PCA Case No. 2023-37

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

SEA SEARCH-ARMADA, LLC

Claimant

and

THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA

Respondent

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

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I. INTRODUCTION

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

2. This case arises from the Republic of Colombia's ("**Colombia**" or the "**Government**" and, together with SSA, the "**Parties**") evisceration of SSA's investment, by issuing a resolution that retroactively recharacterized the treasure in the San José shipwreck as public property, which in turn stripped SSA's rights of any value. The basic facts will now be familiar to the Tribunal. In the early 1980s, SSA's corporate predecessors, Glocca Morra Company Inc. ("**GMC Inc.**"), Glocca Morra Company ("**GMC**") and Sea Search Armada Limited Partnership ("**SSA Cayman**") (individually, "**SSA's Predecessor**" and together "**SSA's Predecessors**"), searched for, found, reported and verified that they had discovered the San José shipwreck. After discussions between SSA's Predecessors and Colombia for a contract to salvage the San José stalled, SSA's Predecessor pursed its rights in court. In 2007, the Colombian Supreme Court ("**Supreme Court**") confirmed ("**2007 Supreme Court Decision**") that SSA's Predecessor had rights to 50% of the treasure in the area ("**Discovery Area**") SSA's Predecessor had reported to Colombian authorities in 1982 ("**1982 Report**"). In parallel, SSA's Predecessor also secured an injunction from Colombian courts prohibiting Colombia from taking any steps to interfere with the shipwreck in the Discovery Area ("**Injunction Order**").

3. SSA Cayman sold its rights to SSA in 2008 pursuant to an Asset Purchase Agreement ("**APA**"). SSA tried to salvage the San José but, facing resistance from Colombian

[1] Unless defined herein, this submission uses the same defined terms as those in its Notice of Arbitration and Statement of Claim, dated 18 December 2022 ("**Notice of Arbitration**") and Claimant's Response to Colombia's Preliminary Objections, dated 20 September 2023 ("**SSA's Response**").

authorities, had to initiate foreign legal proceedings to try to enforce the 2007 Supreme Court Decision. SSA terminated these proceedings once Colombia agreed to reengage in discussions with SSA. While these discussions were ongoing, however, Colombia secured another contractor, Maritime Archaeology Consultants Limited ("**MAC**"), to re-locate the San José. And indeed, in 2015, Colombia found the San José within the Discovery Area.

4. However, the Injunction Order, which was still in place, forced Colombia to contend with SSA's rights to the San José. Colombia tried but failed to permanently vacate the Injunction Order, and in 2019, the Colombian court reinstated it in SSA's favor. SSA wrote to the Colombian authorities noting that it would now take steps to enforce the Injunction Order before Colombian Courts. In response, on 23 January 2020, Colombia issued Resolution No. 0085 ("**Resolution No. 0085**"), declaring that none of the San José shipwreck constituted treasure, and thus none of it could be owned by SSA. With this single resolution, Colombia completely destroyed SSA's investment. On this basis, SSA initiated this arbitration ("**Arbitration**") on 18 December 2022.

5. On 22 July 2023, Colombia filed Preliminary Objections before this Tribunal pursuant to Article 10.20.5 of the TPA. The Parties do not dispute that Article 10.20.5 provides for an expedited process to resolve jurisdictional objections, which is not meant to be a "*mini trial.*"[2] In fact, Article 10.20.5 expressly stays any deliberations on the merits. Accordingly, the Parties appear to agree that should the Tribunal consider facts related to the merits of the proceedings, it should address them only on a *prima facie* basis. Colombia accepts that the Tribunal has the discretion to adopt this standard of review under the United Nations Commission on International Trade Law Arbitration Rules (2021) ("**UNCITRAL Rules**"), and also accepts that the *prima facie* standard requires the Tribunal to defer to SSA's articulation of the facts related to the merits unless SSA's claims are "*frivolous*" or Colombia has "*conclusively*" disproven SSA's claims.[3]

6. Colombia's objections, particularly under the applicable standard of review, are easily

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[2] **Exhibit CLA-25**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 112 ("*Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, . . . it is clear that* ***an expedited preliminary objection is not intended to lead to a 'mini-trial.'***").

[3] Colombia's Reply, ¶ 184.

dismissed.

7. Colombia's first objection is that SSA is not a protected investor under the TPA. But Colombia does not appear to dispute that (i) SSA is a U.S. enterprise and (ii) SSA made an investment by acquiring the rights to 50% of the treasure in the Discovery Area via the APA. These are the only two requirements to be a protected investor under the TPA, which SSA easily meets.

8. Desperate for an argument, Colombia attempts to unilaterally add requirements to the TPA—arguing that SSA also needs to show that it "*actively and personally*" invested in Colombia. Colombia's additional terms have no legal basis. In fact, the only supposed legal support Colombia could muster is a case that does not involve the same treaty language and has been set aside at its seat (*Clorox v. Venezuela*). In any event, SSA made its investment "*actively and personally*" as it directly executed the APA and, as Colombia acknowledges, engaged in consistent and long-term activities to enhance the value of its investment.[4] Thus, Colombia's argument that SSA is not a qualifying investor has no legal or factual basis.

9. Colombia's second objection is that SSA does not own a protected investment because, according to Colombia, the investment does not have the characteristics typically associated with an investment, some of which are listed as examples in Article 10.28 of the TPA.

10. With its original application, Colombia had complained only about the alleged lack of one characteristic—the commitment of capital. Colombia's allegation is factually incorrect. Colombia does not dispute that over USD 11 million was spent in the 1980s alone (*i.e.*, well over USD 40 million in 2023 dollars) to bring about the investment, and since SSA has acquired it, SSA has spent countless hours, including manpower, management, know-how, and expertise, to enhance its value. In any event, the lack of any single characteristic, including commitment of capital, does not deprive an investment of its quality as such.

11. After SSA pointed this out with its Response, Colombia made new (and untimely)

[4] *See, e.g.*, Colombia's Reply, ¶ 137 ("*In the aftermath of the discovery of the Galeón San José, SSA LLC continued its efforts to carry out a verification expedition*").

objections with its Reply that the investment did not display other characteristics listed in the TPA, *i.e.* expectation of gain or profit, and assumption of risk. Colombia's new objections are circular because Colombia claims, without textual or jurisprudential support, that without a contribution of capital, an investment cannot have the other characteristics of a protected investment. That argument is obviously wrong given that the TPA provides a list of sample characteristics separated by an "*or*"—indicating that such characteristics are independent of each other. Because the estimated value of the treasure on board the San José is valued at USD 20 billion, there can be no doubt that the investment here involves an expectation of gain or profit. The investment also involved assumption of risk, given that both SSA and its Predecessors poured significant time, effort, manpower and resources over the course of four decades to acquire and then maintain and enhance the value of the investment.

12. Colombia also makes the subsidiary argument that SSA's investment cannot be characterized as one of the "*forms*" listed under the TPA—specifically, that the investment cannot constitute "*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law*" under Article 10.28(g). Colombia's argument is unmeritorious, not least because it fails to provide any legal basis for its claim that SSA's right to 50% of the treasure in the Discovery Area was not "*conferred pursuant to domestic law*." In making his claim, Colombia ignores the decision of its own court, which recognized SSA as the valid holder of those rights in 2019 when it reinstated the Injunction Order in SSA's favor. In any event, the Tribunal does not need to review this objection, because Colombia does not dispute the validity of the investment as any other "*form*" under Article 10.28, such as under Article 10.28(h) (covering other tangible or intangible, movable or immovable property, and related property rights).

13. Colombia's third and fourth objections are temporal in nature and fundamentally rely on Colombia's attempt to recharacterize the source of SSA's claims. SSA's Notice of Arbitration is clear that Colombia's violations of the TPA that are the subject of this Arbitration all arise from Colombia's issuance of Resolution No. 0085 in January 2020.[5] Despite SSA's express articulation of its claims as such, Colombia insists that Resolution No. 0085 is "*irrelevant*" and "*immaterial*" to SSA's claims,[6] because,

[5] *See* Notice of Arbitration, Section IV (entitled "*Summary of Claims*").

[6] *See* Colombia's Reply, Sections II.M-N.

according to Colombia, it expropriated SSA's investment long before that. There is no legal basis for Colombia's recharacterization of SSA's claims. In any event, Colombia's latest position is simply not true.

14. The question of whether SSA had rights capable of expropriation as of the date of Resolution No. 0085 depends on the factual question of whether the San José shipwreck lies within the Discovery Area. All objective evidence points to the fact that the Discovery Area contains the San José shipwreck. This includes, among other things, (i) uncontested contemporaneous evidence from the time of the discovery, reporting and verification of the shipwreck, including pictures, scientific readings of the discovery, contemporaneous reports by Colombian Navy officers, and carbon dating of wood samples from the site, indicating that the shipwreck found was that of the San José; (ii) draft salvage contracts prepared by SSA's Predecessors and Colombia specifically for the salvage of the San José shipwreck; (iii) Colombia's attempts to find other operators to conduct salvage activities directed at the San José within the Discovery Area, with the recognition of SSA's Predecessor's rights; and (iv) the reported coordinates of Colombia's 2015 rediscovery of the San José lying within the Discovery Area. By contrast, Colombia's so-called evidence consists of the seriously-flawed report prepared by Columbus Exploration, Inc. ("**Columbus**"), authored by an incarcerated criminal, which Colombia commissioned in the midst of litigation against SSA's Predecessors yet chose not to adduce as evidence and has expressly refused to defend before this Tribunal ("**Columbus Report**", which was later announced by the "**Columbus Press Release**").

15. Colombia nevertheless appears to suggest that its unilateral assertions that the San José shipwreck was not at the pinpoint coordinates listed in the 1982 Report somehow extinguished SSA's rights to the San José's treasure. That cannot be correct. SSA's rights to the San José depend only on whether the San José is actually in the Discovery Area, not Colombia's unverified and untested assertions on the matter. Indeed, Colombia's Columbus Press Release and subsequent correspondence with SSA had no legal effect on SSA's rights. Colombian courts repeatedly upheld SSA's rights to 50% of the treasure in the Discovery Area, including in 2019 when the court reinstated the Injunction Order. Thus, Colombia's assertions, even if they could be taken seriously (which they cannot) that the pinpoint coordinates in the 1982 Report do not contain the

San José had no legal impact on SSA's rights.

16. In any event, whether the San José is within the Discovery Area is a question that needs to be addressed in the merits phase of this Arbitration. The inquiry is a factual one that will require, at a minimum, discovery and likely witness and expert evidence. Should the Tribunal decide that it needs to address the question at this stage (*quad non*), it ought to do so on a *prima facie* basis. SSA's position that the Discovery Area contains the San José shipwreck is far from "*frivolous*" and Colombia has nowhere near met its burden to prove otherwise "*conclusively.*" Accordingly, Colombia's temporal objections must fail.

17. Finally, Colombia's request for security for costs must be denied as Colombia fails to provide evidence that SSA is unwilling or unable to pay the costs of this Arbitration or adverse costs, should it be ordered to do so. Indeed, Colombia can point to no tribunal that has ordered a claimant to post security for costs based solely on the fact that it has a contingency fee arrangement with its counsel.

18. SSA's Rejoinder proceeds in the following parts below. In **Section II**, SSA responds to some of the key mischaracterizations Colombia makes regarding the relevant factual background, while noting that these facts stand to be addressed more fully in the merits phase. In **Section III**, SSA sets out the standard of review under Article 10.20.5 of the TPA. In **Section IV**, SSA explains why Colombia's Preliminary Objections lack merit. In **Section V**, SSA explains why Colombia's requests for costs should be denied. And in **Section VI**, SSA sets out its requests for relief.

II. BACKGROUND TO THE DISPUTE

19. Colombia's Reply reveals that most of the factual background that Colombia puts at issue in its Preliminary Objections is irrelevant to its objections. And Colombia does not contest the facts that are, in fact, relevant to its objections. Colombia's Reply "*clarified*" its Preliminary Objections as follows:

> *(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.*
>
> *(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.*[7]

20. With respect to Colombia's first two objections, SSA simply has to establish facts showing that it is a qualifying investor and its investment is protected by the TPA. All of the relevant jurisdictional facts are set out in the Notice of Arbitration,[8] with further details provided in SSA's Response.[9] Colombia does not meaningfully contest any of these jurisdictional facts in its Reply.

21. With respect to Colombia's third and fourth objections, Colombia's pre-Resolution No. 0085 conduct has no bearing on SSA's claims. SSA's claims all stem from Colombia's Resolution No. 0085, which was adopted in 2020. Colombia, however, considers Resolution No. 0085 "*immaterial*" to these proceedings and has refused to discuss its background, rationale or adoption.[10] Instead, Colombia spends considerable ink describing its pre-Resolution No. 0085 conduct to argue that it had already

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7 Colombia's Reply, ¶ 173.

8 *See* Notice of Arbitration, Section II.

9 *See* SSA's Response, Section II.

10 Colombia's Reply, Section II.M (heading).

expropriated SSA's rights before it issued Resolution No. 0085. But Claimant's articulation of its claim, not Respondent's, is to be accepted for purposes of assessing the Tribunal's jurisdiction. Whether Claimant succeeds on the merits of its claims is for the next phase of this Arbitration. Indeed, as Colombia itself has stated,[11] pursuant to Article 10.20.5 of the TPA, the merits of Claimant's case—*i.e.*, whether Resolution No. 0085 constitutes an expropriation of SSA's investment—are suspended pending a resolution of Colombia's Preliminary Objections.

22. Accordingly, the Tribunal need not (and indeed cannot) yet address questions about SSA's Predecessors' discovery or the content, effect and aftermath of Colombia's pre-Resolution No. 0085 actions to rule on Colombia's Preliminary Objections, *i.e.,* factual issues that go to the merits of SSA's case. The only facts relevant to this Tribunal's determination of Colombia's Preliminary Objections are the narrow jurisdictional facts related to (i) whether SSA is a qualifying investor with a protected investment under the TPA, and (ii) whether SSA's claims (as articulated by SSA, not Colombia) in this Arbitration arise from Colombia's conduct that post-dates the TPA and that occurred less than three years before SSA filed its Notice of Arbitration. Colombia does not contest any of the facts relevant to these inquiries.[12]

23. Instead, Colombia argues, at length (yet without offering any evidence other than its own unilateral assertions about historical facts) that SSA's Predecessors did not find the San José shipwreck and that Colombia had already expropriated SSA's investment and treated it in an arbitrary manner before it issued Resolution No. 0085. While Colombia's Preliminary Objections do not require the Tribunal to make that determination now, all available contemporaneous evidence that was available to and verified by both Colombian and SSA officials, suggests that SSA's Predecessors had found and reported the San José shipwreck. Moreover, evidence has since come to light confirming that the Discovery Area contains the San José shipwreck. Notwithstanding the currently irrelevant nature of these factual issues (which the Tribunal should take into account in its cost deliberations), SSA corrects the record as appropriate below to

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[11] *See* Colombia's Reply, ¶ 168.

[12] *See* Colombia's Reply, ¶ 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*"), 154 ("[T]*he record is conclusive in showing that Resolution No. 0085 is irrelevant and immaterial for this case*").

avoid any suggestion that SSA accepts Respondent's factual misstatements.

A. The Circumstances Of The San José's Sinking Indicate That Significant Treasure Is Scattered Over A Large Area

24. As SSA outlined in its Response, in 1708, the San José, which was laden with treasure and making its way from Panama to Colombia, was intercepted by British naval forces, blew up and sank after a short battle.[13]

25. Colombia does not dispute the history and circumstances surrounding the sinking of the San José. Colombia appears to consider these facts to be "*irrelevant.*"[14] However, the historical circumstances of the shipwreck reveal at least three salient details, none of which Colombia has rebutted.

26. First, the San José carried known significant riches, which had been documented and studied.[15] Thus, both Colombian authorities and SSA believed that a significant portion of the shipwreck would be classified as treasure.[16]

27. Second, the San José sank in battle after blowing up.[17] This naturally affected the debris field of the ship, making it impossible to confine the location of the shipwreck to a single set of coordinates.[18]

28. Third, the San José was the only ship to have sank during the battle.[19] Thus, it is highly implausible that SSA's Predecessors may have found another ship that just happened to be of the same age, size and composition of the San José found at coordinates that were determined on the basis of historical research of the battle.[20]

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13 *See* SSA's Response, ¶¶ 14-17.

14 Colombia's Reply, ¶ 21.

15 *See* SSA's Response, ¶¶ 14-15.

16 *See e.g. infra* ¶¶ 135-136 (describing the arbitrary change in Colombia's position regarding the treasure on board the San José reflected by Resolution No. 0085); 244 (noting that before Resolution No. 0085, Colombia considered that at least 83% of the shipwreck would constitute treasure).

17 *See* SSA's Response, ¶ 16.

18 *See* SSA's Response, ¶ 121.

19 *See* SSA's Response, ¶ 17.

20 *See infra* ¶ 39.

B. The Colombian Civil Code Conferred Vested Rights On SSA's Predecessor Upon Its Discovery Of The Treasure

29. Colombia does not dispute that Articles 700 and 701 of the Colombian Civil Code ("**Civil Code**") granted the discoverer of a treasure rights to half that treasure.[21] However, Colombia appears to consider this fact to be "*irrelevant*" to its Preliminary Objections.[22] It is not, however, since it forms the legal basis of the rights granted to SSA's Predecessor that were then transferred to SSA. As the Colombian Supreme Court has confirmed, SSA's Predecessor, GMC, acquired private, vested rights to its discovery under Articles 700 and 701 of the Colombian Code.[23] Once vested, the rights could be freely transferred and did not require authorization from Colombia's General Directorate of the Maritime and Port Authority ("**DIMAR**") or any other administrative body.[24]

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

30. There is no disagreement between the Parties that in 1979, a number of American investors came together to found the Delaware incorporated company GMC Inc.[25] The Parties further agree that Resolution No. 0048 authorized GMC Inc. to conduct underwater exploration within certain coordinates.[26]

31. Colombia, however, takes issue with SSA's characterization of the Resolution

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21 SSA's Response, ¶¶ 19, *citing* **Exhibit C-1**, Colombian Civil Code, 31 May 1873, art. 701 ("*Treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery*.").

22 *See* Colombia's Reply, ¶ 21.

23 *See* SSA's Response, ¶¶ 91, 179; **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 211 ("*The Superior Court of Barranquilla, in ruling on the appeals filed by the parties, decided to 'AFFIRM, in its entirety, the judgment …' from the lower court. To that end, in essence, it ruled that procedural requirements were met; the filings were valid; jurisdiction was correct; the parties had standing; and the reported goods had the status of treasure. In addition, it found that, in accordance with Article 701 of the Civil Code, regardless of whether its location is in territorial waters, the exclusive economic zone, or Colombian continental shelf, it is 50% owned by the plaintiff, as its discoverer and reporting entity, and the remaining half is owned by the Nation, because it exercises full sovereignty over all of the aforementioned marine areas,*" recounting the Superior Court's decision to confirm the applicability of art. 701 of the Civil Code, which the Supreme Court did not reverse) (SSA's Unofficial Translation).

24 *See infra* ¶¶ 212-215.

25 *See* SSA's Response, ¶ 22; Colombia's Reply, ¶¶ 24, 290.

26 *See* Colombia's Preliminary Objections, ¶ 258; SSA's Response, ¶¶ 19, 22-26; Colombia's Reply, ¶ 25.

No. 0048, claiming that it did not specifically authorize a search for the San José.[27] While, this is not relevant to any of Colombia's objections,[28] Resolution No. 0048 plainly says otherwise. The resolution begins by listing the coordinates that GMC Inc. requested to explore, then provides:

> *By resolution No. 173 of 1971,* [DIMAR] *recognized the company REYNOLDS ALUMINIUM EUROPE S.A. as claimstaker* ***for the wreck called Capitana San José****, located in the approximate location* [coordinates]
>
> *By resolution No. 016 dated January 24, 1974,* [DIMAR] *authorized the company FRIENDSHIP S.A. to carry out underwater exploration* ***to search for the above-mentioned wreck for a term of five (5) years which have now elapsed.*** *The company FRIENDSHIP S.A. has asked* [DIMAR] *to extend the above-cited exploration term which was denied as improper by* [certain resolutions]*,* ***this way the official channels are exhausted.***
>
> ***Upon preliminary study of the petition by the company GLOCCA MORRA COMPANY INC,*** [DIMAR] ***demanded that documentary proof be brought to clarify the legal interest of the petitioner as well as information on the technical system to be employed in the search for the sunken wrecks which are the object of the Exploration Permit sought,*** *and said proof has been submitted to our satisfaction.*[29]

32. It is clear from the above that both DIMAR and GMC Inc. considered that the purpose of Resolution No. 0048 was to authorize GMC Inc. to search for the San José within the requested coordinates. That is why Resolution No. 0048 first lists the coordinates for which GMC Inc. requested authorization, then outlines the failed attempts by other companies to find the San José in the coordinates in which those companies were authorized to search. Resolution No. 0048 then establishes that "*official channels* [were] *exhausted*" for the other companies to keep searching for the San José. And on this basis, having verified GMC Inc.'s legal and technical abilities, DIMAR granted GMC Inc. a license to explore the requested coordinates. There was no reason for DIMAR to mention prior failed attempts at finding the San José and establish that those companies had no further rights to find the shipwreck, if the purpose of Resolution

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27 *See* Colombia's Reply, Section II.A.

28 *See supra* ¶¶ 19-22.

29 **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, PDF pp. 2-3 (emphases added) (SSA's Unofficial Translation).

No. 0048 was not to authorize GMC Inc. to search for the same shipwreck.

33. Colombia completely ignores this language in Resolution No. 0048. It focuses only on what it deems is the "*operative*" part of Resolution No. 0048, and claims that the absence of express references to the San José there mean that DIMAR "*never authorized*" GMC Inc. to specifically "*search for the San José*."[30] This is misguided. General rules of interpretation in international law require the Tribunal to give effect not only to the so-called "*operative*" portions of a document, but also to its chapeau or preamble.[31] The preamble is a critical component of interpretation as it can shed light on the object and purpose of the legal document. Likewise, Colombian courts have found that the preamble of administrative resolutions are "*related to the factual and legal reasoning that give rise to the decision of the Administration*"; thus, "[t]*he justification for the administrative act . . . constitutes a structural element of it.*"[32]

34. Colombia's vehement denial that SSA's Predecessors sought to and did find the San José is striking in light of the plethora of evidence that demonstrates otherwise. This evidence includes, among other things, (i) contemporaneous observations by Colombian Navy officials that SSA's Predecessors had found the San José;[33] (ii) Colombia's draft salvage contract contemplating the San José's recovery;[34] (iii) Colombia's later efforts to salvage the San José with other contractors based on the

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30 *See* Colombia's Reply, Section II.A (heading).

31 Under the Vienna Convention on the Law of Treaties ("**VCLT**"), the preamble is treated as part of the text in the primary Article 31, and is not relegated to supplementary means of interpretation. *See* **Exhibit RLA-2**, Vienna Convention on the Law of Treaties, Treaty Series, vol. 1155, UNITED NATIONS, May 1969, art. 31 ("General Rule of Interpretation") ("*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text,* ***including its preamble*** *and annexes*"). *See also* **Exhibit CLA-61**, R. GARDINER, TREATY INTERPRETATION (Oxford, 2nd Ed., 2008), pp. 205-206 ("*By stating the aims and objectives of a treaty, as preambles often do in general terms, preambles can help in identifying the object and purpose of the treaty. . . . The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty or in annexes*."); **Exhibit CLA-72**, BLACK'S LAW DICTIONARY (11th ed. 2019), (entries for "*make*," "*preamble*") (defining "*preamble*" as "[a]*n introductory statement in a constitution, statute, or other document explaining the document's basis and objective*").

32 *See* **Exhibit C-116 [EN]**, Judgment of the Council of State of Colombia, Administrative Chamber, Fourth Section, *Jaramillo Mora S.A. c. Servicio Nacional de Aprendizaje – SENA*, Docket No. 76001-23-31-000-2008-00650 01(21448), 24 September 2015, PDF pp. 10-11.

33 *See infra* ¶¶ 49-51.

34 *See infra* **Section II.G**.

Discovery Area as reported by SSA's Predecessor;[35] and (iv) Colombia's purported discovery of the San José in 2015 at pinpoint coordinates that turned out to be located in the Discovery Area.[36]

35. While Colombia also now insinuates that its officials were not actually onboard SSA's exploration vessels (apparently attempting to feign ignorance of their knowledge of SSA's discovery of the San José),[37] this is contrary to Colombia's clear directives to its Navy and would constitute an admission that Colombian officials were disregarding DIMAR's resolutions and protocol.[38] In any event, Colombia's position is not true, as demonstrated by SSA's photographic evidence showing the presence of Colombian Navy officials aboard its vessels, including the *Auguste Piccard*.[39]

36. Likewise, Colombia's reference to the "*close to a thousand* [other] *shipwrecked species*" in Colombian waters is odd (and misleading).[40] That other shipwrecks may exist in Colombian waters—none of which are identified by Colombia as being anywhere near the San José—is precisely why Resolution No. 0048 specifically refers to the San José. Indeed, the researchers and historians working for SSA's Predecessors specifically chose the coordinates for exploration based on the historical research that they had conducted on the path of the San José and the circumstances of the battle in which it sunk.[41]

D. SSA's Predecessor Discovers The San José In December 1981

37. The Parties agree that on the basis of Resolution No. 0048 and further DIMAR

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35 *See infra* **Section II.H**.

36 *See infra* ¶¶ 117-118.

37 *See* Colombia's Reply, ¶¶ 44-46.

38 Resolution No. 0048 established that GMC Inc. would conduct all exploration work "*under supervision of"* DIMAR and would be obliged to *"supply transportation, per diems, lodging and board*" for the Colombian officials supervising the exploration activities. Resolution No. 0048 further established that GMC Inc. would be required to comply with Decree No. 2349 of 1971, which, likewise, expressly stated that any exploration works would be carried out under DIMAR's supervision. *See* **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, PDF p. 4, arts. 3(a), (d) (SSA's Unofficial Translation); **Exhibit R-1**, Decree No. 2349 of 1971, 3 December 1971, art. 115.

39 *See* **Exhibit C-109**, Photograph of Auguste Piccard Crew, circa 1981-1982.

40 *See* Colombia's Reply, ¶ 28.

41 *See* SSA's Response, ¶ 29. *See also* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981, p. 1 ("*This will advise that the undersigned has performed research, over several years, in the Archives of the Indies in Seville, Spain, on the sinking, location, and cargo of the San Joseph*").

resolutions that extended its scope, SSA's Predecessor conducted exploration in the authorized coordinates and made a discovery in December 1981 that it reported to DIMAR in March 1982.[42]

38. Colombia's fundamental contention in this case is that Colombia, and not SSA, found the San José. That is false, for the reasons already stated in SSA's Response and is, in any event, a question for the merits. Nonetheless, Claimant describes below the circumstances of its remarkable discovery to correct a number of misrepresentations introduced by Colombia in its Reply. In particular, it explains that (i) Colombia has not rebutted the historical and scientific research and analysis surrounding the discovery, (ii) Colombia did not question the discovery or the 1982 Report at the time (and indeed proceeded to recognize SSA's Predecessors' rights[43]), and (iii) Colombia's other arguments questioning the discovery are tenuous at best.

39. First, the scientific and historical evidence surrounding the discovery is not in dispute. Colombia does not make any attempt to rebut the historical and scientific research and analysis conducted by SSA's Predecessors, or their results indicating that the shipwreck found was that of the San José.[44] Indeed, Colombia does not even attempt to rebut the results of the visual, sonar and magnetometer readings, all of which indicated that the SSA's Predecessor's crew had found a ship of the same size and making as the San José.[45] And Colombia fails to explain the carbon dating results of the pieces of wood recovered from the shipwreck, which indicate that they belong to a ship that would have been manufactured at the same time as the San José and were of the same type of wood used to make the San José. Colombia also fails to explain how the sonar readings corresponded to a ship of the same size as the San José.[46]

40. Instead, Colombia deems SSA's evidence as "*completely irrelevant*" and a "*diver*[sion]".[47] While it is true that the question of whether SSA's Predecessor found

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42 *See* SSA's Response, Sections II.D-II.E; Colombia's Reply, Section II.B; Colombia's Preliminary Objections, Section II.3.

43 *See infra* **Section II.F**.

44 *See* SSA's Response, Sections II.D-II.E.

45 *See* SSA's Response, ¶¶ 36-39.

46 *See* SSA's Response, ¶ 39. *See also* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982.

47 *See* Colombia's Reply, ¶ 42.

the San José is one for the merits and quantum phases of these proceedings, and therefore "*irrelevant*" for the present phase, were the Tribunal to consider this question now, it has to consider the evidence on the record. The Tribunal cannot take Colombia's unilateral and unverified assertions regarding what SSA's Predecessor found as truth.

41. Second, Colombia never questioned the discovery at the time, even though it now seeks to fabricate doubts about the strength of the 1982 Report.[48] At the time it was furnished, Colombia accepted the 1982 Report, authorized further missions based on the reported discoveries, and ultimately recognized rights to the treasure contained in the Discovery Area as reported in the 1982 Report.[49] This is not surprising: the 1982 Report describes in detail the exploration methodology, including the equipment used and the results of their survey, all of which evidenced the discovery of a shipwreck of the same time period, size and make of the San José. The 1982 Report also appended the carbon dating results of the wood sample recovered from the discovery, which showed that it was just over 300 years old and of the type that the San José would have been made.[50] Thus, the 1982 Report fully supports SSA's position that its Predecessor had found the San José.

42. Third, unable to refute the evidence on the record, Colombia instead makes a number of tenuous claims to challenge the discovery of the San José in December 1981 by SSA's Predecessor.

43. For example, Colombia insists that the 1982 Report does not mention the San José. As Claimants have pointed out, that is not correct as the 1982 Report was submitted pursuant to Resolution No. 0048, which was issued for the purpose of finding the

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[48] *See, e.g.*, Colombia's Reply, ¶ 35 (insinuating that the report was unreliable and was issued in a hurry to preserve its rights even though SSA "*could not prove it had identified any particular shipwrecked species, let alone the* Galéon San José."). Colombia provides no evidence for this assertion.

[49] *See infra* **Section II.F**.

[50] *See* SSA's Response, ¶ 32; **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 23-24 ("*Their average value would be . . . 1585 A.D., with a one sigma error term of 50 years*.") (SSA's Unofficial Translation).

San José.[51]

44. Indeed, it was clear to both SSA's Predecessors and Colombian authorities that they were engaged in the exploration for,[52] had discovered[53] and sought the potential recovery of the San José.[54] In a letter to DIMAR written after the discovery but before the 1982 Report, GMC outlined potential terms for the salvage of the San José, noting: "[w]*e would like to bring to your attention and consideration the following aspects related to the recovery of the ship, 'Captain San José*.'"[55]

45. To downplay its obvious evidentiary value,[56] (even though Colombia itself put the letter on the record[57]) Colombia now complains that Claimant should have specifically reported the finding of the San José in the 1982 Report.[58] As noted above, that would have been redundant given that the 1982 Report already referred to Resolution No. 0048. Moreover, had Colombia objected to GMC's characterization of its discovery as that of the San José, it would have presumably corrected GMC in subsequent correspondence discussing the salvage of the San José shipwreck. It did not. On the contrary, Colombian authorities expressly acknowledged that the salvage contract they were negotiating with SSA's Predecessors was for the recovery of the San José.[59]

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51 *See* SSA's Response, ¶ 41.

52 *See supra* ¶¶ 31-32.

53 *See infra* ¶¶ 49-51.

54 *See infra* ¶¶ 59-60.

55 *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 1.

56 *See* Colombia's Reply, ¶ 58.

57 Colombia adds this letter to the record to claim that "[o]*ther than the mere reference to the Galeón San José . . . no conclusive evidence was provided about* [the] *alleged finding of the Galeón San José*." *See* Colombia's Preliminary Objections, ¶¶ 29-30, *citing* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982. However, as explained in SSA's Response and in the present Rejoinder, the record is replete with evidence that SSA located the San José. *See* SSA's Response, Sections II.D-II.E. *See also supra* ¶¶ 37-41 and *infra* ¶¶ 51-52.

58 *See* Colombia's Reply, ¶ 58.

59 *See* **Exhibit C-19 [EN]**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 1 (providing terms for salvage with "*regards to your suggestions with respect to the participation of the salvaged items and the areas of the exploration of the possible locations of the* ***Galleon San José***.") (emphasis added).

E. GMC Conducts Further Exploration Of The San José In 1983

46. Colombia does not dispute that in September 1983, after raising an additional USD 5 million for the effort,[60] GMC contracted the subsea engineering firm, Oceaneering, to deploy "*a submersible team saturated with full support equipment . . . that could be brought to the site of the shipwreck*[] … *to carry out* [its] *identification.*"[61] Oceaneering reported that it had "[f]*ound the wreck*",[62] "*survey*[ed] *the wreck with*" a remote-operating vehicle,[63] and ultimately determined that the "*target was successfully located.*"[64]

47. In an effort to cast doubt on Claimant's discovery of the San José, Colombia claims that the reference to the "*next step*" in the 1982 Report shows that "*further marine exploration and substantial capital investments were required for the purposes of identifying whatever had been supposedly found in the reported area*."[65] This is unavailing.

48. In fact, the 1982 Report suggested the following next steps—which GMC then carried out with Oceaneering:

> *The Glocca Morra Company believes from an operational point of view* [that] *either a submersible team saturated with full support equipment or a tethered atmospheric submersible with one man should be brought to the site of the shipwrecks as the next step in the plan to achieve a successful conclusion of the venture. Sea-Search Armada will commit the substantial additional capital and equipment necessary to carry out the identification and rescue of the shipwrecks as soon you reach an*

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60 *See* SSA's Response, ¶ 45.

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

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

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

64 **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 4.

65 Colombia's Reply, ¶ 37.

agreement with the Maritime and Port Director General, so as to start such an operation in the vicinity of Target 'A'.[66]

49. A Colombian Navy official was present on board Oceaneering's ship, the Heather Express, at all times[67] and was in daily contact with his superiors at DIMAR.[68] This official, Carlos A. Prieto Avila, contemporaneously corroborated a range of GMC's and SSA Cayman's findings, including that the crew of the Heather Express had found (i) "[a]*n object . . . that . . . simulates the appearance of a cannon*," (ii) "*a piece of wood*" of approximately 0.5 m by 10 m in size that seemed to have been "*violently*" separated, had a hole that could have been made for a "*screw or a nail*," and whose appearance "*concord*[ed]" with the wood samples retrieved by the Auguste Piccard in 1982 near the tracks left by the submarine, and (iii) a "*piece of ceramic*" that fell back to the ocean floor during attempted recovery.[69]

50. To downplay the obvious significance of its own Navy officer's contemporaneous logs written onboard the Heather Express from August through September 1983, Colombia asserts that "[c]*ontrary 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*" but rather "*reveals, if anything,* [] *that SSA Cayman Islands simply believed, not that it was convinced, that it had found the Galeón San José in that area*."[70] This is highly misleading. While Exhibit C-23 contains a short overview report drafted by Inspector Prieto Avila in 1988, the portion of the exhibit SSA relies on is the **contemporaneous daily logs** documenting the 1983 expedition in detail.

