreover, as was seen, Colombia raised preliminary objections to the jurisdiction under Article 10.20.5 of the TPA, which does not mean Claimant is somehow relieved from its burden to establish the grounds on which the Tribunal may found its jurisdiction. However, Claimant has failed to disprove Respondent's preliminary objections. Accordingly, the Tribunal shall exercise its discretion to decide that it lacks jurisdiction.

[212] **Exhibit RLA-008,** *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 59; **Exhibit RLA-010,** *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 57.

IV. THE TRIBUNAL LACKS JURISDICTION TO ENTERTAIN CLAIMANT'S CLAIMS.

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE* SINCE SSA LLC DID NOT INVEST IN THE TERRITORY OF COLOMBIA AS REQUIRED UNDER ARTICLE 10.28 OF THE TPA.

187. Pursuant to Article 10.28 of the TPA, an investor of a Party is:

> [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 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. (Emphasis added)

188. Just as in its Notice of Arbitration, SSA LLC's Response does not elaborate on the requirement contained in Article 10.28 of the TPA. It simply contends that SSA LLC is an enterprise pursuant to Article 1.3 of the TPA[213] and that "*SSA made a qualifying investment in Colombia by acquiring SSA Cayman's rights in 2008*."[214] This completely misses the point.

189. The TPA clearly conditions the notion of "*investor of a party*" to the existence of an enterprise of a Party that "*has made an investment in the territory*" of Colombia. This means that SSA LLC may only invoke the protection granted by the TPA if it proves that (i) it exercised an act amounting to "invest", and (ii) such act of investing was made in the territory of Colombia.

190. In the case at hand, Claimant has failed to demonstrate that SSA LLC actively invested to obtain the alleged qualifying investment (1), and that it in fact invested in Colombia (2).

1. Claimant has failed to prove that it actively and personally invested to obtain the alleged qualifying asset.

a. Pursuant to Article 10.28 of the TPA, SSA LLC is required to prove it actively and personally invested to secure the qualifying asset.

[213] Notice of Arbitration and Statement of Claim, ¶ 61; Claimant's Response, ¶¶ 159-161.
[214] Notice of Arbitration and Statement of Claim, ¶ 62; Claimant's Response, ¶ 161.

191. In international investment agreements, the general rule is for the contracting parties not to condition the protection of the relevant treaty to investors that have actively made an investment in the host State. However, as noted by the tribunal in *Komaksavia Airport Invest Ltd., v. Moldova*, the inclusion of terms such as "*invested*" or "*made an investment*" to define the concept of protected investor seeks to reinforce the Contracting parties' intention that the investor has made an actual contribution in the case of its investment. In this sense, the tribunal stated:[215]

> Reinforce the understanding that these Contracting Parties expected that any investor seeking to invoke the BIT would have made an actual contribution of some sort, in connection with the putative investment. This flows from the ordinary meaning of the term 'invested', which is a past tense verb, referring to a prior act of 'investing'. (Emphasis added)

192. Treaties following the wording contained in NAFTA and the various US Models have regularly conditioned the protection of the relevant treaty to investors that have actively made an investment on their own behalf.[216] Where the treaty contains the requirement that the enterprise "*has made an investment in the territory of another party*", a purported investor cannot simply rely on an ownership or control interest acquired through the contribution of other entities or persons. Accordingly, in treaties like the TPA, it is imperative to meet the expectations of the State parties by proving that the corporation that seeks its protection, including by commencing investor-State arbitration proceedings, has actively and personally invested in order to secure the alleged investment.[217]

193. In *Clorox Spain S.L. v. Venezuela* (hereinafter, "***Clorox Spain***"),[218] the tribunal noted that, since indirect investments were not prohibited by the relevant treaty -the Spain-Venezuela BIT (1995)[219]-, it would focus on determining whether

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[215] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 153.

[216] **Exhibit RLA-027**, 2004 US Model BIT, p. 4; **Exhibit RLA-028,** Canada-Colombia Free Trade Agreement, signed November 21, 2008, Article 803; **Exhibit RLA-029**, Agreement between the Plurinational State of Bolivia and Chile for the Promotion and Protection of Investment, 22 September 1994, Article 1.2.

[217] The Preamble of the TPA includes among the Parties' objects and purposes to:
"**PROMOTE** broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production.
[…]
ESTABLISH clear and mutually advantageous rules governing their trade;"

[218] **Exhibit RLA-030**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30. The tribunal was presided by Yves Derains, with Bernard Hanotiau and Raúl E. Vinuesa as co-arbitrators.

[219] The Spain – Venezuela BIT defined the term investor as:

claimant had effectively made an investment. According to the tribunal, "*there must exist an action of investing, independently of how the investor is organized to administer its investment*."[220] Therefore, the tribunal was required to determine "*what Clorox Spain invested to find itself in the situation of expecting a return.*"[221]

194. Venezuela relied on Article 1(2) of the Spain–Venezuela BIT (1995) defining investment as assets "*invested by investors*"[222] and contended that, when the treaty required an act of investing, showing mere ownership of the asset was insufficient.[223] Just like SSA LLC, in *Clorox Spain* the claimant argued that showing that it was properly incorporated and that it owned a qualifying investment was enough.[224] Therefore, the claimant in that case requested the tribunal to reject Venezuela's supposed attempt to add an unwritten criteria to the relevant treaty.

195. Contrary to claimant's request in *Clorox Spain*, the tribunal determined that, pursuant to the applicable treaty, incorporation was insufficient to entitle it to the protection afforded by the treaty. The tribunal concluded that a duly incorporated corporation only becomes a protected investor if "*it has made an investment that fulfils the definition of protected investment*."[225] Additionally, the tribunal noted that possessing a qualifying asset is insufficient in cases where the treaty expressly requires said possession to derive from having made an investment.[226]

"b. Any juridical person, including companies, groups of companies, trading companies, subsidiaries, and other organizations which are constituted or, in any case, duly organized according to the law of that other Contracting Party, as well as juridical persons constituted in one Contracting Party but effectively controlled by investors of the other Contracting Party." See Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, 2 November 1995.

[220] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 816.

[221] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 821.

[222] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 226.

[223] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 229.

[224] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶¶ 334-335.

[225] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶¶ 797-798.

[226] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 802.

196. In *Clorox Spain,* the tribunal relied on the award in *Quiborax v. Bolivia*, where the tribunal considered that the claimant had not invested in Bolivia because it "*did not pay for his one share, but rather 'received' it",* adding that there was *"thus no evidence of an original contribution."*[227]

197. In *Quiborax v. Bolivia,* the tribunal also expressed its agreement with Bolivia's proposed distinction between the asset amounting to an investment, and the act of investing:[228]

> While shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets. In the present case, the record shows that Mr. Fosk received a share to comply with a formality under Bolivian corporate law, and that at no point did he make a personal contribution to the investment.

198. Based on these considerations, in *Clorox Spain* the tribunal determined that, even applying a more permissive interpretation to the notion of "*investing*", the claimant was still required to prove an exchange of real value with the original holder of the qualifying asset.[229] Ultimately, the tribunal concluded that no transfer of value was made to trigger the acquisition of the qualifying asset,[230] and, for that same reason, the alleged acquisition of shares could not be described as the result of an act of **investing** in the territory of Venezuela.[231] Finally, the tribunal also concluded that the claimant had failed to prove that, after its creation and the acquisition of shares, it had invested in the Venezuelan company under its control.[232]

199. Similarly, in *Komaksavia Airport Invest Ltd. v. Moldova* the tribunal rejected claimant's argument according to which "*investing*" could be conflated with the terms "*owning*" or "*holding*" an asset, since "*the latter terms connote legal title*

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[227] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 823; **Exhibit RLA-031**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún c.El Estado Plurinacional de Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September de 2012, ¶ 232 citing Quiborax at ¶ 232.

[228] **Exhibit RLA-031**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún c.El Estado Plurinacional de Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September de 2012, ¶ 232 citing Quiborax at ¶ 233.

[229] **Exhibit RLA-030,** *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 829.

[230] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶¶ 830-831.

[231] **Exhibit RLA-030**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 831.

[232] **Exhibit RLA-030,** *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 832.

or possession, while the former refers to a form of conduct, the taking of an act."[233] The tribunal also rejected *Komaksavia's* submission according to which "*a qualifying national who comes to own an asset in the host State, without having made any contribution in respect of that ownership, can be considered to have 'invested' that asset*."[234]

200. Importantly, the tribunal addressed *Komaksavia's* argument that it should not be affected by the restructuring of an investment or corporate restructuring,[235] since Article 1(1) of the Cyprus-Moldova BIT (2007) provided a protection in that sense. The tribunal noted that said provision sought to address a change in the form of an investment after it had been made, in the sense that "*the investor should not be disqualified from protection, simply because of this change in form in the underlying asset into which it had invested*."[236] The tribunal considered that the result should be the same when the change in the form of the investment is merely one where the same investor moves from a direct to an indirect form of ownership of the investment in the host State.[237]

201. Although the tribunal acknowledged that "*all forms of assets which belong to an investor as a result of the carrying out by him of investment activity* (…) *should be protected*",[238] it clarified that such protection was subject to the requirement "*that there must be an 'investment activity' by the investor in the first place*."[239]

202. In light of the above, the tribunal concluded that *Komaksavia's* case was not one of change in the form of the investment, since the claimant had obtained the investment in the exact form it previously had when acquired from the previous and different owner.[240] Moreover, it was not a case of change in the form of

[233] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 154.
[234] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 154.
[235] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 156-157, citing Article I (1) of the Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the reciprocal promotion and protection of investments. Chisinau, 13 September 2007.
[236] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 158.
[237] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 158.
[238] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 159 citing from the Dissenting Opinion of Dominic Pellew in *Energoalian TOB v. Republic of Moldova,* UNCITRAL, ¶ 111.
[239] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 159.
[240] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 160.

ownership, since *Komaksavia* was bringing the claim in its own right, "*not by any alleged corporate parent of both entities that oversaw a corporate restructuring that included a 'change in form' to its subsisting investment*."[241]

203. Ultimately, what the awards in *Clorox Spain*, *Quiborax* and *Komaksavia* reveal is that the requirement of having actively invested must be given *effet utile* where the relevant treaty conditions the notion of investor only to those corporations who have "*made an investment in the territory of the other Contracting Party.*" Since the intention of the contracting parties of the TPA was to qualify protected investors only to those whose made an investment in their territory, it is clear that in this case the tribunal should find that SSA LLC is not a protected investor under the TPA.

b. SSA LLC has failed to provide any evidence that it actively and personally invested to secure the qualifying asset.

204. In its Response, Claimant contends that "*SSA made a qualifying investment in Colombia by acquiring SSA Cayman's rights in 2008.*"[242] In support of this, Claimant makes various factual allegations regarding the history of the creation of GMC Inc. and its parent company, as well as the procedures before DIMAR and Colombia's domestic courts up to the 2007 CSJ Decision.[243] Nonetheless, these assertions are completely irrelevant to prove that Claimant actively and personally made an investment in order to secure the relevant asset, or to enhance the value of the alleged qualifying investment previously made by SSA Cayman Islands.

205. Claimant described "*SSA Partners…deci*[sion] *to reorganize their interest in a U.S. entity",* with Armada Company acting as trustee to "*dispose* [] *of the assets of SSA before formally dissolving SSA*."[244] Claimant stated that "*through an intra-company agreement between the two affiliated entities, SSA Cayman Islands* ***sold*** *'substantially all of the assets' to SSA*."[245] Nevertheless, SSA LLC did not provide any evidence to demonstrate that the relevant operation was in fact a "*sell*", let alone that SSA LLC paid for those assets or in fact made an investment

[241] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 160.
[242] Claimant's Response, ¶ 161.
[243] Claimant's Response, ¶ 166-168.
[244] Claimant's Response, ¶ 169.
[245] Claimant's Response, ¶ 170.

for these purposes. In any case, it is well-rooted in investment arbitration case-law that a mere commercial sell does not amount to an investment.[246]

206. Claimant concedes that, far from investing any capital to secure the alleged qualifying investment, SSA LLC "*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*."[247] This statement manifestly falls short of any evidence proving that SSA LLC personally and actively invested to secure the qualifying assets. It also falls short of proving that there was a meaningful transfer of value between the assignor and the recipient of the assets, or that SSA LLC invested to enhance the alleged qualifying investment made by SSA Cayman Islands. On the contrary, this only proves that the qualifying asset was merely transferred from SSA Cayman Islands to SSA LLC through "*an intra-company agreement*."[248]

207. Finally, Claimant argues that Colombia's concern that there is no evidence that the conditions of the APA were actually fulfilled is unfounded since "*[a]s is clear on the face of the APA, it was validly signed and executed by the parties*."[249] Regardless of the effect Claimant seeks to attribute to the act of signing the APA, the record still lacks any factual evidence that SSA LLC met the conditions provided therein, including that SSA LLC invested in order to secure the qualifying asset.

208. In conclusion, SSA LLC can only objectively prove that it owns the exact alleged qualifying investment made by SSA Cayman Islands, a completely different entity, as a result of a corporate restructuring that required no act of investment from Claimant. Since Claimant cannot prove it actively invested in Colombia, it is not a protected investor under Article 10.28.

2. <u>Claimant has failed to prove it invested in Colombia to secure the qualifying asset.</u>

[246] **Exhibit RLA-053**, *Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 199 ("In sum, the existence of an 'investment' requires a commitment or allocation of resources for a duration and involving risk. For example, a one-time sale resulting in receivables would not qualify as an 'investment,' even if the receivables may be listed as 'assets.'").
[247] Claimant's Response, ¶ 170.
[248] Claimant's Response, ¶ 170.
[249] Claimant's Response, ¶ 172.

a. Article 10.28 of the TPA requires Claimant to prove it invested in Colombia.

209. Apart from requiring the investor to prove that it actively and personally invested, Article 10.28 of the TPA expressly required the alleged investor to prove that it invested in the territory of the other Party to the TPA.

210. The tribunal in *Komaksavia* made recourse to the object and purpose of the treaty to assert, among other things, that the express desire of mutual benefit, together with the concepts of "*investor*" and "*investment*" that require the act of "*investing*", "*tends to affirm that that the purpose of the BIT was to encourage and protect investment in the ordinary sense, namely those that involved some act of contribution*."[250] It also stressed that nothing in the preamble suggested that the intention of the drafters was to "*protect mere transfer of legal title to recipients who contributed nothing to obtain such title or to enhance the assets so obtained, and as a result neither conveyed any benefits to the host State nor, in any real sense, assumed any risk*."[251]

211. This is especially relevant in the case at hand since the preamble of the TPA establishes that the treaty is resolved to, among other things:[252]

> **PROMOTE** broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;
>
> **CREATE** new employment opportunities and improve labor conditions and living standards in their respective territories;
>
> **ESTABLISH** clear and mutually advantageous rules governing their trade;

212. The above-cited objectives necessarily require, if sought to be promoted by a foreign investor, the act of investing in Colombia.

213. The requirement of territoriality of the investment was examined by the tribunal in *Apotex v. United States,* which gave legal effect to the term "*territory*" in the

[250] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 161.
[251] **Exhibit RLA-026**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 161.
[252] **Exhibit CLA-1**, The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012, Preamble.

relevant treaty as requiring a form of "*presence, activity or other investment in the territory.*"[253]

214. Relatedly, international tribunals have extensively elaborated on the concept of "*commitment of capital*", as part of their broader analysis of the concept of "*investment*" in treaties that, like the TPA, include such language.

215. It is well-established in investment case-law that, to be afforded protection, investors must make a "*commitment of capital*" or "*contribution*" in the sense of a meaningful transfer of resources into the economy of the host State.[254] This requirement is also enshrined in the definition of "*investment*" in the TPA, which requires "*the commitment of capital or other resources.*"[255]

216. This is in line with the "*underlying concept of investment*", which requires the investor to commit its own financial means at its own risk. In the words of the *Toto Costruzioni v. Lebanon* tribunal:[256]

> [T]he underlying concept of investment, which is economical in nature […] implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.

217. Accordingly, to qualify as a protected investor under Article 10.28 of the TPA, Claimant is required to prove it invested in Colombia by committing substantive capital of its own.

b. Claimant has failed to prove it invested in Colombia.

218. According to Claimant, the 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*."[257] Claimant also explains that "[i]*n 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,*

[253] **Exhibit RLA-032** *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 7.62
[254] **Exhibit RLA-033**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131; **Exhibit RLA-034**, Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2009), p. 130.
[255] **Exhibit CLA-1**, The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012, Article 10.28, p. 28.
[256] **Exhibit RLA-035**, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (Exhibit R-037), ¶ 84.
[257] Claimant's Response, ¶ 97.

the Assumed Liabilities."[258] In Claimant's own words, its liabilities pursuant to the APA, in exchange for acquiring all of SSA Cayman Islands' assets, included payment and performance of obligations. Claimant's Response further contends that "[a]*fter 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]

219. However, Claimant's Response still fails to provide any evidence that it in fact personally invested in Colombia after the signing of the APA.

220. Claimant argues that "*SSA Cayman's payment and performance obligations included payments to various vendors involved in the search for and identification of the San José*."[260] However, Claimant's Response includes no factual exhibit in support of such allegation.

221. Claimant also argues that "*SSA Cayman had incurred similar obligations as a result of its investment of well over USD 11 million made in search for and identification of the San José*."[261] This is of course completely irrelevant because it would only prove that SSA Cayman Islands -not SSA LLC- invested in Colombia.

222. Claimant refers to the "*negotiations with the Colombian authorities for a salvage contract*",[262] but reference is made to paragraphs 56 to 62 of Claimant's Response which describes conduct performed by SSA Cayman Islands between 1983 and 1984, not SSA LLC's conduct. This is thus irrelevant to prove that Claimant invested in Colombia.

223. Claimant refers to "*efforts to enforce SSA Cayman's rights.*"[263] Nevertheless, those efforts lack relevance for the present purpose considering that the actions were pursued by SSA Cayman Islands from 1993 to 2007, and not by SSA LLC.

