

PCA Case No. 2023-37

IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES-COLOMBIA
TRADE PROMOTION AGREEMENT, ENTERED INTO FORCE ON 15 MAY 2012
(the “TPA”)

and

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2021 (the “UNCITRAL Rules”)

Between:

SEA SEARCH ARMADA, LLC

(“Claimant”)

- and -

THE REPUBLIC OF COLOMBIA

(“Respondent”, and together with Claimant, the “Parties”)

DECISION ON CLAIMANT’S APPLICATION FOR INTERIM MEASURES

Arbitral Tribunal

Mr. Stephen L. Drymer (Presiding Arbitrator)
Mr. Stephen Jagusch KC
Dr. Claus Von Wobeser

Registry

Mr. José Luis Aragón Cardiel
Permanent Court of Arbitration

Tribunal Assistant

Ms. Dina Prokić

3 June 2024

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I. INTRODUCTION

1. The present Decision comprises the Tribunal's ruling on Claimant's *Application for Interim Measures* dated 16 April 2024, brought under Article 10.20.8 of the TPA and Article 26 of the applicable UNCITRAL Rules (the "**Application**").¹
2. As discussed below, Claimant requests the Tribunal to issue a series of orders – including an order for urgent, temporary relief pending a decision on the Application itself – intended to assure the preservation and protection of "evidence arising out of and related to [the] planned salvage of the San José shipwreck."

II. FACTUAL AND PROCEDURAL CONTEXT

3. On 19 March 2024, in view of certain media reports that seemed to imply that Colombia planned to commence salvage operations related to the Galeón San José very shortly, Claimant wrote to Respondent to request that Colombia:²
 - a. Provide SSA with a written undertaking describing the measures that it has implemented and plans to implement to ensure that the items from the San José galleon's shipwreck are preserved, protected from dissipation and accurately recorded and catalogued upon extraction ("Evidence Preservation Protocol");
 - b. Take all actions necessary to implement the Evidence Preservation Protocol; and
 - c. Report to Claimant on a monthly basis the progress of any extractions from the shipwreck, alongside detailed records of the extracted objects.
4. On 8 April 2024, Respondent reverted stating that "the Republic of Colombia maintains its position that SSA, LLC has not proven, and cannot prove, any particular right over the Galeón San José" and that "Claimant has not yet established the Tribunal's jurisdiction in these proceedings."³
5. On 16 April 2024, Claimant filed its Application, together with factual exhibits (C-121 through C-125) and legal authorities (CLA-93 through CLA-97).⁴
6. On 17 April 2024, the Tribunal requested Respondent's response to the Application by 24 April 2024. On the same date, Respondent requested additional time in order to provide its views on the Application.

¹ Application, ¶1.

² Application, ¶9; Response, ¶7; **Exhibit C-124**, Letter from SSA to Colombia, 19 March 2024.

³ Application, ¶10; Response, ¶9; **Exhibit C-125**, Email from Colombia to SSA, 8 April 2024.

⁴ Response, ¶10.

7. On 18 April 2024, Claimant indicated its willingness to agree to Respondent's request on the condition that "Respondent provides by 24 April 2024 *"a written undertaking confirming that it is preserving, protecting from dissipation, and accurately recording and cataloguing any Evidence it recovers from the San José shipwreck until such time as this Tribunal has rendered its decision regarding SSA's Interim Measures Application"* (Application, para. 44)." Later that day, Respondent indicated it would conduct internal consultations and revert promptly.
8. By email dated 19 April 2024, Respondent offered the following clarifications and representations to the Tribunal and Claimant which, it said, "effectively address the concerns raised by Claimant, facilitating the withdrawal of [Claimant's Application]":⁵

First, Claimant's Requests are based on an incorrect factual premise. Contrary to what Claimant argues, Colombia will not conduct (and is not planning to conduct) any archeological excavation (let alone extraction) at the archaeological context of the Galeón San José in the next months. In an effort of good faith and cooperation, Colombia hereby clarifies that the multidisciplinary scientific research project involving the Galeón San José is merely in its early stages. Colombia hereby represents that, in the first year, no archeological excavation is planned nor foreseen. Moreover, no schedule of activities for the recovery of archeological materials has even been prepared.