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

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

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

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

70 Colombia's Reply, ¶¶ 48-49 (emphasis added), *citing* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), p. 1.

Colombia also wrongly asserts, quoting a statement from the 1988 report, that the belief that the expedition had found the San José "*did not come from the Colombian Navy Official, as Claimant misleadingly suggests, but from the company itself*."[71] By 1988, the relationship between the Parties had deteriorated and resulted in litigation, and the *post hoc* statements by a Colombian official should be seen in that light.

51. Indeed, the contemporaneous daily logs from 1983 tell a different story. They leave no doubt that the Colombian Navy official, his superiors, and the crew were (rightly) convinced that they had found the San José.[72] As Inspector Prieto Avila noted in his log, there was "[m]*uch optimism about a potential* ***reencounter with the San José***."[73] This enthusiasm was apparently shared by Colombia, who sent a representative of the President of Colombia, and a Rear-Admiral from Colombia's Atlantic Command, to come on board the Heather Express to follow the operation.[74] Moreover, as Colombia recognizes, the officer noted that a scientific investigator on board took the view that "*the piece has the same construction of a piece of galleon located in Portovelo Panama which is contemporary to the San José.* "[75] This observation only further confirms that everyone onboard, including Colombia's own official, believed that the identification and confirmation process in which they were engaging was that of the San José. Indeed, the daily log report is replete with references to the San José.[76]

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[71] Colombia's Reply, ¶¶ 48-49 (emphasis added), *citing* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), p. 1 (stating that the mission was "*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*") (Colombia's emphasis).

[72] *See* **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 18 ("*The R.O.V. is lowered, the bottom is at 686". In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen, indicating the proximity of the San José*.") (SSA's Unofficial Translation). *See also id.* PDF pp. 9, 14, 19, 20, 23.

[73] **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 7 (emphasis added) (SSA's Unofficial Translation).

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

[75] Colombia's Reply, ¶ 51.

[76] *See* **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 10 ("*The HEATHER EXPRESS continues making the movements necessary to verify the correct positioning of the beacons, so that it will be possible to start using the SIDE SCAN SONAR ("SSS")*

52. Thus, Colombia's characterizations of the 1982 Report, and its further confirmation by Oceaneering, as witnessed and confirmed firsthand by Colombia's own Navy officials, have no merit. It was made clear at the outset, with Resolution No. 0048, that the purpose of the exploration was the discovery of the San José, based on which SSA's Predecessors made and reported a discovery of a shipwreck and provided data to Colombian authorities indicating that what they had found was indeed the remains of the San José. This discovery was further confirmed through identification work later performed by SSA's Predecessors, in the presence and with the validation of Colombian officials, and it was further confirmed in Colombia's various statements at the time.[77]

F. DIMAR Recognizes SSA's Predecessor's Rights To The Treasure

53. The Parties do not dispute that on 3 June 1982, through Resolution No. 0354, DIMAR recognized GMC "*as claimant of the treasures or shipwreck in the coordinates referred to in the*" 1982 Report ("**Resolution No. 0354**").[78] Resolution No. 0354's preamble provides that:

> *The company* [GMC] *making the announcement has undertaken exploration in various areas of the Caribbean Sea by means of several permits of this Department and has verified the said discovery by means of technical proofs, which are included in the* [1982 Report, page 13]*, which is located in this Department, and which is made an integral part of this Resolution.*[79]

54. Accordingly, DIMAR resolved to:

> [A]*cknowledge the Glocca Morra Company, established in accordance with the laws of the Cayman Islands (British West Antilles) as claimant*

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to ***locate the flagship San José.***"), 18 ("*At 18:30* ***contact is made again with the possible remains of the San José***"), 17 ("*It is first explained to him that* ***regardless of how it is measured, the San José is within the 12*** **miles**"), 18 ("*In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen,* ***indicating the proximity of the San José****. . . .* ***At 18:30 contact is made again with the possible remains of the San José****, and the basket left behind by the S.S.A. Piccard in January or February of 1982 is found. . . . A decision is made to move the vessel so that a marker BEACON can be put on the* ***target (possible San José)***.") (emphasis added), 21 ("*According to Mr. Costain,* ***this piece has the same construction as a piece of a galleon contemporaneous with the San José***") (SSA's Unofficial Translation).

77 *See supra* **Section II.E**. *See infra* **Sections II.G-II.H**.

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

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

> *of the treasures or shipwreck in the coordinates referred to in the* [1982 Report, page 13].[80]

55. Page 13 of the 1982 Report in turn defined the Discovery Area as follows:

> *The main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N.*[81]

56. Accordingly, Resolution No. 0354, fully "*integra*[ted]" the 1982 Report and gave GMC rights to the Discovery Area as reported by the 1982 Report,[82] which encompassed the range of coordinates that constituted the "***immediate vicinity***" of 76°00'20"W, 10°10'19"N.[83]

57. Colombia does not dispute the above. Rather, it simply reiterates its complaint that Resolution No. 0354 did not mention the San José by name.[84] That again ignores the fact that Resolution No. 0354 was issued pursuant to Resolution No. 0048, which expressly provided that the exploration was for the San José.[85] But even if DIMAR did not at the time recognize that GMC had discovered the San José shipwreck (*quod non*), DIMAR's recognition or alleged lack thereof did not affect the actual content of SSA's rights. Upon its discovery, GMC had rights to 50% of the treasure in the Discovery Area, where Colombia later itself claims to have found the San José.[86]

G. SSA's Predecessors And Colombia Negotiate A Contract Specifically For The Salvage Of The San José

58. Negotiations for a salvage contract between SSA's Predecessors and Colombia began

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

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

82 **Exhibit C-13 [EN]**, DIMAR Resolution No. 0354, 3 June 1982, preamble (stating that the 1982 Report forms "*an integral part*" of Resolution No. 0354).

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

84 Colombia's Reply, ¶ 27.

85 *See supra* ¶¶ 31-32.

86 *See infra* **Section II.R**.

soon after one of SSA's Predecessors had discovered the San José in December 1981. As noted above, in March 1982, SSA's Predecessor wrote to DIMAR with potential terms for a salvage contract for the San José.[87] This was followed by the filing of the 1982 Report a few days later; further work by Oceaneering to confirm the San José's location, as corroborated by Colombian Navy officials; followed by several exchanges between Colombian authorities and SSA's Predecessors negotiating the terms of a salvage contract.[88] The parties ultimately agreed on a sliding scale that gave SSA Cayman as low as 20% and as high as 50% of the value of the salvaged goods[89] from the San José shipwreck.[90]

59. However, attempting to maintain its unsustainable position that Claimant did not discover the San José, Colombia now asserts that "*Colombia **never** negotiated a salvage contract for the recovery of the Galeón San José with Glocca Morra Company or SSA Cayman Islands*."[91] This strains credibility. The record makes clear that the Parties obviously were discussing the salvage of the San José.

(a) As noted above, in the March 1982 letter opening discussions on salvaging the shipwreck, SSA's Predecessor wrote to DIMAR "*to bring to* [their] *attention and consideration the following aspects related to the recovery of*

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87 *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 ("[W]*e would like to bring to your attention and consideration the following aspects related to the recovery of the **ship 'Captain San José'***.") (emphasis added) (SSA's Unofficial Translation).

88 *See* SSA's Response, Sections II.E-II.G. *See also* **Exhibit R-7**, Letter 2541 sent by SSA Cayman Islands to DIMAR, 2 February 1984; **Exhibit R-8**, Letter 415 sent by DIMAR to SSA Cayman Islands, 13 February 1984; **Exhibit C-54**, Letter No. 231000R from DIMAR to Fernando Leyva, 23 August 1984; **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984; **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984; **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984; **Exhibit C-20**, Letter from Sea Search Armada to DIMAR, 9 November 1984.

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

90 **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 3, section 1.

91 Colombia's Reply, Section E, ¶¶ 55-60 (emphasis added).

the ship 'Captain San José'," [92] followed by setting out the proposed terms of salvage.

(b) Then, in the final letter from DIMAR in November 1984, following many rounds of negotiation, DIMAR wrote to SSA's Predecessor, "[i]*n regards to your suggestions with respect to the participation of the salvaged items and the areas of the exploration of the possible locations of the Galleon San José,*" [93] and set out the final terms for salvage, which SSA's Predecessor later accepted. [94]

60. Colombia attempts to downplay the direct references in this correspondence to the San José by claiming they were merely "*in passing, to recall that* [DIMAR] *was writing in response to SSA Cayman Islands' communication.*" [95] But, the references to the San José clearly are significant. First, any reference to the San José, even "*in passing,*" could only mean that both parties equally understood the exploration and salvage efforts being discussed were in relation to the San José and, thus, did not need to be mentioned by name in every single document. Second, and in any event, both SSA's Predecessor and DIMAR start their letters making it clear that the terms they propose are in relation to the salvage of the San José. [96]

H. Colombia Attempts To Salvage The San José With Other Operators Based On SSA's Predecessor's Discovery

61. The Parties do not dispute that by 1987 discussions between Colombia and SSA's

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92 **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 (SSA's Unofficial Translation).

93 *See* **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 1.

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

95 Colombia's Reply, ¶ 60.

96 *See* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 ("*As a result of the meeting carried out yesterday in your office, with the attendance of Mr. Vice-Admiral Guillermo Uribe Pelaez 2nd Commander of the Navy, we would like to inform you and consider the following aspects related to the recovery of the Capitan San José ship*.") (SSA's Unofficial Translation); **Exhibit C-19**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 3 ("*In regards to your suggestions with respect to the participation of the salvaged items and the areas of exploration of the possible locations of the Galleon San José*").

Predecessors to enter into a salvage contract for the San José shipwreck had stalled.[97] That was because, as SSA has explained (and Colombia has not rebutted), Colombia was, behind the scenes, attempting to limit the proceeds it owed to SSA's Predecessors.[98] Colombia first attempted to do this via the 1984 Decrees that purported to reduce proceeds owed to declarants of shipwrecks from 50% to 5%.[99] These provisions were later struck down as unconstitutional by Colombian courts.[100]

62. Around this time, as SSA explained in its Response, Colombia also began courting other States to conclude a Government-to-Government contract to recover the San José shipwreck on more favorable terms, including the U.S. and Sweden.[101] Unable to deny the obvious, Colombia claims that it reached out to these other States "*precisely because the Galeón San José had not been located by that moment.*"[102] Colombia offers no evidence for this proposition. Indeed, this is patently false and belied by the record. Colombia's attempts to contract with other vendors for the recovery of the San José confirm that Colombia recognized (i) SSA's Predecessor's claim to have found the San José;[103] and (ii) SSA's Predecessors' rights to any salvaged treasure from the Discovery

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97 *See* SSA's Response, ¶ 65; Colombia's Reply, ¶ 61; Claimant's Chronology of Key Facts, Rows 21-23; Colombia's Appendix D, Rows 20-21.

98 *See* Notice of Arbitration, ¶ 23; Colombia's Preliminary Objections, ¶¶ 34-47; SSA's Response, ¶¶ 65-66; Colombia's Reply, ¶ 64.

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

100 *See* SSA's Response, ¶ 75; Colombia's Preliminary Objections, ¶ 55; **Exhibit C-24 [EN]**, Colombian Constitutional Court, Case File No. D-379, Judgment No. C-102/94, 10 March 1994, PDF p. 4 ("*Declare INAPPLICABLE in their entirety the articles 188 and 191 of Decree 2324 of 1984, for exceeding the material limit set forth in the law of legislative authorization (19 of 1983)*") (SSA's Unofficial Translation).

101 As SSA noted in its Notice of Arbitration, contemporaneous press reports indicate that Colombia's deal with Sweden fell apart after accusations of corruption and corporate piracy against both Colombian and Swedish Government officials involved in the scheme had surfaced. *See* Notice of Arbitration, ¶ 25; **Exhibit C-21**, Michael Molinski, *Battle for Spanish Treasure Ship*, UNITED PRESS INTERNATIONAL, 3 August 1988; **Exhibit C-22**, *The Retrieval of the Galleon San José – A Scandal Is Foreseen Among High Officials*, EL SIGLO, 24 August 1988. Colombia has failed to respond to this point.

102 Colombia's Reply, ¶ 61.

103 *See* SSA's Response, ¶ 66; **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, p. 1 ("*the U.S. firm sea Search Armada . . . claims to have already spent 12 million dollars on search and to have found the San Jose under a contract with the GOC*."); **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 2 ("*The coordinates identifying the area shall be set out in the Contract. The*

Area.[104]

63. First, Colombia did not ask the U.S. or Sweden to look anew for the San José, but rather to prepare a salvage operation. Specifically, Colombia asked the U.S. for a proposal for the: "*(A) identification; (B) historical and archeological studies of the shipwreck location; (c) eventual recuperation or salvage of ship; (d) conservation of recovered valuables*."[105] And Colombia's memorandum of understanding ("**MoU**") with Sweden was for "*the identification and salvage of the San José*."[106] Tellingly, Colombia was not asking these Governments to look for the San José because it had not yet been found. Rather, Colombia was asking them simply to conduct the "*identification*" and "*salvage*" of the ship.

64. It is important to note here that "*identification*" does not refer to (or mean the same thing as) a new search for the San José; rather it refers to the identification and cataloguing of the items found aboard the shipwreck. This is consistent with Colombia's own definition of the term in the Draft Contract for the salvage of the San José that Colombia had sent to SSA's Predecessor, where Colombia defined "[i]*dentification and* [i]*nventory*" as "*consist*[ing of] *the mechanical and physical labor to separate the species from the material or substances which might adhere to it, its classification and count.*"[107]

65. Second, Colombia asked both the U.S. and Sweden to conduct the requested identification and salvage activities specifically in the Discovery Area. In its communication to the U.S. Embassy in Bogota, Colombia noted that "*the wreck* [of the San José] *may be located near the Rosario Islands in the Colombian territorial waters*

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identification shall start in the first place within the coordinates declared by Sea Search Armada. The Swedish operator shall use the most precise means to determine the coordinates declared by SSA in such a manner that there is no doubt whatsoever that it is the same precise place.") (SSA's Unofficial Translation).

104 *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 5 ("*If the contractors finds wreck valuables in the area to be identified later,* ***he will have to grant a five percent participation assessed on the gross value of the recovered valuables to the U.S. firm Sea Search Armada****, granted to the Glocca Morra Company in accordance with Article 113 of Decree 2324 of 1984 and Resolution 354 of 1982 from* [DIMAR].") (emphasis added).

105 **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 3.

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

107 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 3(b).

of the Caribbean Sea at an approximate depth of 250 meters."[108] This was precisely where SSA's Predecessor had searched and later declared the location of the shipwreck.[109] Moreover, the Colombian Government specifically noted that SSA's Predecessor would have a right of recovery over any "*wreck valuables in the area to be identified later*" as it had "*concessionaire rights*" under, *inter alia*, Resolution No. 0354.[110] This provision only makes sense if Colombia believed that SSA's Predecessor had actually located the San José in the Discovery Area.

66. Colombia's MoU with Sweden also targeted the Discovery Area. The MoU "*designate*[d] *an area of 100 square nautical miles for the identification and salvage of the San José.*"[111] While the MoU did not identify any specific coordinates, this translates to roughly a radius of just over 5 nautical miles from a pinpoint. Colombia, moreover, instructed Sweden that "*identification* ***shall start in the first place*** *within the coordinates declared by Sea Search Armada*" and that "[t]*he Swedish operator shall use the most precise means to determine the* ***coordinates declared by SSA*** *in such manner that there is no doubt whatsoever that it is the same precise place.*"[112] In other words, Colombia wanted Sweden to find the precise Discovery Area as reported by SSA's Predecessor. Had SSA not located the San José in its search area, this exercise would have been pointless.

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

109 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 6 (describing its search: "*Keeping the station or patrol lines at this distance ranged from about 9.5 to 12 miles from the western tip of the Island of Rosario*.") (SSA's Unofficial Translation). *See also* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 6-15, 17 (describing the search in the vicinity of the Rosario Islands and reporting the finding of "*the possible remains of the San José*" at a depth of 707 feet (215 m)); **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 6 (describing the location of the "*Station 'Island'*" (San Martin) in the Rosario Islands area).

110 **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 5 ("*If the contractors finds wreck valuables in the area to be identified later,* ***he will have to grant a five percent participation assessed on the gross value of the recovered valuables to the U.S. firm Sea Search Armada,*** *granted to the Glocca Morra Company in accordance with Article 113 of Decree 2324 of 1984 and Resolution 354 of 1982 from* [DIMAR].") (emphasis added).

111 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5.

112 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 5 (emphasis added).

67. Third, the reason Colombia was contacting other States for a salvage contract was not because it believed that the San José had not been discovered, but because it was seeking a "*government-to-government*" contract for the identification of its contents and their salvage and/or preservation.[113] While Colombia issued its diplomatic note concerning the underwater salvage project of the San José under a reservation of rights,[114] as Colombia itself points out, Colombia followed up this reservation by providing 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***."[115] In other words, Colombia expected the San José was within the Discovery Area but, if its identification and salvage was not successful, the bidder would be given a chance to look for shipwrecks other than the San José.

68. Thus, Colombia's attempts to contract with other States confirm that Colombian authorities considered that SSA's Predecessors had reported the discovery of the San José shipwreck. The 1982 Report did not present, as Colombia claims, a "*mere* [h]*ypothesis*"[116] but actual data based on which Colombia was actively seeking the identification and salvage of the San José.

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69. While Colombia's Preliminary Objections do not require the Tribunal to determine now whether SSA's Predecessor found the San José,[117] all available contemporaneous evidence that was available to and verified by both Colombian and SSA officials, suggests that SSA's Predecessors had indeed found and reported the San José

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[113] **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 6. *See also* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶¶ 9 ("*Obregon has proposed two possible plans to satisfy the GOC 'Government-to-Government' Requirement*"), 11 ("*It is understood that the Government of the Republic of Colombia is seeking a Government-to-Government Agreement*").

[114] In this respect, Colombia's reference to the fact that it would "*neither guarantee nor assume responsibility for the existence, nature, and identity of either the searched object or the salvage profit*" is of no consequence—this was merely a reservation of rights on Colombia's behalf. Colombia's Reply, ¶ 62, *citing* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 2.

[115] *See* Colombia's Reply, ¶ 62, *citing* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 2.

[116] *See* Colombia's Reply, ¶ 64.

[117] *See supra* ¶ 20.

shipwreck.[118] This understanding was later confirmed by DIMAR itself in discussions with SSA's Predecessors over the terms of a potential salvage contract,[119] and then in communications between Colombian authorities and other governments to enter into such a contract.[120] Needless to say, any final determination of this issue will require additional discovery, including (but not limited to) contemporaneous logs and records of Colombian Navy and DIMAR officials who were supervising the efforts of SSA's Predecessors.

I. SSA Cayman Initiates Litigation Before Colombian Courts To Confirm Its Rights

70. Colombia does not dispute that, in 1988, after several years of good faith attempts by SSA's Predecessors to negotiate with Colombia, the recent public scandals involving corruption and Colombia's covert attempts to deprive them of their rights, the investors in SSA's Predecessor, led by Jack Harbeston, decided to initiate legal actions in Colombia to protect their interests.[121] Colombia also no longer appears to dispute that SSA's Predecessor had applied for declaratory relief, and was not requesting any new or additional rights from the Colombian courts.[122] Indeed, Colombia appears to have dropped completely its argument that SSA inherited only judicial rights from its Predecessor.[123] Colombia also does not contest its procedural misconduct during the Colombian proceedings for which the Colombian courts repeatedly reprimanded the State.[124]

71. There is, moreover, no dispute between the Parties that on 6 July 1994, the Civil Court ruled in favor of SSA's Predecessor, holding as follows:

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118 *See supra* **Section II.D**.

119 *See supra* **Section II.G**.

120 *See supra* **Section II.H**.

121 *See* SSA's Response, ¶ 67; Colombia's Reply, ¶¶ 72-74; Claimant's Chronology of Key Facts, Rows 24-25; Colombia's Appendix D, Row 23.

122 *See* Colombia's Reply, ¶ 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*.") (emphasis added). *See also* SSA's Response, ¶ 67; Claimant's Chronology of Key Facts, Rows 24-25; Colombia's Appendix D, Row 23.

123 *See* Colombia's Preliminary Objections, ¶¶ 6(iii), 268-70.

124 *See* SSA's Response, ¶¶ 89-90.

> [T]*hat the* ***goods of economic, historic, cultural, and scientific value that qualify as treasures belong, in common and undivided equal parts (50%), to the Colombian Nation and to Sea Search Armada****, which goods are* ***found within the coordinates and surrounding areas*** *referred to in the* [1982 Report]*, which is part of resolution number 0354 of June 3, 1982, of* [DIMAR] *that recognized that this company holds declarant's right to such goods; whether* ***these coordinates and their surrounding areas*** *are located in or correspond to the territorial sea, the continental platform, or the Exclusive Economic Zone of Colombia.*[125]

72. Colombia argues that "*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.*"[126] That is not, in fact, SSA's position. SSA's rights vested with its discovery of the shipwreck, as was later confirmed by the Colombian courts.[127]

73. Colombia further claims that the Civil Court did not opine on the whether the Discovery Area contained the San José.[128] This mischaracterizes the context of the proceedings. At the time SSA's Predecessor initiated the litigation, there was no controversy over the fact that the exploration,[129] discovery[130] and attempted salvage[131] work had been in relation to the San José. Rather, SSA's Predecessor's concern was that the 1984 Decrees sought to retroactively reduce the value of SSA's Predecessor's rights.[132] SSA's Predecessor therefore needed the Colombian courts to confirm the nature of SSA's rights, not whether it had found the San José. Indeed, during the court proceedings Colombia did not even raise the argument that the Discovery Area did not contain the San José, or that it was otherwise empty or worthless.[133]

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125 **Exhibit C-25 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 2. (emphases added) (SSA's Unofficial Translation).

126 Colombia's Reply, ¶ 71.

127 *See* SSA's Response, ¶¶ 91, 161, 167, 176, 179, 181.

128 *See* Colombia's Reply, ¶¶ 72-74.

129 *See supra* ¶¶ 31-32.

130 *See supra* ¶¶ 49-51.

131 *See supra* ¶¶ 59-60, **Section II.H**.

132 *See* SSA's Response, ¶¶ 67-77; Claimant's Chronology of Key Facts, Rows 24-25; Colombia's Appendix D, Row 23; **Exhibit C-61 [EN]**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF pp. 1-2 (First through Fifth).

133 *See* **Exhibit C-62 [EN]**, Colombia's Response To SSA Cayman's Civil Court Action, 16 February 1989, PDF p. 2

J. Colombia Still Relies On The Flawed 1994 Columbus Report Yet Makes No Attempt To Defend It

74. In 1994—two days after losing the Civil Court Action—Colombia issued a press release announcing that it had commissioned the Columbus Report that apparently "*scientifically*" showed that the San José was actually not in the area reported by GMC.[134] In its Response, SSA demonstrated that the Columbus Report has little probative value because, among other reasons:

(a) It was issued in the midst of legal proceedings, yet SSA Cayman's representatives were not invited to observe the survey or allowed to review the report's assumptions, methodology or findings;[135]

(b) Colombia refused to rely on the Columbus Report in any subsequent legal proceedings;[136]

(c) Neither the Columbus Report nor the underlying contract with Columbus mentions GMC or SSA Cayman's search or findings, or indeed the 1982 Report;[137]

(d) The Columbus Report does not indicate which coordinates were searched and only says that the Colombian Government provided certain (unspecified) coordinates to Columbus;[138]

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134 *See* **Exhibit R-11**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994, PDF p. 1 (Colombia's Unofficial Translation). *See also* **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994.

135 *See* SSA's Response, ¶ 79.

136 *See* SSA's Response, ¶ 79.

137 *See* SSA's Response, ¶ 80(a). *See* **Exhibit R-10**, Contract No. 544/93 between Colombia and Columbus Exploration, 21 October 1993, art. 2 (explaining the "*scope of the works*"); **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 1.1, p. 2 (explaining the "*hypothesis*") (Colombia's Unofficial Translation).

138 *See* SSA's Response, ¶ 80(b); *See* **Exhibit R-10**, Contract No. 544/93 between Colombia and Columbus Exploration, 21 October 1993, arts. 2(a) ("*The following is the scope of work: a. Location of anomalies that may exist at the bottom of the Caribbean Sea at a maximum depth of 700 meters, within a circumference with a radius of 1.5 Nautical Miles, whose center will be fixed based on the coordinates that* [Colombia] *will provide. . .*"), 10(d) ("*Other obligations of the contractor. . .d) Maintain absolute confidentiality about the coordinates provided by* [Colombia]") (SSA's Unofficial Translation); **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 1.1, p. 3 ("*Columbus Exploration Inc. has been commissioned by the Nation with the task of developing the scientific oceanographic research in*

(e) The Columbus Report discusses analysis of a wood sample but does not describe the provenance of said sample,[139] and does not explain why its purported analysis contradicted the contemporaneous carbon dating analysis that had been submitted to Colombia as part of the 1982 Report, which was fully incorporated into Resolution No. 0354;[140]

(f) The Columbus Report claims that Columbus analyzed with a side scan sonar not just the (unidentified) coordinates but also "*an area hundreds of times greater*" than those coordinates so that "*there were no errors regarding the coverage of the areas of the coordinates*",[141] yet 22 years later, in 2015, Colombia claimed to have found the San José shipwreck within the Discovery Area—just over three nautical miles from the coordinates listed in the 1982 Report;[142] and

(g) A Colombian naval officer was aboard every SSA ship that searched for and found the San José[143] and thus Colombia had contemporaneous access to and presumably reviewed all sonar readings, scientific surveys and analysis of wood samples shared with it, including with the 1982 Report,

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the area of the coordinates located in the Caribbean Sea, approximately 12 miles from the Rosario Islands.") (SSA's Unofficial Translation).

139 *See* SSA's Response, ¶ 80(c). *See also* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 4.3, p. 12 ("*On June 14, Columbus Exploration received a sample of wood that had been considered part of the hypothetical plank.*").

140 *See* SSA's Response, ¶¶ 32, 39-44, 80; **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 9, 11; **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, p. 1; **Exhibit C-103**, Beta Analytic Testing Laboratory, Homepage, 14 September 2023 (last accessed), *available at* https://www.radiocarbon.com/.

141 SSA's Response, ¶ 82(c). *See also* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 3.3, p. 9.

142 *See* SSA's Response, ¶¶ 82, 121-122; *See* **Exhibit C-94**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, PDF p. 4, *available at* https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobiernocolombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de dolares/ ("*The distance between the two points is around 3.24 nautical miles*.") (SSA's Unofficial Translation).

143 *See* SSA's Response, ¶¶ 54-55, 82. *See also*, **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, PDF p. 3; **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 14 ("*Navy admiral coming on board for meeting with client*."); **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 7-8, 10, 11, 14-23.

yet the Columbus Report makes no attempt to reconcile these contradictory results.[144]

75. It is also worth noting that the founder and director of Columbus, Thomas G. Thompson, has been imprisoned in the United States since 2015 for refusing to disclose the location of missing gold coins from another historic shipwreck.[145]

76. Remarkably, Colombia makes no attempt at all to rehabilitate the Columbus Report with its Reply.[146] Instead, Colombia asserts that "[t]*he alleged deficiencies of the Columbus Report are irrelevant to decide on Colombia's jurisdictional objections*" because the only relevant fact, according to Colombia, is that it "*adopted as its own the conclusions*" of the Columbus Report.[147] This is preposterous. Colombia's conclusions are as flawed as the flawed report it adopted.

77. This is important because Colombia—while effectively abandoning the indefensible Columbus Report—nonetheless relies critically on the Report's supposedly "*scientific*" conclusions in support of both its flawed factual narrative and its legal case, which is that SSA found nothing and therefore has no rights. Indeed, Colombia's Reply is replete with references (sometimes oblique) to the Columbus Report and its conclusions.[148]

78. For example, Colombia suggests that it violated SSA's Predecessor's "*legitimate expectations*" as early as 1994, by issuing the Columbus Press Release.[149] Colombia

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144 *See* SSA's Response, ¶ 82(d).

145 *See* **Exhibit C-119**, *Treasure hunter stuck in jail for refusing to disclose location of gold coins faces judge; ingot from shipwreck sells for $2.16 million*, CBS NEWS, 25 January 2022, PDF p. 1, *available at* https://www.cbsnews.com/news/treasure-hunter-tommy-thompson-jail-6-years-gold-coins-hearing-ingot-auctioned/ ("*a **former deep-sea treasure hunter** marking his **sixth year in jail** for refusing to disclose the whereabouts of missing gold coins from an historic shipwreck*") (emphasis added); **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994, section 3.1, p. 8 ("*On 18 June 1994, a meeting took place between the representatives of the Nation and Columbus Exploration. Attendees included Thomas G. Thompson . . . of Columbus Exploration*") (SSA's Unofficial Translation).

146 *See* Colombia's Reply, Section II.G.

147 Colombia's Reply, ¶ 68.

148 *See, e.g.*, Colombia's Reply, Section G, ¶¶ 5, 65-70, 136, 156, 162, 250, 257, 259, 265, 321, 328, 340, 348, 350, 395, 397, 413, 425, 427, 432, 436, 437, 464 (referencing the Columbus Report and/or Columbus Press Release).

149 Colombia's Reply, ¶ 69.

fails to articulate why its self-declared violations of SSA's Predecessor's "*legitimate expectations*" would "*mark the end of the discussion*" or have any impact on SSA's claims before this Tribunal (they do not).[150] Neither SSA nor its Predecessor was required to take at face value such a facially deficient and self-serving Columbus Report and Columbus Press Release, particularly when Colombia made no attempt to use them in the legal proceedings before its own courts. Moreover, the matter of SSA's rights was litigated all the way to the highest level of the Colombian courts—and Colombia lost again and again and again. Thus neither the Columbus Report nor the associated Columbus Press Release by Colombia had any impact on the nature or validity of SSA's rights. Indeed, had the Columbus Report or Columbus Press Release deprived SSA's rights of all value, it would have had no reason to continue to pursue and vindicate them in Colombian courts.

K. Following the Columbus Report, SSA's Predecessor Seeks And Obtains An Injunction Order Preventing Colombia From Accessing The Discovery Area

79. The Parties do not dispute that on 12 October 1994, the Civil Court granted SSA Cayman's request and issued an Injunction Order prohibiting Colombia from taking any steps to interfere with the contents of the Discovery Area.[151] The court also affirmed that Claimant had "*ownership rights over the goods (treasures) found in the reported site, regardless of whether they are the remains of the aforementioned galleon or of any other ship*" by virtue of the reported discovery and as accepted by Colombia.[152]

L. SSA's Predecessor Wins Appeals In 1997

80. The Parties do not dispute that on 7 March 1997, the Superior Court of the Judicial District of Barranquilla ("**Superior Court**") affirmed the Civil Court Decision and the Injunction Order in full ("**Superior Court Decision**"),[153] and admonished Colombia for

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150 Colombia's Reply, ¶ 70.

151 *See* Colombia's Preliminary Objection, ¶¶ 63-64; SSA's Response, ¶¶ 86-87; Claimant's Chronology of Key Facts, Rows 29-30; Colombia's Appendix D, Row 29; **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 3.

152 **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 2 (SSA's Unofficial Translation).

153 *See* SSA's Response, ¶ 88; Colombia's Preliminary Objections, ¶ 65. *See also* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 24 ("*2.) To confirm the entirety the order dated October twelfth (12th), nineteen ninety-four (1994). . . 3.) To confirm*

its abusive conduct during the proceedings.[154]

M. The Colombian Supreme Court Upholds SSA's Predecessors' Rights As Acquired, Private Rights To The Treasure In The Discovery Area

81. The Parties agree that on 5 July 2007, the Supreme Court of Colombia issued the 2007 Supreme Court Decision, largely affirming the decisions of the courts below it.[155] As explained below, Colombia presents a distorted interpretation of the 2007 Supreme Court Decision to support its objections. As a detailed review of the 2007 Supreme Court Decision shows, *inter alia*, the Supreme Court (i) upheld that SSA's Predecessors had vested private rights to ownership over the treasure pursuant to the Civil Code; (ii) DIMAR's powers were limited strictly to authorize underwater exploration, not the transfer of private rights; (iii) dismissed Colombia's objections that the discovery was too speculative or the Discovery Area was too ill-defined to vest rights in SSA's Predecessors; (iv) confirmed that SSA's Predecessors had "*acquired*", not merely "*expected*", rights; and (v) found that the only legal error committed by the lower court was its failure to recognize that items of cultural heritage should be excluded from the definition of treasure.

82. First, in addressing certain procedural objections by Colombia,[156] the Supreme Court confirmed that SSA and its predecessors had vested rights governed by private law.[157] The Supreme Court, like the courts before it, found that while Resolutions Nos. 0048 and 0354 vested the underlying rights, the rights themselves were "*of a civil nature*" and thus were subject to private, not public law.[158] According to the Court, it was the

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the entirety of the judgment dated July sixth (6th), nineteen ninety-four (1994). . ."). (SSA's Unofficial Translation).

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

155 *See* SSA's Response, ¶¶ 3, 4, 91; Colombia's Preliminary Objections, ¶¶ 65-68; Claimant's Chronology of Key Facts, Row 31; Colombia's Appendix D, Row 32; **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007.

156 These included Colombia's objection that SSA Cayman's request for declaratory relief should be heard by the administrative, not civil courts, because it concerned the actions of administrative agencies such as DIMAR. *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 19-20.

157 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 37-39.