224. Claimant refers to a letter filed on 16 March 2010 by Danilo Devis Pereira proposing the establishment of rules and the joint recovery of the Galeón San José, under the threat of unilateral recovery operations in Colombian waters

[258] Claimant's Response, ¶ 98.
[259] Claimant's Response, ¶ 99.
[260] Claimant's Response, ¶ 99.
[261] Claimant's Response, ¶ 99 (references is made to ¶¶ 29-41).
[262] Claimant's Response, ¶ 99 (reference is made to ¶¶ 56-62).
[263] Claimant's Response, ¶ 99 (reference is made to ¶¶ 69-77, 85-93).

should Colombia fail to respond within 30 days.[264] But this manifestly does not amount to investing in Colombia.

225. Claimant refers to the US Civil Action before the DC District Court,[265] in which it requested the "*U.S. court* [to] *enforce the 2007 Supreme Court Decision as a foreign judgment.*"[266] This manifestly does not amount to investing in Colombia.

226. Claimant refers to the petition filed before the IACHR, claiming a violation of its rights to property and judicial protection.[267] This clearly does not amount to investing in Colombia.

227. Claimant refers to SSA LLC's appeal of the Third Civil Court of the Circuit of Barranquilla's decision dated 31 October 2017,[268] ordering the lifting the *Secuestro* Order.[269] This manifestly does not amount to investing in Colombia.

228. Claimant refers to correspondence between the US Embassy in Colombia and SSA LLC describing, *inter alia*, a supposed "*meeting SSA held with the Minister of Culture on 15 February 2017.*"[270] This manifestly does not amount to investing in Colombia.

229. Claimant refers to a letter dated 4 September 2017 from SSA LLC "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."[271] This manifestly does not amount to investing in Colombia, especially considering that nowhere in the 2007 CSJ Decision is there a recognition of SSA

[264] Claimant's Response, ¶ 102 with reference to **Exhibit R-017**, 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.").
[265] Claimant's Response, ¶ 103.
[266] Claimant's Response, ¶ 103.
[267] Claimant's Response, ¶¶ 102 and 107.
[268] Claimant's Response, ¶ 125.
[269] **Exhibit C-93**, Third Civil Court of the Circuit of Barranquilla, Judgment Lifting Injunction Order, 31 October 2017, PDF, p.12.
[270] Claimant's Response, ¶ 126; **Exhibit C-92**, Letter from U.S. Embassy in Colombia to SSA, 16 March 2017.
[271] Claimant's Response, ¶ 127; **Exhibit R-030**, Letter from Sea Search Armada, LLC to Colombia, 4 September 2017, PDF p. 1.

Cayman Islands' right to access the site of the alleged discovery or to its recovery.

230. Claimant refers to a letter dated 8 August 2018, to "newly elected President Iván Duque to open a new dialogue" and through which "*SSA warned that it would take legal action should the parties fail to reach an amicable resolution*."[272] This manifestly does not amount to investing in Colombia.

231. Claimant refers to subsequent letters dated 20 December 2018 and 12 March 2019 to the Vice-President of Colombia raising the joint verification matter.[273] This manifestly does not amount to investing in Colombia, especially considering that nowhere in the 2007 CSJ Decision is there a recognition of a right to access the site of the alleged discovery or to its recovery.

232. In conclusion, since Claimant has manifestly failed to prove that it invested in Colombia, it is not a qualifying investor under Article 10.28 of the TPA.

B. IN ANY EVENT, THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE MATERIAE* SINCE SSA LLC DID NOT MAKE A QUALIFYING INVESTMENT.

233. Claimant argues it possess a protected investment under Article 10.28 of the TPA, by highlighting sections g) and h)[274] of said provision:

> g) licences, authorizations, permits, and singular 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…"[275]

234. SSA LLC continues to argue that it has a protected investment because it allegedly owns or controls DIMAR Resolutions No. 0048 of 1980 and No. 0354 of

[272] Claimant's Response, ¶ 128; **Exhibit R-031**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018, p. 1.
[273] Claimant's Response, ¶¶ 129-130; **Exhibit R-032**, Letter from Sea Search Armada, LLC to Colombia, 20 December 2018, p. 2; **Exhibit R-033**, Letter from Sea Search Armada, LLC to Colombia, 12 March 2019, p. 1.
[274] No clear elaboration in respect to Article 10.28.f of the TPA is discernible in Claimant's Response. Claimant's inapposite and unfounded allegations at paragraphs 181 to 182 are addressed in **Section II (H)** of Colombia's Reply.
[275] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28.

1982.[276] Moreover, Claimant now argues that it made a qualifying investment in Colombia by acquiring SSA Cayman Islands' rights in 2008.[277]

235. As will be shown, **(1)** Claimant does not possess a protected investment either under Article 10.28(g) or under Article 10.28(h) of the TPA, **(2)** nor under the specific requirements provided for in Article 10.28(g).

1. Claimant does not own or control a protected investment under Article 10.28(g) or Article 10.28(h) of the TPA.

236. Article 10.28 of the TPA defines an investment as:[278]

> […] **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. (Emphasis added)

237. Pursuant to Article 10.28 of the TPA, for an asset to constitute an investment it must have the characteristics of an investment such as (i) the commitment of

[276] Claimant's Notice of Arbitration and Statement of Claim, ¶ 66-67. Claimant's Response, ¶ 176,
[277] Claimant's Response, ¶ 161.
[278] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.

capital or other resources, (ii) the expectation of gain or profit, or (iii) the assumption of risk.

238. In its Response, Claimant argues that it has a covered investment as SSA LLC's "*acquisition of SSA Cayman's assets, rights and interests under the APA plainly has the characteristics of an investment*."[279] According to SSA LLC, such acquisition of SSA Cayman Islands' assets constitutes an investment because SSA LLC "*undertook an economic commitment involving risk that brought substantial benefit to Colombia by finding and attempting to salvage the San José shipwreck*."[280]

239. Claimant contends that the characteristics of an investment established in Article 10.28 of the TPA is a "*non-exhaustive list of illustrative and non-cumulative characteristics that are typical of investments in general*."[281] To support this, Claimant refers to paragraph 225 of the *Gramercy v. Peru* ruling, where the tribunal, - interpreting article 10.28 of the US-Peru TPA, which has the exact same wording as Article 10.28 of the TPA-, held that the enumeration of the three characteristics "*is linked by an 'or' implying that it is not necessary that an asset possess all of these characteristics*."[282]

240. Colombia does not contest Claimant's assertion, nor its reference to the *Gramercy v. Peru* ruling. In fact, in *Gramercy v. Peru*, the tribunal goes on to state that "*the more characteristics an asset possesses, the more its character as an investment is reinforced*."[283] This also means that the less characteristics an asset possesses, the more likely it is that such an asset does not constitute an investment.

241. In this case, as the Tribunal will find, the assets claimed by SSA LLC as a protected investment under the TPA, do not possess any of the characteristics of investment set forth in Article 10.28 of the TPA, and therefore is not a protected investment under the TPA.

a. <u>SSA LLC's alleged investment does not include a commitment of capital.</u>

[279] Claimant's Response, ¶ 183.
[280] Claimant's Response, ¶ 183.
[281] Claimant's Response, ¶ 185.
[282] **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.
[283] **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.

242. Article 10.28 of the TPA mandates that for an investment to be protected under the treaty it must include, among others, the "*commitment of capital or other resources.*"[284]

243. The "*commitment of capital or other resources*" is inherent in the act of investing, since without such commitment of resources, the asset, even if belonging to the claimant, would not be the result of it having invested.[285]

244. It is well-established that in order to have a qualifying investment under an international investment treaty, the alleged investor must make a "*commitment of capital*" or "*contribution*" in the sense of a meaningful transfer of resources into the economy of the host State, *i.e.,* Colombia.[286] This requirement also finds concrete expression in the definition of "*investment*" provided for in Article 10.28 of the TPA, which requires "*the commitment of capital or other resources.*"[287]

245. The latter is also in line with the well-established understanding that to merely own or hold an asset does not constitute a contribution, much less amount to an investment.[288] In the *Quiborax v. Bolivia* ruling the tribunal held that the mere legal ownership or control of assets is not enough to establish a commitment of capital or other resources.[289]

246. This was also held by the tribunal in *Komaksavia v. Moldova, where* the tribunal ruled that *investing an asset* is a form of conduct that requires the investor to actually perform the act of *investing*. The tribunal ruled that an investment is "*not akin to mere ownership alone.*"[290] The mere ownership of an asset, simply

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[284] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.
[285] **Exhibit RLA-040,** *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280 ¶. 207; **Exhibit RLA-041,** *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 166.
[286] See, e.g., **Exhibit RLA-033**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131; **Exhibit RL-034**, Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2009), p. 130.
[287] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.
[288] **Exhibit RLA-031.** *Quiborax S.A., Non Methallic Minerals S.A. and Allan Fosk v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Decision on Jurisdiction, 27 September 2012, ¶ 233; **Exhibit RLA-026.** *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 154.
[289] **Exhibit RLA-031.** *Quiborax S.A., Non Methallic Minerals S.A. and Allan Fosk v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Decision on Jurisdiction, 27 September 2012, ¶ 233.
[290] **Exhibit RLA-026.** *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 154.

connotes a legal title or possession that cannot constitute a protected investment.[291]

247. In this case, as already demonstrated in **Section IV.A**, SSA LLC has failed to prove that it personally invested in Colombia after signing the APA with SSA Cayman Islands, much less that it committed any type of resource. SSA LLC has not even proven that the conditions of the APA were fully met, and that the transaction was dully executed.[292] As argued by Colombia in its 10.20.5 Submission,[293] 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.[294] Yet, there is no evidence that those conditions were met or that the assignment was ever completed.

248. Claimant's Response does not provide any clarification on this point even though Colombia raised it in its previous submission.[295] When referring to Colombia's assertion in its Response, Claimant only mentions that "*the APA is a valid and fully executed intra-company agreement that transferred SSA Cayman's vested rights in the discovered shipwreck to SSA.*"[296] However, nowhere in its Response does Claimant present evidence of the fulfillment of the requirements for the APA to be validly and fully executed.

249. Finally, Claimant's affirmation that SSA LLC undertook an economic commitment "*that brought substantial benefit to Colombia by finding and attempting to salvage the San José shipwreck*"[297] is completely unacceptable and is plainly false.

250. Not only neither SSA LLC, nor any of its alleged predecessors found the Galeón San José,[298] but SSA LLC clearly has brought no substantial benefit to Colombia. On the contrary, SSA LLC has negatively impacted Colombia by extending a dispute established on 7 July 1994 for more than 30 years and requiring

[291] **Exhibit RLA-026.** *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 154.
[292] Claimant's Response, ¶ 165.
[293] Colombia's Article 10.20.5 Submission, ¶ 139.
[294] **Exhibit C-30,** Asset Purchase Agreement between Armada Company and Sea Search Armada, LLC, 18 November 2008, p. 6.
[295] Colombia's Article 10.20.5 Submission, ¶¶ 242-245.
[296] Claimant's Response, ¶ 165.
[297] Claimant's Response, ¶ 183.
[298] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994, pp. 2-3.

Colombia to expend significant resources in different fora to defend from an artificial allegation of property rights over the Galeón San José.

251. As mentioned in **Section II**, when Colombia indeed found the Galeón San José back in 2015, such search operation was made without considering any of the coordinates or directions reported by Glocca Morra Company in the 1982 Confidential Report.[299] The 2015 finding symbolizes the exact opposite, the fact that SSA LLC's predecessors did not find the Galeón and that it took the Colombian Government more than 30 years to actually find the Galeón San José. Thus, Glocca Morra Company did not bring any benefit to Colombia with the supposed findings made in 1982.

252. This arbitral proceeding is just another way in which Claimant is negatively impacting Colombia, now by making the State spend significant resources to defend against the same frivolous story it now tries to sell to the Tribunal.

253. For the reasons stated above, Claimant has failed to prove it made a substantial commitment of capital to acquire the investment. This is highly indicative of the fact that Claimant does not own or control an investment, neither under Article 10.28(g) nor under Article 10.20(h) of the TPA.

b. SSA LLC's alleged investment does not include the expectation of gain or profit.

254. Article 10.28 of the TPA mandates that for an investment to be protected under the treaty it must involve, among others, the "*expectation of gain or profit.*"[300] Investment tribunals have understood the requirement of "*expectation of gain of profit*" as a wide concept that requires the investor to seek to obtain a gain or profit after developing their economic activity.[301] Usually, in the case of an investment, the capital is committed precisely for making a profit, which means that if this requirement is not met, neither is the expectation of gain or profit.[302]

[299] **Exhibit R-037**, Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018.
[300] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.
[301] **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.
[302] **Exhibit CLA-52,** *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 127.

255. This requirement is not met in the present case simply because SSA LLC cannot prove it made any substantial commitment of capital from which an expectation of gain or profit can be derived from.[303]

256. Independently, this requirement is not met because SSA LLC could not have had any expectation of gain or profit regarding the Galeón San José, simply because in 2008, when entering into the TPA, SSA LLC knew or at least should have known the Colombian government had already denied any property rights over the Galeón San José to all its alleged predecessor.[304]

257. Indeed, on 7 July 1994, the Colombian Government issued the 1994 Press Release,[305] through which it adopted the report made by Columbus Exploration, which conclusively determined that no shipwreck was found in the coordinates indicated in the 1982 Confidential Report.[306]

258. Years later, through the 2007 CSJ Decision, the CSJ confirmed that SSA Cayman Islands had no rights over the Galeón San José, as it conditioned any rights based on the 1982 Confidential Report to two cumulative requirements: (i) 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) on the assets still being susceptible of being "*qualified judicially as a treasure.*"[307] Since Glocca Morra Company never found the Galeón San José, neither SSA Cayman Islands (nor SSA LLC) could claim any rights over that specific shipwreck.

259. Thus, based on the 1994 Press Release and the 2007 CSJ Decision, when signing the APA SSA LLC knew, or at least as a diligent investor should have known,[308] that there could be no expectation of gain or profit derived from any rights over the Galeón San José. Such rights simply did not exist.

260. In any case, Claimant has not demonstrated that its alleged investment had any probability to generate any gains or profits. Even if the alleged property rights

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[303] See **Section IV.A**
[304] See **Section II** of the Reply.
[305] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994, pp. 2-3. Colombia's Article 10.20.5 Submission, ¶¶ 57-58.
[306] **Exhibit R-012**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994,
p. 2. Claimant's Response, ¶¶ 78-80; Claimant recognizes that the 1994 Press Release was issued by the Colombian government, yet it refers to it as the "Columbus Press Release".
[307] **Exhibit C-28**, Colombian Supreme Court of Justice, Decision of 5 July, pp. 233-235.
[308] **Exhibit RLA-042**, *Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, ¶ 308.

would have consolidated in the 2007 CSJ Decision, as explained in **Section II**, the decision was not a money judgment.[309]

261. For the reasons stated above, Claimant has failed to prove it had any expectation of gain or profit deriving from the alleged investment. This is highly indicative of the fact that Claimant does not own or control an investment, neither under Article 10.28(g) nor under Article 10.20(h) of the TPA.

c. SSA LLC did not assume any risk with the alleged investment.

262. Article 10.28 of the TPA mandates that, for an investment to be protected under the treaty, the investment must involve, among others, the "*assumption of risk.*"[310]

263. Investment tribunals have held that for this requirement to be met, the allocation of capital or other resources must involve a level of risk.[311] In *KT Asia v. Kazakhstan* the tribunal stated that, if there is no contribution of an economic value, there can be no risk. Thus, if the characteristic of commitment of capital is not fulfilled, neither will the characteristic of assumption of risk.[312] Moreover, the tribunal in *Seo v. Korea* also ruled that when the expectation of gain or profit is weak, "*the presence of an assumption of risk is equally doubtful*."[313]

264. In this case, not only is this characteristic not met because of the lack of commitment of capital and of the expectation of gain or profit by SSA LLC, but also because SSA LLC did not assume any risk by acquiring the supposed "*assets*" from SSA Cayman Islands.

265. As stated in **Section II**, when entering the APA, both SSA Cayman Islands and SSA LLC knew that any rights SSA Cayman Islands claimed to have over the Galeón San José were definitively and undoubtedly quashed by the 2007 CSJ Decision, in conjunction with the 1994 Press Release, both making clear that no

[309] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶¶ 9-10.
[310] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.
[311] **Exhibit RLA-041**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 217.
[312] **Exhibit RLA-041**. *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 219.
[313] **Exhibit CLA-52,** *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 134.

property rights could be alleged over the Galeón San José based on the 1982 Confidential Report.

266. Thus, if there were no rights susceptible of being "*expropriated*" as Claimant baselessly claims, there could not be any assumption of risk. Any "*risk*" with regards to the alleged rights over the Galeón San José had already materialized with the 2007 CSJ Decision, and therefore, SSA LLC did not assume any risk.

267. To be clear, since those alleged rights over the Galeón San Jose were the purpose of SSA LLC's alleged investment,[314] and by that time it was already evident that those rights did not exist, then it is adamant SSA LLC did not assume any risk over that matter.

268. For the reasons stated above, Claimant has failed to prove it assumed any risk deriving from the alleged investment. This is highly indicative Claimant does not own or control an investment, neither under Article 10.28(g) nor under Article 10.20(h) of the TPA.

269. In conclusion, the Tribunal lacks jurisdiction *ratione materiae* because there is simply no evidence that Claimant owns or controls a protected investment under Article 10.28(g) or Article 10.28(h) of the TPA.

2. Claimant does not own or control a protected investment under Article 10.28(g).

270. Article 10.28(g) of the TPA defines "*investment*" as follows:[315]

> […] **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:
>
> […]
>
> g) **licenses, authorizations**, permits, and similar rights **conferred pursuant to domestic law; and**

[314] Claimant's Response, ¶¶ 168-171.
[315] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28, p. 29.

271. Article 10.28(g) is controlled by footnotes 14 and 15. Footnote 14 provides as follows:

> 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.