Colombia notes that C-122, which Claimant cherry-picks from C-121, does not support Claimant's position. Simply put, Colombian Navy Captain Escobar did not say that any planned expedition to the Galeón San José was aimed at the extraction of any objects. This is because, in fact, the initial actions regarding the Galeón San José will be non-intrusive and do not require nor involve material collection.

Second, needlessly to say, and as Colombia already stated during the Hearing on Preliminary Objections, the State is taking and will continue to take the necessary measures to protect and preserve the Galeón San José and, particularly, any archeological materials, in compliance with the Colombian Constitution and – already existing and applicable - Colombian laws and regulations for the protection of archeological heritage.

9. The Tribunal immediately invited Claimant to respond, which it did on the same date. SSA noted in particular that (i) the statements and representations in Respondent's 19 April 2024 email seemed to contradict public statements by Colombian officials; and (ii) Respondent "still has not offered a written undertaking to protect and preserve evidence consistent with its obligations under international law." SSA indicated its willingness to confer with Respondent in the hopes of resolving the Parties' differences, while maintaining its Application in the meantime.⁶

⁵ Response, ¶16; **Exhibit R-45**, Email from Respondent to Claimant's counsel, 19 April 2024.

⁶ See also Response, ¶17.

10. On 20 April 2024, noting the possibility of continued discussions between the Parties, the Tribunal granted Respondent until 3 May 2024 to respond to Claimant's Application in the event that the matter could not be resolved amicably before then.
11. On 23 April 2024, Respondent sought to "further [reassure] Claimant that: (i) no extraction or retrieval of items from the San José was to take place in the upcoming months, and (ii) the Evidence, if obtained, would be subject to the highest levels of conservation and protection considering Colombia's constitutional and statutory obligations."⁷
12. On 25 April 2024, Claimant reverted, noting its willingness to withdraw its Application if Respondent provided the Tribunal with the following undertaking:⁸

the Republic of Colombia ("Colombia" or "Respondent") hereby undertakes to (i) **inform** Sea Search-Armada LLC ("SSA" or "Claimant") **at least 60 days in advance of any exploration, studies, interventions, recordings** (video, audio or of any other kind), **scientific research project, extraction, salvage, or recovery of any items or artifacts in and around the wreckage of the San José Galleon of any kind**, regardless of their scale and scope ("Activity"), including, for the avoidance of doubt, items in the vicinity of the San José shipwreck, along with a detailed description of the measures Colombia plans to undertake to ensure that the Activity (or Activities) is properly documented and (ii) **preserve, protect from dissipation and accurately record and catalogue any items salvaged from the San José Galleon's shipwreck during Colombia's Activity (or Activities)**.

Respondent further acknowledges that Claimant reserves all rights to file or re-file an Interim Measures Application if Claimant deems it to be warranted by the circumstances.

(emphasis added).

13. On 29 April 2024, Respondent refused Claimant's proposal.⁹
14. On 3 May 2024, Respondent filed its *Reply to Sea Search Armada LLC's Application for Interim Measures*, together with factual exhibits (R-42 through R-52) and legal authorities (RLA-54 through RLA-81) ("**Response**").
15. On 9 May 2024, Claimant filed a *Reply to the Republic of Colombia's Response to Claimant's Application for Interim Measures*, together with factual exhibits (C-122bis, C-126 through C-132) and legal authority CLA-98 ("**Reply**").

⁷ Response, ¶18; **Exhibit R-47**, Email from Respondent to Claimant's counsel, 23 April 2024 ("Colombia confirms that it will not conduct (and is not planning to conduct) any intervention in the coming months. Colombia also reaffirms that every stage of this scientific research project is governed by Constitutional and legal provisions mandating the highest levels of conservation and protection.").

⁸ Response, ¶19; **Exhibit R-48**, Email from Claimant's counsel to Respondent, 25 April 2024.

⁹ Response, ¶20; **Exhibit R-52**, Email from Respondent to Claimant's counsel, 29 April 2024.