158 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 37 (The Court found in full: "*Consequently, it is clear that the action at hand*

effect of Article 701 of the Civil Code, not the DIMAR resolutions, that created SSA's Predecessors' private rights.[159] As discussed further below, this means that no further DIMAR (or other government) authorization was necessary for the transfer of private rights between parties.[160]

83. Second, the Supreme Court rejected Colombia's argument, similar to the one it makes here,[161] that the assignment of rights between SSA's Predecessors was deficient due to the alleged lack of DIMAR authorization. There, Colombia had argued that DIMAR's resolution had been insufficient to assign rights from GMC to SSA Cayman because it did "*not mention the 'status of reporter of treasures' but simply the 'work of underwater exploration'.*"[162] The Supreme Court rejected this argument and found that GMC had validly assigned its rights to SSA Cayman[163] and that DIMAR did not need to authorize

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does not entail a different issue and it is particularly not essentially linked to the validity of the administrative acts issued by DIMAR or to the activity of administration in general, either by action or omission. Neither does it concern the matter of recovering the discovered goods, which involves some precontractual or contractual arrangement with the Nation. ***It is an entirely different situation that the pertitum would have to do with isolated administrative acts, as is expected, but acts that produce rights of a civil nature****, which does not make the action administrative per se, able to be heard in the framework of what are known as administrative proceedings.*" The Court further noted: *"In addition, note that the judgment of the court of first instance, confirmed in full by the judgment of the Superior Court, did not make any decision on the legality or validity of the administrative acts undertaken by DIMAR, or of its actions, or on the 'privilege or preferential right to contract.'* ***What it did decide is that the parties are co-owners, in joint, undivided ownership, of the goods in question and that those goods were considered to be treasures****, regardless of whether they are in the territorial sea, on the continental shelf or in the exclusive economic zone.*") (SSA's Unofficial Translation) (emphases added).

159 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 41 ("*Observe how the plaintiff argues—correctly—for application of Article 701 of the Civil Code and of others, all of the Civil Code. This means* ***that the core of the dispute revolves around the effectiveness of a legal norm that is part of private law, not an administrative act or of the activity of the administration****, even though some of the history of the matter is unequivocally related to administrative law, specifically with the authorization for underwater exploration and recognition* [of the plaintiff] *as 'reporting entity' of 'treasures or shipwreck goods,' a circumstance that, in and of itself, inevitably does not alter the jurisdiction in question, as noted earlier.*") (SSA's Unofficial Translation) (emphasis added).

160 *See infra* ¶¶ 212-215.

161 *See* Colombia's Preliminary Objections, ¶¶ 261-65; Colombia's Reply, ¶¶ 86-98, 273-81.

162 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 59.

163 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 63-64 ("*It must also be observed . . . that in Resolution No. 204 of March 24, 1983 . . . , in addition to authorizing* Glocca Morra Company *to assign to* Sea Search Armada *'all rights, privileges and obligations' that it had acquired, including those arising from Resolution No. 0354 of June 3, 1982, it authorized 'the company, SEA SEARCH ARMADA, to undertake works of underwater exploration aimed at locating treasures or shipwreck goods in Colombia's jurisdictional waters of the Atlantic Ocean in the areas described in Article 1 of Resolution Nos. 0048 of January 29, 1980 and 0066 of February 4, 1981.* "") (SSA's Unofficial Translation).

the transfer of rights that had vested in the declarant unless the transferee intended to conduct underwater exploration.[164]

84. According to Colombia, the Supreme Court'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.*"[165] But that is directly contradicted by the Supreme Court's statement that DIMAR "*only granted permission for the underwater exploration aimed at locating treasures or shipwreck goods and authorized the respective replacements, recognizing the assignees as such, authorizing them to go ahead with the exploration; allowed the plaintiff to use foreign flagged ships for the purpose and even considered the plaintiff company as a 'reporter of treasures or shipwreck goods,' when later coordinating with it toward execution of the contract for recovery of the goods found*."[166] While the Supreme Court also mentioned that DIMAR, in any event, recognized in its resolution the transfer of "*'all rights, privileges and obligations'*" between SSA's Predecessors, the Supreme Court addressed this only as a

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

[165] Colombia's Reply, ¶ 83.

[166] **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 64 (SSA's Unofficial Translation).

matter of fact.[167]

85. Third, the Supreme Court rejected Colombia's contention here that the Discovery Area must be identified by a precise set of coordinates rather than their vicinity, as provided by the 1982 Report.[168] Instead the Supreme Court upheld that Resolution No. 0354 was legally binding, as drafted, which necessarily included the Discovery Area as defined in the 1982 Report (*i.e.*, the vicinity of the listed coordinates).[169]

86. In the Colombian litigation, Colombia had argued that the "*discovery of treasures or shipwreck goods requires that the finding be indicated precisely*" and thus the lower courts had erred by "*fail*[ing] *to verify the exact location of the alleged treasure*.[170] The Supreme Court fully rejected this objection, finding that any supposed deficiency in the preciseness of the location must be attributed to DIMAR, not GMC, and any action by DIMAR must be upheld "*due to the presumption of legality and correctness underlying it.*"[171] Thus, because Resolution No. 0354 vested GMC with the relevant rights in the treasure (pursuant to Article 701 of the Civil Code), any objections to the alleged lack of precision of Resolution No. 0354 could not succeed.[172]

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167 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 63-64.

168 *See* Colombia's Preliminary Objections, ¶¶ 22, 66, 173; Colombia's Reply, ¶¶ 257-58, 340.

169 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 69-71.

170 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 59, 61 (SSA's Unofficial Translation). *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 59. ("*Concerning recognition of 'acquired rights,' the appellant maintained that the discovery did not suffice, that execution of an administrative contract was required, which would determine each party's share of the results of the exploitation and recovery of the treasures and shipwreck goods.*") (SSA's Unofficial Translation).

171 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 69 ("*Now then, regarding the error of fact alleged by the Nation, consisting of considering the exact location of discovery of the treasure as having been demonstrated although it was not,* ***the Court deems that the Superior Court did not make such a mistake strictly speaking, particularly not a mistake of the obvious****, clear nature that has long been required in a petition for cassation,* ***because if the requested or claimed declaration of ownership was founded on DIMAR Resolution No. 0354 of June 3, 1982, which, as we know, recognized the plaintiff's assignor as a reporter of treasures or shipwreck goods, due to the assignment it made to the latter, the mistake, if any, would not lie in the challenged judgment but in that resolution, which the Superior Court could not ignore and which this body cannot ignore either, due to the presumption of legality and correctness underlying it.***") (SSA's Unofficial Translation) (emphases added).

172 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 71 ("*because the Superior Court's conclusion is based on the discovery, in*

87. Fourth, the Supreme Court addressed Colombia's (new and untimely)[173] objection that SSA's Predecessors had not acquired rights, but only "*a mere expectation of a right.*"[174] In the Colombian litigation, Colombia had argued that SSA's Predecessors could only have acquired rights upon the execution of a salvage contract.[175] The Supreme Court rejected this, and further denounced Colombia's attempts to "*liken*[] [SSA's Predecessors'] *'implicit rights to mere expectations' without noting that the rights referred to . . . are rights 'derived from* [SSA's Predecessor's] *recognition as reporter of treasures through Resolution No. 354 of 1982.*"[176] Thus, the Supreme Court affirmed that "***the discoverer acquired its rights from the very moment of the discovery or the report of the treasure***."[177]

[Resolution No. 0354] *that gave* Glocca Morra Company *its status as reporter of the goods the ownership of which is in dispute here, and that company assigned the privilege to the plaintiff in this case . . . the accusation cannot succeed*.").

173 *See infra* ¶ 221.

174 Colombia's Reply, ¶ 298. *See also* Colombia's Reply, ¶¶ 288-310.

175 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 59, 71 ("*In effect, according to the charge, the only way in which a potential right to the goods discovered can develop for the plaintiff was through execution of the contract aimed at achieving their recovery, since it was only through that convention that any share the plaintiff might have in those goods could be defined*.") (SSA's Unofficial Translation).

176 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 73 ("*Therefore, if the claim concerning the potential 'privilege or preferential right to contract' was excluded from the case, it is not appropriate to say that the Superior Court asserted the existence of 'acquired rights' based on an alleged contract that its decision did not address, precisely because it was not part of the dispute. Consequently, neither could the court make a mistake of fact in not having seen that the DIMAR opinion of July 18, 1983, identifies the plaintiff's rights as 'implicit,' not only because the property rights recognized to it in the judgment have their source in civil law—in Article 701 of the Civil Code in particular—not in an administrative act and much less in an 'opinion', but also because without sufficient explanation or justification one is likening 'implicit rights to mere expectations,' without noting that the rights referred to in the opinion in question—as one can read right there—are rights 'derived from its recognition as reporter of treasures through Resolution No. 354 of 1982' (p. 756, file 1-III).*") (SSA's Unofficial Translation).

177 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 74 (emphasis added). *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 157 ("*It is clear, therefore, that the right to a treasure is acquired by its discovery,* lato sensu*, and not by its material or physical apprehension (*corpus*), a concept that also includes reporting its location, applicable to discoveries that occur on land or property owned by others*."), 154 ("*Therefore, from a legal perspective, it is clear that the right to a treasure is not only or exclusively acquired when there is a physical or material discovery of the precious objects,* ***but also when the place where they are located is specified or identified, even if they have not been extracted and fully identified*** *(*posterius*). In other words,* ***being the discoverer,*** **stricto sensu,** ***or reporting party, is deemed a sufficient circumstance to recognize the right of ownership to the treasure of whoever possesses either status***[.] *The seizure, per se (*apprehensio rei*), will only confer possession or custody, as appropriate, but ownership, ex ante, will have been established from the very moment of discovery or reporting, in the broad sense of the term*."), 155 ("*But just as the act of reporting protects the land owner's (dominus loci) right to the treasure,* ***it also protects the rights of the 'reporting party,' the 'discoverer,' 'who***

88. Accordingly, the Supreme Court of Colombia firmly rejected Colombia's argument, which Colombia improperly attempts to resurface in this Arbitration, that a declarant of a treasure only has potential or expected rights.[178] The Supreme Court stressed throughout its decision that **the act of discovery** vests in the declarant the right to that discovery.[179] That right, once vested, is no longer merely expected.[180]

89. Fifth, the Supreme Court addressed the only legal error it considered the lower court to have committed. Notably, and contrary to Colombia's claims,[181] the Court did not find any error with the lower court's determination of the area over which SSA has rights, but only with the lower court's articulation of what could constitute treasure.

90. In the Colombian litigation, Colombia had argued that the "*disputed goods cannot qualify as treasures*" because the shipwreck was "*'part of* [Colombia's] *heritage and national cultural identity'*."[182] The Supreme Court conducted an extensive analysis of the term "*treasure*" and held that, as reported, the shipwreck could constitute "*treasure*" within the meaning of Articles 700 and 701 of the Civil Code.[183] In its analysis, the

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will own half of the treasure by virtue of the 'discovery' (iure inventionis***).*** *The contrary, that is, to affirm that the rights of the person who discovers a treasure on another's property only arise at the moment it is physically removed, would create a clear imbalance in the legal relationship between the reporting party and the owner of the land, insofar as the former would be subject to the latter, who could take advantage of his ownership of the property, to the detriment of the discoverer, among other scenarios. . . The difference described above is particularly important in the case of treasures found in places where, due to the conditions in which they are hidden, it is difficult to extract the precious objects, especially if it is necessary for the owner to consent to such removal beforehand*."), 182 ("*Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets that are the subject of this judicial controversy, insofar as they of course correspond to a treasure, a circumstance guaranteed in the legal sphere with the recognition that in this sense was made by* [DIMAR]*, according to Resolution 0354 of June 3, 1982, to the* Glocca Morra Company."), 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract. . . it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery*.") (SSA's Unofficial Translation) (emphases added).

178 *See* Colombia's Reply, ¶¶ 288-310.

179 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 157-84.

180 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 182 ("[W]*e must reject the idea that* [the discovery and equal division of treasure] *is only a mere expectation, or a vain hope, or a* pie in the sky. . .") (SSA's Unofficial Translation).

181 *See* Colombia's Reply, ¶¶ 78-79; Colombia's Preliminary Objections, ¶ 66.

182 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 76.

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

Supreme Court specifically distinguished the concept of "*treasure*"—to which the 50/50 apportionment scheme under Articles 700 and 701 of the Civil Code applied—from objects of "*cultural heritage*,"[184] to which that apportionment scheme did not apply.[185]

91. Applying this newly articulated legal standard to the case at hand, the Supreme Court found that the lower court had "*committed a legal error*" by failing to recognize that some of the shipwrecked goods might not be categorizable as treasure.[186]

92. This was the **only** legal error that the Supreme Court identified in the lower court's analysis.[187] Contrary to Colombia's assertions, the Supreme Court did **not** find any

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shipwreck could be treasure because (i) it was manmade; (ii) buried or lost for a long time; and (iii) the owner was not known or could not be found at the time of the discovery. In assessing the third factor, the Supreme Court rejected Colombia's arguments that it was known, at the time of the discovery, that the shipwreck was owned by Colombia or, in the alternative, by Spain. *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 81, 89, 91, 97, 107, 169-71, 211, 234.

184 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 81-146.

185 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 218-19.

186 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 158. *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 161-62 ("*The clear failure by the Superior Court to apply Law 163 of 1959, in particular its aforementioned Article 14, in the case submitted for its consideration, led it, by affirming the decisions of the lower court, to ascribe to the totality of the goods discovered, in general terms, the status of treasures and to recognize, with respect to them, the right of ownership in favor of the plaintiff, including those 'of historical [and] cultural… value...', which are categorically excluded from such special legal regime and are instead subject to the treatment provided for in the aforementioned law, which was applicable at the time in question Stated in more concise terms, the Superior Court's error lies in having ignored that, pursuant to Article 14 of Law 163 of 1959, when the plaintiff's assignor was recognized as an entity reporting treasures, which it transferred to the plaintiff (DIMAR Resolution No. 0354 of June 3, 1982), the notion and scope of the legal concept of the treasure did not correspond to the original or initial idea set forth in Article 700 of the Civil Code, in no way unrestricted, because the aforementioned precept excluded from it the assets comprising national historical, cultural, artistic or archaeological heritage, in particular, the 'movable monuments' established in Article 7 of the aforementioned law, which have their own regulation separate from that provided in the Civil Code for treasures, a circumstance that explains why the judge could not—as he did—assign the status of treasure to a group of goods that,* ministerio legis*, are not and could not be such, given that this legal concept, is not applicable at the present time and, therefore, does not cover goods of 'historical [and] cultural value...', which are subject to special and meticulous legislative protection, not only under the 1959 law, but also under subsequent laws, including those of constitutional lineage, inter alia, Articles 70 et seq. of the Constitution and Decrees 1397 of 1989 and 833 of 2002, which also exclude these types of assets from the legal concept of treasure*.") (SSA's Unofficial Translation).

187 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 166 ('[I]*t is clear that the Superior Court, despite the precedent error having been identified and fully subject to appeal, did not commit the remaining legal errors ascribed to it, as will be explained below*.") (SSA's Unofficial Translation).

error in the lower court's determination of the Discovery Area or alleged lack of specificity of the area to which SSA's Predecessor had vested rights.[188] Thus, the Court's reference to "*without including, therefore, different spaces, zones or areas*"[189] in the *dispositif* could not shrink SSA's rights from the Discovery Area in the 1982 Report—which included the reported coordinates' "*vicinity*"—to pinpoint coordinates, as Colombia purports.[190] Indeed, doing so would have made Resolution No. 0354, which fully integrated the 1982 Report, internally inconsistent.[191]

93. In sum, Colombia's selective and distorted discussion of the 2007 Supreme Court Decision does not withstand scrutiny. Following the 2007 Supreme Court Decision, SSA reached out to the President of Colombia to discuss how to implement the 2007 Supreme Court Decision.[192] These discussions were, at the time, unsuccessful.[193]

N. SSA Makes An Investment In Colombia Under The 2008 APA

94. On 18 November 2008, SSA acquired all of SSA Cayman's assets and liabilities pursuant to the APA.[194] Colombia does not contest that both SSA and SSA's Predecessors represented and maintained the interests of the same underlying U.S. investors who had originally invested in the exploration and reporting of the San José shipwreck.[195]

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188 *See also* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 184-87 (holding that the lower court made no legal error by finding that SSA's Predecessor had made a discovery).

189 Colombia's Preliminary Objections, ¶ 66.

190 *See* Colombia's Reply, ¶ 78.

191 *See* SSA's Response, ¶¶ 49-50. *See also* **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982 (noting that the 1982 Report is "*an integral part of this Resolution*"); **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 13 (defining the Discovery Area as including "*surrounding areas that are located in the immediate vicinity of*" the 76 degrees 00'20"W, 10 degrees 10'19"N coordinates) (SSA's Unofficial Translation). That means that the Supreme Court's decision could have only meant that no areas outside of the vicinity or surrounding areas should be included, but it could not abrogate what Resolution No. 0354 already had confirmed.

192 *See* **Exhibit C-110**, Letter from SSA to the President of Colombia, 15 August 2007.

193 *See infra* **Section II.Q**.

194 *See* SSA's Response, ¶¶ 96-101; **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008.

195 *See* SSA's Response, ¶¶ 166-71 (explaining that the U.S. founders who created GMC Inc. and further U.S. investors in GMC Inc., GMC and SSA Cayman, all had their investments reflected via partnership interests

95. In consideration for the assets, SSA undertook to "*assume and thereafter . . . pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities*" of SSA Cayman.[196] This included payment and performance obligations, including payments to various vendors involved in the search and identification of the San José,[197] as well as the obligation to distribute all proceeds obtained to the Economic Interest Holders, which were all previously Partners of SSA Cayman, in portions equivalent to their rights of recovery under the SSA Cayman Partnership Agreement.[198] Thus, in 2008, SSA became the owner of rights to the discovered treasure that had previously belonged to SSA's Predecessors.

96. Colombia does not contest any of the evidence or events leading up to the execution of the APA between SSA Cayman and SSA. Colombia nonetheless insists that "*the record still lacks any factual evidence that SSA LLC met the conditions*" in the APA.[199]

97. Colombia's allegations lack any merit as a summary review of the APA demonstrates. Section 2.1 of the APA ("*The Closing*") states that the closing of the purchase and sale of the Acquired Assets shall take place in Chicago, Illinois, "*two business days after the date on which all conditions to the Closing set forth in Sections 4.1 and 4.2 have been satisfied or, to the extent permitted, at such other place or time or on such other*

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in SSA Cayman, and ultimately became Economic Interest Holders in SSA, whom SSA must compensate in accordance with their investments pursuant to the APA).

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

197 *See, e.g.,* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. IV ("*The Managing Partner and Chicago Maritime Corporation, a Colorado corporation ('Chicago Maritime'), have agreed that payment of up to six hundred thousand dollars ($600,000) in accrued and unpaid fees payable by the Partnership to Chicago Maritime for the Partnership's charter hire of the submarine Auguste Piccard be deferred, and the Managing Partner and Chicago Maritime may agree that payment of an additional amount of such fees, not to exceed another six hundred thousand dollars ($600,000), be deferred*.").

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

199 Colombia's Reply, ¶ 207. In its original submission, Colombia had asserted that "[n]*o evidence is provided that the conditions were satisfied, that the promised transaction closed or that a price was paid*." Colombia's Preliminary Objections, ¶¶ 139, n. 113 (citing the language in the preamble of the APA that the agreement was based "*upon the terms and subject to the conditions contained therein*"); 244-45 (referring to Art. 2.1 of the APA).

date as shall be agreed upon by the Parties."[200] Sections 4.1 and 4.2, in turn, provide:

> *Conditions to Closing*
>
> *4.1 Conditions to Seller's Obligations. Seller's obligation to close the transactions contemplated by this Agreement is subject to satisfaction of each of the following conditions (any of which may be waived by Seller in its sole discretion):*
>
> > *(a) Compliance with Agreement. On the Closing Date, all of the covenants and agreements to be complied with or performed by Purchaser under this Agreement on or before the Closing Date shall have been complied with or performed in all material respects.*
> >
> > *(b) Accuracy of Representations and Warranties. The representations and warranties made by Purchaser in this Agreement shall be true and correct on and as of the Closing Date as if made at and as of such date, except for representations and warranties which specifically speak only as of an earlier date.*
> >
> > *(c) No Litigation. No action, suit, claim or proceeding, by or before any court, governmental or regulatory official, body or authority, shall be pending which seeks to* [restrain]*, prevent or materially delay or restructure the transactions contemplated by this Agreement or otherwise questions the validity or legality of any such transactions.*
>
> *4.2 Conditions to Purchaser's Obligations. Purchaser's obligation to close the transactions contemplated by this Agreement is subject to satisfaction of each of the following conditions (any of which may be waived by Purchaser in its sole discretion):*
>
> > *(a) Compliance with Agreement. On the Closing Date, all of the covenants and agreements to be complied with or performed by the Receiver or Seller under this Agreement on or before the Closing Date shall have been complied with or performed in all material respects. . .*[201]

98. As is clear from the above, Sections 4.1 and 4.2 are terms of the contract, not pre-execution conditions that must be satisfied, and, in any case, they are expressly waivable upon execution by the Seller and the Purchaser, respectively, in their "*sole*

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[200] *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 2.1.

[201] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, arts. 4.1, 4.2.

discretion."[202] The APA was duly signed and executed by the parties' authorized representatives, confirming that the closing occurred to their satisfaction,[203] and its validity was never contested by either the Seller or the Purchaser. The APA is therefore a valid and fully executed intra-company agreement that transferred SSA Cayman's vested rights to SSA.[204]

O. SSA Seeks To Salvage The San José

99. On 2 March 2009, following the execution of the APA, SSA wrote to Colombia reprising its Predecessors' request to salvage the treasure, fearing that the shipwreck was at risk of being ransacked.[205] These fears were not academic—evidence has since surfaced that the site has been tampered with, if not looted, leading to a criminal complaint filed by a citizen ombudsman against the Government of Colombia.[206]

100. On 14 April 2009, SSA reiterated its concern and highlighted Colombia's attitude that the Government would prefer the treasure be lost to all rather than allow SSA access to the location.[207] For the next two years, SSA continued its efforts to convince Colombia to salvage the treasure, fearing that the treasure may otherwise be lost.[208] In the course of these communications, upon Colombia's request, SSA also confirmed that SSA's Predecessor's attorney, Mr. Devis, could continue acting on behalf of SSA following the assignment.[209]

101. However, Colombia responded to SSA's letters with the threat of force (not any allegation that SSA did not hold the rights at issue), asserting that SSA was prohibited

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[202] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, arts. 4.1, 4.2.

[203] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, p. 16.

[204] *See* SSA's Response, ¶ 172.

[205] *See* **Exhibit C-111**, Letter from SSA to the President of Colombia, 2 March 2009, p. 1.

[206] *See* **Exhibit C-120**, S. Durwin, *Las nuevas imágenes del galeón San José revelan la posible manipulación de los restos arqueológicos*, EL DEBATE, 8 June 2022, *available at* https://www.eldebate.com/historia/20220608/nuevas-imagenes-galeon-san-jose-revelan-posible-manipulacion-restos-arqueologicos.html#.

[207] *See* **Exhibit C-112**, Letter from SSA to the President of Colombia, 14 April 2009, p. 1.

[208] *See, e.g.,* **Exhibit R-17**, Letter from Colombia to Sea Search Armada, LLC, OFI10-00027876 / AUV 13200, 24 March 2010.

[209] *See* **Exhibit C-114**, Letter from SSA to the Legal Secretary to the President of Colombia, 8 March 2012.

from visiting its property without prior approval from the Government of Colombia.[210] This prompted SSA to initiate proceedings before U.S. Courts ("**U.S. Litigation**").

P. SSA Commences Legal Proceedings Outside Of Colombia To Protect The Rights Recognized By The Colombia Courts

102. As set out in SSA's Response and below, SSA initiated proceedings before **(a)** U.S. Courts, and **(b)** the Inter American Commission on Human Rights ("**IACHR**") to protect its rights to the treasure as recognized by the 2007 Supreme Court Decision. SSA ultimately discontinued both of those proceedings at Colombia's request when Colombia signalled a renewed willingness to reach an agreement about the San José.

(a) SSA Initiates U.S. Litigation For Conversion And Breach Of Contract Because Colombia Refused To Allow SSA Access To Its Discovery

103. There is no dispute that on 7 December 2010, SSA filed a complaint against Colombia before U.S. courts.[211] Colombia also acknowledges that in that litigation SSA alleged (i) breach of the salvage contract it was negotiating with SSA;[212] (ii) Colombia had committed conversion by refusing to allow SSA to initiate salvage operations;[213] and (iii) that the U.S. Court should enforce the 2007 Supreme Court Decision as a foreign judgment.[214] None of these are claims for expropriation.

104. Colombia suggests that SSA's breach of contract and conversion claims are somehow equivalent to SSA's claims here, but does not explain its reasoning.[215] Indeed it is hard to see any rationale for Colombia's assertions. SSA is not alleging breach of any contract in this Arbitration. And, as SSA has explained, a conversion claim under U.S.

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210 *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 33.

211 *See* SSA's Response ¶ 103; Colombia's Preliminary Objections, ¶ 74; **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.

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

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

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

215 *See* Colombia's Reply, ¶¶ 104-106.

law is not the same as a claim for expropriation under international law.[216] In any event, SSA's claims in this Arbitration arise from Resolution No. 0085, not Colombia's threats to block SSA's access to the Discovery Area through the use of force, which Colombia later withdrew (leading to SSA's withdrawal of the litigation).[217] Colombia thus fails to provide any legal or other support for its assertions of equivalency.

105. Instead, Colombia points to the factual narrative of SSA's pleading to claim that "*the US Civil Action … contains a clear allegation of expropriation of Claimant's unproven property rights over the Galeón San José*."[218] But Colombia conflates the legal allegations with the factual background (as it has also done in this Arbitration)[219] in that case. Moreover, Colombia ignores the fact that SSA terminated the U.S. Litigation because Colombia was willing to reengage in discussions to allow SSA access to its discovery. Specifically:

(a) Colombia first points to SSA's factual narrative in the U.S. Litigation regarding Colombia's "*attempt to modify the existing legislation*"[220] through the 1984 Decrees. However, Colombia's attempt to modify legislation was corrected when Colombia's Constitutional Court voided the relevant part of the 1984 Decrees in 1994 (thus restoring the *status quo ante*).[221]

(b) Colombia next points to the factual narrative section in SSA's pleading in the U.S. Litigation noting Colombia's threat to use military force if SSA attempted to access its property. Colombia also later redressed this by

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216 *See* SSA's Response, ¶ 105.

217 *See infra* **Section II.Q**.

218 Colombia's Reply, ¶ 100.

219 *See, e.g.*, Colombia's Preliminary Objections, ¶ 150 (conflating SSA's factual narrative in the Notice of Arbitration with its claims in this Arbitration). *See also* SSA's Response, ¶¶ 248-250.

220 Colombia's Reply, ¶ 102.

221 *See* SSA's Response, ¶ 75; Claimant's Chronology of Key Facts, Rows 25-26; Colombia's Appendix D, Rows 25. *See also* **Exhibit C-24 [EN]**, Colombian Constitutional Court, Case File No. D-379, Judgment No. C-102/94, 10 March 1994, PDF p. 4 ("*Declare INAPPLICABLE in their entirety the articles 188 and 191 of Decree 2324 of 1984, for exceeding the material limit set forth in the law of legislative authorization (19 of 1983*). . .") (SSA's Unofficial Translation)

accepting SSA's invitation to "*reopen direct dialogue*"[222] if SSA terminated its legal proceedings. In fact, as Colombia acknowledges, after SSA terminated the U.S. Litigation, Colombia and SSA began negotiating to allow SSA access to the Discovery Area to conduct a verification exercise.[223]

106. In short, neither of these events expropriated SSA's rights, or if they could be construed to have done so (and they cannot), the alleged expropriations were voided by subsequent events.[224] Indeed, Colombia does not dispute that SSA withdrew both the U.S. Litigation and the IACHR proceedings upon Colombia's representation that it was willing to negotiate SSA's access to its discovery as long as SSA ceased those then-ongoing legal proceedings.[225]

107. Colombia additionally notes that "*as early as 7 December 2010, Claimant was of the view that*" Colombia had acted with "*arbitrariness -namely, corruption, threats on the use of force- had taken place.*"[226] Of course, a State may act in an arbitrary fashion more than once, and every arbitrary action does not permanently eviscerate the value of an investment. Accordingly, at most, the U.S. Litigation demonstrates Colombia's long-standing propensity to act in an arbitrary and unlawful manner against SSA.

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222 **Exhibit C-81**, Letter from President of Colombia to SSA, 14 May 2015. *See also infra* ¶ 112.

223 *See infra* ¶¶ 116(a)-(b),(d)-(g).

224 *See* Colombia's Reply, ¶ 102.

225 *See* Notice of Arbitration, ¶ 42; Colombia's Preliminary Objections, ¶ 89; SSA's Response, ¶ 109; Claimant's Chronology of Key Facts, Row 39; Colombia's Appendix D, Row 46; **Exhibit C-32 [EN]**, Letter from the Minister of Culture to SSA, 22 December 2014 (noting that Colombia had received a letter "*stat*[ing] *the willingness of the firm Sea Search Armada to initiate dialog 'to attempt a negotiated solution to the application of the Supreme Court judgment of July 5, 2007*") (SSA's Unofficial Translation); **Exhibit C-33 [EN]**, Letter from SSA to the Minister of Culture, 19 January 2015 ("*As it is about putting an end to a quarter of a century of judicial procedures and through dialogue agree on the application or realization of the decision that resolved the dispute . . . Sea Search Armada agrees to withdraw from the processes that are in progress before the Court of the District of Columbia and the Inter-American Commission on Human Rights, so that according to your position, with the termination of these proceedings, the aforementioned dialogues begin*.") (SSA's Unofficial Translation); **Exhibit C-34 [EN]**, Letter from SSA to the President of Colombia, 20 January 2015, PDF p. 1 ("*Sea Search Armada informs you that it will proceed to terminate the proceedings before the District Court of the District of Columbia and the Inter-American Commission on Human Rights, in order to definitively cease all legal actions in progress, and pave the way for dialogues aimed at the peaceful and mutually agreed application or implementation of the judgment of the Supreme Court of Justice of July 5, 2007*") (SSA's Unofficial Translation); **Exhibit C-115**, Letter from SSA to IACHR Withdrawing Petition, 20 February 2015.

226 Colombia's Reply, ¶ 103.

108. Finally, Colombia claims that because the U.S. Court refused to recognize the 2007 Supreme Court Decision as a money judgment, that somehow reduces the tangibility of SSA's rights.[227] Colombia grossly misstates U.S. law on the recognition of money judgments.[228] The U.S. Court simply held that the 2007 Supreme Court Decision did not qualify as a money judgment under the applicable U.S. statute because Colombia's Supreme Court had merely determined what percentage of recovered San José treasure SSA owned, rather than calculating a specific "*sum of money*."[229] The U.S. Court made no pronouncements (nor was it asked to) on the nature of SSA's rights. In any event, as described below, SSA abandoned its claims in the U.S. Litigation at Colombia's request as a condition for a resumption of the negotiations.

(b) SSA Files The IACHR Petition In Response To Colombia's Stated Refusal To Abide By The 2007 Supreme Court Decision, Arising From Corruption In The Colombian Government

109. While the U.S. Litigation was ongoing, SSA continued to propose and attempt to negotiate salvage missions with the Colombian Government,[230] and even made preparations to move forward with the salvage.[231]

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227 Colombia's Reply, ¶¶ 108-109.

228 U.S. courts generally have limited statutory authority to recognize and enforce foreign judgements. Among other limitations, U.S. courts may exclusively recognize judgments awarding or declining to award **a sum of money**. In this case, the claim was brought under the District of Columbia's Uniform Foreign-Money Judgments Recognition Act ("**UFMJRA**"), which provides that foreign-money judgments—that is, judgments "*of a foreign state granting or denying recovery of a sum of money*"—are "*enforceable in the same manner as the judgment of a sister jurisdiction which is entitled to full faith and credit*." *See* **Exhibit R-19**, United States District Court for the District of Columbia, Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, pp. 8-9. The UFMJRA cannot be used to enforce non-monetary judgments.

229 *See* **Exhibit R-19**, United States District Court for the District of Columbia, Civil Action No. 10-2083 (JEB)– 2083, Memorandum Opinion, 24 October 2011, pp. 9-10. ("*This decision cannot be considered a money judgment; it simply decided how the San José treasure should be divided if and when it is excavated*"). Colombia's assertion that the U.S. 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'*" is therefore highly misleading. Colombia's Reply, ¶ 109. The U.S. court did nothing of the kind. It simply found that the 2007 Supreme Court Decision, while determining the share of plaintiff's rights, did not constitute a monetary judgment within the narrow meaning of the statute.

230 *See* **Exhibit C-113**, Letter from SSA to the President of Colombia, 15 July 2011.

231 *See* **Exhibit R-22**, United States District Court for the District of Columbia. Civil Action No. 13-564, 23 April 2013, ¶ 20 ("*In anticipation of initiating the salvage process, SSA began the process of hiring salvage contractors to perform the actual recovery of SSA's property. SSA entered into a contract for equipment and oceanographic survey consultation (including an American flagged vessel) with Sea Trepid International, LLC, a company located in Louisiana*").

110. As the U.S. Litigation progressed, however, Colombia's attitude towards SSA grew increasingly hostile. While Colombia had earlier confirmed that it would abide by the 2007 Supreme Court Decision,[232] on 26 November 2012 Colombia informed SSA in a letter that Colombia would now wait for the results of the U.S. Litigation before "*adopting the decisions that may be required.*"[233] Based on Colombia's change in attitude, which appeared to have been the result of corruption within the Colombian State, SSA filed a petition before the IACHR.[234]

111. Colombia argues in its Reply that the fact that SSA based its IACHR petition on the 2012 letter from Colombia somehow indicates a "*willing*[ness] *to invent and reinvent whatever narrative in order to recast its claims*."[235] Yet Colombia fails to provide any basis whatsoever for its assertion that SSA has "*invent*[ed]" or "*reinvent*[ed]" any

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[232] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 32 ("*in a meeting on 11 June 2011, President Juan Manuel Santos personally manifested to SSA's Colombia-based attorney of his decision to comply with the Supreme Court ruling through a joint salvage operation, as had been proposed— and rejected—many times before.*") (SSA's Unofficial Translation), 39 ("*With that notification of the definitive purpose of not complying with that ruling, along with the resulting confiscation of the discoverer's property treasures, the intention expressed on 11 June 2011 by the President of Colombia, to submit to its provisions was buried*.") (Colombia's Unofficial Translation).

[233] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 38 (SSA's Unofficial Translation).