272. In light of the above, Respondent will show Claimant does not own or control a protected investment under Article 10.28(g) because (a) the DIMAR resolutions were not conferred to SSA LLC pursuant to Colombia's domestic law, and in any event, (b) the DIMAR Resolutions do not create *in rem* rights under domestic law over specific shipwrecks, let alone over the San José Galeón.

a. The DIMAR resolutions were not conferred to SSA LLC pursuant to Colombia's domestic law.

273. Article 10.28 paragraph (g) of the TPA provides that a protected investment under the TPA includes "*(g) licenses, authorizations, permits, and similar rights* ***conferred pursuant to domestic law***."[316]

274. As will be shown, (i) SSA LLC's alleged predecessor's conduct prove that the assignment of exploration rights from SSA Cayman Islands to SSA LLC required DIMAR's authorization, and (ii) Colombia is not estopped from requiring the assignment of rights from SSA Cayman Islands to SSA LLC to be authorized by DIMAR.

i. SSA LLC's alleged predecessor's conduct proves that the assignment of exploration rights from SSA Cayman Islands to SSA LLC required DIMAR's authorization.

275. Claimant has come to allege that DIMAR's authority ceased once the discovery of the Galeón San José was made, and that, given that SSA Cayman Islands had

[316] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.28 (g), p. 29.

allegedly reported the discovery of the San José, it was not required to seek DIMAR's authorization to assign its exploration rights to SSA LLC.[317] Moreover, Claimant alleges that the fact that "*SSA's Predecessor had requested DIMAR's authorization of the assignment of marine exploration activities in the 1980s is irrelevant*", since the reason for this was that "*the assignees* ***needed to conduct exploration*** *in Colombian waters.*" (Emphasis added)[318] This need would have ceased in 1983 "*after Oceaneering, acting on behalf of SSA Cayman, confirmed that it had* "[f]*ound thre wreck.*" This was also the reason why the "*Colombia court recognized SSA Cayman's lawyers' interest for his services, without any request for confirmation*."[319] Claimant concludes that "*nothing in Colombian law requires DIMAR to authorize the transfer of vested rights from SSA Cayman to SSA*."[320]

276. Contrary to Claimant's new allegation, the record shows that the contemporaneous understanding of both Glocca Morra Company and SSA Cayman Islands was that, even after DIMAR Resolution No. 0354 was issued, the assignment of rights required DIMAR's authorizations. Moreover, on Claimant's own admissions, since Glocca Morra Company did not report the finding of the Galeón San José, but rather expressly declared in the 1982 Confidential Report that further marine exploration was needed, DIMAR's authority was still required after 1983 and even after the 2007 CSJ Decision.

277. On Claimant's own case, DIMAR's authority never ceased, since Glocca Morra Company did not find, nor report the finding of the Galeón San José. Not only does it remain undisputed that the 1982 Confidential Report did not mention the Galeón San José,[321] but it is also objectively true that in the 1982 Confidential Report Glocca Morra Company recognized that "*substantial additional capital* [was] *needed to carry out the identification and rescues of the shipwreck*":[322]

> Glocca Morra Co. believes from an operational point of view that the next step in the plan for a successful conclusion of the venture, will be either a submersion team, backed with a full support team, or a submersible (?) tied up with a man, that could be brought to the site of the shipwreck. **Sea Search Armada is willing to assist with the substantial additional capital**

[317] Claimant's Response, ¶ 200. ("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.")
[318] Claimant's Response, ¶ 201.
[319] Claimant's Response, ¶ 201.
[320] Claimant's Response, ¶ 201.
[321] Colombia's Article 10.20.5 Submission, ¶ 27.
[322] **Exhibit R-004**, Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982, pp. 5-6

> **needed to carry out the identification and rescue of the shipwreck as soon as you reach an agreement with the Maritime and Port Director General**, to start such an operation in the vicinity of target 'A'. (Emphasis added) (Independent translation)

278. Moreover, Claimant fails to explain why it is relevant that in 1983 the Oceaneering, acting on behalf of SSA Cayman Islands, had confirmed that it had "[f]*ound thre wreck.*"[323] This is a purely private act with no bearing on DIMAR's competences.

279. Claimant further argues that the 1983 alleged finding was the reason why the "*Colombia court recognized SSA Cayman Islands lawyers' interest for his services, without any request for confirmation*."[324] This is completely misleading. Claimant erroneously confuses the Superior Court of Barranquilla's recognition of litigation and procedural rights in favor of SSA Cayman Islands' lawyer in the Civil Action, with the transfer of rights arising from DIMAR's Resolutions, which is absolutely inappropriate.

280. It is also objectively incorrect to state that, after Resolution No. 0354 recognized Glocca Morra Company as a reporter of treasures, "*DIMAR no longer had any authority over the use or transfer of those rights.*"[325] As noted in Colombia's Article 10.20.5 Submission,[326] on 24 March 1983, upon request by Glocca Morra Company, DIMAR issued Resolution No. 204, authorizing Glocca Morra Company to transfer the rights granted in Resolutions No. 0048, 0066, 0025, 0249 and 0354 to SSA Cayman Islands.[327] This means that, even after Resolution No. 0354 had allegedly vested the relevant rights on Glocca Morra Company, the same Glocca Morra Company and SSA Cayman Islands as still considered necessary to request DIMAR's authorization of the assignment.

281. Accordingly, pursuant to domestic law, as proven through the conduct of SSA LLC's alleged predecessors, the assignment of rights from SSA Cayman Islands to SSA LLC required DIMAR's authorization.

[323] Claimant's Response, ¶ 53.
[324] Claimant's Response, ¶ 201.
[325] Claimant's Response, ¶ 200.
[326] Colombia's Article 10.20.5 Submission, ¶ 33.
[327] **Exhibit C-17**, DIMAR Resolution No. 204 of 24 March 1983.

ii. Colombia is not estopped from requiring the assignment of rights from SSA Cayman Islands to SSA LLC to be authorized by DIMAR.

282. Claimant's Response contains the allegation that Colombia is somehow estopped from invoking, in these proceedings, the fact that DIMAR never authorized the transfer of rights from SSA Cayman Islands to SSA LLC.[328] Importantly, at no moment was Colombia required to raise such TPA-based argument in its interactions with SSA LLC. It is thus immaterial that Colombia had not alleged a requirement contained in Article 10.28(g) of the TPA in judicial proceedings in Colombia or in the USA,[329] as well as in its correspondence with SSA LLC. In any case, it is false that Colombia had not brough the DIMAR authorization issue.

283. In Colombia, only SSA Cayman Islands, and not SSA LLC, acted as plaintiff in the civil proceedings that led to the 2007 CSJ Decision. There is agreement between the parties that the transfer of rights from Glocca Morra Company to SSA Cayman Islands was previously authorized by DIMAR, upon express request from the companies. Therefore, there was no need to allege this issue before the Colombian courts.

284. It was also unnecessary to bring this matter in subsequent correspondence with SSA LLC because, as should be axiomatic at this moment, Colombia had clearly and consistently denied any property rights based on the 1982 Confidential Report, which is relevant to ascertain whether Colombia was in fact required to raise the different issue of DIMAR's continuous authority. Importantly, at no point did SSA LLC expressed an interest in resuming formal underwater marine exploration activities but limited itself to raising threats of unilateral intervention[330] or further litigation.[331]

285. In the US, as previously noted, Colombia's motion to dismiss was made pursuant to Federal Rule of Civil Procedure 12(b)(6), which required the factual allegations presented by SSA LLC to be presumed as truthful, based on the violation of the

[328] Claimant's Response, ¶ 204.
[329] No reference is made to the proceedings before the IACHR because, although a Petition was filed by Sea Search Armada, LLC, Colombia never had the opportunity to submits its defense on admissibility.
[330] **Exhibit R-017**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010. Colombia's Article 10.20.5 Submission, ¶ 275.
[331] **Exhibit R-031**, Letter from Sea Search Armada, LLC to Colombia, 8 August 2018. Colombia's Article 10.20.5 Submission, ¶ 281.

relevant statute of limitations.[332] Colombia also successfully opposed the recognition and enforcement of the 2007 CSJ Decision on the basis that it was not a money judgment.[333]

286. Finally, on 28 July 2015, Colombia replied to Claimant's previous communications expressing that it was "*willing to facilitate the verification of the area determined in the coordinates established in the Supreme Court's Ruling, according to the 1982 Confidential Report that is an integral part of Resolution 0354 of 1982 issued by DIMAR.*"[334] In this communication, the Ministry of Culture also informed that "*Sea Search Armada shall take the necessary steps to obtain the authorizations from DIMAR and the Ministry of Culture so that by October at the latest this procedure can be carried out.*"[335] By this point it was clear that Colombia did not accept the existence of any property rights based on the 1982 Confidential Report, thereby making unnecessary to raise any issue relating to DIMAR. In any case, Colombia in fact stated that "*Sea Search Armada shall the necessary steps to obtain the authorizations from DIMAR.*"

287. Accordingly, unlike the present case, which is conducted pursuant to the TPA, there was simply no need either in Colombia, the US or the IACHR, to invoke the requisite contained in Article 10.28(g) of the TPA. In any case, although not required to do so, Colombia did raise that any exploration attempt by SSA LLC required DIMAR's previous authorization.

b. *In any event, DIMAR resolutions No. 0048 and No. 0354 do not create in rem rights under domestic law over any specific shipwreck, let alone over the Galeón San José.*

288. Claimant submits that, 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 treasures at the location referenced in the 1982 Report*."[336] Then, Claimant asserts that "*Colombian Courts have repeatedly and unambiguously recognized SSA's rights under Colombian law in connection with its discovery*."[337]

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[332] **Exhibit R–019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, pp. 5–7.
[333] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, ¶¶ 9-10 ; see also **Section II.**
[334] **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015.
[335] **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015.
[336] Claimant's Response, ¶ 179.
[337] Claimant's Response, ¶ 180.

289. This is incorrect.

290. On 22 October 1979, GMC Inc. submitted a request to DIMAR seeking authorization to carry out "*marine exploration works in the Colombian Continental Shelf in the waters of the Atlantic Ocean, with the purpose of establishing the existence of shipwrecked, species, treasures or any other element of historical, scientific or commercial value*."[338] Following GMC Inc.'s request, which did not mention the Galeón San José or any other specific shipwreck, DIMAR issued Resolution No. 0048.

291. Resolution No. 0048 provides as follows in its operative paragraph:[339]

> ARTICLE 1°. TO AUTHORIZE Glocca Morra Company Inc. to carry out underwater exploration activities in the following areas […]".[340]

292. Contrary to Claimant's assertions,[341] Resolution No. 0048 did not authorize the company to explore Colombian waters in search for the Galeón San José, nor was it intended or could have been intended to create any specific *in rem* right. Resolution No. 0048 merely designated certain areas in which the company was authorized to develop underwater exploration activities.

293. The same holds true for DIMAR Resolution No. 0354, through which Glocca Morra Company was recognized as reporter of treasures or shipwreck species.

294. As can objectively be seen from the operative paragraph of Resolution No. 0354, it did not create any *in rem* right over the Galeón San José, or any shipwreck, nor could it have done so. Resolution No. 0354 merely recognized Glocca Morra Company as a reporter of the treasures referred to in the 1982 Confidential Report:[342]

> ARTICLE 1o. To recognize GLOCCA MORRA COMPANY, incorporated under the laws of the Cayman Islands (British West Indies), as reporter of treasures or shipwrecked species in the coordinates referred to in the "Confidential Report on the Underwater Exploration by GLOCCA MORRA Company in the Caribbean Sea, Colombia 26 February 1982" Page 13 No. 49195 Berlitz Translation Service. (Emphasis added) (Independent translation).

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[338] **Exhibit R-002,** Exploration Permit Request from Glocca Morra Company Inc. to DIMAR, 22 October 1979.
[339] Colombia's Article 10.20.5 Submission, ¶ 22.
[340] **Exhibit C-2,** DIMAR Resolution No. 0048, 29 January 1980, Art. 1.
[341] Claimant's Response, ¶¶ 19, 23, 41, 50.
[342] **Exhibit C-13**, DIMAR Resolution No. 0354 of 3 June 1982, p. 1.

295. The fact that Resolution No. 0354, or these types of resolutions do not create *in rem* rights can be further confirmed by reference to Resolution No. 0048 itself.

296. Page 2 of Resolution No. 0048 definitively shows that a previous recognition of a different company as reporter, not of an undetermined shipwrecked species as Glocca Morra Company, but of a specific shipwrecked species, does not create *in rem* rights over the reported species:

> That by resolution No. 173 of 1971, the General Maritime and Ports Directorate recognized the society REYNOLDS ALUMINIUM EUROPE S.A., the character of reporter of the shipwrecked species referred to as Capitan San José situated in the approximate position:
>
> Lat. 10° 18' 30" North
>
> Long. 75° 41' 30" West

297. That Resolution No. 173 of 1971 did not create any *in rem* right for Reynolds Aluminium Europe S.A., derives clearly from the fact that, as also visible in Resolution No. 0048, 3 years later a different company was expressly granted exploration rights to carry out underwater exploration activities over the very same shipwrecked species:

> That through resolution No. 016 dated 24 January 1974, the General Maritime and Ports Directorate authorized the Company FRIENDSHIP S.A., to carry out underwater exploration operations for the search of the shipwrecked species previously mentioned [Capitana San José], for the term of five (5) years (…)

298. The better view is thus that a resolution recognizing a private company as a reporter of treasures does not create any *in rem* rights over the reported species, much less to unreported species as in the case of Glocca Morra Company, but rather a mere expectation of a right, which is completely contingent on the reporter positively establishing that the reported species is in fact in the reported area, and moreover, on the States expressing its positive desire to extract the shipwrecked species.

299. This is objectively discernible from the evidence in the record.

300. In fact, paragraph 3 of Decree No. 2324, cited at paragraph 45 of Colombia's Article 10.20.5 Submission, and one of the bases of Claimant's expropriation claim before the DC District Court,[343] clearly provided that any participation over

[343] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, p.5.

the gross value of the reported shipwrecked species was contingent upon it "*subsequently* [being] *found in the coordinates*."[344]

301. That Resolution No. 0354 did not create any *in rem* rights to the undetermined shipwrecked species reported in the 1982 Confidential Report can also be seen from the exchange of correspondence between DIMAR and SSA Cayman Islands, which was referenced at paragraphs 48 and 49 of Colombia's Article 10.20.5 Submission. In said exchange, DIMAR made clear that the recognition of a reporter pursuant to Resolution No. 0354 did not even grant a preferential status with respect to a potential contract to salvage the species, as it was merely another bidder.[345]

302. This also explains why, as explained at paragraph 53 of Colombia's Article 10.20.5 Submission, the Civil Action instituted by SSA Cayman Islands did not refer to the Galeón San José, but to any assets possessing the quality of a treasure that are located in the coordinates referred to in the 1982 Confidential Report.[346] This is far from being a claim deriving from *in rem* rights, and more closely consistent with an expectation of rights, should a shipwrecked species be discovered in the reported coordinates.

303. Importantly, that resolutions such as DIMAR Resolution No. 0048 and No. 0354 do not create *in rem* rights is also objectively ascertainable in the civil proceedings arising out of the Civil Action filed by SSA Cayman Islands in 1983.

304. As stated by the 10th Civil Court of Barranquilla, SSA Cayman Islands resorted to the Civil Action, not to request a declaration of property over the Galeón San José, but rather to obtain a declaration of property rights over goods that could qualify as treasures, located within the coordinates indicated in the 1982 Confidential Report.[347] This is consistent with the understanding that SSA Cayman Islands, as assignee of Glocca Morra Company, was vested with an expectation of right, rather than with an *in rem* right.

305. Moreover, on 5 July 2007 the CSJ made clear that the property rights recognized by the lower courts was in fact contingent on two conditions:[348]

[344] **Exhibit C-18**, Decree No. 2324 of 1984, Article 194.
[345] **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, p. 2.
[346] **Exhibit R-009**, Sea Search Armada's Civil Action before the Civil Circuit Judge of Barranquilla, 13 January 1984.
[347] **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, p. 1.
[348] **Exhibit C-28**, Colombian Supreme Court of Justice, Decision of 5 July 2007, p. 233-235.

> **SECOND**: In conformity with the previous resolution, the aforementioned point second of the judgment of first instance is **MODIFIED, in the understanding that the property there conferred, in equal parts, in favor of the Nation and the claimant, is referred only and exclusively to the assets that, on one side**, by their characteristics and own features, in conformity with the circumstances and directions indicated in this decision, **are still susceptible of being qualified juridically as a treasure**, in the terms of Article 700 of the Civil Code and the restriction or limitation that placed upon it article 14 of Law 163 of 1959, among other applicable legal provisions **and, on the other side, to the assets referred to by Resolution 0354 of 3 June 1982, issued by the General Maritime and Ports Directorate, namely, those, that are found in 'the coordinates referred to in the 'Confidential Report on Underwater Exploration carried out by the Company' GLOCCA MORRA in the Caribbean Sea, Colombia 26 February 1982' Page 13 No. 49195 Berlitz Translation Service.', without including, therefore, different spaces, zones or areas.**

306. This decision is miles apart from what a holder of *in rem* rights would expect to receive from Colombia's highest court, but one it probably was expecting since SSA Cayman Islands had not requested a declaration of property over any specific *res*, let alone the Galeón San José, but rather a declaration of a property right contingent on the two conditions provided for in thew law.

307. Finally, that DIMAR Resolutions No. 0048 and 0354 did not recognize property rights whatsoever, but merely an expectation of rights contingent on several conditions, was also eloquently expressed by the DC District Court when dismissing SSA LLC request to enforce the 2007 CSJ Decision.

308. The DC District Court recalled that SSA LLC had invoked the District's Uniform Foreign-Money Judgment Recognition Act, which allows for the enforcement of a foreign-money judgment in the same manner as the judgment of a sister jurisdiction, as long as the judgment of the foreign State grants or denies the recovery of a sum of money.[349] The DC District Court recalled SSA LLC's allegation that "*the Colombian Supreme Court's holding that SSA and Colombia each own half of the San Jose treasures is a money judgment entitling t to 50% of the value, which has been estimated as between $4 billion and $17 billion.*"[350]

[349] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, p. 9.
[350] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, p. 9.

The DC District Court conclusively rejected SSA LLC's enforcement request stating that:[351]

> This decision cannot be considered a money judgment; **it simply decided how the *San* Jose treasure should be divided if and when it is excavated."**

309. Although the DC District Court erroneously indicated that the 2007 CSJ Decision was concerned with the San José – due to the fact that this was SSA LLC allegation in those proceedings and the court was statutorily required to presume the plaintiff's factual allegations as true – what is relevant is that it noted that it was not a money judgment because any money would only be claimable in respect to the reported shipwrecked species "*if and when its excavated.*"

310. Pursuant to footnote 14 of Article 10.28(g), this means that neither DIMAR Resolution No. 0048, nor DIMAR Resolution No. 0354 created any *in rem* rights over the Galeón San José, or any specific shipwreck, but simply recognized Glocca Morra Company as a reporter of the treasures reported in the 1982 Confidential Report. Accordingly, DIMAR'S Resolutions are not a protected investment.

C. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE TEMPORIS* SINCE SSA LLC'S CLAIMS AROSE BEFORE THE TPA CAME INTO EFFECT.

311. After Claimant's Response it remains clear that the Tribunal lacks jurisdiction *ratione temporis* over the claims submitted by SSA LLC, since they are all based on State conduct pre-dating the TPA's entry into force.

312. Claimant seeks to establish the Tribunal's jurisdiction *ratione temporis* by reaffirming that "*all of SSA's claims arise from Resolution No. 0085, issued on 23 January 2020, nearly **8 years** after the TPA came into force*."[352] Moreover, in a desperate attempt to escape the fact that it has even admitted that the relevant State conduct crystalized well prior to the TPA's entry into force,[353] Claimant contends that Colombia made a "*recast*" of its claims, which, as will be explained below, is not true.

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[351] **Exhibit R-019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, pp. 9-10.
[352] Claimant's Response, ¶ 215.
[353] Claimant's Response, ¶¶ 243-250

313. Article 10.1 of the TPA sets the relevant legal framework of Colombia's *ratione temporis* submission. As a declaration of the non-retroactivity principle, Article 10.1.3 of the TPA defines its scope and coverage as follows:

> Section A: Investment
>
> Article 10.1: Scope and Coverage:
>
> […]
>
> 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**. (Emphasis added)

314. When interpreting the non-retroactivity principle, several investment tribunals have consistently held that it bars the exercise of a tribunal's temporal jurisdiction when the relevant claims concern acts or facts that are rooted in pre-treaty conduct, even if they took place after the date of entry into force of the treaty.[354] Accordingly, investment tribunals have held they lack jurisdiction *ratione temporis* over acts or facts that took place after the relevant treaty's entry into force, but that are rooted in pre-treaty conduct.[355]

315. Furthermore, investment tribunals have determined that, pursuant to the non-retroactivity principle, they lack jurisdiction *ratione temporis* when the alleged breach arises out of situations that ceased to exist or were fully crystallized before the date on which the relevant treaty entered into force.[356] In other

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[354] **Exhibit RLA-023,** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 141-157; **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, ¶¶ 217-277; **Exhibit CLA-057.** 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, ¶¶ 336-344; **Exhibit RLA-024.** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70.

[355] **Exhibit RLA-023** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 141-157; **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, ¶¶ 217-277; **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, ¶¶ 336-344; **Exhibit RLA-024.** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70.

[356] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 61-73; **Exhibit CLA-24,** *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶¶ 123; **Exhibit RLA-036.** *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 116.

words, when the alleged breach is nothing but a reiteration of an already consolidated situation before the treaty's entry into force.[357]

316. In light of the above, in the analysis of its jurisdiction *ratione temporis* over SSA LLC's claims, the Tribunal shall determine:

(i) Whether the alleged breach is independently actionable, or whether it is rather necessarily linked to other acts of the State that took place before the date of the TPA's entry into force. In the latter case, the Tribunal is barred from exercising jurisdiction *ratione temporis*.[358]

(ii) Whether the evaluation of the alleged breach entails the evaluation of the lawfulness of other pre-TPA State acts. If that is the case, then the Tribunal is barred from exercising jurisdiction *ratione temporis*.[359]

(iii) Whether the alleged breach corresponds to a situation that ceased to exist or was fully settled before the date of the TPA's entry into force. If the alleged breach is the reiteration of a situation that was settled or ceased to exist before the date of the TPA's entry into force, then the Tribunal is barred from exercising jurisdiction *ratione temporis*.[360]

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[357] **Exhibit RLA-024.** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 61-73; **Exhibit CLA-24,** *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 123; **Exhibit RLA-036.** *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 116.

[358] **Exhibit RLA-023** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 141-157; **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, ¶¶ 217-277; **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, ¶¶ 336-344; **Exhibit RLA-024.** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70; **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, ¶¶ 146-148.

[359] **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, ¶¶ 217-277; **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70; **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, ¶¶ 146-148.

[360] **Exhibit RLA-024.** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 61-73; **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 123; **Exhibit RLA-036.** *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 116.

317. In the case at hand, the Tribunal will find that, contrary to SSA LLC's assertions: (i) the Tribunal is not required to assume the date of Claimant's "*impugned measure*" as the sole relevant date for the *ratione temporis* analysis; (ii) Resolution 0085 is not only irrelevant but is not an independently actionable act; (iii) in order to assess the lawfulness of Resolution 0085, the Tribunal must necessarily evaluate the lawfulness of pre-TPA acts; (iv) if accepted as true, *quod non*, the alleged breaches were fully crystallized before the entry into force of the TPA, and (v) neither the Tribunal nor Colombia are prevented from challenging Claimant's characterization of the relevant measures, which, in any case, does not constitute an attempt to recast Claimant's claims.

1. <u>The Tribunal is not required to assume the date of Claimant's "impugned measure" as the sole relevant date for the ratione temporis analysis.</u>

318. SSA LLC contends that Colombia ignores that the date of the impugned measure -that is, Resolution 0085- is "*the only relevant date for the ratione temporis analysis.*"[361]

319. Claimant's assertion is misguided and unfounded.

320. To support such statement, Claimant misrepresents the rulings in *Gramercy v. Peru* and *Carrizosa v. Colombia*, none of which support Claimant's argument that the sole relevant date for the *ratione temporis* analysis is the date of Claimant's conveniently selected "*impugned measure.*"

321. Moreover, the facts in *Gramercy v. Peru* are substantially different from those of the present case. In *Gramercy v. Peru*, the legal situation of the claimant fully consolidated only after the relevant treaty entered into force.[362] On the contrary, in this case, and as Colombia has already demonstrated in its Article 10.20.5 Submission[363], Claimant's legal situation was fully settled as early as 7 July 1994 with the issuance of the 1994 Press Release, and as late as 5 July 2007 with the 2007 CSJ Decision. Alternatively, relying on Claimant's own admission before the DC District Court, as early as 7 December 2010.

322. Claimant also misconstrued the relevant ruling in *Carrizosa v. Colombia*.

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[361] Claimant's Response, ¶¶ 218-222.
[362] **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, ¶¶ 112-142.
[363] Colombia's Article 10.20.5 Submission, ¶¶ 59-85.

323. When deciding on the basis of the very same Article 10.1.3 of the TPA, the *Carrizosa* tribunal analyzed whether a post-TPA measure was rooted in pre-TPA conduct, thereby barring the tribunal from exercising jurisdiction *ratione temporis*.[364] The tribunal stated that an alleged mistreatment to the claimant that arose before the date of entry into force of the TPA "*does not mean that the TPA condoned Colombia's repeated mistreatment of the Claimant's investment after its entry into force.*"[365] However, nowhere did the *Carrizosa* endorse Claimant's unfounded allegation that the sole relevant date for the *ratione temporis* analysis is the date of Claimant's conveniently selected "*impugned measure.*"

324. On a final note on *Carrizosa*, Claimant also conveniently failed to mention that, in the very same paragraph 138, the tribunal held that if the alleged breach "*could give rise to a self-standing breach of the TPA*, […] *the principle of treaty non-retroactivity would not place that post-TPA breach outside the treaty's temporal scope.*"[366] Colombia does not dispute the *rationale* in the *Carrizosa* ruling, which is that if the alleged breach were to constitute a self-standing breach to the TPA, then the latter would clearly be within the tribunal's jurisdiction. However, in the present case, by Claimant's own admission, all the purported breaches are rooted in pre-TPA unequivocal State conduct.

325. After analyzing *Gramercy v. Peru* and *Carrizosa v. Colombia*, the only plausible conclusion is that Claimant's legal authorities do not support its baseless position. Importantly, absent any authority effectively requiring Colombia and the Tribunal to accept the date of the conveniently selected "*impugned measure*" as the only relevant date for the *ratione temporis* analysis, nothing prevents Respondent to shed light on the relevant facts, as necessary to prove that the alleged breach is in fact rooted in pre-TPA State conduct.

326. As noted by the tribunal in Chevron v. Ecuador, the presumption of truthfulness of Claimant's factual allegations is not absolute and certainly "*not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT*" (emphasis added).[367] This is especially relevant in the present case, considering that, by

[364] **Exhibit RLA-023,** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 124-167.
[365] **Exhibit RLA-023,** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 138.
[366] **Exhibit RLA-023,** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 138.
[367] **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, ¶ 109.

Claimant's own admission, the alleged breaches were perfected as a result of State conduct prior to 15 May 2012.

327. In conclusion, the Tribunal is not bound to consider the date on which Resolution 0085 was issued as the only relevant date for its *ratione temporis* analysis. Such interpretation would simply render the *ratione temporis* analysis void, as any claimant could establish the tribunals temporal jurisdiction by just attaching its claims to the most recent (although immaterial) measure taken by the Respondent State.

2. Resolution No. 0085 is not an independently actionable act.

328. Since 7 July of 1994, or at the latest on 5 July 2007, through unequivocal State conduct, the alleged property rights over the Galeón San José based on the 1982 Confidential Report were extinguished, as well as the supposed legitimate expectation to a 50% of its value based on the same report. In any case, according to Claimant's own admissions before the DC District Court, the full evisceration of its alleged property rights over the Galeón San José, as well as the alleged instances of arbitrariness explaining such evisceration, would have perfected on 7 December 2010. Hence, it is completely unreasonable to sustain, as Claimant does, that Resolution 0085 -which is specifically referred to the Galeón San José-, is an independently actionable measure *vis-à-vis* SSA LLC.

329. In this section, Colombia will demonstrate that neither case law (i), nor the facts support Claimant's proposition (ii).

a. Case law does not support that Resolution 0085 is an independently actionable act.

330. To assert that Resolution 0085 "*is an independently actionable breach,*"[368] Claimant relies on the rulings in *Berkowitz v. Costa Rica*, *Mondev v. USA*, and *Carrizosa v. Colombia*.

331. Claimant denies that the *Berkowitz v. Costa Rica* established a particular "*test*" for the *ratione temporis* analysis.[369] This labelling issue is irrelevant. What is important is that, pursuant to *Berkowitz*, a *ratione temporis* analysis requires a two-fold assessment (i) whether there is a post-treaty independently actionable

[368] Claimant's Response, ¶¶ 223-238.
[369] Claimant's Response, ¶ 223.

act, and (ii) whether such act can be evaluated without having to review the lawfulness of a pre-treaty conduct.[370]

332. Claimant then relies on the award rendered in *Modev v. USA* to sustain that Resolution 0085 is an independently actionable breach.[371] *Mondev* does not assist Claimant's case.

333. In *Mondev v. USA*, the tribunal ruled that pre-treaty events may be relevant to understand the background of a post-treaty act that breached said treaty. This is not disputed by Respondent. However, the tribunal also stated that such post-treaty act of the State must be in itself a breach of the treaty, not connected to those pre-treaty acts[372]. In that sense, unless the post-treaty act is in itself inconsistent with the provisions of the relevant treaty, the fact that it is related to the pre-treaty acts bars the tribunal from exercising its jurisdiction.[373]

334. Claimant also misconstrues the award in *Carrizosa v. Colombia*, which does not assist Claimant's case either.

335. When determining whether a post-treaty act falls within the tribunal's temporal jurisdiction, the *Carrizosa* tribunal unequivocally ruled that a post-treaty act that is related to other pre-treaty acts, falls within the tribunal's temporal jurisdiction only if such post-treaty act can in itself constitute an interpedently actionable breach:[374]

> 141. […] constitutes an **independently actionable breach of the treaty, the principle of treaty non-retroactivity would not prevent the treaty tribunal from exercising jurisdiction over claims arising out of such breach.**
>
> […]
>
> 143. Thus, if post-treaty conduct can constitute an independent cause of action under the treaty, **it will come under the treaty tribunal's jurisdiction, irrespective of whether such conduct may pertain to a broader pre-treaty dispute**. (emphasis added)

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[370] **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, ¶ 237.b.
[371] Claimant's Response, ¶¶ 226-227
[372] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 60-70.
[373] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70.
[374] **Exhibit RLA-023,** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶¶ 141-143.

336. Claimant argues that the *Carrizosa v. Colombia* ruling does not support Respondent's case since there, the tribunal decided that it did not have jurisdiction *ratione temporis* over the claim because the only post-TPA act was not an independent actionable breach in its own right.[375] But this is precisely Colombia's case: that the alleged triggering act – Resolution No. 0085 – is conveniently the only post-TPA State conduct, but it is materially incapable in itself to trigger an independent breach of the TPA.

337. It being clear that Claimant's authorities do not harm Colombia's position, Respondent will now show that the facts also belie Claimant's claim that Resolution No. 0085 is an independently actionable breach.

b. Resolution 0085 is not an independently actionable act.

338. In its Response, Claimant contends that Resolution 0085 is an independently actionable breach, because: (i) Colombia's actions before Resolution 0085 "*did not foreclose SSA's enforcement of its rights*" supposedly granted by the 2007 CSJ Decision;[376] (ii) Resolution 0085 "*eviscerated*" SSA's rights to the 50% of the salvaged treasure;[377] (iii) the 2019 reinstatement of the Injunction Order by Colombian Courts "*affirmed that SSA retained rights to its Predecessors' discovery*";[378] and (iv) up until Resolution 0085, Colombia had recognized that the 2007 CSJ Decision "*conferred Claimant limited rights over GMC's discovery.*"[379]

339. As already explained in **Section II**, to which Colombia refers in its entirety, Resolution No. 0085 has not (i) foreclosed the enforcement of any of SSA's alleged rights over the Galeón San José, because those rights do not exist; (ii) Resolution No. 0085 was incapable of eviscerating any rights of SSA LLC over the Galeón San José, because those alleged rights do not exist; and (iii) no decision from any Colombian court has ever affirmed nor recognized any property right over the Galeón San José on behalf of SSA LLC or any of its alleged predecessors.

340. In fact, in **Section II** of this Reply, Colombia has convincingly demonstrated that:

[375] Claimant's Response, ¶¶ 228-230.
[376] Claimant's Response, ¶ 233.
[377] Claimant's Response, ¶ 234.
[378] Claimant's Response, ¶ 234.
[379] Claimant's Response, ¶ 236.

(1) GMC Inc. never requested and thus DIMAR never authorized it to search for the Galeón San José.[380]

(2) The 1982 Confidential Report did not report the finding of the Galeón San José, and in fact shows that further exploration for the purposes of identification has always been necessary.[381]

(3) Colombia has never recognized the alleged discovery of the Galeón San José by Glocca Morra Company.[382]

(4) Colombia expressly denied that the Galeón San José had been discovered by Glocca Morra Company by adopting the content of the 1994 Columbus Report, which unequivocally concluded that no shipwreck, much less the Galeón San José, was located in the coordinates indicated in the 1982 Confidential Report.[383]

(5) Colombia's domestic courts did not vest SSA Cayman Islands with property rights over the Galeón San José, as (i) Glocca Morra Company never requested the recognition of property rights specifically over the Galeón San José, but rather over goods that could qualify as treasures, located within the coordinates indicated in the 1982 Confidential Report; (ii) the 2007 CSJ Decision did not vest SSA Cayman with any specific property rights over the Galeón San José, nor any other specific shipwreck, as the CSJ clearly conditioned any property rights of Glocca Morra Company, to the assets being in the area of the specific coordinates indicated in the 1982 Confidential Report to in the Confidential Report;[384] and (iii) the 2019 Superior Court's Decision did not affirm that SSA LLC had nor retained any right whatsoever to the Galeón San José, as it merely determined whether the lifting of the 1994 *Secuestro* Decision was justified or not.[385]

341. In light of the above, it remains clear that well before Resolution No. 0085 SSA LLC had not property right whatsoever over the Galeón San José as the existence of those alleged rights were consistently and unequivocally denied by Colombia's acts between 1980 and 2007.

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[380] See **Section II.A** of this Reply.
[381] See **Sections II.B** and **II.C** of this Reply.
[382] See **Section II.D** of this Reply.
[383] See **Section II.D** of this Reply.
[384] **Exhibit C-28**, Colombian Supreme Court of Justice, Decision of 5 July p. 233 235.
[385] See **Section II.H** of this Reply.

342. Accordingly, Resolution 0085 is not an independently actionable breach as it cannot in itself constitute any violation to the TPA without referring to the pre-TPA acts mentioned above.