[234] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 38-39. SSA had uncovered evidence suggesting that certain members of the Antiquities Commission had "*dedicated themselves to rob, for their personal benefit, the*[] [San José]." (SSA's Unofficial Translation). **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 43. *See also* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 43 ("*Members of this commission include the Minister of Foreign Affairs, the Minister of Culture, the Director of DIMAR, the Administrative Department Director of the Presidency, the Judicial Secretary of the Presidency, (who also serves as the Commission's Technical Secretary) and five experts designated by the President. Among these five experts are Misters Fabio Echeverri Correa (since July 2009), Germán Montoya Velez (since October 2002) and Rodolfo Segovia Salas (since February 2011). These individuals are well-known in Colombia, and wield extraordinary influence over all administrations, and since the shipwreck's discovery was announced in 1982, they have dedicated themselves to rob, for their personal benefit, these treasures. These commissioners planned and promoted the litigation which the Supreme Court resolved in 2007. More than five years after the issue was resolved in favor of the discoverer, they continue using their influence as public officials to promote the Colombian Republic's noncompliance with the ruling, thanks to their status as members of the Presidents' advisory board on the matter.* ***Due to their overwhelming and relentless persecution of those treasures, these individuals have been accused of serious corruption allegations before the Colombian Senate, as in the case of German Montoya Velez. Or, they have signed contracts and received public funds as payment for activities relating to the discovered shipwreck, with the purpose of rendering a false report on its location to a U.S. fugitive, as did commissioner Fabio Echeverri Correa while he represented the Colombian government. Or through personal actions and frequent press releases, as in the case of commissioner Rodolfo Segovia Salas, who has effectively supported his partners and colleagues in the commission.*** *This corruption, and its proof, has been made known to the President of Colombia to no avail, given that the commissioners continue exercising the public functions that facilitate their assault on other's property*.") (emphasis added) (SSA's Unofficial Translation).

[235] Colombia's Reply, ¶ 124.

claims—Colombia offers no evidence refuting the truth of any of SSA's claims.[236] It cannot be controversial that Colombia's actions can, and did, give rise to different claims, under different legal regimes, each with different procedural requirements. The fact that SSA sought relief before these venues only reveals the long history of Colombia's refusal to comply with the law. Despite their significance for raising causes of actions relating to the U.S. and IACHR proceedings, Colombia's actions did not rise to the level of an expropriation under the TPA until 2020.

112. Colombia appears to acknowledge that SSA's claim before the IACHR was for violations of its rights to property[237] and judicial protection[238] under the American Convention on Human Rights. Yet Colombia asserts, without explanation, that SSA's IACHR petition shows that "*Colombia had already expropriated* [SSA's] *alleged property rights without granting any compensation, and that it had acted arbitrarily*."[239] As support for its flawed contention, Colombia points to the factual section of SSA's application describing Colombia's attempt to change the law through the 1984 Decrees, including Decree No. 2324, which purported to reduce SSA's entitlement to a 5% finder's fee. But Decree No. 2324 was subsequently overturned by the Colombian

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236 The only supposed "*contradiction*" between the proceedings Colombia asserts is that "*before the DC District Court SSA LLC argued that it had 'reached an agreement' with Colombia regarding the distribution percentages over the recovered treasures.*" Colombia's Reply, ¶ 123, *citing* **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, ¶ 10. That is not what SSA had alleged in the U.S. Litigation. SSA's breach of contract claim before U.S. courts recognizes that the contract had not been executed, as SSA clarifies that "*the Government of Colombia delayed signing the written agreement it had drafted, and eventually refused to sign the offer it had made to SSA*." **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, ¶ 10. This is exactly what SSA stated in its IACHR petition, only providing more context but ultimately reiterating what was advanced in the U.S. Litigation, that the Colombian Government never signed the written draft contract. *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 17. SSA was able to advance a breach of contract claim in the U.S. Litigation nonetheless because under U.S. law, execution is not always necessary to form a binding contract.

237 *See* **Exhibit CLA-4**, American Convention on Human Rights, 22 November 1969, arts. 21(1)-(2) ("*1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. 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.*").

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

239 Colombia's Reply, ¶ 114.

Constitutional Court and therefore could not have been an expropriation.[240] Ultimately, Colombia appears to acknowledge that the basis of SSA's IACHR petition was not the 1984 Decrees but what appeared to be, at the time, Colombia's declaration that it would not abide by the 2007 Supreme Court Decision.[241] Colombia later reversed this position by agreeing to engage in discussions with SSA to verify the precise location of and salvage the San José from the Discovery Area.[242] As with the U.S. Litigation, SSA also abandoned the IACHR proceeding in order to resume negotiations with Colombia.[243]

Q. Colombia Agrees To Relaunch Discussions With SSA Upon SSA's Termination of the U.S. And IACHR Proceedings

113. Colombia further acknowledges that for the next several years "*SSA LLC continued its efforts to carry out a verification expedition*"[244] and sought "*to recover what in their view belonged to them.*"[245] Indeed, Colombia accepts that SSA regularly and continually reached out to Colombian authorities to salvage the San José,[246] and that, at least initially, Colombia appeared to be willing to engage in a verification exercise.[247] Notably, Colombia no longer asserts that in this correspondence SSA "*acknowledged that, for years . . . it had known that there was no shipwreck in the 1982 Coordinates*."[248] As the 1982 Report plainly shows, SSA's Predecessor reported that the shipwreck—which was spread out on the bottom of the ocean after it exploded—was located in the "*immediate vicinity*" of the coordinates listed in the 1982 Report, not at the coordinates themselves.[249]

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240 *See supra* ¶ 105.

241 *See* Colombia's Reply, ¶¶ 116-17; **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 43.

242 *See infra* **Section II.Q**. *See also* **Exhibit C-32**, Letter from the Minister of Culture to SSA, 22 December 2014.

243 *See* **Exhibit C-115**, Letter from SSA to IACHR Withdrawing Petition, 20 February 2015.

244 Colombia's Reply, ¶ 137.

245 Colombia's Reply, ¶ 138.

246 Colombia's Reply, ¶¶ 128, 131, 135, 140, 144.

247 Colombia's Reply, ¶¶ 132, 134.

248 Colombia's Preliminary Objections, ¶ 95.

249 *See supra* ¶ 55. *See also* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 22 August 1984, PDF p. 13; **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF pp. 1-2 (informal translation of Colombia's Note by the U.S. Embassy).

R. Colombia Claims To Find The San José In 2015 At Coordinates Later Revealed To Lie Within The Discovery Area

114. The Parties do not dispute that soon after reopening engagement with SSA over access to and the salvage of the San José shipwreck, in December 2015, Colombia announced that it had found the San José with another contractor, MAC.

115. Colombia cherry-picks from a selection of its own correspondence (wholly ignoring SSA's letters[250] and the other relevant context) to assert that "*Colombia clearly and unequivocally informed Claimant that it had no rights over the Galéon San José, as no shipwreck was located in the coordinates reported in the 1982 Confidential Report*."[251] This is not the case. As explained in SSA's Response, in that correspondence Colombia was contesting the existence of the shipwreck at **specific coordinates**, and **not the validity of SSA's rights**.[252] SSA, however, had no reason to take Colombia's unilateral, unverified assertions at face value, and its rights (as consistently recognized by the Colombian courts) were not in doubt.

116. A brief summary of the communications between the Parties after SSA terminated the U.S. and IACHR proceedings at Colombia's request makes clear that Colombia's assertions lacked credibility, particularly in light of the context of these discussions.

(a) On 14 May 2015, the President of Colombia informed SSA that, while in the past it had not been possible to negotiate with SSA due to ongoing legal proceedings, "*in the new circumstances*" Colombia wished to "*reopen direct dialogue*" which would be led by the Minister of Culture.[253] Colombia does not mention this correspondence in its Reply.

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250 This includes **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, **Exhibit C-86**, Letter from SSA to Ministry of Culture, 21 July 2015.

251 Colombia's Reply, Section II.L (heading).

252 *See* SSA's Response, ¶¶ 110-13, 237, 271 ("*Colombia suggests that its assertions that there was no shipwreck in the Discovery Area reported by SSA should be enough to dismiss this case on temporal grounds. As explained above, Claimant's claim arises from Resolution No. 0085 retroactively declaring the entirety of the San José cultural patrimony, not Colombia's assertions about the purported contents of the target area reported by SSA's Predecessor, GMC.*").

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

(b) On 19 May 2015, the Minister of Culture met with SSA representatives.[254] At the meeting, Colombia insisted that SSA only had rights over the pinpoint coordinates indicated in the 1982 Report, which SSA corrected.[255] Days later, SSA sent a letter to Colombia setting out the actual language of the 1982 Report, which clearly expresses that the discovery was made in the vicinity of the reported coordinates.[256] Colombia does not mention this correspondence in its Reply either.

(c) On 26 May 2015, Colombia contracted with another foreign company, MAC, to conduct an oceanographic survey to supposedly confirm the location of the San José.[257] Under the terms of the agreement, MAC would be awarded "*20% of the value of the assets that do not constitute heritage"* if it made *"a discovery.*"[258] Colombia ignores the fact that at the same time that Colombia was in discussions with SSA, it had contracted with another company to which it would owe a much smaller share of the treasure from the San José.

(d) On 27 May 2015, the day after it had entered a contract with MAC, Colombia wrote to SSA, noting that it would consider SSA's analysis and asked SSA for more details of how it proposed to define the Discovery

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254 *See* **Exhibit C-35 [EN]**, Letter from SSA to the Minister of Culture, 20 May 2015, p. 15 ("*According to what was said yesterday at your office*") (SSA's Unofficial Translation).

255 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 2. Colombia had originally claimed that this letter indicated that SSA was aware that the San José was not at the coordinates listed in the 1982 Report. As SSA explained in its Response, the 1982 Report described the area of its discovery as the coordinates within the "*vicinity*" of the pinpoint coordinates listed in the 1982 Report. *See* SSA's Response, ¶ 43. Colombia accordingly seems to have abandoned its original argument.

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

257 *See* **Exhibit C-36 [EN]**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 1 ("*APPROVE the pre-feasibility and AUTHORIZE Maritime Archaeology Consultants Limited MAC- the exploration in Colombian maritime waters to identify contexts likely to contain submerged cultural heritage under the parameters established in the present resolution*.") (SSA's Unofficial Translation).

258 *See* **Exhibit C-36 [EN]**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 14 ("*If, as a result of the authorized exploration activities, a discovery is made, the remuneration to whoever is awarded the public-private partnership contract for the development of the activities of intervention, economic use, preservation, conservation and curatorship of the underwater cultural heritage, will be 20% of the value of the assets that do not constitute heritage*.") (SSA's Unofficial Translation).

Area.[259]

(e) On 3 June 2015, SSA responded, asking for a meeting to discuss the parameters of the area.[260] SSA sent a follow up letter on 9 June 2015, explaining the technological considerations that needed discussion to properly delineate the area.[261] Colombia completely ignores these letters in its Reply.

(f) On 25 June 2015, the Ministry of Culture informed SSA that it was coordinating its response with the Antiquities Commission.[262] Colombia asserts this was not a "*delay tactic*"[263] or an attempt to obtain confidential proprietary information it could feed to a competitor, ignoring that its work with MAC was well underway at this point.

(g) On 28 July 2015, Colombia rejected SSA's request for a meeting to discuss the verification parameters.[264] Colombia asserts that in this letter "*it was clear that Colombia agreed to a verification expedition in the area expressly delineated by the 2007 CSJ Decision*"[265] but this is highly misleading. At that time, Colombia was still insisting on pinpoint coordinates (as opposed to the Discovery Area), which would have made a joint verification mission a waste of time.[266] The Parties therefore still

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259 **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015. Colombia only refers to this letter to point out that in it Colombia objected SSA's "*multiple mentions of*" the San José because the verification had not yet been conducted. *See* Colombia's Reply, ¶ 130. The only reason the verification had not been conducted at the time was precisely because of Colombia's refusal to work with SSA to implement a joint verification and salvage process.

260 **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015, pp. 1-2.

261 **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, pp. 2-3. *See also* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 2 (following up on its request for a meeting date).

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

263 Colombia's Reply, ¶ 133. *See also* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 1; **Exhibit C-86**, Letter from SSA to Ministry of Culture, 21 July 2015 (reiterating its request for a date to begin formal discussions to enforce the 2007 Supreme Court Decision).

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

265 Colombia's Reply, ¶ 134.

266 *See* **Exhibit C-88 [EN]**, Letter from SSA to President of Colombia, 31 July 2015, PDF p. 2 ("*On May 20, the day after the meeting convened by the Minister of the Presidency, SSA presented in writing its well-founded position regarding the maritime areas in which the shipwreck should be verified, which do not coincide with the scope that the Government attributes to the location clearly indicated in the* [1982 Report] *based on which the Supreme Court declared the discoverer's dominion over the treasures in community with*

needed to agree on the specific search area.[267]

(h) Between July-November 2015, SSA reached out to the President, the Antiquities Commission and the Ministry of Culture to advance discussions.[268] Colombia maligns these requests as an "*overwhelming tactic of sending countless letters*"[269] ignoring Colombia's conspicuous refusal to respond as it was preparing to make an announcement on its work with MAC.

117. In fact, the very next month, on 5 December 2015, as Colombia acknowledges, it "*publicly announced the discovery of the Galeón San José*."[270] The reason for Colombia's stalling soon became apparent, as multiple sources have revealed that MAC's purported discovery of the San José was well within the vicinity of the coordinates listed in the 1982 Report, *i.e.*, the Discovery Area.[271] Colombia claims that the leaked coordinates are "*false and poorly supported*" but does not provide any evidence to substantiate this.[272] Indeed, the Director of the National Oversight of the Submerged Cultural Heritage of Colombia (a non-profit agency that oversees the Government's public management of submerged cultural heritage) used the same

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the Nation and in equal parts. In addition, at the request of the Ministry of Culture on June 9, SSA further expanded the basis of its criteria on this issue. And without substantiating her position, and without daring to refute the rationale of SSA's position, on the following July 9, the Minister merely expressed her disagreement."). Additionally, Colombia provided an ultimatum to SSA to either agree to a search in the coordinates indicated by Colombia (at its own expense) or accept that Colombia could conduct the search unilaterally. *See* **Exhibit C-87**, Letter from Ministry of Culture to SSA, 28 July 2015, p. 2.

267 *See* **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, pp. 2-4; **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 2.

268 **Exhibit C-88**, Letter from SSA to President of Colombia, 31 July 2015; **Exhibit C-89**, Letter from President of Colombia to SSA, 3 August 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; **Exhibit R-27**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015.

269 Colombia's Reply, ¶ 135.

270 Colombia's Reply, ¶ 135. *See* **Exhibit C-37**, Statement from President Santos on the discovery of the San José Galleon, 5 December 2015.

271 *See* **Exhibit C-94**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, PDF p. 4, *available at* https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobierno-colombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de-dolares/ ("*The distance between the two points is around 3.24 nautical miles*.").

272 Colombia's Reply, ¶ 136.

coordinates in ongoing litigation against Colombia.[273]

118. Instead of rebutting the veracity of these coordinates, Colombia deems them "*irrelevant, given that since 1994 Colombia had clearly adopted the Columbus Report denying the discovery of the Galeón San José in 1982*."[274] But Colombia's self-serving declarations based on a deeply flawed[275] and unverified report by an individual who has spent over six years in U.S. prison for contempt of court,[276] which even Colombia refuses to defend in this Arbitration,[277] do not constitute evidence of the contents of the Discovery Area. Colombia's unilateral declarations about what the Discovery Area contains are further undermined by the correspondence preceding its announcement of MAC's supposed discovery of the San José. As set out above, the correspondence illustrates Colombia's reluctance to engage with SSA on coordinating the verification exercise at the same time it was working with MAC under an agreement that awarded MAC a far smaller share of the treasure than what Colombia was obligated to allocate to SSA.[278]

119. The reality is that this issue (and the volume of SSA correspondence Colombia complains about[279]) could have been resolved through a simple joint verification mission. As Colombia acknowledges, SSA repeatedly asked to be taken to the coordinates of MAC's alleged discovery of the San José to verify whether it was outside the Discovery Area.[280] Indeed, Colombia even acknowledges that, "[i]*n the aftermath*

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273 *See* **Exhibit C-118**, Appeal filed by the National Oversight Office for the Social Control of Submerged Cultural Heritage of Colombia, in the Popular Action No. 25000234100020180054000, 27 July 2020, pp. 8-9, 15-20 (filed to enjoin the Colombian Government from entering into a salvage agreement with MAC on the grounds that it would violate the Government's obligations under Colombian law).

274 Colombia's Reply, ¶ 136.

275 *See* SSA's Response, ¶¶ 82-83.

276 *See supra* ¶ 75.

277 *See supra* **Section II.J**.

278 *See supra* **Sections II.Q-II.R**.

279 *See, e.g.*, Colombia's Reply, ¶¶ 131, 133, 135.

280 *See, e.g.*, **Exhibit C-38 [EN]**, Letter from SSA to the President of Colombia, 10 December 2015, PDF p. 1 ("*In order to determine whether the discovery of the San José galleon. . .occurred in a maritime area other than the one denounced on March 18, 1982, and recognized by. . .resolution 0354 of June 3, 1982.* [sic] *I respectfully state that Sea Search Armada (SSA) is at your disposal for its representatives to be transferred to the site of the discovery announced on November 5, in order to verify two things: 1) if it is of that galleon; and 2) if the shipwreck is outside the maritime areas indicated as its location in the* [1982 Report]. . ") (SSA's Unofficial Translation); **Exhibit R-35**, Letter from SSA to the Ministry of Culture, 4 January 2016.

of the discovery of the Galeón San José, SSA LLC continued its efforts to carry out a verification expedition"[281] and sought "*to recover what in their view belonged to them.*"[282]

120. Instead, Colombia takes issue with SSA's statement that it would consider anew pursuing legal remedies for Colombia's failure to engage with SSA.[283] SSA was simply making clear that it intended to go on pursuing all available avenues to ensure that Colombia complied with its own court's decision.[284] As SSA made clear in later correspondence, this included "*judicial actions . . . to* [enforce] *other precautionary measures, such as a renewed seizure of the treasures and/or the suspension of*" the contract with MAC.[285]

121. On 4 February 2016, Colombia sent an abrupt letter to SSA that Colombia quotes in full in its Reply. In the letter, Colombia asked SSA to take its "*accusations*" to the "*judicial authorities*."[286] Colombia also claimed in that letter that SSA made an "*express statement that there is no shipwreck in the coordinates reported by* [SSA] *in the*" 1982 Report.[287] Colombia does not present the letter where SSA supposedly made such a statement—SSA has found none in its records. Colombia further asked for an end to the "*unnecessary epistolary exchange*."[288]

122. Colombia's abrupt change in position was in sharp contrast to Colombia's offers to conduct a joint verification exercise to the Discovery Area prior to MAC's supposed discovery.[289] By November 2016, Colombia dropped even its offer to conduct joint

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281 Colombia's Reply, ¶ 137.

282 Colombia's Reply, ¶ 138.

283 *See* Colombia's Reply, ¶ 139, *citing* **Exhibit R-35**, Letter from SSA to the Ministry of Culture, 4 January 2016.

284 *See* **Exhibit R-35**, Letter from SSA to the Ministry of Culture, 4 January 2016, PDF p. 2 ("*As far as SSA is concerned, this matter will only be concluded when the Nation complies with its institutional duty to abide by the* [2007 Supreme Court Decision] *that declared owners in common and pro indiviso, in equal parts, of the treasures found in the place indicated by the person who discovered them*.") (Colombia's Unofficial Translation).

285 **Exhibit R-30**, Letter from SSA to Colombia, 4 September 2017, ¶ 87 (SSA's Unofficial Translation).

286 Colombia's Reply, ¶ 139, *citing* **Exhibit R-36**, Letter from the Ministry of Culture to SSA, 4 February 2016.

287 Colombia's Reply, ¶ 139, *citing* **Exhibit R-36**, Letter from the Ministry of Culture to SSA, 4 February 2016.

288 Colombia's Reply, ¶ 139, *citing* **Exhibit R-36**, Letter from the Ministry of Culture to SSA, 4 February 2016.

289 *See supra* **Section II.Q**.

verification, and instead proclaimed that it had already carried out the verification unilaterally, without so much as informing or inviting SSA, or providing SSA with even a report of its exercise.[290] Had MAC indeed discovered the San José outside the Discovery Area, Colombia would have had little reason to be so reluctant to conduct joint or independent verification. Rather, with confirmation that MAC's purported discovery lay within the Discovery Area to which SSA had confirmed rights, Colombia sought to block SSA's access to the shipwreck once again.

123. As detailed below, SSA took up Colombia's offer to, once again, take its complaint to the Colombian judiciary. And the Colombian judiciary, once again, upheld SSA's rights.

S. Colombia's Superior Court Reaffirms SSA's Rights And Reinstates The Injunction Order Over The Discovery Area On 29 March 2019

124. The 2007 Supreme Court Decision, which the Parties have discussed at length, was not the last engagement of the Colombian courts with this matter. Colombian courts also reaffirmed Claimant's rights in subsequent proceedings dealing with the Injunction Order.[291] Remarkably, Colombia fails to analyze this proceeding at all in its Reply, even though it is fatal to Colombia's Preliminary Objections.[292] Claimant sets out the key implications of the process leading to the 2019 Superior Court Decision below.

125. On 16 December 2016, two weeks after telling SSA that it had conducted a unilateral verification exercise, Colombia sought to lift the Injunction Order that had been in effect since 1994.[293] Had the Discovery Area really contained nothing at all, Colombia would have had no reason to do this. With the Injunction Order in place, however, Colombia could not legally access or salvage any items in the Discovery Area, which

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290 *See* **Exhibit R-29**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, PDF p. 1 (alleging that "[*t]he Colombian Government already made the verification of the coordinates reported in the confidential report filed by* [Glocca Morra] *in 1982 and was able to confirm here is no trace of any shipwreck at that site*").

291 *See* SSA's Response, Sections II.J, II.K, II.P.

292 *See* Colombia's Reply, ¶¶ 81-83 (referring obliquely to but not engaging with the 2019 Superior Court's Decision).

293 *See* **Exhibit C-91**, Colombia's Challenge Of Injunction Order Before 10th Civil Court of the Circuit of Barranquilla, 16 December 2016, p. 1.

included, as MAC had reportedly confirmed, the San José shipwreck.[294] SSA reminded Colombia of this issue in September 2017, noting that the "*precautionary measure remains in force, and will be effective against whoever at any time attempts to salvage the protected treasures*."[295]

126. The Civil Court lifted the injunction on 31 October 2017,[296] which SSA subsequently appealed. At the same time, as Colombia acknowledges, SSA (and the U.S. Government on its behalf) continued to repeat their requests for a joint verification.[297]

127. On 29 March 2019, the Superior Court reinstated the Injunction Order, upholding SSA's rights over the Discovery Area.[298] The Superior Court found that the purpose of injunctive relief is to ensure compliance with a judicial decision, and "[t]*hus, the exercise of the injunctive relief measure was conditional upon access to the goods that*

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294 *See supra* ¶¶ 79, 122.

295 **Exhibit R-30**, Letter from SSA to Colombia, 4 September 2017, ¶ 33. *See also* **Exhibit R-30**, Letter from SSA to Colombia, 4 September 2017, ¶¶ 84 ("*But to achieve this objective they need to get rid of the embargo decreed in 1994 on the treasures found in the immediate vicinity of the coordinates denounced in 1982, where the salvage would be made*."), 87 ("*Without taking into account, moreover, that having the title of dominion par excellence, such as a Supreme Court ruling,* ***SSA has at its disposal judicial actions that allow it easy access to other precautionary measures, such as a renewed seizure of the treasures*** *and/or the suspension of the execution of the salvage contract in process.*") (emphasis added) (SSA's Unofficial Translation).

296 *See* **Exhibit C-93**, Third Civil Court of the Circuit of Barranquilla, Judgment Lifting Injunction Order, 31 October 2017, PDF p. 2.

297 *See* **Exhibit C-92**, Letter from U.S. Embassy in Colombia to SSA, 16 March 2017 ("*I understand that Sea Search Armada (SSA) has proposed to conduct a new survey of the site coordinates it originally identified in 1982, with the objective of demonstrating that the ship is, in fact, located at these coordinates. Furthermore, I understand that SSA met with the Ministry of Culture and* [DIMAR] *on February 15 and is currently negotiating with those entities on the specifics of such a visit*."); **Exhibit R-31** Letter from Sea Search Armada, LLC to Judicial Secretary of the Presidency, 4 September 2017, PDF p. 1 ("*Whatever the position of the Commission regarding the proposal for a joint verification of the shipwreck denounced in 1982, which was presented to the Minister of Culture on July 24 and August 8, we consider the knowledge of the history and developments of a litigation that arose 35 years ago, which remains in force despite its final resolution by judgment of the Supreme Court of Justice of July 5, 2007 to be useful to the commissioners*.") (SSA's Unofficial Translation); **Exhibit R-33**, Letter from Sea Search Armada, LLC to Colombia, 12 March 2019, pp. 1 ("*Sea Search Armada (SSA) would like to ratify its proposal from 20 December 2009* [sic]*, of attempting to reach a consensual solution. . .*") (Colombia's Unofficial Translation), 3 ("*And it also requests a response from the current government to its repeated proposal for a joint verification of the maritime areas denounced in 1982, with the purpose of physically proving, and with absolute certainty, that in 2015 MACS rediscovered the shipwreck discovered in 1982*.") (SSA's Unofficial Translation).

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

are the object thereof once they were removed or salvaged."[299] Since the goods had not yet been salvaged, SSA's rights needed protection, warranting the maintenance of the Injunction Order. The Court further found that SSA was suffering prejudice by being "*depriv*[ed] . . . *of the only tool* [*i.e.*, the Injunction Order] *it has at its disposal to enforce the 1994 and 1997 judgments, due to the failure to perform an action that is not in its power to perform*."[300]

128. Accordingly, the Superior Court reinstated in full the Injunction Order, which had ordered "*the seizure of the goods that have the nature of treasure, that are rescued or removed* ***from the area determined by the coordinates*** *indicated in* [the 1982 Report]."[301] By acknowledging that SSA had rights over the area identified in the 1982 Report, and not a pinpoint as alleged by Colombia, the Superior Court affirmed SSA's interpretation of the 2007 Supreme Court Decision. Colombia ignores the decision, its holding and consequences in its Reply.

129. Colombia does not ignore the 2019 Superior Court Decision entirely. It takes issue with SSA's statement that the Superior Court interpreted the 2007 Supreme Court Decision "*in precisely the same manner as SSA,*"[302] which it calls a "*gross misrepresentation of the 2019 Superior Court Decision*."[303] Colombia maintains that the Superior Court could not and did not recognize SSA's rights in accordance with its interpretation of the 2007 Supreme Court Decision because it was merely asked to decide whether or not Colombia was entitled to request the lifting of the 1994 Injunction

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

300 **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, pp. 6-7 ("***The harm that does exist is in depriving the plaintiff of the only tool it has at its disposal to enforce the 1994 and 1997 judgments, due to the failure to perform an action that is not in its power to perform****. Thus, maintaining the injunction in this particular situation is reasonable, proportional, necessary and adequate, given that it seeks to achieve a legitimate objective; it serves the proposed purpose and there is no other measure that is less burdensome and that guarantees the rights of the plaintiff. Thus not only is it not feasible to revoke it; it is also not feasible to modify it*.") (emphasis added) (SSA's Unofficial Translation).

301 **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, p. 5 (emphasis added) (SSA's Unofficial Translation). *See also* **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 7 (resolving to "*maintain the* [Injunction Order] *declared in the order of 12 October 1994.*") (SSA's Unofficial Translation).

302 Colombia's Reply, ¶ 80, referring to SSA's Response, ¶ 131, *citing* **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 4 ("*Based on the foregoing, the declaration of ownership was modified to restrict it to property that can be legally qualified as treasure, excluding submerged historical, artistic and cultural patrimony*.") (SSA's Unofficial Translation).

303 Colombia's Reply, ¶¶ 81-82.

Order.[304] This misses the point. The undeniable fact—which Colombia fails to address at all in its Reply—is that the Superior Court **did reinstate** the Injunction Order on **precisely the same terms** as it had been ordered in 1994 without circumscribing it in any way (*i.e.,* to include the vicinity identified in the 1982 Report and not the pinpoint coordinates alone), and it repeatedly referenced SSA's rights.[305]

130. The fact remains that, had the Discovery Area been empty, as Colombia alleges before this Tribunal, then Colombia could (and should) have provided that evidence to the Superior Court and disposed of SSA's claim once and for all. It is incongruous to maintain an injunction over an area in which a claimant has no rights. The fact that the Government failed to do that in the Colombian proceedings, and that the court reinstated the Injunction Order, means that the Discovery Area contains SSA's treasure.

131. Following this further setback in the Colombian courts, Colombia's Vice-President reached out to SSA on 17 June 2019.[306] Colombia describes this letter as a "*crucial piece of evidence*" that proves that SSA had no rights.[307] It is not. In the letter, which pointedly ignored the recently reinstated Injunction Order, the Vice-President purported to respond to SSA's request for a joint verification dated 12 March 2019 (*i.e.*, just before the Superior Court reinstated the Injunction on 29 March 2019) and again made a number of self-serving statements.[308] In particular, the Vice-President reprised the theory that—in view of the Columbus Report—SSA had no rights because there was no shipwreck at the coordinates verified by Columbus.[309] As set out before, SSA had

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304 *See* Colombia's Reply, ¶ 82.

305 *See* SSA's Response, ¶¶ 124-34.

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

307 Colombia's Reply, ¶¶ 151-53.

308 *See* **Exhibit C-40 [EN]**, Letter from the Vice-President of Colombia to SSA, 17 June 2019, PDF p. 4 ("[T]*he General Directorate of the Maritime and Port Authority indicated that: '*The coordinates reported in 1982 by the Glocca Morra Company . . . delivered in the [1982 Report] . . . do not correspond to the same coordinates reported in 2015 by Maritime Archeology Consultants Switwerland [sic].'") (SSA's Unofficial Translation); **Exhibit R-33**, Letter from Sea Search Armada, LLC to Colombia, 12 March 2019.

309 *See* **Exhibit C-40 [EN]**, Letter from the Vice-President of Colombia to SSA, 17 June 2019, PDF p. 2 ("*In relation to the verification of the coordinates reported in 1982,* ***this task was already carried out within the framework of contract No. 544 of 1993, whose results led to the conclusion*** *that* ***there is NO shipwreck*** *at the site of the coordinates reported by Glocca Morra Company (today Sea Search), much less any trace of the galleon San José. Only a piece of wood was found at the site, but after examination, it was concluded that it did not belong to any shipwreck.* ***Based on the foregoing, the company Sea Search Armada (SSA) does not have any right over the galleon San José or its contents, because it is not located at the coordinates reported by that company***.") (emphases added) (SSA's Unofficial Translation).

little reason to accept Colombia's assertions based on the Columbus Report (whose author, methodology and findings are so dubious that Colombia does not even attempt to defend it in this Arbitration).[310]

132. Moreover, the letter had (and still has) no legal value and no bearing on SSA's rights in light of the Superior Court's reinstatement of the Injunction Order, as SSA pointed out in its Response (which Colombia ignores). On 12 July 2019, SSA wrote to Colombia noting that the Superior Court had reinstated the Injunction Order, and that "[s]*ince this is a case of special characteristics,* ***the Superior Court established in an unequivocal manner, both the location of the goods to be seized, as well as the detailed procedure for its practice***."[311] SSA noted that the seizure process would begin imminently and, as Colombia had "*rejected the possibility of a consensual resolution,*" the matter now lay "*in the hands of the Judge, allowing the institutions to act, as it corresponds in any State under the rule of law.*"[312] The message was clear: though Colombia's executive branches were continuing to block SSA's access to its rights, its judicial organs had once again recognized and upheld them. SSA could and intended to use the Injunction Order to press for its rights in Colombian courts.

T. Colombia Issues Resolution No. 0085 On 23 January 2020

133. Just a few months after the Superior Court reinstated the Injunction Order and SSA indicated that it would enforce it in court, on 23 January 2020, Colombia completely eviscerated SSA's rights by issuing Resolution No. 0085 declaring that the **entirety of the San José** was a "*National Asset of Cultural Interest*."[313] Colombia does not deny that this resolution leaves no part of the San José, including items that would have been previously classified as "*treasure,*" subject to apportionment pursuant to Articles 700-701 of the Civil Code.

134. Colombia refrains from saying anything at all about Resolution No. 0085 because it

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310 *See supra* **Section II.J**.

311 **Exhibit C-41 [EN]**, Letter from SSA to the Vice-President of Colombia, 12 July 2019, PDF p. 2 (emphasis added) (SSA's Unofficial Translation).

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

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

considers it to be "*immaterial*"[314] since "*Colombia had definitively denied* [SSA] *any property rights over the Galéon San José based on the 1982 Confidential Report*."[315] This is not true. Colombia fails to contend with the fact that its own judiciary had consistently upheld SSA's rights to the Discovery Area, including as recently as 2019. Colombia's contradictory, self-serving, unverified, and highly suspect assertions that the Discovery Area did not contain the San José (or any shipwreck at all) lack objective evidence and credibility. Independent reports of the leaked coordinates of MAC's supposed discovery of the San José have revealed that the Galleon lies within the Discovery Area, a fact that is supported by the Colombian Navy officials' reports made contemporaneously to SSA's Predecessors' discovery and verification efforts.[316] Colombia's assertions alone therefore cannot be said to have deprived SSA of its rights, which were reaffirmed by Colombian courts in 2019, mere months before Resolution No. 0085.

135. And, of course, Resolution No. 0085 is "*material*" to this case. That is the measure giving rise to SSA's claims in this Arbitration (a fact that Colombia no longer seems to deny). SSA's case is simple: before Resolution No. 0085, SSA had rights to enforce, which Resolution No. 0085 fully expunged. Resolution No. 0085, moreover, does not provide any basis for re-designating the entirety of the San José as national patrimony, particularly in light of the Supreme Court's ruling that to do so required an item-by-item evaluation that could not be performed until items were recovered from the bottom of the ocean floor.[317] Colombia does not object to this, but merely avers that the reasons behind Resolution No. 0085, the very measure at issue in this Arbitration, is "*absolutely*

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314 *See* Colombia's Reply, Section II.M.

315 Colombia's Reply, ¶ 156.

316 *See* SSA's Response, ¶¶ 27, 33-34, 45, 50-55, 84; **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 7 (noting there was "[m]*uch optimism about a potential reencounter with the San José*."), 17 ("*It is first explained to him that* ***regardless of how it is measured, the San José is within the 12*** **miles**"), 18 ("*The R.O.V. is lowered, the bottom is at 686". In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen,* ***indicating the proximity of the San José*** *. . .* ***At 18:30 contact is made again with the possible remains of the San José****, and the basket left behind by the S.S.A. Piccard in January or February of 1982 is found*.") (emphases added) (SSA's Unofficial Translation).

317 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 223 ("*The extraction or exhumation of the declared goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus their characteristics, features, or individuals traits are not fully known*.") (SSA's Unofficial Translation).

immaterial."[318]

136. Colombia also does not dispute that following the issuance of Resolution No. 0085, SSA, with the support of the U.S. Government, met twice with Colombian representatives.[319] Again SSA requested a verification mission and again Colombia rejected SSA's request, "*stating SSA owned nothing so the GOC had no interest*."[320] Colombia complains that Resolution No. 0085 "*bears no relevance*" to these meetings, ignoring that they were scheduled in response to Colombia issuing Resolution No. 0085.[321] As Colombia appears to acknowledge, establishing that Resolution No. 0085 breached Colombia's obligations under the TPA is a question for the merits, and accordingly SSA reserves its right to supplement the evidence of and arising from these meetings. For present purposes, however, they show that Resolution No. 0085 heralded a watershed moment for SSA pursuant to which it lost its rights irretrievably, necessitating the direct intervention of the U.S. Government and face-to-face meetings with Colombian representatives.