3. To assess the legality of Resolution No 0085, the Tribunal must necessarily evaluate the lawfulness of pre-TPA acts.

343. In its Response, Claimant argues that its claim is not rooted in pre-TPA acts and that the only relevant date for the consolidation of the breach is 23 January 2020, when Colombia issued Resolution 0085,[386] declaring the shipwreck of the Galeón San José an Asset of National Cultural Interest."[387]

344. The tribunal in *Berkowitz v. Costa Rica* held that an alleged breach that occurred post-treaty is rooted in pre-treaty acts or facts, and thereby outside the tribunal's temporal jurisdiction, when the evaluation of such post-treaty act necessarily requires the review of the lawfulness of a pre-treaty conduct.[388]

345. Such interpretation reflects the positions held by tribunals in other cases such as *Mondev v. USA*,[389] and *Renco v. Peru (II)*.[390]

346. It is not possible to assess the legality of Resolution No. 0085 *vis-à-vis* SSA LLC without assessing first the legality of Colombia's pre-treaty acts through which any and all property rights Claimant may have had over the Galeón San José were definitively denied. In other words, to assess the legality of Resolution No. 0085 *vis-à-vis* Claimant, the Tribunal would, by force, have to decide on the lawfulness of all Colombia's act that took place between 1980 and 2010. As explained above, through those acts, Colombia definitely denied any property right Glocca Morra Company, SSA Cayman Islands and certainly Claimant could have over the Galeón San José.

347. Moreover, the alleged full evisceration of such rights through Colombia's conduct was such that, as early as 7 December 2010, Claimant filed the US Civil Action

[386] Claimant's Response, ¶¶ 216, 218-238.
[387] **Exhibit C-42**, Ministry of Culture of the Republic of Colombia, Resolution 0085 of 2020.
[388] **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, para. 237.b; **Exhibit RLA-023** *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 153.
[389] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 70.
[390] **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, ¶¶ 146-148.

claiming a fully perfected expropriation and arbitrariness, as well as damages up to USD 17 billion.

348. Importantly, even if one were to accept that it was not until the 2007 CSJ Decision that the legal status of SSA Cayman Islands *vis-à-vis* the Galeón San José was fully defined, the Tribunal would by force have to analyze whether the interaction between the 1994 Press Release, and the 2007 CSJ Decision, led to the absolute nullification of any property rights SSA Cayman Islands could have had over the Galeón San José, and the legality of said measure.

349. In conclusion, to rule on the legality of Resolution No. 0085 *vis-à-vis* SSA LLC would necessarily require the Tribunal to assess whether such alleged full deprivation of the alleged Claimant's property rights over the Galeón San José was legal or illegal, a task absolutely prohibited by the treaty and customary international law.

4. Claimant's claims correspond to a situation that fully crystallized before the entry into force of the TPA.

350. Claimant opposes Respondent's argument that any breach crystallized on 7 July 1994 (date of the 1994 Press Release), 5 July 2007 (date of the 2007 CSJ Decision), or at the latest on 7 December 2010 (date of the US Civil Action).[391]

351. Investment tribunals have held that if an alleged breach is nothing but the mere continuation of a situation that was already crystallized before the date of entry into force of the treaty, then such breach is outside of the tribunal's temporal jurisdiction.[392] Such interpretation was adopted by the tribunals in *Mondev v. USA*[393] and *AHCA v. Congo*,[394] among many others.

352. Claimant does not present any reason as to why such assertion is incorrect. All Claimant does is argue that any reference made by Colombia to pre-TPA acts is

[391] Claimant's Response, ¶ 232.
[392] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 61-73; **Exhibit CLA-24,** *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 123; **Exhibit RLA-033,** *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶. 116.
[393] **Exhibit RLA-024,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 61-73.
[394] **Exhibit RLA-033,** *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 116.

a matter for the merits and damages phases, and that "*Colombia cannot recast Claimant's claims to be about something they are not.*"[395]

353. Although Claimant's train of thought is vague and unclear, its positions seem to be that before Resolution No. 0085, SSA LLC's situation was supposedly not crystallized, because SSA LLC "*had rights that it was attempting to enforce through litigation and discussions with Colombian authorities.*"[396]

354. This is not true. As explained in **Section IV.C.2.b** above, in all of the instances referred to above, the evisceration of the alleged property rights over the Galeón San José was a fully consolidated situation. Moreover, even in the event that the Tribunal considered that Claimant's situation was not fully consolidated with the 2007 CSJ Decision, it was undoubtedly consolidated, by Claimant's own admissions, by 7 December 2010, the when the US Civil Action was filed before the DC District Court.

355. As noted in Colombia's Article 10.20.5 Submission, on 7 December 2010,[397] SSA LLC filed the US Civil Action alleging a breach of contract and an expropriation of its ownership rights, consequently claiming damages in the amount of USD 17,000,000,000.[398]

356. In fact, and as explained in detail in **Section II.J**, SSA LLC admitted before the DC District Court that the alleged (i) unlawful expropriation, (ii) several instances of arbitrariness, and (iii) Colombia's favoring of third parties were already perfected at the latest by 7 December 2010.[399]

357. These facts unequivocally lead to the conclusion that even <u>as late as 7 December 2010</u> Claimant's legal situation was fully and unequivocally crystallized.[400]

358. In conclusion, the Tribunal does not have jurisdiction *ratione temporis*.

5. <u>Colombia is not recasting SSA LLC's claims but rather setting the record straight on the measures that caused the alleged breach to the TPA.</u>

[395] Claimant's Response, ¶ 232.
[396] Claimant's Response, ¶¶ 232-233.
[397] Colombia's Article 10.20.5 Submission, ¶¶ 6, 74.
[398] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF p. 50.
[399] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010.
[400] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 27, 56, 72.

359. In its Response, Claimant argues that Colombia is not entitled to recast Claimant's claim, as there is "*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.*"[401]

360. As a threshold matter, Colombia is not attempting to recast Claimant's claims. Claimant is fully entitled to cast its claims in whatever form it sees fit. In the present case, Claimant claims that Colombia has breached the TPA in particular, through an unlawful expropriation, and the violations of the FET, national treatment, full protection and security and MFN standards.[402] This does not mean, however, that Colombia or the Tribunal are impeded from contesting claimant's characterizations of the relevant facts underlying its claims, especially when a close analysis of the factual matrix is necessary to properly establish jurisdiction.

361. Claimant relies heavily on the rulings in *Gramercy v. Peru* and *Renco v. Peru (II)*, to maintain that "*the Tribunal must determine its jurisdiction based on SSA's claims, not Colombia's version of them.*"[403] Such rulings do not support Claimant's position.

362. Claimant's references to the rulings in *Gramercy v. Peru* and *Renco v. Peru (II)*, are misleading since none of those decisions support the contention that the respondent is not allowed to give the tribunal further information, *inter alia*, about the timeline of the alleged acts that constitute the alleged breach of the applicable treaty and, as in this case, set the record straight.

363. First, Claimant's reference to *Gramercy v. Peru* does not assist its case, as nowhere in such ruling does the tribunal prevent the respondent from providing further information and background to the measures that, according to the claimant, constitute the alleged breach to the treaty.

    Second, in *Renco v. Peru (II)*, the tribunal stated that in a preliminary stage, such as the current one under article 10.20.5 of the TPA, the tribunal only has to determine whether a breach to the treaty could have occurred, and therefore the tribunal must, "*defer to the factual characterizations put forward by the Claimant unless the Respondent is able already, at this stage, to conclusively*

[401] Claimant's Response, ¶ 243.
[402] Claimant's Notice of Arbitration, Section IV.
[403] Claimant's Response, ¶ 247.

disprove them." (emphasis added).[404] Colombia does not disagree with the ruling in *Renco v. Peru*. In fact, Colombia agrees that an arbitral tribunal must take into consideration the facts advanced by a respondent to challenge the factual characterization of the claimant. No other way could the tribunal determine whether the respondent has conclusively disproved those facts.

364. Respondent should once more recall, as mentioned in **Section III**, that the presumption of truthfulness of Claimant's factual allegations is not absolute as it is "***not meant to allow a claimant to frustrate jurisdictional review*** *by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT."*[405] (Emphasis added)

365. According to the above, contrary to Claimant's baseless affirmations, Respondent is entitled to contest Claimant's factual characterization. This task is especially relevant in the present case, as it is clear that Claimant's allegations are completely distorted and frivolous with the sole purpose of artificially establishing the Tribunal's jurisdiction.

366. Although it is clear that Colombia is not attempting to recast Claimant's claims, the whole purpose of this line of argument is clearly to prevent both Colombia and the Tribunal to challenge Claimant's self-serving characterization of the relevant facts, in a further desperate attempt to establish the Tribunal's jurisdiction.

D. IN THE ALTERNATIVE, THE TRIBUNAL DOES NOT HAVE JURISDICTION RATIONE VOLUNTATIS SINCE SSA LLC'S CLAIMS FALL OUTSIDE THE THREE-YEAR LIMITATION PERIOD OF ARTICLE 10.18.1 OF THE TPA AND ARE TIME-BARRED.

367. SSA LLC claims that Colombia allegedly violated the unlawful expropriation, Fair and Equitable Treatment, Full Protection and Securities, Most Favored Nation, and National Treatment standards of the TPA[406], and that Claimant suffered alleged losses due to such violations estimated in USD 10 billion.[407]

368. However, Claimant has filed for arbitration in respect to those claims in flagrant violation of the three-year time limitation period provided for in Article 10.18.1

[404] **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.
[405] **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, ¶ 109
[406] Notice of Arbitration, ¶¶ 72 – 86.
[407] Notice of Arbitration, ¶¶ 94.

of the TPA, as a necessary element of Colombia's consent to arbitration. As Colombia will demonstrate in this section, SSA LLC knew of the alleged breaches and was certain that they had caused damages more than three years before the date it filed its Notice of Arbitration on 18 December 2022. Therefore, SSA LLC´s claims are time-barred.

369. In this section, Respondent will show that the legal framework supports that SSA LLC knew or should have known about the alleged breaches of the TPA and damages before 18 December 2019 (1). Colombia will then show all Claimant's claims are time-barred (2), which makes Resolution No. 0085 immaterial (3).

1. The applicable legal framework supports that SSA LLC knew or should have known about the alleged breaches of the TPA, and the alleged loss or damage incurred before 18 December 2019.

370. Article 10.18.1 of the TPA reads as follows:

> 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.** [408] (Emphasis added).

371. Article 10.18 of the TPA clearly states the conditions and limitations for the consent to arbitration given by its signatories.[409] Paragraph 1 clearly states that no claim may be submitted to arbitration if more than three years have elapsed from the date on which the Claimant first acquired or should have first acquired knowledge of (i) the alleged breach, and (ii) that it had incurred loss or damage. Claimant's failure to comply with said conditions necessarily implies that its claims cannot be subject to arbitration as they would not be in accordance with

[408] **Exhibit CLA-1,** The United States-Colombia Trade Promotion Agreement (excerpts), 15 May 2012 (entry into force), Article 10.18.1, p. 18.
[409] **Exhibit RLA-017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 191.

the requirements for consent provided for in the TPA, which in turn determine the Tribunal's jurisdiction.[410]

372. As acknowledged by Claimant, the relevant date for determining the time limitation of SSA LLC's claims is 18 December 2019, since SSA LLC submitted its Notice of Arbitration three years later on 18 December 2022.[411] Therefore, if Claimant (i) first acquired or should have acquired knowledge of the alleged breaches before 18 December 2019, and (ii) first acquired or should have acquired knowledge that it had incurred loss or damage before 18 December 2019, the Tribunal lacks jurisdiction.

373. When examining provisions similar to the one enshrined in Article 10.18.1 of the TPA, several investment tribunals have considered that the three-year limitation period does not allow any suspension, prolongation, or other modifications or qualifications.[412] In particular, tribunals that have analyzed similar NAFTA provisions such as Articles 1116(2) and 1117(2), which share the same wording as Article 10.18.1 of the TPA, have found that the limitation period is a "*clear and rigid limitation defense which, as such, is not subject to any suspension*."[413]

374. Arbitral tribunals have further clarified that this type of provisions "*limits the availability of arbitration within the clear-cut period of three years and does so in full knowledge of the fact that a State, i.e., one of the three Member Countries, will be the Respondent, interested in presenting a limitation defense*."[414] Article

[410] **Exhibit CLA-48,** *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146; **Exhibit RLA-017**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 191.
[411] Claimant's Response, ¶ 257.
[412] **Exhibit RLA-037,** *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29; **Exhibit RLA-038,** *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63; **Exhibit RLA–017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 192.
[413] **Exhibit CLA-48,** *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146; **Exhibit RLA-038,** *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63; **Exhibit RLA–017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 192; **Exhibit CLA-47,** *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153.
[414] **Exhibit RLA-038,** *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63.

10.18.1 should be interpreted similarly, **recognizing that Colombia has not consented to claims that fall outside the three-year limitation period**.

375. Claimant argues that under Article 10.18.1 of the TPA, "*it is not enough for the Claimant to be aware of a potential breach; it must be aware of the resulting loss or damage*"[415] and that arbitral tribunals have recognized that it is not enough that the Claimant suspects it might suffer a loss, since a "*degree of certainty*" is required.[416] This does not assist Claimant's case for various reasons, one being that Claimant has expressly admitted that the alleged breaches had crystallized and the damage had already perfected by 7 December 2010.

376. In any case, Claimant fails to recognize that investment tribunals have modulated the understanding of the two criteria to be met under Article 10.18.1 of the TPA.

377. Regarding the first criterion, that is, that more than three years have elapsed from the date on which Claimant first acquired knowledge of the alleged breach, tribunals have understood that the knowledge can be actual or constructive.[417] Constructive knowledge of the breach means that the criterion is fulfilled even if the Claimant did not have actual knowledge of the breach but, because of the circumstances, should have acquired knowledge of said breach.[418] The discussion becomes moot when the treaty provision, actually provides for construction knowledge explicitly. This is the case of Article 10.18.1 of the TPA.

378. Moreover, investment tribunals have highlighted the importance of the word ***first*** in the language of a provision like Article 10.18.1. Notably, tribunals have accepted that an investor cannot *first* acquire knowledge of the same matter in more than one occasion.[419] The same reasoning was followed in the *Ansung Housing v. China* case where the tribunal granted the early dismissal of investor's claim under Article 41(5) of the ICSID Rules. In that case, the Tribunal found

[415] Claimant's Response, ¶ 253.
[416] Claimant's Response, ¶ 253.
[417] **Exhibit RLA–017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 193; **Exhibit CLA-47,** *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153; **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, ¶ 525.
[418] **Exhibit RLA–017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 193, 197; **Exhibit CLA-47,** *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153.
[419] **Exhibit CLA-48,** *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 147.

that even in the case of continued omissions by a State, the relevant date for time-period limitation is the **first** day the alleged investor should have knowledge of the alleged breach.[420] The tribunal further found that to allow the Claimant to adjust the date of first knowledge of the alleged breach, like SSA LLC is doing, will be to allow and endless parsing up of a claim into finer subcomponents of breach over time in an attempt to trump the time-limitation period provided in the relevant treaty. The Tribunal stated:[421]

> "However, even assuming a continuing omission breach attributable to China, which the Tribunal must assume, and even assuming Ansung might wish to claim damages from a date later than the first knowledge of China's continuing omission – for example, from November 2, 2011, when Ansung tentatively agreed to transfer its shares or even December 17, 2011, when Ansung's commercial patience ran out – that could not change the date on which Ansung first knew it had incurred damage. And it is that first date that starts the three-year limitation period in Article 9(7). **To allow Claimant to adjust that date of first knowledge by selecting the date from which it wants to claim damages for continuing breach would be, to borrow from the Spence decision, to allow an "endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period**."

379. In the case at hand, SSA LLC first acquired knowledge of the alleged breaches by the time when the TPA came into force on 15 May 2012 and, at the very latest, by 17 June 2019, dates that fall outside the TPA's time-limitation period.

380. Regarding the second criterion, it is agreed that knowledge of the breach is insufficient to trigger the limitation period, since it also required that Claimant also had knowledge of the loss or damage incurred.[422]

381. In *Corona v. Dominican Republic*, a case which involved a provision identical to Article 10.18.1 of the TPA, the tribunal dismissed the case under an expedited procedure after concluding that the claims were time-barred. The *Corona* tribunal found that, for the second criterion to be met, the investor had to know

[420] **Exhibit RLA-039**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, ¶ 113.
[421] **Exhibit RLA-039**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, ¶ 113.
[422] **Exhibit RLA-017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 194; **Exhibit CLA-48,** *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 154.

that it had incurred loss or damage even if not yet in the capacity to precisely determine the specific quantum:[423]

> For the limitation period to begin to run, **it is not necessary that a claimant be in a position to fully particularize its legal claims** (in that they can be subsequently elaborated with more specificity), **nor must the amount of loss or damage suffered be precisely determined**. It is enough, as the *Mondev* tribunal found when applying NAFTA's limitation clause, that a "claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."

382. Furthermore, in cases such as *Resolute Forest v. Canada* and *Gramercy v. Peru*, the tribunals have confirmed that all that is required is the simple knowledge that loss or damage has been caused, even if their extent and quantification are still unclear.[424] Therefore, compliance with the second requirement does not entail a precise knowledge of the loss or damage incurred, since its quantification could be defined afterwards. Nevertheless, the investor must be certain that the loss will occur.[425]

383. As it will be shown below, both criteria in Article 10.18.1 are met, meaning Claimant's Notice of Arbitration is time-barred in respect of all of its claims.

2. All Claimant's claims are time-barred.

384. It is Response, Claimant submits that "*all SSA's claims arise out of Resolution No. 0085. Not only is Resolution No. 0085 the breaching measure alleged by SSA, **but it is also the measure that divested SSA's rights of all their value***" (emphasis added).[426]

385. As a part of its desperate attempt to overcome the TPA's time-limitation period, SSA LLC qualifies Resolution No. 0085 as the only measure after which it first acquired or should have acquired knowledge (i) of the alleged breach, and (ii) that it had incurred loss or damage.[427] SSA LLC contends that "*prior to Resolution*

[423] **Exhibit RLA-017,** *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 194.
[424] **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, ¶ 528; **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.
[425] **Exhibit CLA-47**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 99.
[426] Claimant's Response, ¶ 258.
[427] Claimant's Response, ¶ 258.

SSA had valuable rights which had been confirmed by the Colombian Supreme Court."[428] Further, SSA LLC claims that "[w]*hile 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* […]."[429]

386. This is simply not true. All of Claimant's claims are time-barred, and Resolution No. 0085 is immaterial. Resolution No. 0085 is immaterial *vis-à-vis* SSA LLC simply because its subject matter is the Galeón San José and, as was already made clear in Colombia's Article 10.20.5 Submission,[430] before 18 December 2019, the Colombian government had explicitly, repeatedly, and unequivocally informed SSA LLC that it had no property rights over the Galeón San José since Glocca Morra Company had not found it back in 1982.[431] Moreover, the 2007 CSJ Decision confirmed SSA Cayman Islands had no rights over the Galeón San José either.[432] Decisively, before the DC District Court, Claimant alleged that, by 7 December 2010, an unlawful expropriation without compensation, and several instances of arbitrariness had already perfected, and it had already incurred damage up to USD 17,000,000,000.[433] In any case, no action by the Colombia judiciary amounts to a recognition of SSA LLC's property rights over the Galeón San José.

387. Therefore, Colombia could not, as Claimant states, have eviscerated its property rights over the Galeón San José through Resolution No. 0085, because there were simply no property rights to be eviscerated.

388. The following sections describe the application of Article 10.18.1 in respect of all Claimant's claims.

    a. *Colombia has not consented to arbitrate SSA LLC's unlawful expropriation claim under TPA (Article 10.7) because it is time-barred.*

[428] Claimant's Response, ¶ 269.
[429] Claimant's Response, ¶ 269.
[430] Colombia's Article 10.20.5 Submission, Section V (3).
[431] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994; **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016; **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 1.
[432] **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016; **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p.1.
[433] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF p.50.

389. Article 10.7 of the TPA provides that for an expropriation to be lawful, it must be for a public purpose, with prompt and adequate compensation, in a non-discriminatory manner and in accordance with due process of law. Article 10.7.1 of the TPA reads as follows:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law and Article 10.5.

390. Accordingly, SSA LLC knew or should have known of an alleged unlawful expropriation as soon as its alleged property rights over the Galeón San José had been taken by Colombia, either directly or indirectly, without compensation.

391. SSA LLC wrongfully contends that, by issuing Resolution No. 0085, Colombia allegedly expropriated its investment and, therefore, breached Article 10.7 of the TPA.[434] Specifically, Claimant stated in its Notice of Arbitration that "[by] *retroactively deeming the San José as an 'Asset of National Cultural Interest,' Colombia eviscerated almost the entirety of the value of the SSA's investment*"[435] and that Colombia allegedly took 50% of its discovery.[436]

392. As will be shown, Claimant's unlawful expropriation claim is time-barred and accordingly, Colombia did not consent to arbitrate said claim under the TPA. Moreover, Resolution No. 0085 is immaterial.

393. SSA LLC should have known of the alleged unlawful expropriation without compensation and the alleged resulting damage as soon as the TPA entered into force on 15 May 2012, or soon thereafter, including as shown by Claimant's own admissions in the proceedings before the DC District Court and the IACHR. In any case, Claimant knew -or should have known- about the alleged unlawful expropriation and the alleged resulting loss well before 18 December 2019. This

[434] Notice of Arbitration, ¶ 75; Claimant's Response, ¶ 258.
[435] Notice of Arbitration, ¶ 75.
[436] Notice of Arbitration, ¶ 75.

position was consistent, unequivocal, and reiterated numerous times by Colombia well before 18 December 2019.

394. To assist the Tribunal, Colombia has prepared two appendices. **Appendix B** portrays the ways in which Claimant has deliberately modified the date of the alleged breaches before different international fora in an attempt to unduly establish jurisdiction. Moreover, **Appendix C** portrays that, despite this attempt, Claimant has substantially presented the same claims before the different international forums. This is SSA LLC's final attempt to re-litigate its case by conveniently misrepresenting the relevant facts.

i. Claimant knew or should have known of the alleged unlawful expropriation and damage as soon as the TPA entered into force on 15 May 2012.

395. Claimant knew or should have known about the alleged expropriation as soon as the TPA came into force on 15 May 2012. By then, the Colombian government had communicated to SSA LLC's alleged predecessors that they had not found the Galeón San José and thus could not have any rights over it.[437] As a matter of fact, on 7 July 1994, the Colombian government issued the 1994 Press Release whereby it confirmed, on the basis of scientific evidence, that Glocca Morra Company had not found any shipwreck in the coordinates reported in 1982, much less the Galeón San José:[438]

> The Government of Colombia, after reviewing the evidence presented by Columbus Exploration, Inc. following their exploration of the area whose coordinates were furnished by the Nation to the contractor, **being the same coordinates informed in 1982 by the Glocca Morra Company, Inc**. (Sea Search Armada), **has concluded that no shipwreck is located thereto** (and consequently **no traces of the Galeón San José either**). (emphasis added).

396. While in 2007 the CSJ issued a decision whereby it contoured SSA LLC's alleged predecessor's rights as a reporter of a treasure, the truth is that the CSJ never vested SSA Cayman Islands with rights over the Galeón San José.[439] As has been shown in this submission, and against Claimant's baseless assertions in its

[437] **Exhibit R-008**, Letter 415 sent by DIMAR to SSA Cayman Islands, 13 February 1984; **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994; **Exhibit R-012**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994.
[438] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994.
[439] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 234-235.

Response, the CSJ made crystal clear that the ruling could not confer Claimant any rights over the Galeón San José:[440]

> It is convenient to note that there is no evidence in the record that proves that the report made before the DIMAR by the Glocca Morra Company, whose rights it later transferred to the plaintiff and to which the present controversy is referred, actually corresponds to a specific or precise shipwrecked vessel and, much less, that it is inexorably or unfailingly the "Galeón San José. (Emphasis added) (Independent translation)

397. Moreover, the 2007 CSJ Decision limited any hypothetical property right to the coordinates contained in the 1982 Confidential Report, which, in its necessary interaction with the 1994 Press Release, further confirmed that Colombia had definitively defined Glocca Morra Company any property rights over the Galeón San José.

398. In sum, by 15 May 2012, Colombia had already unequivocally denied that SSA LLC's alleged predecessors had found the Galeón San José, had further stated that no shipwreck was found in the 1982 coordinates, and the 2007 CSJ Decision made clear that the proceedings were not concerned with the Galeón San José, meaning that the final decision could not confer any rights to SSA LLC's predecessors over the Galeón.[441]

ii. By Claimant's admission, on 7 December 2010 SSA LLC already had knowledge of the alleged unlawful expropriation and damage.

399. On 7 December 2010, SSA LLC filed a lawsuit against Colombia before the DC District Court[442] alleging the taking of its property rights over the Galeón San José without compensation.[443] Before the DC District Court, SSA LLC equated the rights recognized in the 2007 CSJ Decision with property rights over the Galeón San José and asserted that Colombia had completely deprived SSA LLC of its rights over the Galeón San José in the following terms:[444]

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[440] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 226.
[441] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 226.
[442] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, PDF p. 1.
[443] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010.
[444] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 94.

> By its actions, **Colombia has intentionally exercised dominion and control over SSA's chattels, and intentional dominion by Colombia so seriously interferes with SSA's right to control the chattels that SSA is deprived of its chattels.** (Emphasis added).

400. As can be seen from Claimant's own admission, in 2010 SSA LLC clearly stated that Colombia was exercising dominion and control over its chattels and that Colombia allegedly deprived it of its possessions. Importantly, the DC District Court emphasized that SSA LLC's case was that Colombia had acquired the property unlawfully, in which case "*a conversion claim accrues immediately.*"[445]

401. These issues constitute a clear characterization of an unlawful expropriation, thereby substantively overlapping with the standard of protection contained in Article 10.7 of the TPA.

402. Moreover, the US Civil Action shows that since 2010, SSA LLC not only had certainty of the damage or loss it could have incurred due to the alleged breach, but also quantified said damage between USD 4 billion to USD 17 billion.[446]

403. Before the DC District Court, Claimant expressly stated that "[s]pecifically, Colombia has refused to permit SSA to initiate salvage operations at the site and is therefore misappropriating SSA's property valued in the amount of $4 billion to $17 billion" (Emphasis added).[447]

404. Therefore, it is evident from Claimant's assertions that by 2010, SSA LLC already (i) should have known about the alleged wrongful expropriation of its alleged property rights over the Galeon San José, *quod non*, and (ii) knew about the alleged resulting damage or loss.

405. In conclusion, as soon as the TPA entered into force, SSA LLC should have known about Colombia's alleged expropriation breach under Article 10.7 of the TPA and damage. Since the three-year limitation period regarding the alleged breach of Article 10.7 of the TPA started to run on 16 May 2012, a day after the TPA entered into force, Colombia has not consented to arbitrate SSA LLC's expropriation claim.

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[445] **Exhibit R–019**, United States District Court for the District of Columbia. Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011, p. 7.
[446] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 88.
[447] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 88.

iii. In any case, by Claimant's admission, it knew or should have known about the alleged expropriation breach and the loss incurred on 26 November 2012.

406. On 29 March 2013, Claimant filed a petition before the IACHR alleging that Colombia had breached its rights to private property and judicial protection.[448] SSA LLC labeled and qualified Colombia's conduct regarding its alleged rights over the Galeón San José as an expropriation since it stated that Colombia (i) confiscated SSA LLC's private property, and (ii) did not recognize SSA LLC a fair compensation for said confiscation.[449] Claimant's petition before the IACHR read as follows:[450]

> Naturally, that extreme resistance to the exercise of such powers by the owner **implies the confiscation of private property without the payment of fair compensation. It implies the consequent violation of that other commitment acquired by the Colombian State through Article 21 of the American Convention on Human Rights, which states that "No person may be deprived of his property except upon payment of fair compensation, for a public purpose or social interest and in the situations and according to the forms established by law.** (Emphasis added)

407. SSA LLC stated in the petition that Colombia violated Article 21 of the ACHR regarding property rights. It is essential for the Tribunal to note that Article 21 of the ACHR, apart from having a similar wording and virtually the exact requirements as Article 10.7 of the TPA relating to expropriation, protects the right to property of both nationals and non-nationals as long as Those property rights fall under Colombia's jurisdiction. In fact, regarding the deprivation of property by a State, Article 21 of the ACHR states that:[451]

> No one shall 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. (Emphasis added)

408. If SSA LLC knew by 29 March 2013 of the alleged violation of Article 21 of the ACHR, it should have had knowledge of the alleged breach of Article 10.7 of the

[448] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, p. 1.
[449] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 36.
[450] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 36.
[451] **Exhibit RLA-025,** American Convention on Human Rights, Article 21.2.

TPA regarding unlawful expropriation, therefore, meeting the first criterion contained in Article 10.18.1 of the TPA.

409. According to the petition, Colombia's expropriation of SSA LLC's alleged rights over the treasure took place, at the latest, on 26 November 2012. Claimant argued before the IACHR that on 26 November 2012, Colombia notified SSA LLC of its intention to not comply with the 2007 CSJ Decision, which Claimant characterized as "**the notification of the definitive confiscation of its treasure, without payment of fair compensation**" (emphasis added).[452] SSA LLC also contended that after 26 November 2012, "*it was consummated the confiscation of the treasures the dominion of which by SSA was declared in the same judgment*" (emphasis added).[453]

410. Further, SSA LLC argued before the IACHR that they sued before the DC District Court "to be compensated for the damages caused by the opposition [from the Colombian Government] to SSA's access to its treasure."[454]

411. In conclusion, after the TPA entered into force, and as communicated in the 29 March 2013 petition, Claimant already knew or should have acquired knowledge of the alleged unlawful expropriation and breach of the TPA. By this date, Claimant also knew of the damage or loss incurred since it had already even quantified said damage before the DC District Court. SSA LLC knew of the alleged breach and had a degree of certainty over the correlated damages since, by its admission, Colombia had definitively confiscated its treasure, which meant a 100% loss over its alleged investment.

412. Since the two criteria of Article 10.18.1 of the TPA were met on 29 March 2013, Colombia did not consent to any expropriation claim brought by SSA LLC after 29 March 2016.

iv. In any event, at several instances between 2015 and 2018, Claimant knew or should have known of the alleged unlawful expropriation and resulting damage.

413. On 20 May 2015, SSA LLC sent Colombia's Minister of Culture a report summarizing its position regarding the interpretation of the 2007 CSJ Decision.

[452] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.
[453] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, pp. 10-11, ¶ 26.
[454] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, p. 18.

In the letter, SSA LLC recognized that the Colombian government's long-standing position had been that the 2007 CSJ Decision excluded the surrounding areas of the 1982 Confidential Report from its ruling.[455] Therefore, even if the plain text of the 2007 CSJ Decision had not been sufficient, SSA LLC expressly conceded that on 20 May 2015 it knew that Colombia only recognized property rights on the basis of the 2007 CSJ Decision in respect of assets located in the precise coordinates stated in the 1982 Confidential Report, where no shipwreck was identified.[456] Since SSA LLC and its alleged predecessor should have known that on 7 July 1994 Colombia explicitly denied that the Galeón San José was located in the coordinates stated in the 1982 Confidential Report, the alleged unlawful expropriation and alleged loss was made clear, at the latest, on that date.

414. In any case, on 5 December 2015, the President of Colombia publicly announced that an archaeological site corresponding to the Galeón San José had been found.[457] The announcement stated that the Colombian Government and international scientists had found the Galeón San José on 27 November 2015.[458] With the public announcement made by the Colombian government, SSA LLC should have acquired knowledge that Colombia denied that SSA LLC's alleged predecessors had found the Galeón San José and, accordingly, could not claim any property rights based on the 1982 Confidential Report.

415. Notwithstanding decades of consistent denial of property rights over the Galeón San José based on the 1982 Confidential Report, on 10 December 2015, SSA LLC sent a new letter to Colombia's President requesting access to the Galeón San José.[459] In response, on 17 June 2016, the Ministry of Culture replied making clear, once again, that SSA LLC did not have any rights over the Galeón San José.[460] The then Minister of Culture expressly stated, "*The Supreme Court of Justice's ruling is clear; it does not admit interpretations, and no alleged rights over the Galeón San José can be inferred from it, as you claim*."[461] Furthermore, the Ministry of Culture stated that the 2007 CSJ Decision did not confer Claimant

[455] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015.
[456] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015.
[457] **Exhibit C-37**, Statement by President Santos on the discovery of the San José Galleon, 5 December 2015, p.1.
[458] **Exhibit C-37**, Statement by President Santos on the discovery of the San José Galleon, 5 December 2015, p.1.
[459] **Exhibit C-38**, Letter from SSA to the President of Colombia, 10 December 2015.
[460] **Exhibit R–028**, Letter from the Minister of Culture to Sea Search Armada, 17 June 2016, p. 2.
[461] **Exhibit R–028**, Letter from the Minister of Culture to Sea Search Armada, 17 June 2016, p. 2.

any rights over areas different from the express coordinates stated in the 1982 Confidential Report.[462]

416. Even though Colombia had unequivocally reiterated to SSA LLC that Glocca Morra Company had not found the Galeón San José or any other shipwreck in the location identified in the 1982 Confidential Report and that, consequently, no property rights over the Galeón San José could be claimed based on the 1982 Confidential Report, on 4 November 2016 SSA LLC sent a new letter to the President of Colombia.[463]

417. On 30 November 2016, SSA LLC received an answer from the Minister of Culture reiterating Colombia's long-standing position denying SSA LLC any rights over the Galeón San José. The letter stated that no shipwreck was found in the coordinates reported in 1982 by SSA LLC's predecessors in the following way:[464]

> "On the other hand, **the Colombian Government has already verified the coordinates denounced in the confidential report submitted by Gloca Morra in 1982 and was able to verify that there is no trace of any shipwreck in that place**."
>
> […]
>
> Moreover, although the Colombian Supreme Court of Justice was obvious in affirming that the rights of Sea Search Armada were limited to the coordinates reported in the confidential report "without including, therefore, spaces, zones or diverse areas," **we can affirm without any doubt that in the areas described in the graphic provided in the confidential report, there is no vestige of any shipwreck either.** (Emphasis added) (Independent translation)

418. In said letter, the Ministry of Culture explicitly told SSA LLC that it did not have any type of right to claim 50% of the treasure of any shipwreck in the following way:[465]

> For this reason, 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**

[462] **Exhibit R–028**, Letter from the Minister of Culture to Sea Search Armada, 17 June 2016, p. 2.
[463] **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016.
[464] **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p. 1.
[465] **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p. 1.

the coordinates established in the confidential report. (Emphasis added).

419. After this letter, SSA LLC could not possibly have had any doubt on the fact that, based on the 1982 Confidential Report, Colombia had never recognized in its favor any rights over any shipwreck, let alone over the Galeón San José.

420. Even when Colombia's position regarding the fact that SSA LLC's predecessors had not found the Galeón San José and, therefore, did not have any rights over its treasure was clear, unequivocal, and reiterative, SSA LLC kept sending letters to the Colombian Government to claim alleged rights to which it was not entitled to. SSA LLC sent a new letter to the President on 23 November 2017.[466]

421. As a result, on 5 January 2018, the Ministry of Culture sent a letter again to SSA LLC, stating it had no rights whatsoever over the Galeón San José since its predecessors had not found the Galeón.[467] The Ministry of Culture stated that neither the DIMAR Resolutions nor the local courts had recognized SSA LLC any rights over the Galeón San José.[468] Additionally, the letter clearly stated that "*It is not understood how it can be argued and claimed that Sea Search Armada has any right over the Galeón San José*."[469] (emphasis added)

422. It is therefore clear that Claimant knew or should have known about the alleged unlawful expropriation and damage well before 18 December 2019.

v. In the alternative, Claimant knew or should have known of the alleged expropriation breach and the loss incurred by 17 June 2019.

423. In the remote event that the Tribunal does not find that by 2018, the two criteria for SSA LLC's expropriation claim to be time-barred were met, with the letter sent by Colombia's Vice-President on 17 June 2019, well before 18 December 2019, Claimant knew or should have known about the alleged unlawful expropriation and damage.