137. Moreover, as Claimant explained in its Response and as the above discussion makes clear, until Resolution No. 0085 Colombia did **not** "*consistently*" deny SSA's rights.[322] Colombia's official position oscillated over time, and involved a number of overtures towards reach a negotiated solution, including at the juncture when SSA abandoned its U.S. and IACHR legal proceedings. Moreover, in parallel, and irrespective of the Colombian executive's position, the Colombian judiciary consistently upheld SSA's rights.

138. Accordingly, as a direct result of Resolution No. 0085, on 17 September 2022 SSA submitted a notice of its intent to submit a claim to arbitration pursuant to

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318 *See* Colombia's Reply, ¶ 160.

319 **Exhibit C-95**, Email from Colombia's State Department to Michael McGeary, 12 October 2021; **Exhibit C-96**, Mark Regn, Notes regarding meeting with ANDJE, 13 October 2021; **Exhibit C-97**, Mark Regn, Notes regarding meeting between U.S. Senator Robert Menendez and President Duque and second meeting with ANDJE, 10 March 2022.

320 **Exhibit C-96**, Mark Regn, Notes regarding meeting with ANDJE, 13 October 2021.

321 Colombia's Reply, ¶ 158.

322 SSA's Response, ¶ 270.

Article 10.16(2) of the TPA,[323] followed by the Notice of Arbitration on 18 December 2022. Colombia no longer seems to contest that in both of these documents SSA had made clear that its claims arose from Resolution No. 0085.

139. Colombia ends its "*factual account*" with a series of unsourced and facially false allegations.[324] It accuses SSA of "*mischaracteriz*[ing] *the facts,*" "*contradicting itself repeatedly*" and "*repeatedly changing its position*" without pointing to a single instance of such alleged mischaracterization, contradiction or change.[325] It claims that SSA "*ignore*[s] *30 years of unsuccessful litigation*"—oblivious to SSA's consistent victories before Colombia's own courts.[326] Colombia's claims cannot withstand the slightest scrutiny.

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

[324] Colombia's Reply, Section II. *See also* Colombia's Reply, ¶ 163.

[325] Colombia's Reply, ¶ 163.

[326] *See* Colombia's Reply, ¶ 163. *See also* SSA's Response, ¶¶ 73-77, 131; Claimant's Chronology of Key Facts, Rows 27, 29-31, 68; Colombia's Appendix D, Rows 25-26, 29-30, 32, 72; **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF pp. 33-34; **Exhibit C-24**, Colombian Constitutional Court, Case File No. D-379, Judgment No. C-102/94, 10 March 1994, PDF p. 4; **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF pp. 63-64; **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 233-35; **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 7.

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

140. The Parties agree that the UNCITRAL Rules apply to this Arbitration and that the Tribunal has the discretion to apply them in parallel with the TPA.[327] Colombia accordingly does not contest that the Tribunal should defer the resolution of factual matters concerning the merits of this case pursuant to Article 10.20.5.

141. Instead, Colombia contends that it has not "***advanced any fact that delves into the merits of the case***," such that "*Claimant's request to address Colombia's preliminary objections on a* prima facie *basis should be dismissed as completely unwarranted.*"[328] That is absurd. The vast majority of the factual issues that Colombia raises in these proceedings are inextricably intertwined with the merits of the Arbitration and quantum of damages, including (i) whether SSA's Predecessors found the San José, and (ii) whether Colombia's pre-Resolution No. 0085 actions had already expropriated or reduced the value of SSA's rights. Both these factual determinations are relevant to the inquiry of whether Resolution No. 0085 breached SSA's rights and its impact on the value of SSA's investment. These factual questions also require substantial evidential review, document disclosure and likely witness and expert submissions. Thus, the Tribunal should defer determination of such issues until the merits phase of the proceeding.

142. And even if the Tribunal did consider these facts, which are necessarily related to the merits of this case,[329] Colombia also appears to agree that the Tribunal should only review them on a *prima facie* basis.[330] And Colombia accepts the basic premise from the *Chevron v. Ecuador* award that, for a *prima facie* review, "*in principle,* ***it should be***

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[327] *See* Notice of Arbitration, ¶¶ 1, 56-59; Colombia's Response to Notice of Arbitration, ¶ 5; Terms of Appointment, Section 3.1. Colombia's Reply, ¶ 168 ("*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.*"); SSA's Response, ¶¶ 148-49 ("*Among other things, the Tribunal has discretion to decide jurisdictional objections 'either as a preliminary question or in an award on the merits' . . . Colombia seems to suggest that Article 10.20.5 has somehow stripped the Tribunal of its discretion under the UNCITRAL Rules*."). Colombia, however, wrongly asserts that Claimant sees a contradiction between Article 10.20.5 of the TPA and Article 23(3) of the UNCITRAL Rules. The opposite is true. *See* SSA's Response, ¶¶ 148-54.

[328] Colombia's Reply, ¶ 174.

[329] *See, e.g.*, *infra* ¶¶ 141, 246-247.

[330] *See* Colombia's Reply, ¶¶ 184-85.

presumed that the Claimant's factual allegations are true" so long as Claimant has not made "***frivolous allegations*** *to bring its claim within the jurisdiction of the BIT*."[331]

143. A frivolous claim is one that is capable of being "*dismissed out of hand*."[332] To be considered non-frivolous "*is a relatively low threshold*" and "*simply means that* [the arguments] *on their face . . . appear to warrant serious attention and consideration by the Tribunal. No further weighing of the merits of those decisions can or will be made until they are considered having given both sides a full opportunity to be heard in a procedurally economic manner*."[333]

144. SSA's claims are not frivolous. SSA has offered objective evidence backing every single one of its claims and dismantling Colombia's position. Colombia, on the other hand, relies primarily on its unilateral assertions about the contents of the Discovery Area;[334] does not even attempt to rehabilitate the fundamentally flawed, criminal-authored Columbus Report;[335] makes half-baked assertions to equate different legal claims before different jurisdictions with the one here;[336] and continues to ignore SSA's formulation of claims in this Arbitration, and thus fails to address facts that are actually relevant to SSA's claims.[337] It is Colombia's, not SSA's, position that is frivolous here. Accordingly, SSA's characterization of the relevant facts should be accepted for purposes of assessing Colombia's preliminary objections.

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331 Colombia's Reply, ¶ 184, *citing* **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. *See also id.* ¶ 184 (noting that "[t]*he 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****.' 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.***").

332 *See, e.g.*, **Exhibit CLA-76**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 8, 12 November 2020, ¶ 40 (finding that respondent's objections could not be said to be "*frivolous*" where "*both Parties were able to cite authority for their respective positions, and the objections are not ones that* ***could be dismissed out of hand***.") (emphasis added); **Exhibit CLA-77**, *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Procedural Order No. 2, 26 March 2021, ¶ 15(i) ("*The Objection is not frivolous. On its face, the Objection is* ***arguable***") (emphasis added).

333 **Exhibit CLA-81**, *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3 (Decision on Bifurcation), 7 June 2022, ¶ 48.

334 *See* Colombia's Reply, ¶¶ 66, 256-57.

335 *See* Colombia's Reply, ¶ 68.

336 *See* Colombia's Reply, Sections II.J-II.K (discussing the U.S. Litigation and IACHR Proceedings).

337 *See* Colombia's Reply, Sections II.M-II.N (designating Resolution No. 0085 "*immaterial*" and "*irrelevant*" to SSA's claims).

IV. COLOMBIA'S PRELIMINARY OBJECTIONS ARE MERITLESS

145. Colombia appears to agree that it has the burden to prove its Preliminary Objections.[338] For the reasons below, Colombia has failed to discharge this burden.

A. SSA Is A Qualifying Investor

146. Colombia's first objection, as it has now clarified, is that "*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 it invested in Colombia's territory for said purpose.*"[339] Colombia's objection fails because it is unsupported by the TPA and, in any event, SSA meets the purported additional requirements Colombia seeks to add to the text of the TPA.

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

> ***claimant*** *means an* ***investor of a Party*** *that is a party to an investment dispute with another Party;*
>
> . . .
>
> ***investor of a Party*** *means a Party or state enterprise thereof, or a national or an* ***enterprise of a Party****, that* ***attempts through concrete action to make, is making, or has made an investment in the territory of 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. . .*[340]

148. Colombia does not dispute that SSA is an "*enterprise*" of the United States, but it still insists that SSA has not made an investment in Colombia. That is wrong. SSA "*has* ***made*** *an investment*" (or "*has attempt*[ed] *through concrete action to make . . . an investment*") in Colombia.

149. To "*make*" an investment, one only needs to acquire it. As the *B3 Croatian Courier* tribunal held:

> *The Tribunal is of the view that* ***the ordinary meaning of the verb "to make" includes the act of acquiring an investment. The verb "to***

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338 *See* Colombia's Reply, ¶ 186 ("*Claimant has failed to disprove Respondent's preliminary objections*.").

339 Colombia's Reply, ¶ 173(i).

340 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28 (emphases added).

> ***acquire" is defined as "to gain possession or control of; to get or obtain" something.*** *In other words,* ***the emphasis is on the act of obtaining title or possession over something, as opposed to the monetary value exchanged for title or possession. Thus, "making" an investment includes instances in which title or possession over an asset that qualifies as an investment is obtained.*** *Respondent disputes that Claimant acquired the investment at issue in the present case, countering that it merely held it, which is not one of the accepted meanings of the term "to make". The Tribunal disagrees.* ***Claimant acquired (i.e., gained control over) the investment on 1 April 2011****, ...* ***Thus, Claimant's indirect holding of 100% shares in*** . . . [the local company] ***is in conformity with the ordinary meaning of the term "made" in Article 10 of the Treaty****.*[341]

150. This corresponds with the definition of the verb "*make*" in Black's Law Dictionary (a leading U.S. legal dictionary).[342] As Colombia acknowledges, this provision of the TPA is based on the U.S. Model BIT[343] and thus its terms must reflect its drafters' understanding, here U.S. Government lawyers. Accordingly, the act of acquiring, gaining possession or control of an investment, is sufficient to show that an investor has "*made*" an investment.

151. Here, SSA's investment consists of the rights to 50% of the treasure in the Discovery Area, which contains the San José shipwreck.[344] In 2008, SSA made an investment in Colombia by acquiring virtually all of the assets and rights of its predecessor,[345] SSA

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[341] **Exhibit CLA-73**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, ¶ 574. *See also* **Exhibit CLA-73**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, ¶¶ 575-82; **Exhibit CLA-72**, BLACK'S LAW DICTIONARY (11th ed. 2019), (entries for "*make*," "*preamble*") (defining "*make*" as "[t]*o acquire (something)*."); **Exhibit CLA-80**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶ 352 (rejecting respondent's position that an investment must be "active" and holding that "***the ordinary meaning of the verb 'making' includes an act of acquiring an investment which can be defined as gaining possession or control of, or getting or obtaining something. The emphasis is not on the exchange of monetary value for title or possession, but on the act of obtaining title or possession. Thus, 'making' an investment includes instances in which title or possession is obtained over an asset that qualifies as an investment****. In this case, Claimant acquired (*i.e.*, obtained title to, gained control over) the shares of the Bank on 26 March 2014*") (emphasis added); **Exhibit CLA-80**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶¶ 348-61.

[342] *See* **Exhibit CLA-72**, BLACK'S LAW DICTIONARY (11th ed. 2019), (entries for "*make*," "*preamble*") (defining "*make*" as "[t]*o acquire (something)*.").

[343] *See* Colombia's Reply, ¶ 192. *See also* Colombia's Reply, n. 216, *citing* **Exhibit RLA-27**, 2004 U.S. Model BIT, p. 4.

[344] *See infra* **Section IV.B**.

[345] *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.1 ("*Agreement to Purchase and Sell. Upon the terms and subject to the conditions contained herein, at the Closing (as defined herein) Seller will sell, assign, transfer, convey and deliver to* [SSA, LLC], *and* [SSA, LLC] *shall purchase from Seller the right, title and interest of Seller in*

Cayman, including rights to 50% of the treasure in the Discovery Area.[346] Colombia no longer seems to dispute that the APA fully transferred the entirety of SSA Cayman's interests in the Discovery Area to SSA.[347] Colombia also no longer appears to dispute that SSA owns and controls the investment following the APA.[348] Colombia's only remaining grievance with the APA's execution appears to be its claim that SSA has not provided evidence that certain purported conditions of the APA were met before its execution. But, as explained above, (i) these were not conditions precedent to the execution of the APA, but were rather representations and warranties regarding the Parties' willingness and ability to participate in the APA; and (ii) they were, in any event, waivable by the parties to the APA upon execution.[349] Under Illinois law (which governs the APA),[350] an agreement is considered fully executed upon signature by the intended parties.[351] Thus, by entering into the APA, SSA gained possession and control

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and to the Acquired Assets . . . including the following: (a) All rights, title and interest in and to the search area license (the "License") granted to Glocca Morra Company by the government of Colombia in Resolution 0048 on January 29, 1980, and assigned to Seller with authorization by the Colombian Maritime and Port Authority Resolution 204 dated March 24, 1983, and as confirmed by the Supreme Court of Colombia's July 5, 2007 rulings of the first and second instances as validly granting the holder thereof the right to search areas off the Coast of Colombia near Cartegena [sic] *for ancient shipwrecks and sunken treasure and ownership of fifty percent (50%) of all items found and recovered as a result of such search and salvage efforts; (b) all the assets, business, goodwill and rights of Seller of whatever kind and nature. . . (d)* [e]*ach contract, agreement, understanding, lease, license, commitment, undertaking, arrangement or understanding . . . (e)* [a]*ll governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals . . . (i)* [a]*ll other assets of Seller of every kind and description . . .*").

346 *See infra* **Section IV.B**. *See also* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982.

347 *See* Colombia's Preliminary Objections, ¶¶ 241-45; SSA's Response, ¶¶ 165-73.

348 *See* Colombia's Preliminary Objections, ¶¶ 239-41; SSA's Response, ¶¶ 165-73.

349 *See supra* ¶ 98. *See also* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, arts. 4.1 ("*Seller's obligation to close the transactions contemplated by this Agreement is subject to satisfaction of each of the following conditions (**any of which may be waived by Seller in its sole discretion**)*", and listing the following conditions: "*Compliance with Agreement*", "*Accuracy of Representations and Warranties*" and "*No Litigation*"), 4.2 ("*Purchaser's obligation to close the transactions contemplated by this Agreement is subject to satisfaction of each of the following conditions (**any of which may be waived by Purchaser in its sole discretion**)*", and listing the sole condition "*Compliance with Agreement*") (emphases added).

350 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 7.6 ("*Governing Law. This Agreement and its validity, construction and performance shall be governed by and construed and enforced in accordance with the laws of the State of Illinois (without regard to its conflict of laws principles).*").

351 Under Illinois law, signature of both parties to the contract is sufficient proof of its execution. *See, e.g.*, **Exhibit CLA-79**, *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 Appellate Court of Illinois (1st) 210526 (2021), 16 November 2021, ¶ 21 ("*A party who has signed a contract is charged with knowledge of and assent to its terms*.").

of the underlying investment (*i.e.*, rights to 50% of the treasure in the Discovery Area), thereby acquiring it, and as such, has satisfied the requirements of Article 10.28 of the TPA to "*have made*" an investment.

152. To make its case otherwise, Colombia looks outside the TPA to import additional requirements. Specifically, Colombia contends that SSA must also show that it (i) "*actively and personally invested to secure the alleged qualifying investment*"; and (ii) that SSA "*invested in Colombia's territory for said purpose*."[352] As set out in **Sections (a)** and **(b)** below, the TPA contains no such requirements. In any event, SSA's actions would meet even Colombia's heightened criteria.

(a) The TPA Does Not Require A Protected Investor To Have "*Actively*" Or "*Personally*" Invested

153. Colombia provides no support—in either the text of the TPA or other jurisprudence—for its alleged requirement that investing must be "*active*" or "*personal*" . Nor does Colombia make any effort to define what "*active*[] *and personal*[]" investing would mean in practice.

154. The TPA standard—that a qualifying investor is one that "*attempts through concrete action to make, is making, or has made an investment*"—does not leave room for Colombia to unilaterally introduce additional requirements of "*active*" or "*personal*" investing. As the *B3 Croatian Courier* tribunal found, absent an express treaty provision, there is no requirement for "*investors to be actively involved in the making of the investment in order to qualify for Treaty protection*."[353] In reaching this conclusion, the *B3 Croatian Courier* tribunal found it instructive that the treaty's stated purpose, which was to "*extend*[] *and intensify*[] *the economic relations between*" the Contracting States, would be equally served by investments from "*passive*" investors with indirect investments.[354] The TPA here has a similar purpose.[355] Likewise, the

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352 Colombia's Reply, ¶ 173(i).

353 **Exhibit CLA-73**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, ¶ 582.

354 **Exhibit CLA-73**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, ¶ 578.

355 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), Preamble (stating that the Contracting States, *inter alia, resolved to "STRENGTHEN the special bonds of friendship and cooperation between them and promote regional economic integration; PROMOTE*

Addiko tribunal squarely rejected the respondent's contention there that the term "'*making' an investment*" "*denotes an 'active relationship between the investor and the asset held'*" or that "*there must be 'an acquisition for value or exchange of resources*'."[356]

155. Unable to find any textual support for its position, Colombia points instead to inapposite jurisprudence in an attempt to justify its added criteria. The primary case Colombia relies on is the first jurisdictional decision in *Clorox v. Venezuela.*[357] In that case, the claimant (a Spanish company) had acquired shares in a Venezuelan company (which constituted the underlying investment) from its U.S. affiliate, which had originally purchased the shares.[358] Colombia relies heavily on *Clorox v. Venezuela* for the proposition that the tribunal declined jurisdiction because the Spanish company had not provided payment for the shares and therefore had not made a protected investment in Venezuela.[359]

156. However, despite citing the case over a dozen times in its brief, Colombia conveniently ignores the fact that **the *Clorox v. Venezuela* decision was set aside at the seat of arbitration** by the Swiss Federal Court.[360] The Swiss court rejected the *Clorox* tribunal's reading of the phrase "*invested by investors*" (which the TPA here does not contain in any event) to require "*an active investment that must have been made by the investor itself in return for consideration*"[361] and held that the tribunal had "*relie*[d] *on*

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broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production"); **Exhibit CLA-73**, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, ¶ 577 (explaining that the treaty's preamble reads: "*Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party*.").

356 **Exhibit CLA-80**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶ 349.

357 *See* Colombia's Reply, ¶¶ 193-96.

358 *See* **Exhibit RLA-30**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, 20 May 2019, ¶ 333.

359 *See* Colombia's Reply, ¶ 195; **Exhibit RLA-30**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, 20 May 2019, ¶¶ 829-31.

360 *See, e.g.*, **Exhibit CLA-75**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal, Case No. 4A_306/2019, 25 March 2020, p. 13. *See also infra* ¶ 180.

361 **Exhibit CLA-75**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal, Case No. 4A_306/2019, 25 March 2020, ¶ 3.4.2.7 ("*There is no reason to infer from the phrase 'invested by investors' the requirement of an active investment that must have been made by the investor itself*

additional conditions" that were not treaty.[362] On that basis, the Swiss court set aside the decision. Accordingly, the *Clorox v. Venezuela* case does not support Colombia's case.

157. The other case Colombia relies on extensively, *Komaksavia Airport Invest Ltd. v. Moldova*,[363] does not help Colombia either. In *Komaksavia*, the Cypriot claimant had acquired shares in a Moldovan company (which constituted the underlying investment there) from a Russian company for no consideration.[364] Like the *Clorox v. Venezuela* tribunal, the *Komaksavia* tribunal specifically considered the phrase "*invested by investors*" recognizing that it was "*not present in all BIT definitions of investment*" (it is likewise absent from the TPA at issue here).[365] To the *Komaksavia* tribunal, the term "*invested by investors*" "*reinforce*[d] *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*."[366] The tribunal based this interpretation on "*the ordinary meaning of the term* ***'invested', which is a past tense verb****, referring to a prior act of 'investing.'*"[367]

158. The language in the Cyprus-Moldova BIT underlying the *Komaksavia* tribunal's decision does not exist in the TPA. Unlike the Cyprus-Moldova BIT, the TPA specifically contemplates a range of activities, where the investor could be attempting

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in return for consideration. Quite to the contrary, the BIT does not contain any requirements going beyond the holding by an investor of one contracting party of assets in the territory of the other contracting party. Consequently, the Arbitral Tribunal cannot be followed when it relies on additional conditions, which it considers not to be fulfilled in the present case, to declare that it lacks jurisdiction.").

362 **Exhibit CLA-75**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal, Case No. 4A_306/2019, 25 March 2020, ¶ 3.4.2.7.

363 *See* Colombia's Reply, ¶¶ 199-202.

364 *See* **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶¶ 61-62, 170.

365 *See* **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 153.

366 **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 153, n. 188 (highlighting all of the cases cited by the parties that "*do not involve BITs with this operative language*," and distinguishing them from those that do).

367 **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 153 (emphasis added).

to make, is making or has made an investment.[368] Thus, unlike the Cyprus-Moldova BIT, the TPA does not add any temporal or substantive requirements to the act of investment, making the *Komaksavia* tribunal's holding inapposite here. In fact, the *Komaksavia* tribunal:

> [A]*ccept*[ed] *that shareholdings presumptively do satisfy the relevant test, and that* ***in the great majority of cases, this will be the end of the matter****. Ownership of shares by an investor, be it a physical person or a company, will in general be considered as sufficient for fostering international protection.*[369]

159. The *Komaksavia* tribunal ultimately rejected that general position purely because of its interpretation of the ordinary meaning of the treaty text before it,[370] which does not exist in the TPA.

160. Finally, *Quiborax*, another case Colombia cites,[371] is also inapposite because the tribunal there was interpreting the definition of investment (not the act of investing) under Article 25(1) of the ICSID Convention.[372] That tribunal interpreted the "*contribution*" prong of the *Salini* test, which some tribunals have applied to assessing whether Article 25(1) of the ICSID Convention (which does not apply here, as this is not an ICSID arbitration) has been satisfied.[373] The tribunal found that one of the claimants had received the shares in the company merely to comply with a formality under Bolivian law (that a company ought to have three shareholders), and therefore

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368 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28.

369 **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 147 (emphasis added).

370 *See* **Exhibit RLA-26**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶¶ 154-55.

371 *See* Colombia's Reply, ¶ 197

372 *See* **Exhibit RLA-31**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 228, 232. *See also* **Exhibit CLA-68**, *Guaracachi and Rurelec v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 350 (distinguishing *Quiborax* on this basis).

373 *See, e.g.*, **Exhibit CLA-68**, *Guaracachi and Rurelec v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 364 (explaining that "***it is not appropriate to import 'objective' definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration*** *such as the present case.* ***On the contrary, the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only*** *from the (very broad)* ***definition contained in the BIT*** *concluded by Bolivia and the United Kingdom*.") (emphases added).

had not made a qualifying contribution.[374] Neither the *Salini* test (which itself seems to have fallen out of favour)[375] nor the facts of that case apply here.

161. Accordingly, none of the cases Colombia relies on support its contention that a qualifying investor under the TPA must have "*actively and personally*" invested.

162. But, even if the TPA did require "*active*" and "*personal*" investing (*quod non*), it is clear that SSA's act of investment met these criteria. SSA executed the APA (*i.e.*, actively), and acquired SSA Cayman's rights directly (*i.e.*, personally). This is a vastly different situation from the one in *Quiborax*, where the claimant had received the investment solely to comply with a formality of Bolivian corporate law, and not thanks to any steps or activities of its own.[376] By contrast, here SSA affirmatively and directly entered into the APA. Moreover, unlike the claimants in *Clorox* and *Komaksavia*, the APA was executed subject to an exchange of value or consideration. Under the APA, SSA received all of SSA Cayman's rights to the treasure in the Discovery Area in exchange for SSA Cayman's liabilities and an obligation to pay the SSA Partners in accordance with their contributions.[377]

(b) The TPA Does Not Require A Protected Investor To Contribute Capital To Colombia

163. Colombia also asserts that Article 10.28 "*expressly required the alleged investor to prove that* ***it invested in the territory of*** [Colombia]", implying that SSA must have carried out investing activities within Colombia.[378] But Colombia mischaracterizes the relevant provision of the TPA to manufacture this supposed requirement.[379] In reality,

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[374] *See* **Exhibit RLA-31**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 232-33.

[375] **Exhibit CLA-75**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal, Case No. 4A_306/2019, 25 March 2020, p. 13.

[376] *See* **Exhibit RLA-31**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September de 2012, ¶ 232.

[377] *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. 1.5. *See also infra* ¶¶ 187-194.

[378] Colombia's Reply, ¶ 209.

[379] *See* Colombia's Reply, ¶¶ 187-90 ("*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*.").

the TPA provides that a covered investor is one that "*attempts through concrete action to make, is making, or has made* ***an investment in the territory of another Party***."[380] In other words, the investor's actions to "*make*" or acquire the investment do not need to take place in Colombia; rather, it is the investment itself that must be located in the territory of Colombia.[381] There is no dispute in this Arbitration that SSA's investment, *i.e.,* its rights to 50% of the treasure in the Discovery Area, is located in Colombian waters.[382]

164. Colombia points to the TPA's preamble in an attempt to justify its mischaracterization, arguing that the TPA's objectives could only be met with "*the act of investing in Colombia*."[383] This is patently false. The TPA's preamble establishes that its purpose is to promote investment.[384] This objective is equally served by the investor "*making*" (*i.e.*, acquiring) its investment through an act that takes place inside or outside the host State.[385] Indeed, precluding investors from conducting acts of investing outside of the

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[380] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28.

[381] *See* **Exhibit CLA-20bis**, C. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), p. 139, ¶ 197 ("*Not all investment activities are physically located on the host State*"). *See also* **Exhibit CLA-71**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro,* ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 204 ("*The fact that the assignment was done in Amsterdam is irrelevant for the location of the investment. The investment continues to be in Montenegro. The fact that RCA was not an active investor because of the activity connotation of the expression 'making an investment', as argued by the Respondent, does not mean that an investor, once a loan is made or equity in a company is acquired, needs to make further investments or be particularly active in the management of the investment*."); **Exhibit CLA-68**, *Guaracachi and Rurelec v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 358-59; **Exhibit CLA-64**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 279 (holding that "*it is the 'activity' that must take place 'in the territory' of Ukraine and not necessarily the flow of funds that allows that 'activity' to take place*" and agreeing with prior decisions that "*the location of the project in question constitutes the 'center of gravity' and the 'focal point' insofar as the territorial dimension of an 'investment' is concerned*").

[382] *See* Colombia's Preliminary Objections, ¶¶ 273-86 (where Colombia even accuses Claimant of "*threats of unilateral intervention in Colombian waters*"); SSA's Response, ¶¶ 19-20, 22, 31; Colombia's Reply, ¶¶ 53, 292.

[383] Colombia's Reply, ¶¶ 211-12.

[384] *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), Preamble ("*The Government of the United States of America and the Government of the Republic of Colombia, resolved to: STRENGTHEN the special bonds of friendship and cooperation between them and promote regional economic integration; PROMOTE broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production*").

[385] In this respect, Claimant notes that Colombia's reliance on *Apotex*, a NAFTA case, is misplaced. *See* Colombia's Reply, ¶ 213, *citing* **Exhibit RLA-32**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 7.62 ("*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 relevant treaty as requiring a form of 'presence, activity or other investment in the*

host State would be inconsistent with the TPA's express protection of "*every asset that an investor owns or controls, directly or* ***indirectly***."[386]

165. But even if the TPA could be read to include a requirement for an act of investment to have taken place in Colombia (which it plainly cannot), SSA evidently engaged in investment activities **in Colombia**. Colombia itself appears to accept that various activities that SSA's Predecessors conducted in the Colombian territory[387] constitute an investment. Indeed, Colombia itself acknowledges that after executing the APA, "*SSA LLC continued its efforts to carry out a verification expedition*"[388] and sought "*to recover what in their view belonged to them.*"[389] Thus, Colombia appears to acknowledge that SSA engaged in activities that enhance the value of an investment, and thus also constitute the act of investing.[390]

166. Colombia further complains that SSA's actions "*brought no substantial benefit to Colombia.*"[391] Again, there is no requirement in the TPA (or anywhere else, for that matter) for SSA's acts to "*bring substantial benefit to Colombia*" and, indeed, Colombia points to none. On the contrary, tribunals and scholars have roundly disclaimed that such a requirement can be read into the definition of "*investing*" or

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territory.""). First, the cited language does not constitute the majority's holding but is rather dicta as the tribunal there found on the jurisdictional issue on the basis of *res judicata* principles and only indicated that it was "*attracted*" to the State submissions on the interpretation of the treaty such that it required that an investment to be "*in the territory*" of the host State. Second, in that case, the tribunal questioned whether the investment could meet the territoriality requirement given that the claimant "*has never had any presence, activity or other investment in the territory of the USA*", the host State. Here, by contrast, Claimant's agents were present in Colombia, much of its activity took place in Colombia, and, moreover, the investment and its expected gains originated in a license issued by Colombia and lie within the control of the Colombian State.

386 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28 ("***investment*** *means every asset that an investor owns or controls, directly or* ***indirectly***") (first emphasis in original, second emphasis added).

387 *See* Colombia's Reply, ¶¶ 222-31. *See also* SSA's Response, ¶¶ 99-107, 125-30. *See supra* **Sections II.G**, **II.I**, **II.P**, **II.S**.

388 Colombia's Reply, ¶ 137.

389 Colombia's Reply, ¶ 138.

390 Moreover, Colombia appears to acknowledge that activities that enhance the value of the investment also constitute the act of investing. *See* Colombia's Reply, ¶ 206 (alleging that SSA "*also falls short of proving that . . . SSA LLC invested to enhance the alleged qualifying investment made by SSA Cayman Islands*"). *See also* **Exhibit CLA-64**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶¶ 279-81 (explaining that the claimant had spent significant time and effort working with a hotel in Ukraine and that the economic benefits the claimant was to receive were to be derived from the hotel's commercial activity in Ukraine).

391 Colombia's Reply, ¶ 250.

"*investment.*"[392] That said, SSA's actions in Colombia were clearly aimed at bringing a significant benefit to the State by finding, identifying and ultimately salvaging the contents of a valuable sunken shipwreck and leaving 50% of the treasure to Colombia.[393] That this goal could not be realized (solely due to Colombia's actions) does not detract from the *bona fide* nature of SSA's activities in the country.

B. SSA Made A Qualifying Investment

167. Colombia's second objection is that "*Claimant does not possess a qualifying investment under Article 10.28(g) or Article 10.28(h) of the TPA*."[394] For the reasons below, Colombia's second objection must also fail.

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

> ***investment** means **every asset** that an investor **owns or controls, directly or indirectly**, that has **the characteristics of an investment**, including such characteristics as the **commitment of capital or other resources**, the **expectation of gain or profit**, or the **assumption of risk**. **Forms that an investment** may take include:*
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> . . .
>
> *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.*[395]

169. Thus, the TPA contains a broad definition of investment as "*every asset*" that (i) an investor "*owns or controls*" and (ii) has the "*characteristics of an investment*". Notably, Colombia does not challenge Claimant's interpretation of Article 10.28 and expressly subscribes to the Claimant's discussion of the analogous provision in *Gramercy v. Peru*,[396] which therefore provides a clear and agreed basis for this Tribunal's analysis.

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[392] *See infra* nn. 419, 420.

[393] *See supra* **Sections II.G**, **II.O**.

[394] Colombia's Reply, ¶ 173(ii).

[395] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28 (emphases added).

[396] Colombia's Reply, ¶¶ 239-40 ("*Colombia does not contest Claimant's assertion, nor its reference to the Gramercy v. Peru ruling*.").

170. The investment here satisfies the conditions set out in the TPA.

171. First, pursuant to the APA, SSA "*owns*" and "*controls*" the rights granted by Articles 700-701 of the Civil Code, pursuant to DIMAR Resolution Nos. 0048 and 0354, which gave SSA's Predecessor, GMC, rights to 50% of the treasure in the Discovery Area, upon its discovery.[397] The 2007 Supreme Court Decision upheld the existence and validity of these rights.[398] GMC validly assigned those rights to SSA Cayman,[399] which then validly sold them to SSA.[400] Accordingly, SSA now "*owns*" and "*controls*", *inter alia*, the "*licenses, authorizations, permits, and similar rights*

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397 *See* SSA's Response, ¶¶ 91-92, 208. *See also,* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 157 ("*It is clear, therefore, that the right to a treasure is acquired by its discovery,* lato sensu*, and not by its material or physical apprehension (*corpus*), a concept that also includes reporting its location, applicable to discoveries that occur on land or property owned by others.*"), 182 ("*Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets that are the subject of this judicial controversy, insofar as they of course correspond to a treasure, a circumstance guaranteed in the legal sphere with the recognition that in this sense was made by the General Maritime and Port Directorate, according to Resolution 0354 of June 3, 1982, to the* Glocca Morra Company*. . . . we must reject the idea that* [the discovery and equal division of treasure] *is only a mere expectation, or a vain hope, or a* pie in the sky*. . .*"), 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract . . . it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery*.") (SSA's Unofficial Translation).

398 *See supra* ¶¶ 82-88.

399 *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983. *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 64 ("*Viewing it in this way, it is uncontestable that no 'assignment' of 'personal credits' was verified between the plaintiff company and* Glocca Morra Company*, the perfection of which would require observing the requirements established in Article 1959 et seq., of the Civil Code, because,* strictly speaking*, the Nation, acting through DIMAR, did not make itself an obligor of those companies, but rather only granted permission for the underwater exploration aimed at locating treasures or shipwreck goods and authorized the respective replacements, recognizing the assignees as such, authorizing them to go ahead with the exploration; allowed the plaintiff to use foreign flagged ships for the purpose and even considered the plaintiff company as a 'reporter of treasures or shipwreck goods,' when later coordinating with it toward execution of the contract for recovery of the goods found*.") (SSA's Unofficial Translation). The Supreme Court also noted that Colombia was estopped from challenging the assignment as it had not challenged the assignment or SSA Cayman's standing in the Civil Court or Superior Court cases; **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 66 ("[I]*t must be added that in answering the complaint. . .the Nation did not express the least misgiving about the plaintiff's standing. On the contrary, the Office of the Inspector General of the Nation, acting in representation of the Nation, admitted that Facts 4, 5, 6, 16 and 17 were true and that it had no evidence concerning Fact 15 and would wait to see what was proven. The Nation held to this position during the processing of the two instances; it did not—either in the allegations formulated at the close of the first instance, or in the appeal of that trial court decision, or in arguing its appeal to the Superior Court—put forward any argument at all concerning the plaintiff's lack of standing and, much less, that the assignments on which it relied in the present process had not been proven*.") (SSA's Unofficial Translation).

400 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, arts. 1.1, 2.1.

conferred pursuant to domestic law" and the "*related property rights*" to the treasure in the Discovery Area.[401]

172. Second, SSA's acquisition of SSA Cayman's assets, rights and interests under the APA plainly has the "*characteristics of an investment*", both including, and in addition to, the sample characteristics listed Article 10.28 (*i.e.,* (i) "*commitment of capital or other resources*"; (ii) "*expectation of gain or profit*" and (iii) "*assumption of risk*").[402]

173. Under the APA, SSA undertook an economic commitment involving risk that aimed to bring both itself and Colombia substantial benefit by identifying and then salvaging the San José shipwreck. Indeed, even after signing the APA, SSA sought for years, both through negotiations and litigation, to salvage the San José shipwreck for the benefit of both Colombia and itself.[403] SSA, moreover, expected that its efforts would bear fruit and assumed significant risk in the process. Specifically, SSA assumed the liabilities of its Predecessors, including paying the original investors and vendors in the exploration process, and also expended considerable resources of its own including time, manpower, management and decision-making resources. And while there is no express duration requirement in the TPA,[404] SSA's investment would also comfortably satisfy this criterion as SSA had held its investment for almost a dozen years before it was expropriated by Colombia.[405]

174. As discussed above, Colombia no longer appears to contest that SSA's investment satisfies the first requirement (*i.e.*, that SSA owns and controls the investment).[406]

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401 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), arts. 10.28(g), (h).

402 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28.

403 *See supra* **Section II.O**.

404 *See* **Exhibit CLA-53**, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, ¶ 228 ("*In the absence of an explicit requirement of duration in the FTA, there are no clear indications which duration is to be deemed sufficient. Assuming (but not deciding) that an implicit duration requirement exists, the Tribunal agrees with the flexible approach adopted by other tribunals, as formulated by the* Romak v. Uzbekistan *tribunal: 'The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of 'investment' status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor's overall commitment*.").

405 *See supra* **Sections II.N-II.O**.

406 *See supra* ¶ 151.

Rather, Colombia denies that the investment exhibits "*the characteristics of an investment*." And Colombia claims that SSA's investment cannot be characterized as one under Article 10.28(g).

(a) SSA's Investments Has The "*Characteristics Of An Investment*"

175. While Colombia originally complained that SSA's investment lacked only one characteristic—"*contribution of capital.*"[407]—Colombia now newly complains that the investment also lacks an "*expectation of gain or profit"* and the *"assumption of ris*k."[408]

176. Colombia's new objections are untimely because Colombia's failed to include them in its Preliminary Objections within the required 45 day deadline under Article 10.20.5 of the TPA.[409] Colombia appears to have added its new arguments in response to SSA's brief, which unambiguously demonstrated that the TPA contains a non-exhaustive list of characteristics that an investment may (but is not required to) have.[410] Indeed, the language of the TPA, as confirmed by numerous tribunals, is clear that the absence of any one (or even all) of the characteristics listed in Article 10.28's definition of investment is not fatal to the finding of an investment.[411] Rather, the assessment of whether an investment has the characteristics of one must be done on a case-by-case

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407 Colombia's Preliminary Objections, ¶¶ 246-56.

408 Colombia's Reply, ¶ 237.

409 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.20.5 ("*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 therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days*.").

410 *See* **Exhibit CLA-46**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 165 ("*The Tribunal is of the view, in agreement with most previous decisions, that there is no inflexible requirement for the presence of* all *these characteristics, but that an investment will normally evidence most of them*."); **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 140 (discussing the same article under CAFTA). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 180-81.

411 *See* SSA's Response, ¶¶ 163-64, 174-75, 185.

basis depending on the specific circumstances at hand. As described above, SSA's investment patently has the characteristics of an investment.[412]

177. In any event, Colombia's complaints alleging that SSA's investment lacks the characteristics listed in Article 10.20.5—both new and old—are meritless.

(1) SSA's Investment Involved The "*Commitment of Capital And Other Resources*"

178. Colombia's complaints regarding the purported absence of a "*commitment of capital and other resources*" are both legally and factually deficient. The investment evidently involved the commitment of capital and other resources. Colombia misreads the TPA in a strained effort to try to show otherwise.

179. First, though Colombia appears to accept the widely accepted principle that the characteristics of investment listed in the TPA are merely illustrative, and not cumulatively necessary for an asset to qualify as an investment,[413] Colombia nonetheless insists that "*commitment of capital or other resources*" is "*inherent in the act of investing*" and that, without it, there can be no investment.[414] This is not true. Had a "*commitment of capital or other resources*" been a necessary criterion for every investment to exist, the Contracting Parties would have clearly said so in the TPA. They chose not to do so and instead included an illustrative, non-cumulative, and non-exhaustive list.[415]

180. Colombia further argues that "[i]*t is well-established in investment case-law that, to be*

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412 *See supra* ¶¶ 172-173.

413 *See* Colombia's Reply, ¶¶ 239-40. *See also* SSA's Response, ¶¶ 163-64, 174-75, 185.

414 Colombia's Reply, ¶ 243 ("[W]*ithout such commitment of resources, the asset, even if belonging to the claimant, would not be the result of it having invested*").

415 *See* SSA's Response, ¶¶ 163-64, 174-75, 185. The cases Colombia cites in purported support do not aid its position. *See* Colombia's Reply, ¶ 243, *citing* **Exhibit RLA-40**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, 26 November 2009, ¶ 207; **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 166. *KT Asia* is an ICSID case, and the tribunal in *Romak*, interpreting the Swiss-Uzbekistan BIT, applied the ICSID definition to the term "*investments*" in the BIT because that treaty, apart from a non-exclusive list of examples of the forms of investment, did not language as to the characteristics that constitute an investment. **Exhibit RLA-40**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, 26 November 2009, ¶¶ 188-90, 206, 207. That is distinguishable from this case, which is not pursuant to the ICSID Convention and where the TPA provides specific characteristics of investments, and the Tribunal is not left to its own devices to divine what the Contracting Parties intended.

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,*** *i.e., Colombia.*"[416] This is also incorrect. Colombia is effectively seeking to import one of the outmoded *Salini* factors to define "*investment*" under Article 25 of the ICSID Convention; however, that test does not apply here (if anywhere), where the Arbitration is not proceeding under the ICSID Convention and the TPA itself contains a definition of investment. Moreover, this particular criterion has been rejected emphatically by recent tribunals, including both the *KT Asia* tribunal[417] and the *Seo* tribunal[418] on whose reasoning Colombia relies.[419] It has also been flagged as potentially problematic in the context of the ICSID Convention by Professor Christoph Schreuer, whose treatise

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416 Colombia's Reply, ¶ 215 (emphasis added).

417 *See* **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 171 (rejecting Kazakhstan's argument that the contribution to the host State's development or prosperity is a requirement for an investment and noting that, "[i]*n the Tribunal's opinion, such a contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment. As the Claimant points out, this is the one criteria that has been 'rejected most emphatically by the recent cases.* "').

418 The *Seo* tribunal expressly rejected Korea's argument that "*one must add to the three listed characteristics a fourth one from the* Salini *criteria, namely that there must be a contribution to the host State's development, and then consider all four cumulative criteria or requirements in deciding whether the relevant asset qualifies as an '*investment.'" **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 97 (finding that that interpretation was "*precluded by the fact that the three listed characteristics are not cumulative requirements (given the word '*or*'). This cannot, as a matter of logic, change even if one were to add a fourth characteristic*."). *See also* **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶¶ 98-101 (emphasizing that the *Salini* criteria serve to identity an investment within the meaning of the ICSID Convention, "*which does not itself provide any definition of what an investment is*," and which therefore "*stands in stark contrast to Article 11.28 of the KORUS FTA, which contains an express definition of the term. The Tribunal does not find it possible or appropriate to replace the wording of said provision (in particular the terms '*including*' and 'or') with another tribunal's findings made in the context of ICSID arbitration cases*.").

419 *See also* **Exhibit CLA-63**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶¶ 110-11 (holding that while "*the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention,*" that a contribution to the host State's economic development does not "*constitute*[] *a criterion of an investment within the framework of the ICSID Convention . . . .* [W]*hile the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment*."); **Exhibit RLA-31**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 220-24 (noting that while "*the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong* Salini *test . . . such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment*."); **Exhibit CLA-62**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 231-32 (explaining that, under the ICSID Convention, the contribution to the host State's economic development should be seen as a consequence of rather than a requirement for an investment).

Colombia miscites[420] in support of this supposed requirement. Contrary to Colombia's suggestion, Professor Schreuer in fact stated the following:

> ***A test that turns on the contribution to the host State's development should be treated with particular care****. The reference in the Convention's Preamble indicates that economic development is among the Convention's object and purpose. This would support the proposition that an international transaction that is designed to promote the host State's development enjoys the presumption of being an investment.* ***But it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection***.[421]

181. In sum, even if this test still had a role to play in the context of the ICSID Convention (which is increasingly doubtful), it has no place here, where the TPA contains no reference to a required contribution to the host State, let alone a "*meaningful transfer of resources into the economy of the host State*."[422]

182. Second, even if a "*commitment of capital or other resources*" were a necessary requirement for an investment (which it expressly is not under the TPA), that requirement is clearly met here.

183. Colombia alleges that SSA's investment "*does not include a commitment of capital.*"[423] That is incorrect. Colombia does not dispute that SSA and/or SSA's Predecessors have expended capital of at least USD 11 million on exploration and verification of their discovery in the 1980s (which would be the equivalent of over USD 40 million

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[420] *See* Colombia's Reply, n. 254, *citing* **Exhibit RLA-34**, Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2009), p. 130; **Exhibit RLA-33**, *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. As for *Bayindir*, that case is inapposite. First, it focuses on the meaning of investment in Article 25 of the ICSID Convention. Second, both parties agreed on the notion of investment under Article 25 of the ICSID Convention, as defined in particular in the decision in *Salini v. Morocco*, which held that the notion of investment presupposes, *inter alia*, a contribution to the host State's development. Finally, the tribunal found that Bayindir "*made a significant contribution, both in terms of know how, equipment and personnel and in financial terms*" because it had "*trained approximately 63 engineers, and provided significant equipment and personnel to the Motorway*." **Exhibit RLA-33**, *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, ¶¶ 115, 130-31.

[421] **Exhibit CLA-20bis**, C. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), p. 134, ¶ 173.

[422] Colombia's Reply, ¶ 244.

[423] Colombia's Reply, Section IV.B.1.a (heading).

today).[424] That is how SSA's Predecessor found and reported the shipwreck to acquire rights to 50% of the treasure in the Discovery Area, *i.e.*, the investment. SSA's investment, therefore, undoubtedly "*include*[s] *a commitment of capital*."

184. It is important to note that, unlike other treaties,[425] the TPA does not require the **investor** to have committed the capital itself. The TPA deliberately defines "*investor*" and "*investment*" as distinct terms. To qualify as an investor, one must have the requisite nationality and have attempted to—or have successfully—"*made*", or acquired, an investment.[426] An investment, in turn, is defined as an "*asset*" with certain investment-like characteristics. These characteristics, however, must simply be possessed by the investment; the investor itself is not required to have been the one to satisfy these characteristics in order to qualify for protection under the TPA. Had the drafters of the TPA required the investor to have performed certain acts to be protected, they could have simply stated that a qualifying investor must have committed capital and undertaken risk. But this is not what the TPA provides. The only connection that the TPA requires between an "*investor*" and "*investment*" is that the investor have "*made*" the investment (*i.e.*, acquired it), and thus that the investor "*own*" or "*control*" the investment.

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[424] *See* SSA's Reponse, ¶¶ 99, 167, 190; Colombia's Reply ¶ 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.' This is of course completely irrelevant because it would only prove that SSA Cayman Islands -not SSA LLC- invested in Colombia.*"). *See also* **Exhibit R-5**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, p. 1; **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 11-12 ("*Up to January 31, 1982, the Glocca Morra Company and its affiliates have spent more than six million ($ 6,000,000) dollars (U.S.) in the underwater search and exploration project instituted by Resolution No. 0046. The Sea-Search Armada, a limited liability company existing under the laws of the Cayman Islands, British Antilles, which is an affiliate of the Company Glocca Morra, is prepared to spend five million ($ 5,000,000) dollars (U.S.) for the rescue of shipwrecks located during the search operation of Phase Three described above.*") (SSA's Unofficial Translation).

[425] *See, e.g.*, **Exhibit CLA-59**, Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, 23 September 1986 (entry into force), art. 1(6) ("*Investor: The Government of any contracting party or natural corporate person, who is a national of a contracting party and* ***who owns the capital and invests it in the territory of another contracting party***."") (emphasis added); **Exhibit CLA-58**, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Thailand for the Promotion of the Investment of Capital and for the Protection of Investments, 11 August 1979 (entry into force), art. 3(1) ("***The benefits of this Agreement shall apply only in cases where the investment of capital by the nationals and companies of one Contracting Party*** *in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party*.") (emphasis added).

[426] *See supra* ¶¶ 146-152.

185. The distinction between "*investor*" and "*investment*" is important as it allows, for example, the TPA to accord protections to investors who are assignees or transferees of an investment. Extending protection in this way advances commerce and economic development, and allows the TPA to meet its stated objective of "[ensuring] *a predictable legal and commercial framework for business and investment*".[427]

186. On this basis, tribunals have consistently recognized that investments can be transferred without affecting their protected status. For example, in *Levy de Levi v. Peru*, a father had transferred his shares to his daughter free of charge, who then initiated the arbitration in her name. Peru raised similar objections as Colombia does here. The *Levy* tribunal rejected Peru's arguments finding that the investment did not lose its status as an investment simply by being transferred without an exchange of value:

> *The Respondent also argued that the Claimant acquired her rights to the investment without charge . . . since they were assigned to her by her father, Mr. Levy, in 2005.* ***This Tribunal considers that the monetary value of assignments of rights and endorsements of shares does not affect the status of the initial investment****. This was recognized by the Arbitral Tribunal in the case of Pey Casado v. Republic of Chile. In light of the paragraphs above, the Tribunal will reject the first argument on jurisdiction advanced by Peru.*
>
> . . .
>
> ***It is clear that the Claimant acquired her rights and shares free of charge. However, this does not mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the Claimant by perfectly legitimate legal instruments.***
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> . . .
>
> *As to Peru's third argument—that the Claimant's interest in BNM does not qualify as an investment under the ICSID Convention (paragraph 118(c) above)—the Tribunal considers that* ***the initial investment made by the Claimant's relatives meets all the requirements described by the Respondent****: it provided resources to establish the Bank and make it operational; risk was incurred in each of the operations, which were typical bank operations; the investment was of some duration and it*

[427] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), Preamble.

contributed to the development of Peru, through the various services provided by BNM to the public and private sectors.[428]

187. But even if SSA itself were required to have committed the "*capital or other resources*" (which it was not, by clear terms of the TPA), it clearly has done so here. The APA expressly sets out in Article 1.5 that SSA provided the following consideration in exchange for the purchase of SSA Cayman's rights:

> *Purchase Price. **In consideration for the assignment of the Acquired Assets** and in lieu of the payment of any cash or cash equivalents, at the Closing, Purchaser shall:*
>
> *(a) **Assume the Assumed Liabilities**;*
>
> *(b) **Grant**, pursuant to the Limited Liability Company Agreement of Purchaser dated Nov. 14, 2008, a copy of which is attached hereto as Exhibit B (the "Purchaser LLC Agreement"), **Economic Interests** (as such term is defined in the Purchaser LLC Agreement) **to the several parties identified as Economic Interest Holders**, the relative priorities in and percentages or amounts of the "Profits" and "Losses" (as such terms are defined in the Purchaser LLC Agreement) associated with such Economic Interests as set forth in the Purchaser LLC Agreement;*
>
> *(c) **Deliver an assignment and assumption agreement** (the "Assumption Agreement") in substantially the form attached hereto as Exhibit C, whereby, among other things, **Purchaser***

[428] **Exhibit CLA-69**, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶¶ 146, 148, 151. *See also* **Exhibit CLA-62 [EN]**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 542 ("*The Respondent objected that said rule could not be applied to the present case, since, contrary to the facts of the* FEDAX N.V. v. Republic of Venezuela *case, the President Allende Foundation did not make any payment in exchange for the rights that were transferred to it.* ***In the opinion of the Tribunal, the fact that, in the present case, Mr. Pey Casado has transferred the shares by virtue of a donation does not change the fact that the Foundation has obtained the status of investor through said transfer. As long as the transfer of shares that constitute the initial investment is valid (as confirmed by the arbitral tribunal in the present case), it confers the status of investor to the transferee***.") (emphasis added) (SSA's Unofficial Translation); **Exhibit CLA-71**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 203 ("*The assignment of the First Loan did not change its terms in relation to ZN. The assignment changed the creditor. The arguments of the Respondent are based on the consideration of the assignment as a transaction in itself irrespective of what is assigned.* ***The First Loan did not change its condition as an investment because of the assignment. The change of creditor changes the investor but not the substance of the investment****. RCA made at least the contribution of extending the loan terms twice, the second time on the occasion of the guarantee granted by the Government to the Crédit Suisse Loan. The extension of the maturity of the First Loan is proof of the risk taken on by RCA*.") (emphasis added).

> ***shall assume all of Seller's obligations under and pursuant to the Assumed Liabilities***.[429]

188. Accordingly, there was a "*meaningful transfer of value*"[430] in exchange for the rights acquired under the APA. SSA purchased valuable rights to the discovery made by its Predecessors, and SSA Cayman was able to offload its liabilities before being dissolved. These included "*Assumed Liabilities*" by SSA, which included:

> *(i) to the extent not previously paid or performed,* ***the payment and performance obligations of Seller arising prior to the Closing Date under the Acquired Permits and the Acquired Contracts****;*
>
> *(ii) the payment and performance obligations of Purchaser arising from and after the Closing Date under the Acquired Permits and the Acquired Contracts; and*
>
> *(iii)* ***distribution and allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement*** *(defined below).*[431]

189. Accordingly, SSA was now liable for payments to various vendors involved in the search and identification of the San José. This included, for example, Chicago Maritime, to which the SSA Cayman Partners had recorded a debt of hundreds of thousands of dollars in 1982 for the "*for the Partnership's charter hire of the submarine Auguste Piccard.*"[432]

190. SSA's acquired liabilities also included accrued payment obligations to vendors. For example, SSA acquired the SSA Cayman's liabilities under the 1988 Limited Partnership Venture Management Agreement between SSA Cayman and IOTA Partners, a limited partnership based in Idaho, U.S. (an "Acquired Contract" under the

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[429] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008 (emphases added).

[430] Colombia's Reply, ¶ 206.

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

[432] **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, art. IV ("*The Managing Partner and Chicago Maritime Corporation, a Colorado corporation ('Chicago Maritime'), have agreed that payment of up to six hundred thousand dollars ($600,000) in accrued and unpaid fees payable by the Partnership to Chicago Maritime for the Partnership's charter hire of the submarine Auguste Piccard be deferred, and the Managing Partner and Chicago Maritime may agree that payment of an additional amount of such fees, not to exceed another six hundred thousand dollars ($600,000), be deferred*.").

APA).[433] IOTA was retained to provide leadership and management services to SSA Cayman in connection with the salvage of the SSA's targets, including the San José. In addition to providing services, IOTA advanced the "[c]*osts, fees and expenses*" incurred by SSA Cayman, its managing company, Armada Company, and their agents.[434] As compensation, IOTA was entitled to "*a portion of the proceeds derived from the treasure salvaged from SSA's Targets*," but these payments were deferred.[435] Therefore, under the terms of the APA, SSA assumed the obligation to compensate IOTA for its services and advances.

191. In addition to liabilities owed to vendors, SSA assumed SSA's Predecessors' liabilities and obligations to repay the original investors in its Predecessors. Specifically, SSA is obliged to distribute all proceeds among the Economic Interest Holders—all Partners of SSA Cayman—in amounts equivalent to their rights of recovery under the SSA Cayman Partnership Agreement.[436] Colombia does not dispute that the SSA Cayman Partners spent over USD 11 million by 1987 (over USD 40 million today) on exploration, reporting and verification exercises.[437] SSA thus assumed the liability of paying these Partners in accordance with their partnership interests in SSA Cayman, which in turn arose from their original investments in SSA's Predecessors for their exploration and reporting activities.[438]

192. It is not controversial that consideration does not just include cash payment, and that it may involve the transfer of anything with value, including the assumption of liabilities by the purchaser.[439] Colombia itself has acknowledged that the assumption of liabilities

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433 *See* **Exhibit C-58**, Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988.

434 **Exhibit C-58**, Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988, art. 6.

435 **Exhibit C-58**, Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988, art. 2.

436 *See* **Exhibit C-30bis**, Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (complete), 18 November 2008, arts. 1.3(iii), 1.5(b); Exhibit B (LLC Agreement), art. 13.2. *See also* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 3.3.

437 *See supra* n. 424.

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

439 *See, e.g.*, **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 71 (explaining that the claimant "*bought these shares by issuing*

may constitute consideration[440] and relies on cases that support this proposition.[441] Moreover, Colombia does not appear to dispute that that the term "*commitment*" includes promises to pay in the future. A "*commitment*" of capital or other resources thus includes promises to provide them in the future,[442] and accordingly can be made through contractual obligations.[443] This is plainly what the APA provided.

193. In addition to providing a "*commitment of capital*" SSA independently made contributions of "*other resources*" such as time, management and expertise following the execution of the APA. For more than a decade after executing the APA, SSA sought to salvage the ship by, *inter alia*:

(a) Repeatedly reaching out to the Colombian Government and the presentation of numerous proposals for the salvage of shipwreck.[444]

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promissory notes to [the seller]"), 221 (finding that the claimant held an investment pursuant to the applicable treaty). *See also infra* n. 450.

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

441 *See, e.g.*, **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 203 (explaining that the "*consideration was covered by a loan of which neither the capital nor the interest was ever paid*.").

442 *See, e.g.,* **Exhibit CLA-66**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶¶ 297-300 (holding that "*contribution can take any form. It is not limited to financial terms but also includes know-how, equipment, personnel and services*" and further finding that claimant's future commitment to pay the State depending on the oil prices, as part of a hedging agreement, constituted a contribution for the purposes of an investment); **Exhibit CLA-65**, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶¶ 113-14 (holding that, in a case involving a signed contract with the State, the claimant had a valid investment even though it "*does not appear to have performed many services in connection with it. Nonetheless,* ***the fact of being bound by that Contract implied an obligation to make major contributions in the future. That commitment constitutes the investment; it entails the promise to make contributions in the future for the performance of which that party is henceforth contractually bound***" and holding that "***the protection here extends to deprivation of the revenue the investor had a right to expect in consideration for contributions that it had not yet made, but which it had contractually committed to make subsequently.***") (emphases added); **Exhibit CLA-21**, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶¶ 242-43 ("*There would be no need for actual expenses to have been incurred by the private party, the relevant criterion being the* commitment *to bring in resources toward the performance of such exploration*").

443 *See, e.g.*, **Exhibit CLA-20bis**, C. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (Cambridge, 2nd Ed., 2009), p. 126, ¶ 148 ("*It is also well established that rights arising from contracts may amount to investments*.").

444 *See supra* **Sections II.G**, **II.O**, **II.Q**.

(b) Progressing with efforts to salvage the shipwreck.[445]

(c) Initiating legal actions against Colombia before the U.S. courts and IACHR to protect its investment.[446]

(d) Protecting its investment against efforts by Colombian authorities to lift the Injunction Order and successfully reinstating it over the Discovery Area.[447]

(e) Soliciting assistance from the U.S. Government to support its negotiations with the Colombian Government in relation to salvaging the shipwreck.[448]

194. These actions were clearly aimed at and did "*enhance*" and protect the value of SSA's investment.[449] And importantly, they reflect the expenditure not only of capital, but also of other resources, including management, time and expertise by SSA's officers, contractors and employees.

195. Colombia does not seem to dispute that SSA has invested "*other resources*" including management, time and expertise, or that the commitment of these resources is a characteristic of an investment. Indeed, tribunals have consistently found that activities such as decision-making, management, and expertise constitute the types of "*commitments*" that can characterize an investment.[450] What matters is that the claimant

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445 *See* **Exhibit R-22**, United States District Court for the District of Columbia. Civil Action No. 13-564, 23 April 2013, ¶ 20 ("*In anticipation of initiating the salvage process, SSA began the process of hiring salvage contractors to perform the actual recovery of SSA's property. SSA entered into a contract for equipment and oceanographic survey consultation (including an American flagged vessel) with Sea Trepid International, LLC, a company located in Louisiana*").

446 *See supra* **Sections II.P**.

447 *See supra* **Section II.S**.

448 *See supra* ¶ 126.

449 *See* Colombia's Reply, ¶ 206 (claiming that SSA "*falls short of proving that . . . SSA LLC invested to enhance the alleged qualifying investment made by SSA Cayman Islands*.")

450 *See, e.g.*, **Exhibit CLA-53**, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, ¶¶ 206-07 (holding that claimants had sufficiently established that the general partner's investment decision-making, management and expertise constituted a commitment of "*other resources*" in the sense of Article 11.28 of the U.S.-Korea FTA, even though the general partner did not make any cash contributions to the partnership and the funds used to acquire the Samsung shares originated from the limited partner's cash contributions); **Exhibit CLA-66**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 300 (finding that the claimant had "*committed resources of substantial economic value*" where its employees engaged in over two years of regular meetings, negotiations and correspondence with the State and organized a number of meetings to help Sri Lanka reduce the required payment under the hedging agreement). *See also* **Exhibit RLA-33**, *Bayindir Insaat Turizm Ticaret Ve Sanayi*

"*must have committed some expenditure, in whatever form, in order to pursue an economic objective.*"[451] That test is plainly met here.

196. In sum, there is no "*inherent*" requirement to show a commitment of capital to establish an investment under the TPA. Notwithstanding this, the investment patently involved commitments of both capital and other resources.

(2) SSA's Investment Involved The "*Expectation of Gain or Profit*"

197. Colombia also makes the new and untimely objection that SSA's investment did not involve an expectation of gain or profit. The Tribunal should disregard Colombia's new objection as Colombia raised it more than 45 days after the Tribunal's constitution.[452] But were the Tribunal to consider it, Colombia's assertion is obviously false given the magnitude of the treasure on board the San José, which the President of

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A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131 ("*In the case at hand, it cannot be seriously contested that Bayindir made a significant contribution, both in terms of know how, equipment and personnel and in financial terms*"); **Exhibit CLA-21**, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶ 249 ("*there seems to be a wide acceptance, in arbitral jurisprudence and doctrine, of the idea that the existence of an investment as a requirement for jurisdiction is not dependant* [sic] *on the amounts actually spent by the alleged investor; and that an investment 'may be financial or through work,' including know-how or industry*.")

[451] **Exhibit CLA-66**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 297 (holding that "*contribution can take any form. It is not limited to financial terms but also includes know-how, equipment, personnel and services*," and confirming that contributions could "*consist of loans, materials, works, services, as long as they have an economic value*."). *See also* **Exhibit RLA-40**, *Romak v. Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, ¶ 214 ("*The Arbitral Tribunal interprets the term 'contribution' in broad terms. Any dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance, can be a 'contribution.' In other words, a 'contribution' can be made in cash, kind or labor*.").

[452] Colombia only made this objection with its Reply, which is therefore out of time. *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.20.5 ("*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 therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days*.") (emphasis added).

Colombia himself claimed is worth billions of U.S. dollars.[453]

198. Colombia does not dispute that GMC Inc., GMC, and then SSA Cayman, and the hundreds of U.S. citizens who invested their savings in those companies, had done so with the expectation of recouping their investment from the salvage and distribution of the treasure on board the San José. By the time the APA was signed in 2008, the Colombian Supreme Court had unambiguously confirmed Claimant's rights to the treasure in its 2007 Supreme Court Decision.[454] Colombia does not dispute that SSA itself had entered the APA with an expectation of gain or profit. Indeed, SSA would not have undertaken to assume the significant liabilities to vendors and the management company, as well as the obligation to distribute proceeds from the salvage of the San José to the original investors in SSA Cayman had it not expected a gain or profit.[455] Thus the investment obviously included an expectation of gain or profit.

199. Nonetheless, Colombia argues that "*the capital* [must be] . . . *committed precisely for making a profit, which means that if this requirement is not met, neither is the expectation of gain or profit*."[456] Needless to say, there is no requirement in the TPA that the commitment of capital must be made with the expectation of gain or profit, or that the expectation of gain or profit cannot be found without a commitment of capital or other resources—and Colombia can identify no textual basis for its position. On the contrary, the TPA lists these two potential investment characteristics distinctly, separated by an "*or*", indicating that they can be considered independently of each other.

200. Colombia attempts to rely on the *Seo v. Korea* case for the proposition that there can be no expectation of profit without the commitment of capital. But that decision does not support Colombia's case. At issue in that case was whether a relatively modest residential property (acquired by the claimant there for $300,000)—which was

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453 *See* **Exhibit C-117**, *Colombia says treasure-laden San Jose galleon found*, BBC, 5 December 2015, *available at* https://www.bbc.com/news/world-latin-america-35014600 ("*Mr Santos said the cargo was worth at least $1bn (£662m)*.").

454 *See supra* **Section II.M**.

455 *See supra* ¶¶ 189-191.

456 Colombia's Reply, ¶ 254, *citing* **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 127.

"*initially used exclusively as the private dwelling of the owner's family and only subsequently and partially rented out*"—could qualify as an investment.[457] Not only did the Tribunal confirm that the characteristics listed in the definition of investment are non-exhaustive,[458] and that these characteristics were not equivalent to the *Salini* factors,[459] it also found that while, as a general matter, when an investor commits capital, it will typically do so in the expectation of gain or profit,[460] this was not always the case. The *Seo* tribunal found that the capital committed did not evince an expectation of profit or gain as the property was primarily used for private purposes.[461] In other words, contrary to Colombia's representation, the *Seo* tribunal **did not** find that one needs to make a contribution of capital to expect profit.

201. Here, SSA acquired its investment via the APA in 2008, mere months after the Colombian Supreme Court had confirmed SSA's Predecessors' rights to 50% of the treasure in the Discovery Area. Colombia does not dispute that SSA believed—as it

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457 **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 139.

458 In *Seo,* the tribunal interpreting the analogous provision in Article 11.28 of the Korea-U.S. FTA emphasized the non-exhaustive and non-cumulative nature of the characteristics set out in the treaty and squarely rejected the position Colombia advances in this case. *See* **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶¶ 88 ("*Article 11.28 of the KORUS FTA provides the following definition: '*investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:. . . '"), 101 (noting the KORUS FTA "*pursues a typological approach that revolves around a non-exhaustive and non-cumulative list of three important characteristics*"). Specifically, the tribunal found: "*It is also worth noting that Article 11.28 of the KORUS FTA connects the three listed characteristics with the word 'or.'* ***Thus, not all three characteristics must necessarily be present cumulatively for an asset to quality*** [sic] ***as an investment****. Based on the plural in the phrase '*including such characteristics' *(emphasis added), the Respondent argues that at least two of the mentioned three mentioned* [sic] *characteristics must be present.* ***However, the Tribunal is not attracted by the Respondent's argument.*** *It would have been very easy for the drafters of the KORUS FTA to incorporate such 'two out of three' requirement in a very clear fashion if that is what was intended. Further, the Tribunal finds it highly unlikely that the State parties to the KORUS FTA preferred instead to count on tribunals reaching such result as a matter of subtle linguistics for this important issue of what qualifies as '*investment*' for treaty protection. Instead, the Tribunal considers that the meaning of the phrase '*including such characteristics*' in Article 11.28 of the KORUS FTA is merely to express that the three listed characteristics are examples for '*characteristics of an investment*.'* ***However, as the word implies, none of them is indispensable***." **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶¶ 94, 95 (emphases added).

459 *See supra* n. 418.

460 *See* **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 127.

461 *See* **Exhibit CLA-52**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019, ¶ 128 (concluding that "*the presence of an expectation of profit or gain was at best weak in relation to the Property*" where the property was used about 50% of the time for private purposes).

still does, that—the Discovery Area contained the San José shipwreck, estimated to be valued at approximately USD 20 billion, and indeed SSA's persistent actions to enforce its rights demonstrate the same.

202. Colombia nonetheless claims that the Government's supposed "*den*[ials] [of] *any property rights over the Galeón San José*" should have extinguished any such expectations by SSA.[462] That is disingenuous. But, in an attempt to support its position, Colombia refers to the dubious Columbus Report[463] that Colombia itself chose not to rely on before its courts, cannot defend before this Tribunal, and whose author has been incarcerated for years.[464] Colombia also acknowledges that the 2007 Supreme Court Decision confirmed SSA's rights to treasure at the Discovery Area, but again makes the unsupported claim that the Discovery Area does not contain the San José.[465] Regardless of what Colombia now believes about the presence of the San José in the Discovery Area (a matter for the merits), the record leaves no doubt that SSA itself believed that it had found the San José and therefore expected to be remunerated in accordance with its judicially-confirmed rights.

(3) SSA's Investment Involved The "*Assumption Of Risk*"

203. Colombia also makes the new and untimely objection that the investment did not involve the assumption of risk. Like the argument in subsection **(2)** above, the Tribunal should disregard this objection because Colombia has submitted it more than 45 days after the Tribunal was constituted. Should the Tribunal address the objection, SSA demonstrates below that Colombia is not correct.

204. Colombia does not dispute that the SSA Partners (all of which represented the interests of U.S. citizens) had invested over USD 11 million by 1987 (over USD 40 million today) and considerable technical expertise (as DIMAR and Colombian Courts have recognized) in exploration, discovery, and reporting of the shipwreck, as well as

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462 Colombia's Reply, ¶ 256.

463 *See* Colombia's Reply, ¶ 257.

464 *See supra* **Section II.J**.

465 *See* Colombia's Reply, ¶ 258. Colombia also vaguely asserts that because the 2007 Supreme Court Decision was not a money judgment under U.S. law, SSA could not have an expectation of gain or profit. *See* Colombia's Reply, ¶ 260. This is incorrect, for the reasons explained above. *See supra* ¶ 108.

additional capital and resource since then to support the enforcement of their legal rights to the discovery.[466] The SSA Partners also incurred debt to third parties who had assisted them with the exploration.[467] By entering the APA, SSA assumed the obligation to pay not just the SSA Partners in accordance with their investments but also the creditors and third parties to which the SSA Partners owed debt.[468] The assumption of liability necessarily incurs an assumption of risk. In addition to this, SSA itself incurred significant risk, having spent thousands of man hours, management skills and monetary resources in an attempt to identify the San José and negotiate a salvage contract with Colombia and third parties, as well as protect its rights through negotiations and litigation.[469] The expenditure of significant time and manpower, not to mention the expenses that accompanied them, clearly created risk for SSA.