424. The letter sent by the Vice-President to SSA LLC unambiguously reminds SSA LLC that no property rights were ever recognized based on the 1982 Confidential

[466] **Exhibit R-037,** Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018, P. 1.
[467] **Exhibit R-037,** Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018.
[468] **Exhibit R-037,** Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018, p. 1.
[469] **Exhibit R-037,** Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018, p. 2.

Report. In the letter, the government reminded SSA LLC that it had no rights whatsoever over the Galeón San José since its predecessors had not found the Galeón.[470]

425. The letter reminded SSA LLC that, as soon as 1994, after the commission of the Columbus Report, the Colombian government had concluded and shared with Glocca Morra Company that no shipwreck was found in the 1982 coordinates. The Vice-President explicitly told SSA LLC the following:[471]

> 2. Regarding the verification of the coordinates reported in 1982, such a task was already carried out within the framework of contract No. 544 of 1993, the results of which led to the conclusion that in the site of the coordinates reported by Glocca Morra Company (today Sea Search), **there is NO shipwreck, much less any trace of the Galeón San José. Only a piece of wood was found at the site, which, after being examined, led to the conclusion that it did not belong to any shipwreck**.

426. The letter further communicated to SSA LLC that on 8 July 1994, Colombia's Presidency sent DIMAR a communication stating that "having explored the site of the coordinates supplied by the Nation to the contractor (SIC), the same coordinates received in 1982 from GLOCCA MORRA COMPANY INC (SEA SEARCH ARMADA), the government has concluded that no shipwrecked species exists there (and of course there is no trace of the Galeón San José)."[472]

427. The Vice-President further asserted the logical conclusion of Colombia's decades-long unequivocal statements regarding that no shipwreck was found in the 1982 coordinates provided by Glocca Morra Company. Namely, "***Sea Search Armada (SSA) has no right over the Galeón San José or its content because it is not located at the coordinates reported by that company***."[473] Additionally, the Vice-President questioned why SSA LLC kept pushing the exact same argument before the Colombian Government when Colombia had clearly conveyed that neither SSA LLC nor its predecessors had rights over the Galeón San José or any shipwreck since 1994.[474]

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[470] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.
[471] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 2.
[472] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 4.
[473] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 2.
[474] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 4 "Taking into account that the Colombian State verified several years ago the site of the coordinates denounced by Glocca Morra Company (today Sea Search Armada), concluding that in said coordinates there is NO shipwreck, your request is inadmissible. This has been communicated since 1994, so it is not understood the reason why this company insists on a claim without cause." **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 4.

428. If the Tribunal is not convinced that Colombia's acts before 17 June 2019 met the two criteria outlined in article 10.18.1 for a claim to be time-barred under the TPA, *quod non*, there is no question that the letter sent by the Vice-President on 17 June 2019 undoubtedly meets the two requirements, given that:

(i) First, the letter clearly states on multiple occasions that SSA LLC had no right over the Galeón San José or its content because the Galeon was not located at the coordinates reported by its predecessors in 1982. Therefore, SSA LLC's expectation of any right or expropriation claim regarding its alleged rights over the Galeón San José was definitely quashed or eviscerated, as Claimant alleges, with this letter.

(ii) Second, by 17 June 2019, SSA LLC had certainty of the loss incurred. As soon as the Colombian government stated that SSA LLC's predecessors had not found the Galeón San José, the fundamental requirement for accessing 50% of the treasure of the Galeón San José perished. Therefore, by 17 June 2010, SSA LLC's potential loss was not only certain but also fully quantified.

429. Since the two requirements of Article 10.18.1 of the TPA were unequivocally met after the 17 June 2019 communication, it is evident that any expropriation claim brought by SSA LLC after 17 June 2022, that is, after the three-year limitation period, is manifestly time-barred. Since SSA LLC filed its Notice of Arbitration on 18 December 2022, Colombia has not consented to arbitration regarding SSA LLC's expropriation claims under Article 10.7 of the TPA.

b. Colombia has not consented to arbitrate SSA LLC's claims concerning the alleged violation of Article 10.5 of the TPA regarding Fair and Equitable Treatment and Full Protection and Security.

430. SSA LLC argues that Colombia has allegedly breached its obligation to accord SSA Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS").[475] As stated by the Claimant in the Notice of Arbitration, "[b]*y 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 under DIMAR's authorizations and subsequent confirmation by the 2007 Supreme Court Decision*."[476] SSA LLC further argues that "*Colombia's conduct in issuing Resolution No. 0085 was also arbitrary, unreasonable and inconsistent as it contravened Colombia's position over the*

[475] Claimant's Notice of Arbitration, ¶ 80.
[476] Claimant's Notice of Arbitration, ¶ 80.

last four decades that the shipwreck was "treasure" and subject to a 50/50 apportionment with the discoverer."[477] Additionally, Claimant argues that Colombia allegedly issued Resolution No. 0085 without sufficient due process guarantees and deprived SSA of its rights to its discovery.[478] SSA LLC also stated that Colombia's conduct following the issuance of Resolution No. 0085 was presumably arbitrary because it ignored and failed to follow its own court orders.[479]

431. As shown below, Claimant knew or should have known about the alleged breach to the FET standard well before 18 December 2019 and, in any case, Resolution No. 0085 is immaterial.

432. As shown below, Claimant should have known about the alleged breach of the FET and FPS standards before 18 December 2019. First, even admitting the FET standard includes investor's legitimate expectation under Article 10.5 of the TPA, *quod non*, as soon as the Colombian government reiterated to SSA LLC that neither it nor its alleged predecessors had found the Galeón, any legitimate expectation regarding property rights over the Galeón San José ceased to exist.[480] This alleged change of Colombia's position regarding SSA LLC's alleged rights over 50% of the treasure of the Galeón San José took place as early as 1994 and by 17 June 2019 at the latest, thereby falling outside of the time limitation period.[481]

433. Therefore, Resolution No. 0085 had no impact on SSA LLC's rights since the object of Resolution No. 0085 is the Galeón San José. By then (i) it was clear that SSA LLC had no rights over the Galeón San José because its predecessors had not found it and (ii) Colombia had communicated on several occasions to SSA LLC and its predecessors that it did not recognize any rights over the Galeón before 18 December 2019. Contrary to Claimant's assertions, Colombia's conduct in issuing Resolution No. 0085 was consistent with Colombia's decades-long reiterated position that SSA LLC's predecessors have not found the Galeón. Additionally, Resolution No. 0085 did not modify at all SSA LLC's standing regarding its non-existing rights over the Galeón San José.

[477] Claimant's Notice of Arbitration, ¶ 81.
[478] Claimant's Notice of Arbitration, ¶ 81.
[479] Claimant's Notice of Arbitration, ¶ 82.
[480] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 2.
[481] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994; **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.

434. Claimant argues that Colombia allegedly issued Resolution No. 0085 without sufficient due process guarantees and deprived SSA of its rights to its discovery.[482] This statement is a blatant lie. Colombia issued Resolution No. 0085 following its domestic law and due process guarantees. Claimant has not provided a single exhibit or argument to sustain this claim in either the Notice of Arbitration or in Claimant's Response. Nevertheless, it is crucial to highlight to the Tribunal that, as stated before, Resolution No. 0085 is immaterial for SSA LLC's claims regarding its alleged rights over the Galeón San José.[483]

435. Second, as will be shown, Colombia's actions were not arbitrary, as stated by the Claimant,[484] because Colombia always acted following its courts' decisions and compliant with the express requirements outlined in the 2007 CSJ Decision for SSA LLC's predecessors to have any right over 50% of a treasure.[485]

i. Claimant knew or should have known of the alleged FET and FPS and its consequent alleged loss or damage as soon as the TPA entered into force on 15 May 2012.

436. As soon as the Colombian government issued the 1994 Press Release stating that Glocca Morra Company found no shipwreck, Colombia frustrated any legitimate expectation SSA LLC's predecessors could have regarding its 50% ownership rights to its discovery and to any alleged property rights over the Galeón San José.[486]

437. The 2007 CSJ Decision further confirmed that the 1994 Press Release unequivocally crystallized the alleged evisceration of any rights SSA LLC's predecessors could have over the Galeón San José.[487] Said Decision also crystallized any alleged arbitrariness by the Colombian government, *quod non*, that resulted from the deviation from DIMAR's alleged acceptance that Glocca Morra Company had rights over a shipwreck.[488]

438. As early as 2010, Claimant had already alleged that Colombia acted arbitrarily before the DC District Court. Section B of SSA LLC's submission was titled

[482] Notice of Arbitration, ¶ 81.
[483] See **Section II.M.**
[484] Claimant's Notice of Arbitration, ¶ 82.
[485] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.
[486] **Exhibit R-011**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994,
[487] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 227.
[488] **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007.

"*Chronology of Colombia's Bad Faith Actions Against SSA: 1980-2010.*"[489] In that section, SSA LLC claimed that since 18 July 1982, the government of Colombia started "*to surreptitiously develop a scheme to take over the properties of the American investors without losing the support of the US Government*."[490]

439. In the Civil Action, SSA LLC additionally stated that by 21 September 1984, "the GOC's bad faith offer in light of its legal research, which was known to SSA, became a serious concern, particularly given the GOC stalling tactics that had extended the negotiation for months. SSA worried the GOC would take SSA's entire share in the manner of a Banana Republic."[491] Further, SSA LLC raised different claims regarding alleged corruption by the Colombian Government[492] and claims that Colombia was favoring third parties of different nationalities.[493] SSA LLC also questioned the impartiality of Colombian courts regarding SSA LLC's alleged rights[494] and the fact that "Colombia ha[d] even gone so far to threaten military intervention if SSA attempt[ed] to initiate salvage operations."[495]

440. In Claimant's Response, SSA LLC states that "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. Thus, given the lack of Colombia's transparency and inconsistencies, there was no reason for SSA to take Colombia's assertions at face value."[496] Colombia's rejection of the joint verification happened shortly after the 2007 CSJ Decision and, therefore, clearly fall outside the time-limitation period.

441. As soon as the TPA entered into force on 15 May 2012, SSA LLC knew about Colombia's alleged breach of the FET and FPS provisions. In fact, before the DC District Court, Claimant argued that Colombia acted (i) in an arbitrary manner; (ii) in a corrupt manner; (iii) in violation of SSA LLC's alleged predecessor's

[489] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010.
[490] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 20
[491] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, para. 23.
[492] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, paras. 27, 56, 72.
[493] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, paras. 27, 30, 31.
[494] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, para. 82.
[495] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, para. 79.
[496] Claimant's Response, ¶ 272.

supposed property rights over the Galeón San José; (iv) disregarding their own courts' decisions, (v) favoring investor from other nationalities and Colombian nationals, and (vi) threatening SSA LLC's predecessor with the use of force against them. Further, Claimant knew such behavior allegedly caused it damage, which it described and calculated in USD 17 Billion. Consequently, SSA LLC's FET and FPS claims are time-barred since 15 May 2015.

ii. In the alternative, Claimant knew or should have known of the alleged FET and FPS breaches and their consequent alleged loss or damage by 17 June 2019.

442. As early as 2013, SSA LLC stated in the petition filed before the IACHR that Colombia had acted arbitrarily.[497] SSA LLC further stated that Colombia did not comply with the 2007 CSJ Decision because of corruption from Colombia's government.[498] Furthermore, SSA LLC argued that Colombia had acted in bad faith:

> The **bad faith** in this last and definitive manifestation of rebellion against the judgment of the Supreme Court is evidenced if one takes into account that the judgment was issued on 5 July 2007, and the lawsuit before the Federal Court of Appeals of the District of Columbia was filed on 6 December 2010, **3 years and 5 months after**, during which no judicial process was conducted.[499]

443. Moreover, regarding the alleged corruption arguments, SSA LLC argued that for 30 years, SSA LLC had been fighting the corruption that was stripping SSA LLC of its alleged property rights in the following way:[500]

> But the corruption that has been fighting for the past 30 years to strip SSA of its treasures managed once again to change the course of things. Its treasures managed once again to change the course of things. Once again, returning to its excuses and pretexts, on November 26, 2012, the Republic of Colombia definitively rejected its access to the shipwreck in any form.

444. Hence, before the IACHR, SSA LLC claimed that the supposed evisceration of its legitimate expectations over its property rights over the treasure, *quod non*, occurred in 2012. SSA LLC also stated that Colombia's supposed repudiation of

[497] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, pp. 10-11, ¶ 26.
[498] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, pp. 10-11, ¶ 26.
[499] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, pp. 10-11, ¶¶ 26, 38.
[500] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, pp. 10-11, ¶ 38.

the 2007 CSJ Decision resulted from an alleged arbitrariness in the form of State corruption and bad faith.[501]

445. Moreover, as has been already discussed, on 30 November 2016 and 17 June 2019, SSA LLC received letters from Government officials reiterating Colombia's long-standing position denying SSA LLC any rights over the Galeón San José.[502]

446. By the latest, on 17 June 2019 SSA LLC should have known that any expectation it had regarding property rights over the Galeón San José had no basis, and by that time Claimant was fully aware of Colombia's supposed arbitrary actions that deprived SSA LLC of its alleged investment.[503] Furthermore, since before the DC District Court Claimant had already pleaded arbitrariness as a result of Colombia's actions and claimed USD 17 billion in damages, Claimant was fully aware of the damage or loss it could have incurred due to Colombia's alleged arbitrary conduct.[504]

447. Since the two requirements of Article 10.18.1 of the TPA were unequivocally met after the Vice-President's 17 June 2019 communication, it is evident that any FET or FPS claim brought by SSA LLC after 17 June 2022, that is, after the three-year limitation period, is manifestly time-barred. Since SSA LLC filed its Notice of Arbitration on 18 December 2022, Colombia has not consented to arbitration regarding SSA LLC's FET and FPS claims under Article 10.7 of the TPA.

c. Colombia has not consented to arbitrate SSA LLC's claims concerning the alleged violation of Article 10.3 and 10.4 concerning the National Treatment and Most-Favored Nation standards.

448. Regarding the alleged violation of the NT and FET clauses, SSA LLC only states that Colombia allegedly breached those obligations "*by singling SSA out and expressly and intentionally seeking to undermine it while favoring other domestic and foreign investors*."[505] Further, SSA LLC claimed in the Notice of Arbitration

[501] **Exhibit R-021**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 38.
[502] **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016; **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.
[503] **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019.
[504] **Exhibit R-018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 89-94.
[505] Claimant's Notice of Arbitration, ¶ 85.

that in 2022, "*Colombia claimed to have engaged other operators to search precisely the same coordinates that had been reported in the 1982 Report*."[506]

449. In 2015, the President of Colombia announced that Colombia found, alongside international scientists, the Galeón San José.[507] Hence, it is false that by 2022, Colombia had engaged operators to search for the Galeón in the coordinates of the 1982 Confidential Report, as stated by SSA LLC.[508]

450. As will be shown below, as soon as the TPA came into force, SSA LLC should have known about Colombia's alleged favoring of domestic and foreign investors. Furthermore, without a doubt, after 17 June 2019, SSA LLC should have known, with certainty, that Colombia recognized operators from a different nationality had found the Galeón San José. Therefore, any claims regarding MFN and NT brought by SSA LLC after 17 June 2022 are clearly time-barred.

i. Claimant knew or should have known of the alleged NT and MFN breach as soon as the TPA entered into force on 15 May 2015.

451. As early as 2010, before the DC District Court, SSA LLC had already argued that Colombia favored third parties of different nationalities and its own nationals over SSA Cayman Islands. Claimant stated before the DC District Court that favoring investors from other nationalities started when Colombia's government began negotiations regarding the identification of the Galeón San José with other parties before 1987.[509]

452. Before the DC District Court, SSA LLC alleged that between March 27 and 28, 1987, "Secret meetings between Swedish business interests and the GOC were held at the Presidential retreat near Cartagena."[510] SSA LLC further argued that "the Cartagena meetings resulted in a covert agreement to award the contract to Swedish businessmen following a charade of inviting and evaluating bids from

[506] Claimant's Notice of Arbitration, ¶ 85.
[507] **Exhibit C-37**, Statement by President Santos on the discovery of the San José Galleon, 5 December 2015.
[508] Claimant's Notice of Arbitration, ¶ 85.
[509] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶¶ 27, 30, 31.
[510] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 27.

several unsuspecting sovereign nations."[511] SSA LLC went as far as to say that "Payoffs to influential Colombians was assured by the Swedish businessmen."[512]

453. Additionally, in the US Civil Action, SSA went as far as to state that one of the tasks of a member of Colombia's Antiquities Commissions was to "*solemnize the corrupt deal with Swedish businesses by declaring the faux "Government of Sweden" the winner of a competitive bidding process*."[513] Regarding the alleged agreement with the Swedish enterprise, SSA LLC argued that the Government of Colombia was going to charge the Swedish company with "commissions" in the following way:[514]

> The Swedish share would be significantly reduced by the "commissions" it would pay to influential Colombians and by the payment of SSA's finder's fee of 5%, **increasing the GOC's share further**. By shifting payment of the finder's fee entirely to the Swedes, the GOC also provided an adverse incentive to the Swedes to find or invent a reason not to pay the Americans. **The deal with Swedish businesses again betrays the GOC's nose for profits regarding the San José**. (Emphasis added)

454. In Claimant's response, SSA LLC states that Colombia began courting various states to enter into a contract for recovering the Galeón San José as soon as 1987.[515] Claimant states that Colombia courted Sweden, Brazil, Norway, and Japan, among others, to conclude a Government-to-Government contract to "*search for and recover the Spanish treasureship [sic] 'San José'*."[516]

455. Further, SSA LLC admits that on 17 July 1988, the Colombian Government entered into a MoU with the Swedish government to recover the Galeón San José. This shows that SSA LLC and its predecessors had complete knowledge of Colombia's alleged favoring of nationals of other nationalities and nationals of its own to the detriment of SSA LLC's predecessors' interests, *quod non*, before the TPA entered into force.