205. Colombia cites the decision in *KT Asia v. Kazakhstan* to argue 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*."[470] The text of the TPA clearly makes this argument irrelevant in the present case, as it lists the characteristic of "*assumption of risk*" separately from "*commitment of capital and other resources.*" The *KT Asia* case does not assist Colombia for other reasons too.

206. First, the *KT Asia* tribunal was interpreting the definition of "*investment*" under Article 25(1) of the ICSID Convention, which for the reasons set out above, does not apply to the TPA.[471] The *KT Asia* tribunal found that not only had the claimant "*made*

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466 *See, e.g.*, SSA's Response, ¶¶ 41, 45, 65, 167, 183, 190.

467 *See supra* ¶ 189.

468 *See supra* ¶¶ 187-189.

469 *See supra* **Sections II.D**, **II.G**, **II.I**, **II.K-II.M**, **II.P**, **II.S**; SSA's Response ¶ 167.

470 Colombia's Reply, ¶ 263, *citing* **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 217, 219. Colombia also argues that "*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.*'*" Colombia's Reply, ¶ 263. Moreover, this case involved particular facts where the investor had acquired a property for personal use without any expectation of profit or gain (and therefore risk). *See supra* ¶ 200. That case finds no analogy here.

471 *See* **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 173 (concluding that "*the objective definition of investment under the ICSID Convention and the BIT comprises the elements of a contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return*.").

no contribution [of some economic value] *and, having made no contribution, incurred no risk of losing such (inexistent) contribution*," but also that the claimant was not "*meant to absorb any financial losses*" other than the loss of its contributions.[472] The tribunal underscored that KT Asia, or rather its beneficial owner Mr. Ablyazov, never intended to discharge its reimbursement obligations vis-à-vis other companies, and that Mr. Ablyazov "*used the corporate structures involved in the transaction so as to shield the Claimant from any investment risk*."[473] On the "*unusual facts*" of that case,[474] "*Mr. Ablyazov used the companies as his 'pockets' shifting assets from one to the other solely to suit his own purposes*."[475] The *KT Asia* tribunal questioned, but did not decide the "*legality of these practices*," where Mr. Ablyazov treated the assets of companies formally owned by other persons as his personal property.[476]

207. The facts are very different here. Indeed, Colombia makes no allegations that SSA moved around or structured the APA or other inter-company agreements so as to shield itself from investment risk. Instead, what Colombia argues is that SSA could not have assumed any risk because the dubious Columbus Report had already supposedly divested it of all its property rights and thus it had no risk to incur.[477] Colombia's position does not make sense. Neither the Columbus Report nor the Columbus Press Release had any impact on Claimant's rights.[478] Even if the Columbus Report could be taken seriously (and it cannot), it in no way impacted the rights SSA or SSA's Predecessors had in the treasure within the Discovery Area (as later confirmed by the Colombian Supreme Court) or they risk they took to acquire and pursue their rights. In any event, the question of whether or not "*there were no rights susceptible of being 'expropriated'*"—which Colombia wrongly appears to treat as a threshold issue to

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472 **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 219-20.

473 **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 220.

474 **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 213.

475 **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 204.

476 **Exhibit RLA-41**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 205.

477 Colombia's Reply, ¶¶ 265-67.

478 *See supra* **Section II.J**.

determine whether there is an assumption of risk—is not properly before this Tribunal in this preliminary proceeding and can only be fully briefed and decided on the merits.

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208. In sum, SSA's investment, *i.e.,* the rights to 50% of the treasure contained in the Discovery Area, clearly reflect the characteristics of an investment, including (though not required) each of the sample characteristics listed in the TPA.

(b) SSA's Investment Falls Under TPA Article 10.28(g)

209. Colombia claims that SSA "*does not own or control a protected investment under Article 10.28(g)*."[479] For the reasons below, that is incorrect. However, even if Colombia were correct (which it is not), this objection would still not affect the Tribunal's jurisdiction because Article 10.28(g) is just one of the many forms that SSA's investment "*may*" take.[480] Colombia makes no objections, for example, to the categorization of SSA's investment under Article 10.28(h).[481] Moreover, Colombia does not dispute that the types of investments listed in Article 10.28(a)-(h) of the TPA are merely indicative, such that a qualifying investment does not need to be categorized as any particular type as long as it meets the requirements of being an investment.[482] As

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479 Colombia's Reply, Section IV.B.2 (heading).

480 **CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28 ("*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*).

481 While Colombia asserts in a number of places that Claimant does not possess a qualifying investment under Article 10.28(h), it does not even attempt to substantiate this assertion anywhere in its brief.

482 *See* SSA's Response, ¶ 164, nn. 409-410. As a general principle, tribunals have found jurisdiction where the claimant's investment meets the "*general definition of investment*" set forth by the applicable treaty without the need to rely or even reference any of the specifically enumerated examples provided by said treaties. *See, e.g.*, **Exhibit RLA-33**, *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, ¶¶ 111-13 ("*. . . the question boils down to whether Bayandir made an investment within the meaning of Article I(2) of the BIT.* ***Before listing a non exhaustive series of examples, Article I(2) provides as a general definition that investment*** *'shall include every kind of assets'. . . The Tribunal agrees with Bayandir that the general definition of investment of Article I(2) of the Treaty is very broad*.") (emphasis added). More specifically, **Exhibit CLA-74**, *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya (II)*, ICC Case No. 21371/MCP/DDA, Final Award, 11 February 2020, ¶¶ 7.3.5 ("***It seems sensible to deal first with the question of whether Claimant's commitment of resources and equipment to carry out the works under the Contract constitutes an investment under the 'every kind of asset' wording in the introductory clause of Article 1(2) of the Treaty. If the answer to this question is yes****, (on the basis that Claimant's commitment of*

detailed above, SSA's investment meets the requirements under the TPA as it is owned and controlled by a protected investor, and has the characteristics of an investment.[483] Accordingly the Tribunal does not need to undertake this review if it finds that SSA has otherwise made an investment under Article 10.28.[484]

210. In any event, for the reasons stated below, Colombia's complaints regarding the applicability of Article 10.28(g) are meritless.

211. Pursuant to Article 10.28(g), one of the "*forms*" that a qualifying "*investment may take*" are "*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law*".[485] Colombia alleges that SSA's investment does not qualify under Article 10.28(g) because the DIMAR resolutions underlying SSA's investment were (i) not "*conferred to SSA LLC pursuant to Colombia's domestic law*" as DIMAR did not authorize their assignment;[486] and (ii) did not create *in rem* rights.[487] This makes no sense.

212. First, the term "*conferred pursuant to domestic law*" is not a characteristic of the investment (much less a required one), but rather a condition of the validity of the underlying instrument (*i.e.,* license, permit, authorization).[488] Colombia does not

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capital, resources and equipment to Phase III of the Project compromise 'assets' 'invested' in the State of Libya), ***it will not be necessary, except in passing, to consider the parties' submissions on the scope of the more specific sub-sections of Article 1(2)***.") , 7.3.14 ("*Having so concluded, it is not necessary to consider whether the Contract, and Claimant's deployment of equipment in Libya fall within the categories set out in Article 1(2)(c) and 1(2)(e).*") (emphases added).

483 *See supra* ¶¶ 167-208.

484 Notably, Colombia no longer seems to allege that the investment more broadly must be compliant with Colombian law or that it is not, in order to be protected under the TPA. *See* Colombia's Preliminary Objections, ¶ 255 ("[E]*ven if it is established that Sea Search Armada, LLC complied with the conditions of the APA and that the transaction closed…the Tribunal would still lack jurisdiction over the dispute, because Claimant cannot prove that the alleged investment was conferred to it pursuant to domestic law.*").

485 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28.

486 Colombia's Reply, Section IV.B.2.a (heading).

487 Colombia's Reply, Section IV.B.2.b (heading).

488 *See* **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 140; **Exhibit CLA-13**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 46 (holding that the reference to the law of the host State in the BIT was "*to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal*" and finding that, in that case, "*whether one looks to the pre-contractual stage or that corresponding to the performance of the contract*

contest this interpretation of the term in its Reply.[489] Here, the investment in question is the right to 50% of the treasure at the Discovery Area. This right was vested in SSA's Predecessor by the operation of, *inter alia*, DIMAR Resolutions Nos. 0048 and 0354, pursuant to Articles 700-701 of the Civil Code, as confirmed by the Supreme Court in 2007.[490] Colombia has not alleged—and it cannot reasonably allege in view of the decisions of its own courts in 1994, 1997, 2007 and 2019[491]—that **the vested rights** to the treasure in the Discovery Area are somehow deficient under Colombian law.[492]

213. Instead, Colombia attacks the validity of the sale of those rights. However, Colombia has still not identified **any** legal basis for its assertion that the sale was invalid. The TPA does not make the transfer of an investment subject to the host State's domestic law or consent, and Colombia has not furnished any evidence of such requirements under its own law. The APA, moreover, is not governed by Colombian law, and was not executed by Colombian parties. Neither does the APA subject the seller's or buyer's agreement to the instrument or its validity to any authorization by DIMAR or any other Colombian authority. Colombia does not respond to any of these arguments made by SSA in its Reply.

214. But even if Colombian law were relevant to the validity of the sale, Colombia has failed to offer any evidence that Colombian law required DIMAR to authorize the sale. Even with its Reply, Colombia fails to cite to a single provision of its law requiring DIMAR's authorization to transfer rights to the treasure. Instead, Colombia points solely to "***the conduct of SSA LLC's alleged predecessors***" as alleged proof of such purported

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for services, it has never been shown that the Italian companies infringed the laws and regulations" of Morocco).

489 *See* SSA's Response, ¶¶ 177-79, 194.

490 *See supra* ¶ 82. *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, pp. 37, 41.

491 *See supra* **Sections II.I**, **II.L**, **II.M**, **II.S**. *See also*, **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994 (SSA's Unofficial Translation); **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994; **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997; **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007; **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019.

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

domestic law requirement.[493]

215. SSA's Predecessors' conduct is neither proof of nor a source of Colombian law, and it has to be understood in its proper context. As SSA had explained, and Colombia appears to agree,[494] DIMAR's authority is narrow and limited to "*oversight and control of underwater explorations and exploitation.*"[495] Because all SSA's Predecessors—including GMC Inc., GMC and SSA Cayman[496]—needed to conduct underwater exploration in Colombian waters, they sought and received DIMAR's authorization to do so.[497] As Colombia itself points out "*at no point did SSA LLC express*[] *an interest in resuming formal underwater marine exploration activities*" and so there was no need for SSA to apply for DIMAR authorization.[498] Should there be a need for SSA to conduct further underwater marine exploration activities in the future, SSA could then seek DIMAR's authorization at the appropriate time.

216. Colombia asserts that additional exploration was required even after DIMAR had issued Resolution No. 0354, supposedly to identify the specific coordinates and conduct a salvage mission.[499] But even if this were the case, this would not affect SSA's right to 50% of the treasure in the Discovery Area that had already vested in SSA's Predecessor upon the discovery, and was validly transferred to SSA. Indeed, the 2007 Supreme Court Decision affirmed that the discoverer obtains rights to its discovery upon discovering or reporting it; no further work is required to formalize the rights:

> *Therefore, from a legal perspective, it is clear that* ***the right to a treasure*** *is not only or exclusively* ***acquired*** *when there is a physical or material*

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493 *See* Colombia's Reply, ¶ 281 (emphasis added).

494 Colombia's Reply, ¶ 88.

495 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 64-65 (SSA's Unofficial Translation).

496 *See supra* **Section II.D**. *See also* **Exhibit C-2,** DIMAR Resolution No. 0048, 29 January 1980; **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982; **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983. Colombia claims that SSA "*fails to explain why it is relevant*" that Oceaneering conducted further searches. Colombia's Reply, ¶ 278. Oceaneering's work is relevant because it was for this purpose that SSA Cayman sought and received DIMAR authorization to continue exploratory work. *See supra* **Section II.E** (which answers Colombia's complaint at ¶ 280 of its Reply).

497 *See supra* **Section II.C**. *See also* **Exhibit C-2,** DIMAR Resolution No. 0048, 29 January 1980; **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982; **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983.

498 Colombia's Reply, ¶ 284.

499 Colombia's Reply, ¶ 276.

> *discovery of the precious objects, but also when the place where they are located is specified or identified,* ***even if they have not been extracted and fully identified*** *(*posterius*). In other words,* ***being the discoverer,*** **stricto sensu,** ***or reporting party, is deemed a sufficient circumstance to recognize the right of ownership to the treasure of whoever possesses either status***[.] *The seizure, per se (*apprehensio rei*), will only confer possession or custody, as appropriate,* ***but ownership,*** **ex ante,** ***will have been established from the very moment of discovery or reporting, in the broad sense of the term***.[500]

217. Contrary to Colombia's position before this Tribunal, Colombian courts have clearly and unanimously spoken that SSA's rights to the treasure within its Discovery Area are fully vested regardless of whether said treasure is in Claimant's possession.

218. Colombia also objects to being estopped from questioning the validity of the transfer under Colombian law.[501] Colombia does not dispute that it knew but did not object to the transfer of SSA Cayman's rights to the treasure to SSA for over a decade.[502]

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[500] **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 154. *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 74 ("*the discussion put forward by the appellant concerning the notion of acquired rights, on the basis of which it claimed violation of various laws and decrees that had been issued subsequent to the aforesaid date, related to the shipwreck antiquities and to the historical heritage of the Nation, but based on the consideration that those rights would arise from a contract that was not executed, is not in strict harmony with the core argument in the judgment, wrong or not, consisting of the fact that the discoverer acquired its rights from the very moment of the discovery or the report of the treasure.*"), 155 ("*But just as the act of reporting protects the land owner's (*dominus loci*) right to the treasure,* ***it also protects the rights of the 'reporting party,' the 'discoverer,' who will own half of the treasure by virtue of the 'discovery' (*iure inventionis***).** *The contrary, that is, to affirm that the rights of the person who discovers a treasure on another's property only arise at the moment it is physically removed, would create a clear imbalance in the legal relationship between the reporting party and the owner of the land, insofar as the former would be subject to the latter, who could take advantage of his ownership of the property, to the detriment of the discoverer, among other scenarios. The difference described above is particularly important in the case of treasures found in places where, due to the conditions in which they are hidden, it is difficult to extract the precious objects, especially if it is necessary for the owner to consent to such removal beforehand.*"), 157 ("*It is clear, therefore, that the right to a treasure is acquired by its discovery,* lato sensu*, and not by its material or physical apprehension (*corpus*), a concept that also includes reporting its location, applicable to discoveries that occur on land or property owned by others.*"), 182 ("***Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets*** *that are the subject of this judicial controversy, insofar as they of course correspond to a treasure, a circumstance guaranteed in the legal sphere with the recognition* ***that in this sense was made by the General Maritime and Port Directorate, according to Resolution 0354 of June 3, 1982, to the*** **Glocca Morra Company**."), 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract,* ***it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery***.") (SSA's Unofficial Translation).

[501] Colombia's Reply, Section IV.B.2.a.ii.

[502] *See supra* **Section II.F**. *See also* **Exhibit C-114**, Letter from SSA to the Legal Secretary to the President of Colombia, 8 March 2012.

Colombia could have objected to the transfer in its correspondence, but it did not.[503] Colombia could have objected to the transfer during the U.S. court proceedings, but it did not.[504] Colombia could have objected to the transfer during the litigation before the Colombian Superior Court from 2016-2019 in relation to Colombia's efforts to remove the Injunction Order, but it did not.[505] In fact, the Colombian court in 2019 reinstated the Injunction Order in **SSA's favor**, confirming, beyond doubt, that SSA is the rightful owner of the rights to 50% of the treasure in the Discovery Area under Colombian law (even if that were a relevant legal regime to consider for this question).

219. Indeed, Colombia conspicuously ignores its failure to complain about the transfer in the post-2008 litigation in Colombia by arguing that SSA was not a party to the litigation leading to the 2007 Supreme Court Decision.[506] This speaks volumes. Colombia's feeble defense to its consistent recognition of SSA as the legitimate owner of its Predecessor's rights is that Colombia was not "*required to raise*" any challenges to the assignment before.[507] This is preposterous—if Colombia knew that it was supposedly not dealing with the proper owner of the rights at issue, then it could and should have said so 15 years ago.

220. Second, Colombia introduces a new purported objection that SSA does not have a

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[503] In fact, in all its correspondence to SSA, Colombia consistently acknowledged that SSA was the proper owner of all the rights of its predecessors. *See, e.g.*, **Exhibit R-28**, Letter from the Minister of Culture to Sea Search Armada, 17 June 2016, p. 2 (referring to SSA and "*possible rights over the possible shipwreck that may exist in the coordinates reported by **you** and which are established in the* [1982 Report]") (emphasis added) (Colombia's Unofficial Translation); **Exhibit R-29**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p. 1 (stating that "*Colombia already made the verification of the coordinates reported in the* [1981 Report] *filed by Glocca Morra*" and that the "*rights of Sea Search Armada were limited to the coordinates reported in the* [1982 Report]"); **Exhibit R-37**, Letter from the Ministry of Culture to Sea Search Armada, LLC, 5 January 2018, p. 1 (stating that "*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*.") (emphasis added) (Colombia's Unofficial Translation); **Exhibit C-40 [EN]**, Letter from Vice-President of Colombia, 17 June 2019, p. 1 ("*reported by Glocca Morra Company (today Sea Search)*") (SSA's Unofficial Translation).

[504] Colombia asserts that it did not need to raise this issue under the rules of civil procedure in the U.S. Colombia's Reply, ¶ 285. However, Colombia could have raised this objection, as it would have been natural to do if Colombia actually believed that the lawsuit was being brought by a plaintiff that had no standing or was not a party in interest.

[505] *See supra* **Section II.S**.

[506] Colombia's Reply, ¶ 283.

[507] Colombia's Reply, ¶ 282.

protected investment because the DIMAR resolutions did not grant *in rem* rights.[508] Colombia's position is both unclear and untenable.

221. As an initial matter, Colombia's new objection is improper as it is not responsive to SSA's Response.[509] Notably, Colombia seems to substitute this new argument for another argument it originally made (and has now dropped) that SSA's investment could not be derived from the 2007 Supreme Court Decision.[510] It seems to have dropped that argument because it was never SSA's position that it derived its rights from the 2007 Supreme Court Decision; rather, that decision (like the 2019 Superior Court Decision) merely confirmed the rights that SSA already had.[511] Colombia's latest legal theory in the Reply appears to be that SSA's Predecessors never acquired any rights at all and that any rights that they obtained were only expectational or contingent in nature.[512] As Colombia makes this objection more than 45 days after the Tribunal's constitution, the Tribunal should disregard it as untimely.

222. Should the Tribunal address the objection, it will find that Colombia's latest objection makes no sense and finds no legal support. There is nothing in the TPA that requires SSA's rights to be *in rem* rights in order for them to be protected as an investment (nor does Colombia appear to be alleging as much). Thus, it is unclear why Colombia spends so much ink assessing whether the DIMAR resolutions created *in rem* rights.[513]

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508 *See* Colombia's Reply, Section IV.B.2.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 Galéon San José.*"); Colombia's Reply, ¶ 310 (reasoning 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*").

509 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.20.5 ("*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 therefor, no later than 150 days after the date of the request****. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days*.") (emphasis added).

510 *See* Colombia's Preliminary Objections, ¶¶ 266-71.

511 *See* SSA's Response, **Section IV.A.(e)**.

512 Colombia's Reply, ¶¶ 298-310.

513 *See* Colombia's Reply, ¶¶ 292-98.

223. To be clear, SSA had fully vested and binding rights to 50% of the treasure at the Discovery Area until Colombia issued Resolution No. 0085.[514] That is why the Colombian Superior Court was able to order injunctive relief to SSA in 2019, mere months before Colombia issued Resolution No. 0085.

224. Were there any doubt that SSA held fully vested rights, the Colombian Supreme Court was clear on the question.[515] The Supreme Court rejected the very arguments that Colombia now attempts to advance before this Tribunal.

(a) First, the Supreme Court unambiguously determined that SSA's Predecessors' rights "***had been 'acquired' based on the fact of the discovery itself***."[516]

(b) Second, the Supreme Court denounced Colombia's attempts to "*liken*[] [SSA's Predecessors'] *'implicit rights to mere expectations'*".[517]

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[514] *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 211 ("*The Superior Court of Barranquilla, in ruling on the appeals filed by the parties, decided to 'AFFIRM, in its entirety, the judgment …' from the lower court. To that end, in essence, it ruled that procedural requirements were met; the filings were valid; jurisdiction was correct; the parties had standing; and the reported goods had the status of treasure. In addition, it found that, in accordance with Article 701 of the Civil Code, regardless of whether its location is in territorial waters, the exclusive economic zone, or Colombian continental shelf, it is 50% owned by the plaintiff, as its discoverer and reporting entity, and the remaining half is owned by the Nation, because it exercises full sovereignty over all of the aforementioned marine areas*" recounting the Superior Court's decision to confirm the applicability of art. 701 of the Civil Code, which the Supreme Court did not reverse) (SSA's Unofficial Translation).

[515] In this respect, Colombia's references to the U.S. court's discussion of the 2007 Supreme Court Judgment is completely irrelevant. *See, e.g.*, Colombia's Reply ¶¶ 307-310 (alleging, *inter alia*, "[a]*lthough the DC District Court erroneously indicated that the 2007 CSJ Decision was concerned with the San José . . . 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.'"*). Colombia's discussion of money judgments under U.S. law is incorrect, for the reasons explained above. *See supra* ¶ 108. Moreover, the U.S. court did not opine on the nature of Claimant's rights recognized by the Colombian courts, and no conclusions can be drawn from that opinion about Claimant's property rights as a matter of Colombian and international law.

[516] **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 71 (emphasis added) (SSA's Unofficial Translation).

[517] **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 73 (providing in full: "*Therefore, if the claim concerning the potential 'privilege or preferential right to contract' was excluded from the case, it is not appropriate to say that the Superior Court asserted the existence of 'acquired rights' based on an alleged contract that its decision did not address, precisely because it was not part of the dispute. Consequently, neither could the court make a mistake of fact in not having seen that the DIMAR opinion of July 18, 1983, identifies the plaintiff's rights as 'implicit,' not only because the property rights recognized to it in the judgment have their source in civil law—in Article 701 of the Civil Code in particular—not in an administrative act and much less in an 'opinion,'* ***but also because without sufficient explanation or justification one is likening 'implicit rights to***

225. Accordingly, Colombia's objection not only finds no support in the language of the TPA, but directly contradicts the findings of its own Supreme Court.

226. But even if Colombia's argument that SSA's rights were contingent on certain conditions were being credited (*quod non*), this would not deprive SSA's investment of protection under the TPA. Colombia made a similar argument before the *Eco Oro* tribunal, arguing that the claimant's exploration right was circumscribed and "*subject always to compliance with applicable licensing restrictions and other laws*" and was thus "*a mere expectation*" rather than an acquired right.[518] The tribunal rejected Colombia's contentions there, finding that "*Eco Oro had certain vested rights capable of being expropriated*"[519] notwithstanding Colombia's allegations that their value would have been difficult or even impossible to realize.[520]

C. Claimant's Claim Arose After the TPA Came Into Effect

227. Colombia asserts that the Tribunal lacks jurisdiction *ratione temporis* under Article 10.1.3 of the TPA because SSA's claims supposedly predate the entry into force of the TPA.[521] That is plainly not true. SSA's claims arise out of Resolution No. 0085, which Colombian authorities issued over eight years after the TPA came into effect.

(a) The TPA Applies To Measures Colombia Took After The TPA Came Into Effect, Including Resolution No. 0085

228. The Parties agree that Article 10.1 of the TPA sets out the legal framework underlying Colombia's *ratione temporis* objection.[522] Article 10.1 provides that:

'mere expectations,' without noting that the rights referred to in the opinion in question—as one can read right there—are rights 'derived from its recognition as reporter of treasures through Resolution No. 354 of 1982'") (SSA's Unofficial Translation).

518 **Exhibit CLA-78**, *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 400, 414.

519 **Exhibit CLA-78**, *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 439-40, 623.

520 **Exhibit CLA-78**, *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 439 (finding that "[t]*he fact the exploitation right may be difficult to value, or indeed may be valueless in circumstances where it has almost no chance of getting an environmental licence, cannot and does not of itself mean it is not an acquired right.*").

521 *See* Colombia's Preliminary Objections, ¶¶ 142-200.

522 *See* Colombia's Preliminary Objections, ¶ 146; SSA's Response, ¶¶ 210-11; Colombia's Reply, ¶ 313.

> *1. **This Chapter applies to measures** adopted or maintained by a Party relating to:*
>
> *a) investors of another Party;*
>
> *b) covered investments; and*
>
> *c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.*
>
> *2. A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.*
>
> *3. For greater certainty, **this Chapter does not bind any Party** in relation to **any act or fact** that took place or any situation **that ceased to exist before the date of entry into force of this Agreement**.*[523]

229. As SSA had explained in its Response, the TPA defines the scope of its investment chapter to apply to "*measure*[s]". Colombia does not refute this fact (though it only partially quotes Article 10.1 in its Reply to omit its reference to measures).[524] The TPA defines the term "*measure*" as "*any law, regulation, procedure, requirement, or practice*."[525] Pursuant to Article 10.1.3 of the TPA, the Tribunal thus has jurisdiction over "*any act or fact that took place or any situation that continued to exist after the Treaty entered into force*."[526] Accordingly, here, the Tribunal has jurisdiction to review the legality of measures that Colombia took after the TPA came into force in 2012.

230. SSA's claims arise from Colombia's Resolution No. 0085, issued on 23 January 2020, nearly **eight years** after the TPA came into force.[527] SSA has not made **any** claims for

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[523] *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.1. (emphases added).

[524] *See* Colombia's Reply, ¶ 313.

[525] *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.28.

[526] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.1.3. *See also* **Exhibit CLA-24**, *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, ¶ 116 (emphasis added); **Exhibit RLA-4**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, art. 13 ("*An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs*.").

[527] Notice of Arbitration, ¶¶ 75-85.

relief arising out of any of Colombia's measures before 23 January 2020, let alone before the TPA came into force. Even in its Reply, Colombia cannot point to any of its measures predating the TPA that give rise to SSA's claims.[528] Thus, the Tribunal's inquiry can stop here, and the Tribunal can dismiss Colombia's temporal objection.

231. Colombia, moreover, agrees that the Tribunal's standard of review for this objection should be guided by the *Chevron v. Ecuador* case, where the tribunal applied the "*presumption of truthfulness*" that could only be overcome if the claimant made "*frivolous allegations to bring its claim within the jurisdiction of the BIT*".[529] Thus, to find for Colombia, the Tribunal must find that SSA has asserted its claims "*frivolous*[ly]", *i.e.*, that it is not even "*arguable*" that SSA's claims arose out of Resolution No. 0085.[530] That is clearly not the case here.

(b) The Date Of The Impugned Measure Is The Only Relevant Date For The *Ratione Temporis* Analysis

232. Colombia argues that it is not the date of the impugned measure, Resolution No. 0085, but the date on which "*Claimant's legal situation was fully settled*", that must apply as the critical date for its *ratione temporis* objection.[531] Colombia does not explain what it means by the date on which "*Claimant's legal situation was fully settled*" but, in any event, Colombia's attempt to rewrite the TPA is unavailing.

233. Colombia provides no textual basis for its argument. As Colombia itself acknowledges, TPA Article 10.1.3 (and its corollary in the VCLT)[532] is designed to preclude retroactive

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528 Colombia claims that "*by Claimant's own admission, the alleged breaches were perfected as a result of State conduct prior to 15 May 2012*", but Colombia does not cite to any such admission by SSA (nor could it). Colombia's Reply, ¶ 326.

529 Colombia's Reply, ¶ 326 *citing* **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.

530 *See supra* ¶ 142. *See, e.g.*, **Exhibit CLA-76**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 8, 12 November 2020, ¶ 40 (finding that the respondent's objections could not be said to be "*frivolous*" where "*both Parties were able to cite authority for their respective positions, and the objections are not ones that* ***could be dismissed out of hand***.") (emphasis added); **Exhibit CLA-77**, *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Procedural Order No. 2, 26 March 2021, ¶ 15(i) ("*The Objection is not frivolous. On its face, the Objection is* ***arguable***") (emphasis added).

531 Colombia's Reply, ¶ 321.

532 *See* **Exhibit RLA-2**, Vienna Convention on the Law of Treaties, Treaty Series, vol. 1155, UNITED NATIONS, May 1969, art. 28 ("*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*.")

application of obligations that States acquire under treaties before those treaties come into effect.[533] Neither Article 10.1.3 nor the retroactivity principle has anything to do with a prospective litigant's "*legal situation.*"[534]

234. Finding no textual support, Colombia attempts to draw this principle from jurisprudence. It points to *Gramercy v. Peru*, asserting that in that case "*the legal situation of the claimant fully consolidated only after the treaty entered into force*," such that the impugned measure is less relevant. That is not what *Gramercy* stands for. The *Gramercy* tribunal held that the "***relevant date for establishing temporal jurisdiction** . . . **is** . . . **the date when an impugned 'law, regulation, procedure, requirement, or practice' was 'adopted or maintained' by the host State**."[535] Thus, the *Gramercy* tribunal used the date of the impugned measure, not the date of the alleged "*consolidation*" of the claimant's "*legal situation,*" to assess whether the breach alleged came within its jurisdiction.[536] In fact, the *Gramercy* tribunal clearly found that the post-treaty measures at issue had their antecedents in the 1980s, which is the exact situation here, and still found jurisdiction as the impugned measure post-dated the treaty's entry into force.[537]

235. Colombia also refers to the *Carrizosa* decision, but cannot point to any language in that case that calls for the assessment of whether the TPA is being applied retroactively

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533 *See* Colombia's Preliminary Objections, ¶¶ 142-47; SSA's Response, ¶¶ 213-14; Colombia's Reply, ¶ 313.

534 *See* Colombia's Reply, ¶¶ 321, 348, 357.

535 **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 (emphasis added).

536 **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, ¶¶ 341-44.

537 *See* SSA's Response, ¶¶ 240-42. *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 343-44 (holding that the measures in question, which were adopted or maintained four, five, and eight years after the U.S.-Peru FTA's entry into force, constituted "*actionable alleged Treaty breaches in their own right, and therefore, cannot be excluded from the scope of protection of the Treaty merely because they are related to pre-Treaty acts and facts*."); **Exhibit CLA-78**, *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 360 (holding that, "**[f]*or the purposes of this jurisdictional objection, as Eco Oro relies only on post-15 August 2011 measures, that is sufficient to found jurisdiction over those measures**: the Tribunal does not have jurisdiction to determine whether prior acts are compatible with the FTA, although it is entitled to have regard to those acts in establishing the facts as they occurred after 15 August 2011, including the state of mind of the Parties, and the expectations they may have had at that time. Whether or not Eco Oro had protected rights will be considered below, but on the basis that Eco Oro's claim stands or falls on its reliance only upon facts and events which occurred after 15 August 2011, the requirements of Article 801(2) are satisfied*.") (emphasis added).

based on the date of the consolidation of the "*Claimant's legal situation*".[538] In fact, Colombia expressly accepts the rationale of the *Carrizosa* decision "*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*."[539]

236. Colombia also argues that the Tribunal is not "*bound to consider the date*" of the impugned measure because otherwise claimants could make "*frivolous*" arguments and "*establish the tribunal*[']*s temporal jurisdiction by just attaching its claims to the most recent (although immaterial) measure taken by the Respondent State*."[540] But the Tribunal is bound to apply the language of the TPA. And the TPA requires the Tribunal to consider the date of the impugned measure to assess its jurisdiction. If a claimant has frivolously "*attach*[ed] *its claim to the most recent measure*" just to obtain jurisdiction, then the respondent is free to plead abuse of process. But Colombia alleges no such abuse of process here (nor are there grounds for Colombia to do so).

237. Rather, Colombia argues that the assessment of the legality of an act is outside of the Tribunal's jurisdiction "*when the evaluation of such post-treaty act necessarily* ***requires the review of the lawfulness*** *of a pre-treaty conduct*."[541] The TPA contains no such test. But even if Colombia's test is applied, the Tribunal does not need to review the lawfulness of Colombia's pre-TPA acts—including Colombia's Columbus Press Release and correspondence with SSA—to determine whether Resolution No. 0085 violated Colombia's obligations under the TPA. While, as Colombia itself puts it, "*pre-treaty events may be relevant to understand the background of*" Resolution No. 0085,[542] the legality or illegality of Colombia's pre-TPA acts do not impact that of Resolution No. 0085.

238. To be sure, Colombia's pre-TPA acts had no impact on the validity or content of SSA's

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538 *See* Colombia's Reply, ¶¶ 323-25.

539 *See* Colombia's Reply, ¶ 324. *See also* Colombia's Reply, ¶ 323, *citing* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 138 (agreeing that "*an alleged mistreatment to the claimant that arose before the date of the 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.'*").

540 Colombia's Reply, ¶¶ 326-27.

541 Colombia's Reply, ¶ 344 (emphasis added). *See also* Colombia's Reply, ¶ 345.

542 Colombia's Reply, ¶ 333.

investment. Colombia's Columbus Press Release and subsequent letters to SSA denying the existence of the San José at specific pinpoint coordinates cannot be taken at face value. Even if they could, Colombia's unilateral and unverified statements had no legal impact on SSA's rights to 50% of the treasure in the Discovery Area. This was confirmed by the Colombian Court in its 2019 decision to reinstate the Injunction Order in SSA's favor over the entirety of the Discovery Area rather than just the listed pinpoint coordinates in the 1982 Report.[543] This confirmed that SSA had rights to 50% of the treasure over the entirety of the Discovery Area and not just pinpoint coordinates.[544] And none of Colombia's communications purported to state that the San José was outside the Discovery Area[545]—indeed, they could not, given that the reported coordinates of Colombia's 2015 rediscovery of the San José indicates that it lies within the Discovery Area.[546] Rather, Colombia simply made the (irrelevant) statement that the San José was not located at the specific pinpoint coordinates provided by SSA's Predecessors (as opposed to the vicinity of those coordinates). Thus, Colombia's letters did not, and indeed could not, impact SSA's rights.