456. As can be seen, it is clear that by 15 May 2012, SSA LLC had (i) knowledge of Colombia's alleged breach of the MFN and NT clause and (ii) knowledge of the

[511] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 27.
[512] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 27.
[513] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 30.
[514] **Exhibit R–018**, Sea Search Armada's Claim against Colombia before the District of Columbia Court. Civil Action No. 1:10-cv-02083, 7 December 2010, ¶ 31.
[515] Claimant's Response, ¶ 65.
[516] Claimant's Response, ¶ 65.

alleged damage since it included in the lawsuit the favoring of Colombia's own nationals and third parties of different nationalities and quantified all the damages in USD 17 billion.

ii. In the alternative, Claimant knew or should have known of the alleged MFN and NT claims and the consequent alleged loss or damage by 17 June 2019.

457. As a matter of fact, on 19 November 2015, SSA LLC informed the Minister of Culture that it was inevitable for alleged new disputes to arise, given the Government's negotiations with third parties to salvage the treasure.[517] In the letter, SSA LLC stated that "*as soon as the secret identity of the third party with whom it plans to contract the ransom is made public, SSA will take the appropriate legal action against those who intend to appropriate what belongs to it by court order*."[518] Additionally, per Claimant's admissions, "*On 27 November 2015, a third party hired by Colombia purported to discover the San José shipwreck, which Colombia announced on 5 December*."[519] It is clear that by 2015, after the entry into force of the TPA, SSA LLC knew about the alleged breach MFN and NT breach that is now claiming.

458. Further, on 5 December 2015, the President of Colombia publicly announced that, on 27 November of that same year, an archaeological site corresponding to the Galeón San José had been found with the help of "*international scientists*."[520]

459. Additionally, on 17 June 2019, the Vice President of Colombia replied to SSA LLC's proposal to find a consensual solution regarding the 2007 CSJ Decision. In its communication, it once again reminded SSA LLC of the two conditions clearly established by in 2007 CSJ Decision and of the results of the Columbus Report, therefore reiterating what had been Colombia's consistent position that SSA LLC had no right over the Galeón San José.

460. Further, the Vice-President informed SSA LLC that:

> According to the Dimar certification attached to this document, **the coordinates reported by Maritime Archaeology Consultants Switzerland (MACS) do not correspond to those reported by Glocca**

[517] **Exhibit R–027**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015.
[518] **Exhibit R–027**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015.
[519] Claimant's Response, ¶ 120.
[520] **Exhibit C-37**, Statement by President Santos on the discovery of the San José Galleon, 5 December 2015.

Morra Company and do not overlap with these coordinates". (Emphasis added) (Independent translation)

461. As can be seen, by the latest on 17 June 2019, SSA LLC could have known that Colombia allegedly singled "*SSA out and expressly and intentionally seek[ed] to undermine it while favoring other domestic and foreign investors*."[521] Therefore, SSA LLC should have known about the alleged MFN and NT claims by the latest on 17 June 2019. Further, on the same date, SSA LLC knew clearly about the damage that the alleged MFT and NT claims entailed.

462. If Colombia recognized a company from another nationality as the one who discovered the Galeón San José, it was clear that such recognition would deem moot any alleged rights the SSA LLC had over the Galeón, *quod non*. Hence, as the criteria of Article 10.18.1 of the TPA are fully met, Colombia has not consented to any MFN or NT claim brought by SSA LLC after 17 June 2022. Since SSA LLC filed its Notice of Arbitration on 18 December 2022, SSA LLC's MFN and NT claims are time-barred.

3. Resolution No. 0085 is immaterial vis-à-vis Claimant.

463. In light of the above, it is completely untrue that before Resolution No. 0085, "*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*"[522].

464. On the contrary:

(i) There is no doubt that, well before 23 January 2020, SSA LLC knew or should have known the alleged unlawful expropriation of its alleged property rights over the Galeón San José had perfected. As early the 1994 Press Release, Colombia made clear, based on scientific evidence that assess the 1982 Confidential Report, that Glocca Morra Company had not found the Galeón San José. Moreover, as early as 7 July 2007, the CSJ made clear that no property rights could be claimed over the Galeón San José based on the 1982 Confidential Report. But even if the 2007 CSJ Decision is construed as the basis of the alleged property rights over the Galeón San José, said judgment made clear that any property rights were contingent on the assets being located on the precised coordinates of the 1982 Confidential Report. The interaction of the 2007

[521] Claimant's Notice of Arbitration, ¶ 85.
[522] Claimant's Response, ¶ 269.

CSJ Decision and the 1994 Press Release is thus clear: after 2007, SSA Cayman Islands was made aware, and should have known SSA LLC, that no property rights could be claimed over the Galeón San José based on the 1982 Confidential Report.

(ii) Finally, through express admission by Claimant, the alleged unlawful expropriation and several alleged instances of arbitrariness, including violations of the non-discrimination standard crystallized well before 18 December 2019, all with the alleged purpose of denying Claimant's allege property rights over the Galeón San José.

465. In short, this means that Resolution No. 0085, dated 23 January 2023 and strictly concerned with the Galeón San José, could not have had any bearing *vis-à-vis* Claimant.

V. THE TRIBUNAL SHALL AWARD SECURITY FOR COSTS

466. Respondent hereby reiterates its request for security for costs,[523] considering that such request is fully compliant with the requirements enshrined in Article 26(3) of the UNCITRAL Arbitration Rules. As it will be explained throughout this section: (i) Respondent's right to an enforceable award on costs is likely to be impaired by the fact that Claimant is advancing its case through third-party funding, and the lack of certainty as to whether the funding agreement covers a potential award on costs in Respondent's favor; (ii) the harm faced by Respondent substantially outweighs the harm -if any- that is likely to result to Claimant if security for costs is granted, and (iii) there is a reasonable -and feasible- possibility that Colombia's jurisdictional objections will succeed. In this context, Colombia is entitled to an assurance that an award on costs in its favor will be covered by Claimant, who is not even paying for its own costs in this case.

467. As previously recognized by investment tribunals,[524] Article 26(3) of the UNCITRAL Arbitration Rules provides arbitral tribunals constituted under the UNCITRAL Arbitration Rules with the necessary authority to grant interim measures in the form of security for costs:

> 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
>
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

468. Tribunals have also consistently recognized parties' right to an enforceable order for costs, should they ultimately prevail and be awarded costs.[525]

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[523] See Colombia's Article 10.20.5 Submission, Section VI.

[524] **Exhibit RLA-043,** *Domingo García Armas, Manuel García Armas, Pedro García Armas and others c. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision regarding Respondent's request for provisional measures, 20 June 2018, ¶ 186.

[525] **Exhibit RLA-044,** *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, ¶ 40; **Exhibit RLA-045,** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No.

469. However, in the case at hand, Respondent's inherent procedural right to recover the costs of the arbitration is likely to be impaired in face of Claimant's disclosure according to which: (i) Claimant's Counsel was engaged to represent SSA LLC under a contingency fee arrangement;[526] (ii) Claimant's Counsel entered into the Financing Facility Agreement with a third-party "*in order to offset contingency fee agreements entered into by the firm, like the one in this case*",[527] and (iii) Claimant's reluctance to disclose whether the Financing Facility Agreement includes the funder's obligation to cover a potential adverse decision on costs.[528]

470. The fact that SSA LLC engaged its counsel on a contingency fee arrangement and that, in order to offset such arrangement, Claimant's Counsel entered into the Financing Facility Agreement, necessarily implies that Claimant's case is funded by a third-party.

471. Although Claimant contends that "*the contingency fee arrangement between SSA and Gibson Dunn does not constitute third-party funding within the meaning of Section 4.4 of the Terms of Appointment*",[529] the whole arrangement through which Claimant is funding its case does qualify as third-party funding, which in turn has been considered by Tribunals as a relevant criterion to grant security for costs.

472. The *IBA Guidelines of Conflicts of Interest in International Arbitration* defines "*third-party funder*" as any person or entity that contributes with funds or any other material support to the prosecution or defense of a case and that has an economic interest in the outcome of the proceedings, regardless of whether the agreement -through which the contribution with funds or material support is provided- is entered into by Claimant itself or its counsel:[530]

> For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶ 71; **Exhibit RLA-046,** *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/05, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶ 60.

[526] **Exhibit R-039**, Email from Gibson Dunn to the Tribunal, 21 September 2023.
[527] **Exhibit R-039**, Email from Gibson Dunn to the Tribunal, 21 September 2023.
[528] **Exhibit R-040**, Email from Gibson Dunn to the Tribunal, 9 October 2023.
[529] **Exhibit R-039**, Email from Gibson Dunn to the Tribunal, 21 September 2023.
[530] **Exhibit RLA-048.** The IBA Guidelines of Conflicts of Interest in International Arbitration, pp. 14-15.

473. The same approach was adopted in *the Report of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration*, which defines third-party funding as:[531]

> an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,
>
> (a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
>
> (b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute or provided through a grant or in return for a premium payment.

474. It must be noted that none of these definitions determine that, in order to qualify as third-party funding, the relevant agreement must be entered into directly by Claimant. The common and relevant factors to qualify as such are: (i) the existence of a third-party; (ii) a contribution of funds or other material support to the prosecution or defense of the case by the third-party, and (iii) a direct economic interest on the outcome of the proceedings by the third-party.

475. In the case at hand, Claimant's statement according to which the Financing Facility Agreement seeks to "*offset*" the contingency fee arrangement with its counsel necessarily and undoubtedly implies that the Financing Facility Agreement with a third party is the source of the funds through which Claimant is advancing its case and that -irrespective of Claimant's failed attempt to deny it- this is a case of third-party funding.

476. The undisputed fact that Claimant is advancing its case through third-party funding, is reinforced by the fact that top-tier firms as Gibson Dunn & Crutcher LLP take over and assume the costs arising from a US$ 10 billion case under a contingency fee arrangement, when they have secured through third parties the funds to cover such expenses.

477. That said, it is also undisputed that third-party funding has been considered by investment arbitration tribunals as a relevant criterion when deciding on States'

[531] **Exhibit RLA-047,** *REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION*, April 2018, p. 50.

application for security for costs.[532] For instance, the Tribunal in *García Armas v. Venezuela* determined that:[533]

> 197. Likewise, the Claimants have insisted, both in their presentations prior to the issuance of PO6 and PR5 and those submitted subsequently, that the issue of their solvency is irrelevant to the decision on the Guarantee. The Tribunal would like to recall that this position has also been rejected in its PO6 and PR5. **Naturally, when what is being discussed is the possibility of the respondent State of executing an award to recover its representation costs, the solvency of the person who must comply with that eventual award is of fundamental importance; especially when there is a third-party funder taking charge of all the costs of the proceedings, but without securing any award on costs**.
>
> […]
>
> 199. **The truth is that, even those decisions that have established that the issues of third-party funding and financial difficulties of the claimants do not constitute *per se* grounds for the granting of security for costs, at the same time they have recognized (contrary to what Claimants contend), to a greater or lesser extent, that these considerations are relevant to the analysis.** (Emphasis added) (Independent translation)

478. Moreover, the fact that third-party funding agreements do no cover potential adverse awards on costs has been considered a circumstance likely to undermine respondents' right to enforce an order for costs, and a critical and decisive factor in tribunals' decision to grant security for costs, as it was the case in *Dirk Herzig v. Turkmenistan*:[534]

> **The question the Tribunal must decide in the instant case is the import of a third factor beyond impecunity and third-party funding – the explicit non-liability of the third-party funder for a costs award adverse to its funded party.** This presents a more extreme situation here:

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[532] **Exhibit RLA-043,** *Domingo García Armas, Manuel García Armas, Pedro García Armas and others c. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision regarding Respondent's request for provisional measures, 20 June 2018, ¶ 199; **Exhibit RLA-054,** *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 (Interim Measures), 27 February 2020, ¶¶ 109-110; **Exhibit RLA-049,** *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, ¶¶ 9-10; **Exhibit RLA-050,** *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's request for security for costs and the Claimant's request for security for claim, 27 January 2020, ¶ 57.

[533] **Exhibit RLA-043,** *Domingo García Armas, Manuel García Armas, Pedro García Armas and others c. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision regarding Respondent's request for provisional measures, 20 June 2018, ¶¶ 197, 199.

[534] **Exhibit RLA-050,** *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's request for security for costs and the Claimant's request for security for claim, 27 January 2020, ¶ 57.

> Dr Herzig is (i) representing Unionmatex as a bankrupt, (ii) relying on third-party funding from La Française, and (iii) **La Française is expressly not liable under the funding contract for an ultimate award of costs in Turkmenistan's favor**. (Emphasis added)

479. The contingency fee arrangement between Claimant and its counsel is a clear and unequivocal indication of Claimant's inability to cover an eventual award on costs in Colombia's favor, considering that Claimant is not even paying for its counsel's fees. This circumstance, along with the absolute lack of certainty as to whether the Financing Facility Agreement covers a potential adverse award on costs, necessarily implies that Respondent is likely to be deprived from recovering the costs incurred in this proceeding.

480. The lack of guarantee of claimant's ability to pay an eventual and adverse award on costs was indeed considered by the Tribunal in *García Armas v. Venezuela* as a circumstance under which respondent was likely to face harm not adequately reparable by an award of damages under the terms of Article 26(3) of the UNCITRAL Arbitration Rules:[535]

> Likewise, the recovery of representation costs is materialized, naturally, through compensation in the form of a hypothetical award ordering Claimants to pay costs. But **if there is no guarantee that Claimants will have the means to pay an eventual award ordering them to pay costs or assets against which said award can be enforced, compensation would be of no use to the Respondent**. Therefore, it is evident that the damage that would be caused to the Respondent is one that cannot be adequately compensated through compensation. (Emphasis added) (Independent translation)

481. The Tribunal in *García Armas v. Venezuela* further acknowledged the risk faced by respondent states of not being able to enforce a favorable award on costs in cases of third-party funding and, in this context, the relevance of obtaining some sort of guarantee[536], which in this case is also non-existent:

> 235. Likewise, **the tribunal in Eskosol v. Italy accepted the premise that respondent States have genuine concerns regarding their ability to enforce favorable awards.** Although the tribunal ended up not granting the requested guarantee in that case, it did so, among other things, because the third-party funder, financing a claimant subject to bankruptcy proceedings,

[535] **Exhibit RLA-043,** *Domingo García Armas, Manuel García Armas, Pedro García Armas and others c. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision regarding Respondent's request for provisional measures, 20 June 2018, ¶ 226.
[536] **Exhibit RLA-043,** *Domingo García Armas, Manuel García Armas, Pedro García Armas and others c. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision regarding Respondent's request for provisional measures, 20 June 2018, ¶ 236.

> had assisted the claimant in obtaining an insurance policy "after the event", the specific purpose of which was to protect claimant from the risk of an adverse cost order. Precisely, that is what the Guarantee would seek to protect in this case. (Emphasis added) (Independent translation)

482. With respect to the proportionality of Respondent's request for security for costs, it is not likely that Claimant -unlike Respondent- might suffer any harm resulting from said measure. It is a proven fact that Claimant is not bearing the costs of this proceeding; therefore, although Respondent's request for security for costs might result in the need for Claimant to secure funds for said purpose, this does not impede or hinder in any way its access to the TPA's adjudication system, and Claimant has not proven otherwise. By contrast, Respondent's likeliness of not being able to recover an award on costs is certain, based on the proven fact that Claimant is pursuing its claim through third-party funding and its reluctance to disclose the terms of the Financing Facility Agreement regarding an adverse award on costs.

483. Furthermore, as required by Article 26(3) of the UNCITRAL Arbitration Rules, there is a reasonable possibility that Respondent's jurisdictional objections will succeed. Although Colombia's jurisdictional objections are fully substantiated, it must be recalled that, for the purposes of this determination, the Tribunal must simply verify that a reasonable case has been made, if the facts alleged are proven, as stated by the Tribunal in *Paushok v. Mongolia*:[537]

> at this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal.

484. In the same vein, the Tribunal in *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* determined that it suffices that Respondent's position is at least plausible. In other words, that a future claim for cost reimbursement is not evidently excluded,[538] which is in fact Respondent's case.

485. Therefore, contrary to Claimant's assertions in its Response, Respondent's request for security for costs is fully compliant with the requirements envisaged

[537] **Exhibit RLA-051,** *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL arbitration, Order on Interim Measures, 2 September 2008, ¶ 55.
[538] **Exhibit RLA-052,** *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucía's Request for Security for Costs, 13 August 2014, ¶ 74.

in Article 26(3) of the UNCITRAL Rules and falls within those circumstances in which former investment tribunals constituted under said rules have granted security for costs in Respondent's favor. As it was previously explained, Respondent's right to an enforceable award on costs is likely to be impaired by the undisputable fact that Claimant is advancing its case through third-party funding, together with the lack of certainty as to whether the Financing Facility Agreement covers an award on costs in Respondent's favor. It must be recalled that investment arbitration tribunals have previously considered such circumstance as one of those under which security for costs is appropriate.

486. In light of the above, Respondent respectfully requests the Tribunal that, pending its decision on jurisdiction, order Claimant to post security for costs in the amount of no less than USD $800,000 to cover a potential award on costs in favor of the Republic of Colombia, which are to be deposited in an escrow account or provided as an unconditional and irrevocable bank guarantee, or as the Tribunal deems appropriate in light of the circumstances underlying Respondent's request.

VI. PRAYER FOR RELIEF

487. Colombia respectfully requests the Tribunal to:

(i) Declare that it lacks jurisdiction over all of the claims submitted by Sea Search Armada, LLC.

(ii) Order Sea Search Armada, LLC to bear all the costs of this arbitration, including legal fees assumed by the Republic of Colombia.

(iii) Order that, pending its award on jurisdiction, Sea Search Armada LLC, post security for costs in the amount of no less than USD 800,000 to cover a potential award of costs in favor of the Republic of Colombia, and to be deposited in an escrow account or provided as an unconditional and irrevocable guarantee or as the Tribunal deems appropriate in light of the circumstances underlying Respondent's request.

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