239. Accordingly, Colombia's insistence that the Tribunal should use the date of consolidation of "*Claimant's legal status*" to assess its jurisdiction under Article 10.1.3 has no textual, jurisprudential or, indeed, rational basis. It is the date of the impugned measure that matters, as is evident from the text of the TPA and confirmed by case law. There is no dispute that the date of the impugned measure here, Resolution No. 0085, occurred after the TPA came into effect.

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543 *See* SSA's Response, ¶ 131. The Superior Court reinstated the Injunction Order under the same terms as it had done in 1994, *i.e.* over the area reported in the 1982 Report. The Superior Court did not specify that the Injunction Order was only valid over the pinpoint coordinates in the 1982 Report in light of the 2007 Supreme Court Decision. *See* **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 7 (resolving to "*maintain the* [Injunction Order] *declared in the order of 12 October 1994.*") (SSA's Unofficial Translation); **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, p. 5 (ordering "*the seizure of the goods that have the nature of treasure, that are rescued or removed* ***from the area determined by the coordinates indicated*** *in* [the 1982 Report].") (emphasis added) (SSA's Unofficial Translation).

544 *See supra* ¶¶ 127-129.

545 *See e.g.* **Exhibit R-11**, Letter from President's Office to DIMAR informing of Press Release, 8 July 1994; **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015; **Exhibit R–029**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016, p. 1; **Exhibit C-40**, Letter from Vice-President of Colombia to SSA, 17 June 2019, p. 2.

546 *See supra* ¶¶ 117-118.

(c) Resolution No. 0085 Is An Independently Actionable Measure

240. The Parties appear to agree that the Tribunal has jurisdiction *ratione temporis* if the impugned post-treaty act—even if "*rooted*" in pre-treaty conduct—is "*independently actionable*."[547] The Parties' disagreement appears to be one of fact: whether Resolution No. 0085 is independently actionable. As explained in SSA's Response and discussed below, Resolution No. 0085 is an independently actionable measure. Moreover, Colombia appears to agree that the Tribunal must defer to SSA on issues of fact at this stage of the proceedings unless SSA's claims are "*frivolous.*"[548]

241. The Parties agree that an "*independently actionable*" act is one that gives rise to an independent cause of action.[549] Accordingly, the test for whether a measure is "*independently actionable*" has nothing to do with the "*consolidation*" of the claimant's "*legal status*," as Colombia suggests.[550] Instead, as Colombia itself posits elsewhere, a measure is not considered "*independently actionable*" where "*an alleged breach is nothing but the mere continuation of*" a pre-TPA measure.[551] For this reason, tribunals have rarely refused temporal jurisdiction on the basis that a separate post-treaty measure is not "*independently actionable*." Indeed, the only cases, to which Colombia can point, which found that a measure was not independently actionable involved claims arising out of an impugned post-treaty measure that was the final decision in legal proceedings

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547 *See* Colombia's Reply, ¶¶ 316-17, Section IV.C.2 (heading). *See also* Colombia's Preliminary Objections, ¶¶ 187-200; SSA's Response, ¶¶ 223-38. Colombia also seems to have abandoned its wrong statement of the supposed Berkowitz "*test*"—a point it now calls "*irrelevant*". Colombia's Reply, ¶ 331 ("C*laimant denies that the Berkowitz v. Costa Rica established a particular 'test' for the ratione temporis analysis. This labelling issue is irrelevant*."); SSA's Response, ¶¶ 224-25 ("*The* Berkowitz *tribunal held that a post-treaty act should be 'independently actionable,' not that that act had to fundamentally alter the status quo of the claimant's investment . . .* Berkowitz *therefore did not articulate a new test for non-retroactivity. Indeed, given that the jurisdictional aspects of that case were 'heavily fact-specific,' the Berkowitz tribunal expressly "caution[ed] [against] any reading of this Award that would give it wider 'precedential' effects.*").

548 *See supra* ¶¶ 142-143; Colombia's Reply, ¶¶ 364-65 ("*Respondent should once more recall . . . 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.' 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*.") (emphases added). *See also* Colombia's Reply, ¶¶ 175-85.

549 SSA's Response, ¶ 230; Colombia's Preliminary Objections, ¶ 187; Colombia's Reply, ¶ 331.

550 *See* Colombia's Reply, ¶¶ 343, 348.

551 Colombia's Reply, ¶ 351.

simply upholding the pre-treaty rulings of the same court.[552] That is clearly not the situation here.

242. For the reasons already set out in SSA's prior submissions, Resolution No. 0085, by itself, gives rise to an independent legal claim.[553] SSA's investment consisted of rights to 50% of the treasure in the Discovery Area, which SSA says contains the San José shipwreck. For the first time, Resolution No. 0085 recategorized the entirety of the San José shipwreck as cultural patrimony, rendering null SSA's ownership of any part of the treasure on the shipwreck. The issuance of Resolution No. 0085 occurred after the TPA came into force. Thus, the Tribunal is being called on to adjudicate the legality of Colombia's conduct after the TPA's entry into force.

243. Resolution No. 0085 is not the "*continuation of*" any pre-TPA measures,[554] and Colombia cannot identify any evidence to suggest otherwise. In fact, Colombia argues that Resolution No. 0085 is "*irrelevant*" and "*immaterial*" to its pre-Resolution No. 0085 conduct.[555] Colombia has not even argued, much less provided any evidence, that Resolution No. 0085 upheld prior decisions by administrative or judicial bodies finding that the entirety of the San José was cultural patrimony. Any such argument would epitomize what is meant by "*frivolous*".

244. Rather, as SSA has explained all along, Resolution No. 0085 was an arbitrary reversal in Colombia's position. Since 1982, Colombia had consistently indicated that a significant portion of the San José shipwreck constituted divisible treasure, as it proposed salvage agreements allowing the contents of the shipwreck to be shared, first

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552 *See* **Exhibit RLA-23**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶ 156 (finding no jurisdiction *ratione temporis* over the claim, where "*the legal effect of the 2014 Order was to leave unaltered the outcome of the 2011 Decision*"). *See also* SSA's Response, ¶¶ 228-31 (discussing *Carrizosa*); **Exhibit CLA-41**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶¶ 255-86, 308(2) (finding no jurisdiction to entertain claimants' expropriation claims arising from the judicial proceedings in relation to compensation for the same, while retaining jurisdiction over claimants' allegations that the courts' assessment of compensation may amount to manifest arbitrariness and/or blatant unfairness); SSA's Response, ¶¶ 224-25 (discussing *Berkowitz*).

553 *See* SSA's Response, ¶¶ 223-38.

554 *See supra* ¶ 241.

555 *See supra* ¶¶ 21, 134. *See* Colombia's Reply, ¶ 386.

with SSA,[556] then with the Swedish Government,[557] and finally with MAC.[558] Indeed, after issuing Resolution No. 0085, Colombia rescinded its contract with MAC on the basis that the entirety of the shipwreck was cultural patrimony, even though before issuing Resolution No. 0085 "*it was foreseen that more than 83% of* [MAC's] *remuneration would consist of recovered pieces that are not part of the Cultural Heritage of the Nation*."[559] Accordingly, Resolution No. 0085 was not a "*continuation*" of any pre-TPA measures by Colombia. It was an abrupt and unlawful reversal of Colombia's position on SSA's ability to own 50% of the treasure aboard the San José shipwreck.

245. Colombia, accordingly, tries a new argument with its Reply: that by virtue of the 1994 Columbus Press Release and its correspondence thereafter denying the existence of the shipwreck at the pinpoint coordinates in the 1982 Report, "*before Resolution No. 0085 SSA LLC had no*[] *property right whatsoever over the Galéon San José.*"[560] Colombia's assertion, however, misses the mark.

246. First, as explained above, Colombia's unilateral assertions that the San José was not at certain pinpoint coordinates had no impact whatsoever on the legal validity of SSA's rights to 50% of the treasure in the Discovery Area, as reconfirmed by the Colombian court in 2019.[561] All of the evidence indicates that the San José is within the Discovery

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556 *See supra* ¶ 58; **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984.

557 *See* **Exhibit C-59**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 1.

558 *See supra* ¶ 116; **Exhibit C-36**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 1.

559 **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF p. 5 (SSA's Unofficial Translation). *See also* **Exhibit C-43**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF pp. 5-6 ("*In accordance with the foregoing, it is clear that the financial model under which the Public-Private Partnership of Private Initiative without Disbursement of Public Funds was planned and structured* ***is only feasible if it is remunerated with the handover of pieces from the find, which is not currently legally possible****, insofar and inasmuch as the National Council of Cultural Heritage determined, in session of December 19, 2019, that* ***the entirety of the find identified as the galleon San José consists of goods considered to be National Cultural Heritage, and consequently the Ministry of Culture declared it to be a National-Level Asset of Cultural Interest through Resolution 0085 of January 23, 2020***.") (emphases added) (SSA's Unofficial Translation).

560 Colombia's Reply, ¶ 341. *See also* Colombia's Reply, ¶ 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*.").

561 *See supra* ¶ 238.

Area.[562] But to the extent Colombia disputes this, the location of the San José is a question of fact that must be addressed in the merits phase of this proceeding.

247. Second, the Tribunal ought to defer the determination of the facts relating to what the Discovery Area contained and the value of what it contained at the time Colombia issued Resolution No. 0085 to the appropriate stage of the proceedings. In order to establish whether the Discovery Area contains the San José shipwreck, the Tribunal will need to consider, at a minimum, the evidence of SSA's Predecessor's findings, Colombia's findings, and, likely, expert evidence. That is an assessment for the merits and damages phases of this Arbitration, and thus one the Tribunal cannot (and should not) undertake at this stage. Not only does the Tribunal not have the full evidence to make such a determination at this stage, but the Tribunal is precluded from making such an assessment during Article 10.20.5 proceedings.[563]

248. In this respect, Colombia's assertions regarding the U.S. and IACHR proceedings are also unavailing.[564] Not only does Colombia continue to misrepresent the nature of SSA's claims in those proceedings,[565] but it also ignores the fact that those proceedings were brought by SSA to enforce its rights as confirmed by the Colombian Supreme Court.[566] Moreover, as already explained, SSA terminated those legal actions when Colombia offered to reengage in negotiations with SSA with respect to its rights.[567] Had

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562 *See supra* ¶¶ 118-119.

563 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.20.5 ("*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 therefor, no later than 150 days after the date of the request****. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days*.") (emphasis added).

564 *See* Colombia's Reply, ¶ 10.

565 *See supra* **Section II.P**. As explained above, a breach of contract claim and conversion claim arising out of Colombia's refusal to allow SSA access to the shipwreck site under U.S. law are not equivalent to its claims for violation of the TPA arising from Resolution No. 0085 under international law here. Likewise, SSA's claims before the IACHR arose from corruption inside the Colombian government leading to the government expressly refusing to abide by its own court's judgment, giving rise to human rights violations. *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013.

566 *See supra* ¶ 102.

567 *See supra* ¶¶ 102, 112.

SSA's rights been irretrievably expropriated, Colombia would not have made an offer to negotiate, and SSA would not have ceased the legal proceedings in response to that offer. Colombia fails to respond to this point as well. The fact is that before Resolution No. 0085, SSA had valuable rights, and the Colombian, U.S., and IACHR proceedings show that SSA was attempting to enforce those rights. Resolution No. 0085, however, fully expunged any of those rights in the San José.

249. In sum, Colombia's objections go fundamentally to the merits of SSA's claim. They do not go to whether Resolution No. 0085 gives rise to an independent right of action. While Colombia may "*contest*[] *claimant's characterization of the relevant facts underlying its claims*,"[568]—including whether the Discovery Area contains the San José—Colombia also accepts that the Tribunal should defer to SSA's characterization of the facts at this stage unless Colombia "*conclusively*", meaning "*without any doubt*"[569] proves those facts to be wrong.[570] Colombia has failed to carry that burden to prove "*conclusively*" that SSA had no rights to the San José by the time Colombia issued Resolution No. 0085. Accordingly, Resolution No. 0085 constitutes an actionable breach in its own right.

D. Less Than Three Years Have Elapsed Since SSA First Acquired Knowledge Of The Alleged Breach

250. Colombia makes an alternative argument that the Tribunal lacks jurisdiction because SSA's claims are "*in flagrant violation of the three-year time limitation period provided for in Article 10.18.1 of the TPA, as a necessary element of Colombia's consent to arbitration*."[571] As in its Preliminary Objections, Colombia relies on essentially the same set of arguments it raised in relation to Article 10.1.3 to argue that Claimant's claim does not comply with Article 10.18.1.[572]

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568 Colombia's Reply, ¶ 360.

569 **Exhibit CLA-82**, CAMBRIDGE DICTIONARY (entry for "*conclusively*"), 17 November 2023 (last accessed).

570 *See* Colombia's Reply, ¶ 363 ("*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 disprove them.'*** . . . ***Colombia does not disagree with the ruling in Renco v. Peru***.") (emphasis added).

571 Colombia's Reply, ¶ 368.

572 *Cf.* Colombia's Preliminary Objections, ¶ 211 ("*Colombia has already demonstrated that any conduct that may have resulted in international liability occurred before the TPA's entry into force. But even in the event*

251. Like its arguments in relation to Article 10.1.3, Colombia's second temporal objection is also meritless. Colombia fails to respond to most of the arguments raised in SSA's Response. Among others, Colombia, once again, ignores the language of Article 10.18.1 which requires the prospective claimant to have acquired knowledge of "*the breach alleged*" and the "*loss or damages*" incurred no more than three years from the date of initiating arbitration. The breach SSA alleges is the passage of Resolution No. 0085 in 2020, which occurred less than three years from the date SSA commenced this arbitration. That is enough to summarily dismiss Colombia's objection.

(a) The Relevant Inquiry For Article 10.18.1 Is When The Claimant Acquired Knowledge Of "*The Breach Alleged*", Here Resolution No. 0085

252. The Parties agree that Article 10.18.1 of the TPA governs the assessment of SSA's claim.[573] Article 10.18.1 provides:

> *No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of* ***the breach alleged*** *under Article 10.16.1* ***and*** *knowledge that the claimant (for 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****.*[574]

253. The Parties also agree that the critical date is 18 December 2019, *i.e.*, three years before SSA initiated this Arbitration.[575] The Parties further agree that for SSA's claims to comply with Article 10.18.1, SSA must have first acquired knowledge of (i) the breach it alleges the host State committed and (ii) the existence of loss or damage caused by such breach, no earlier than 18 December 2019.[576]

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that, quod non*, the only acts related to the dispute were the ones that took place after the entry into force of the TPA, the claims would be time barred. The record is full of documentary evidence that shows that, after the entry into force of the TPA and prior to 18 December 2019, Sea Search Armada, LLC acquired knowledge of the alleged breach and of the resulting damage*.").

573 *See* Colombia's Preliminary Objections, Section V.3; SSA's Response, Section IV.C.a; Colombia's Reply, Section IV.D.1.

574 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement (complete), 15 May 2012 (entry into force), art. 10.18.1 (emphases added).

575 *See* Colombia's Preliminary Objections, ¶ 202; SSA's Response, ¶ 257; Colombia's Reply, ¶ 372.

576 *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 527-31 (reviewing jurisprudence).

254. In its initial pleading, Colombia had wrongly asserted that the Tribunal "*must assess the existence of the underlying dispute*" in every case when considering the temporal limitation.[577] As SSA showed in its Response, that was not supported by Article 10.18.1, which relies on the assessment of knowledge of the "*breach alleged*" (and not any more general dispute). While Colombia appears to have dropped its original argument, Colombia still continues to ignore the presence and significance of the term "*breach alleged*" in Article 10.18.1.[578]

255. Here, the "*breach alleged*" is Colombia's issuance of Resolution No. 0085 on 23 January 2020 leading to a violation of Colombia's obligations to not commit an unlawful expropriation and accord fair and equitable treatment, full protection and security, and other protections under the TPA.[579] Colombia has not offered any evidence to show that Resolution No. 0085 was merely a confirmation or a continuation of prior measures, or provided any indication that SSA knew or should have known prior to 23 January 2020 that Colombia was going to change the law so as to retroactively recharacterize the entirety of the San José shipwreck as cultural patrimony, such that none of it could be considered divisible treasure.[580] Indeed, the Supreme Court had contemplated that such a determination required the salvage of the goods and an item-by-item analysis, which Colombia did not conduct.[581] Therefore, SSA did not and could not have had actual or constructive knowledge of Colombia's breach through the issuance of Resolution No. 0085 until after 18 December 2019, let

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577 Colombia's Preliminary Objections, ¶ 204.

578 Rather, Colombia focuses on aspects of the legal standard which have little relevance here. For example, Colombia asserts that "*Claimant fails to recognize*" how investment tribunals have interpreted Article 10.18.1, including that knowledge can be constructive. Colombia's Reply, ¶¶ 376-77. This is not true. Claimant's brief clearly sets out the correct standard. *See* SSA's Response, ¶¶ 253, 257, 259. In any event, Colombia does not allege (or explain) that SSA had or should have had constructive knowledge of Resolution No. 0085 here. Likewise, Colombia focuses on when a claimant "*first*" acquires knowledge of the alleged breach and the damage. Colombia's Reply, ¶¶ 378-79. Again, this is evidently a part of the test as discussed in Claimant's brief. *See, e.g.*, SSA's Response, ¶ 253. And, again, Colombia does not contend that, much less explain why, SSA should have "first" acquired knowledge of Resolution No. 0085 before it was actually issued.

579 Notice of Arbitration, ¶¶ 75-85.

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

581 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 223 ("*The extraction or exhumation of the declared goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus their characteristics, features, or individuals traits are not fully known*.") (SSA's Unofficial Translation).

alone of the "*loss or damage*" it would thereby incur.

(b) Only SSA Is Entitled To Define The "*Breach Alleged*"

256. Colombia cannot overcome the fact that Article 10.18.1's reliance on knowledge of "*the breach alleged*" is fatal to its case. So Colombia manufactures its own version of the TPA breaches and spends over 20 pages arguing why Colombia's version of its breaches do not comply with Article 10.18.1.[582] For instance, Colombia asserts that "*SSA LLC* ***wrongfully contends*** *that, by issuing Resolution No. 0085, Colombia allegedly expropriated its investment and, therefore, breached Article 10.7 of the TPA*."[583] But, of course, it is up to SSA to formulate its claims before this Tribunal, whether Colombia considers them "*wrongful*" or not. Indeed, whether SSA's claim is "*wrongful*" is squarely a question for the merits and therefore cannot be reviewed during Article 10.20.5 proceedings. Elsewhere in its Reply, Colombia acknowledges that "*Claimant is fully entitled to cast its claims in whatever form it sees fit*,"[584] yet Colombia reformulates SSA's claims over and over again, alleging that they do not arise from Resolution No. 0085 but prior acts by Colombia, and thus SSA should have had knowledge of them.

257. However, there is no room in Article 10.18.1 or jurisprudence for the Tribunal to assess its jurisdiction on the basis of Colombia's recharacterization of SSA's claims. As set out in SSA's Response, and uncontested by Colombia, arbitral jurisprudence confirms that SSA's articulation of its claim and related facts should be given deference at the jurisdictional phase[585] and that respondents are not entitled to recharacterize the

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582 *See* Colombia's Reply, ¶¶ 367-447.

583 Colombia's Reply, ¶ 391 (emphasis added).

584 Colombia's Reply, ¶ 360.

585 *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 544-45 (finding that Peru's allegations mischaracterized claimants' claims and were, in any case, baseless); **Exhibit CLA-45**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶¶ 329, 332-33 (explaining that, to determine when the claimant first acquired (or should have first acquired) knowledge of a specific breach or that it had suffered loss or damage, the tribunal "*must begin by identifying the date on which the alleged breach crystallized. This requires a substantive review of each of the measures complained of as well as of the measures that the Respondent considers lie at the heart of the Claimant's case (in particular, of the 2010 TCA Decision). This analysis is deeply intertwined with the merits, and the Tribunal will thus conduct it during the merits phase*.").

claimants' pleadings.[586] Colombia also acknowledges that SSA's claims must be reviewed only to ensure that they are not "*frivolous*."[587] There is accordingly no basis to credit Colombia's objection here.

258. Colombia's Article 10.18.1 arguments are identical to its Article 10.1.3 ones (and accordingly meritless for the same reasons),[588] with the addition of some cherry-picked correspondence Colombia points to as purported evidence that Colombia did not recognize SSA's rights to the San José.[589] But even if Colombia's unverified and unsubstantiated statement (based solely on a report authored by an incarcerated criminal)[590] could be taken at face value (*quod non*), all this correspondence shows is that Colombia denied that the San José existed at the pinpoint coordinates listed in the 1982 Report. SSA, however, had rights to 50% of the treasure in the Discovery Area, as recently confirmed by the Colombian courts in June 2019. Thus, neither SSA's rights (nor its expectations) could be "*quashed*" by Colombia's unilateral, self-serving, and often inconsistent assertions[591] given the unambiguous position of the Colombian courts, including as recently as 2019, that upheld SSA's rights to treasure within the Discovery Area,[592] which, all evidence on the record indicates, includes the San José.[593] Again, to the extent it is contested, the question of whether the San José is actually within the Discovery Area (and it is) is one for the merits. It goes to whether Resolution No. 0085 expropriated Claimant's investment (*i.e.*, its rights to treasure within the

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586 For example, the *Kappes* tribunal took "*Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging . . .*" **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 223. With respect to another project, where claimant's pleadings were less clear, the *Kappes* tribunal acknowledged "*important factual questions for determining the timeliness*" of the FPS claim, but concluded that "*they are not questions the Tribunal can determine simply on the basis of the short initial pleading in this case*." **Exhibit CLA-54**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 224.

587 Colombia's Reply, ¶¶ 364-65.

588 *See supra* **Section IV.C**.

589 *See* Colombia's Reply, ¶¶ 413-29.

590 *See supra* ¶ 75.

591 Colombia's Reply, ¶ 428.

592 *See supra* **Sections II.I**, **II.L**, **II.M**, **II.S**; SSA's Response, ¶ 272.

593 *See supra* ¶¶ 14, 34, 117-118. As discussed above, should there be any doubt that the San José is not within the Discovery Area, the Tribunal must assess that question in the merits phase of the proceeding. *See supra* ¶¶ 16, 247.

Discovery Area) or not. It does not go to any jurisdictional question.

* * *

259. Thus SSA could not have acquired knowledge of Colombia's breaches and damages in this Arbitration prior to Colombia's issuance of Resolution No. 0085 in January 2020. Contrary to Colombia's assertions, Resolution No. 0085 did not reconfirm Colombia's prior position with respect to SSA's rights: it was a radical and unexpected reversal of that position. And Colombia's correspondence denying the existence of the San José and specific coordinates did nothing to vitiate the existence or value of SSA's rights, the determination of which is a matter for the merits and damages phase of this Arbitration. It was only after Resolution No. 0085 that SSA lost any legal rights it had in the treasure aboard the San José.

V. COLOMBIA'S BASELESS REQUESTS FOR COSTS SHOULD BE DENIED

260. In its original application, Colombia made two requests for costs: (i) for SSA to "*bear all the costs of this arbitration, including legal fees assumed*" by Colombia;[594] and (ii) for SSA to "*post security for costs in the amount of no less than USD 300.000*[595] *to cover a potential award of costs in favor of*" Colombia.[596] SSA explained in its Response that Colombia had failed to set out a case for costs under Article 10.20.6, and, in any event, costs should be awarded to SSA.[597] The case for costs against Colombia has become stronger in light of the numerous frivolous arguments it has raised and already abandoned, and its multiple attempts to introduce new, untimely arguments with its Reply.[598] In fact, Colombia failed to respond to SSA's arguments against awarding costs in Colombia's favour, and it appears to have dropped its allegations that SSA is acting abusively because it initiated this Arbitration.[599]

261. Instead, in its Reply, Colombia focuses only on its security for costs application. Colombia claims that SSA's notification that its counsel is acting on a contingency fee basis is a sufficient ground to warrant a security for costs award.[600] That is incorrect and not supported by arbitral jurisprudence.

262. The relevant facts, as the Tribunal is aware, are as follows:

(a) On 21 September 2023, SSA's counsel wrote to the Tribunal noting that "[t]*hough it is not a third party, out of an abundance of caution*" SSA's counsel had been retained by SSA on a contingency fee arrangement, and that counsel had "*a general and confidential financing facility arrangement*

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[594] Colombia's Preliminary Objections, ¶ 289(iii). *See also* Colombia's Preliminary Objections, ¶¶ 272-88.

[595] Colombia has now, inexplicably, raised this sum to USD 800,000. *See* Colombia's Reply, ¶ 486.

[596] Colombia's Preliminary Objections, ¶ 290. *See also* Colombia's Preliminary Objections, ¶ 288.

[597] *See* SSA's Response, ¶¶ 276-90.

[598] *See supra* ¶¶ 70, 151, 175-176, 197, 203, 220. Colombia also no longer appears to challenge that SSA's Predecessor had acquired more than judicial rights. *See* Colombia's Preliminary Objections, ¶¶ 6(iii), 268-70. Colombia no longer seems to dispute that the APA fully transferred the entirety of SSA Cayman's interests in the Discovery Area to SSA. *See* Colombia's Preliminary Objections, ¶¶ 239-41; SSA's Response, ¶¶ 165-73.

[599] *See* Colombia's Reply, Section V.

[600] *See* Colombia's Reply, ¶ 479.

to offset contingency fee agreements entered into by the firm, like the one in this case."[601]

(b) On 5 October 2023, Colombia wrote to the Tribunal insisting that (i) there was a third-party financing this Arbitration; and (ii) SSA's counsel must "*disclose the terms of the financing agreement and the identity of the third party involved in such agreement*" or, "[i]*n the alternative . . . inform whether the financing agreement includes the funder's obligation to cover a potential adverse decision on costs.*"[602]

(c) On 9 October 2023, SSA's counsel responded, noting that (i) their contingency fee arrangement did not constitute third-party funding, and their own financial arrangements could not constitute third-party funding, as such an impossibly broad definition would require boundless disclosure of all sources of financial support for law firms; (ii) even if the situation could constitute third-party funding, SSA had complied with its obligations under the Terms of Appointment; and (iii) any additional disclosure, such as of the terms of the financing agreements by SSA's counsel should not be permitted.[603]

(d) On 11 October 2023, the Tribunal rejected Colombia's demands for additional disclosure, finding that "*regardless whether the arrangement(s) described by Claimant could be considered to constitute third party financing*" SSA had "*furnished the information expressly contemplated by*" the Terms of Appointment, which did not require disclosure of the terms of third-party financing, but simply disclosure of its existence.[604]

263. In its Reply, Colombia insists that SSA's counsel's financing facility "*undoubtedly implies*" that SSA is pursuing the Arbitration with third-party funding,[605] and the mere

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601 **Exhibit R-39**, Email from Gibson Dunn to Tribunal, 21 September 2023.

602 **Exhibit R-41**, Email from ANDJE to Tribunal, 5 October 2023.

603 *See* **Exhibit R-40**, Email from Gibson Dunn to Tribunal, 9 October 2023.

604 Email from Tribunal to the Parties, 11 October 2023.

605 *See* Colombia's Reply, ¶ 475.

existence of a contingency fee arrangement "*is a clear and unequivocal indication of Claimant's inability to cover an eventual award on costs.*"[606] Neither of these claims is correct.

264. First, a contingency fee arrangement does not equate to third-party financing. Colombia has not identified a single tribunal that has held as much. Nor can Colombia point to any award finding that independent financial arrangements made by counsel to offset their contingency fee arrangements are examples of third-party funding. Such a broad reading of the term "*third-party financing*" would require counsel to disclose all of its sources of financial support and risk abatement, including potential lines of credit, banking relationships, and insurance policies.

265. Second, regardless of whether SSA's counsel's independent financing arrangements can be construed as third-party funding, neither third-party funding, nor contingency fee arrangements have been considered sufficient by any tribunal to award security for costs.[607] Even an alleged lack of assets, impossibility to show available economic resources, or existence of economic risk or difficulties that affect a claimant's finances **do not *per se* warrant security for costs**.[608] Tribunals have required additional indicia demonstrating the claimant's unwillingness or inability to pay, such as showing that the claimant is insolvent at the same time as the third-party funding agreement expressly

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606 *See* Colombia's Reply, ¶ 479.

607 Arbitral tribunals have repeatedly confirmed that the existence of third-party funding *per se* is not determinative as to whether security for costs must be granted. *See, e.g.*, **Exhibit CLA-70**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Requests for Provisional Measures), 23 June 2015, ¶ 123 (holding that "*financial difficulties and third party-funding—which has become a common practice—do not necessarily constitute* per se *exceptional circumstances justifying . . . an order of security for costs*"); **Exhibit CLA-67**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, ¶ 7 (finding that Bolivia "*has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs*").

608 *See* **Exhibit CLA-38**, *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Security for Costs), 11 January 2016, ¶ 63 ("*the general position of investment tribunals in cases deciding on security for costs is that the lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs*."); **Exhibit CLA-27**, *RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.19 ("*In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order.*").

disclaiming any liability for adverse cost;[609] or a history of non-payment of costs, including advances requested by the PCA.[610]

266. Here, Colombia has failed to show that any such factors are present. SSA is not bankrupt, it has timely paid all the advance costs required in this Arbitration,[611] and it has no agreement with any third-party funder, much less one with an express waiver of costs liability.

267. Colombia accepts that security for costs may be awarded as an interim measure under the UNCITRAL Rules,[612] which are granted only in exceptional circumstances where an "*essential interest of* [a] *Party st*[ands] *in danger of irreparable damage,*"[613] *i.e.*,

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609 *See* **Exhibit RLA-43,** *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, 243, 250-51 (where the third-party funding agreement expressly disclaimed liability for adverse costs and claimants were insolvent, emphasizing that an award of damages remains an "*exceptional*" remedy and that third-party financing *per se* is insufficient justification); **Exhibit RLA-50,** *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, ¶¶ 57-59 (finding, by a majority, that security for cost was warranted where (i) claimant was impecunious, (ii) it was reliant on third-party funding, and (iii) the third-party funder was expressly not liable for a costs award adverse to its funded party and noting that, while "*every party in arbitration faces some risk that it will not be able to collect on a costs award, whether due to the opposing party's intransigence or insolvency. Here, however, because of the terms of the third-party funding contract, Turkmenistan faces not a risk but, on the basis of the factual record before it, a certainty that it could not collect a costs award*.").

610 *See* **Exhibit CLA-35**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 82 (emphasizing that "*Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide compelling ground for granting Respondent's request.*"); **Exhibit CLA-51**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶ 146 (noting that claimants' payment of advance fees "*demonstrates the Claimants' willingness to shoulder the necessary financial burden to ensure the continuation of the proceedings*" and that *"Claimants have not engaged in any abuse, serious misconduct, inappropriate behavior, dilatory tactics or bad faith actions during the course of these proceedings.*").

611 Indeed, it is Colombia that has regularly sought month-long extensions to pay its share of the PCA's advances in this case. *See, e.g.*, Letter from the PCA to the Parties, 27 July 2023; Letter from the PCA to the Parties, 4 September 2023; Email from Colombia to the Tribunal, 3 November 2023.

612 *See* Colombia's Reply, ¶ 467.

613 *See* **Exhibit CLA-17**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, ¶ 57 ("[I]*t would only be in the most extreme case - one in which an essential interest of either Party stood in danger of irreparable damage - that the possibility of granting security for costs should be entertained at all.*"). *See also* **Exhibit CLA-31**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (Annulment Proceeding), 20 September 2012, ¶ 45 ("[T]*he power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced*."); **Exhibit CLA-11**, *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶ 10 ("*The imposition of provisional*

where security for costs is both (i) necessary and (ii) urgent.[614] Colombia has failed to put forward any concrete evidence that security for costs is necessary or urgent here. Beyond mere alleged "*implications*"[615] of the supposed involvement of third-party funding in this Arbitration, Colombia fails to show that SSA is unable or unwilling to pay adverse costs.[616] As such, Colombia's application will cause undue prejudice to SSA[617] without demonstrating its need for Colombia, and thus must be rejected.

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measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application."); **Exhibit CLA-14 [EN]**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶ 86 ("*the recommendation to require 'surety' for the payment of eventual costs could not be accepted as a general and ordinary measure*."); **Exhibit CLA-38**, *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Security for Costs), 11 January 2016, ¶ 59 ("[I]*nvestment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested*.").

614 *See* **Exhibit CLA-43**, *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, ¶¶ 378-79 ("[T]*he controlling criteria in the review of requests for security for costs is to establish whether there are exceptional circumstances that demonstrate a high real economic risk or that there is bad faith on the party subject to security for costs.*"). In addition, tribunals consider whether an order of security for costs would be proportionate. *See, e.g.*, **Exhibit CLA-29**, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), 3 May 2012, ¶ 41 ("*Even if there were more persuasive evidence than that offered by the Respondent concerning the Claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed. Notably, there are no provisions in the ICSID Convention or the Arbitration Rules imposing such a condition, except the advance on costs under Administrative and Financial Regulation 14(3)(d). The Claimants met this requirement on January 11, 2012. After weighing the interests of both parties, the Tribunal rejects the Respondent's Request*."); **Exhibit CLA-40**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶ 36 ("*Tribunals also should ensure that the particular measures requested are proportionate, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them*.").

615 *See* Colombia's Reply, ¶ 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*") (emphasis added).

616 In this respect, Colombia's attempts to shift the burden on SSA to substantiate its ability and willingness to pay adverse costs should be rejected. *See* Colombia's Reply, ¶ 479. SSA has demonstrated that it is both able and willing to meet the costs of these proceedings by timely paying the PCA's advance fee requests. By contrast, it is Colombia that has frequently asked for extensions to meet its obligations. *See supra* n. 611. SSA is under no obligation to make further disclosures, nor can it since it has no third-party funding agreements to disclose. Its counsel's agreements are, on the other hand, confidential, and therefore not subject to voluntary disclosure.

617 *See* **Exhibit CLA-51**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶ 145 ("*The potential harm to a respondent . . . must be weighed against the potential harm to a claimant, taking into account that: . . . (iii) a claimant's financial distress may be caused by the respondent's actions that are the subject of the dispute, etc*.").

VI. REQUEST FOR RELIEF

268. Claimant respectfully requests that the Tribunal:

a) **REJECT** Colombia's objections pursuant to Article 10.20.5 of the TPA;

b) **REJECT** Colombia's request for costs and request for security for costs;

c) **ORDER** Colombia to pay all costs of and associated with its Preliminary Objections pursuant to Article 10.20.6 of the TPA; and

d) **GRANT** such other and further relief as the Tribunal deems just and proper.

269. Claimant reserves the right to supplement, add and modify its claims and defenses, to request such additional or different relief as may be appropriate, to submit memorials, documents, exhibits, witness statements, expert reports, and other evidence elaborating its case and the relief sought in the course of these proceedings.

Respectfully submitted for and on behalf of Sea Search-Armada, LLC.

Gibson, Dunn & Crutcher LLP

Gibson, Dunn & Crutcher LLP

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