16. On 10 May 2024, Respondent requested leave to respond to Claimant's Reply, which the Tribunal granted later that day.
17. On 14 May 2024, Respondent filed a *Sur-Reply to Sea Search Armada LLC's Reply on Interim Measures*, together with factual exhibits (R-53 through R-57) and legal authorities (RLA-82 through RLA-84) ("**Rejoinder**").¹⁰

III. APPLICABLE TREATY PROVISIONS AND RULES

18. **Article 10.20.8 of the TPA** empowers the Tribunal to:

order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation.

19. **Article 26 of the UNCITRAL Rules** provides in relevant parts as follows:

[...]

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is

¹⁰ When it invited Colombia to comment on SSA's Reply, the Tribunal erroneously referred to that further submission as a "sur-reply" as opposed to a "rejoinder". That terminological error is corrected here, where the term "Rejoinder" is used.

likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

[...]

20. The Tribunal is also mindful of the following provisions of the TPA:

Article 10.21: Transparency of Arbitral Proceedings

[...]

(3) Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information).

Article 10.28: Definitions

Protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

Article 22.2: Essential Security

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 22.4: Disclosure of Information

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law

enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

IV. SUBMISSIONS

A) CLAIMANT'S APPLICATION

21. As suggested very briefly above, Claimant's Application was prompted by a number of media reports to the effect, for example, that "Colombian authorities have recently reinitiated plans to salvage the San José shipwreck" (reports which had already been foreshadowed by Respondent's counsel during the hearing on Respondent's Preliminary Objections under Article 10.20.5 of the TPA in December 2023), as well as reports that the San José shipwreck has already been tampered with, if not looted.¹¹ Claimant points to a statement of a Colombian Naval Captain in late February 2024 that an expedition will be carried out to the location of the shipwreck in "June, July or August."¹² According to Claimant, Respondent's "planned salvage operation will give rise to important evidence regarding, *inter alia*, the value of the shipwreck,"¹³ which makes its preservation critical for the purposes of the present arbitration.

22. In its Application, Claimant requests that the Tribunal make the following orders ("**Requested Measures**"): ¹⁴

Order Colombia to submit a written undertaking to the Tribunal and Claimant describing the measures that it has implemented and plans to implement to ensure that any Evidence is preserved, protected from dissipation, and accurately recorded and catalogued in the form of a draft Evidence Preservation Protocol;

Order Colombia to report to the Tribunal and the Parties on a bi-monthly basis on the progress of any Evidence recovered from the shipwreck and on the implementation of the Evidence Preservation Protocol;

Order Colombia to implement the Evidence Preservation Protocol with due care and to promptly notify the Tribunal and Claimant of any departures from or violations of the Evidence Preservation Protocol whether by Colombia or third parties; and

Order Colombia to pay the full costs of this Application.

23. The "**Evidence**" to which the Requested Measures are directed is defined in SSA's Application as including: ¹⁵

¹¹ Application, ¶¶2, 7, 22, 30.

¹² Application, ¶8; **Exhibit C-121**, Interview of Captain Germán Escobar, Bluradio Colombia, 23 February 2024; **Exhibit C-122**, Transcript of Interview of Captain Germán Escobar, Bluradio Colombia, 23 February 2024.

¹³ Application, ¶2.

¹⁴ Application, ¶43; Reply, ¶49.

¹⁵ Application, ¶¶19, 21.

Any and all objects or artifacts identified, recovered or salvaged as part of Colombia's expedition(s) to the San José shipwreck, including any information on their condition;

A log of the coordinates at which any and all objects or artifacts are identified, recovered or salvaged as part of Colombia's expedition(s) to the San José shipwreck;

Any and all recordings or records (including visual recordings, sound recordings, electromagnetic readings, sonar readings, written records, etc.) during and resulting from the exploration and salvage expedition(s) conducted by Colombia (including notes taken by Colombian Navy and government officials and any private company involved in the operation); and

Any and all records, registration, catalogue, classification, study, memorandum, summary, or any similar documents, written or otherwise, related to the identification or salvage and subsequent handling of any identified or recovered object or artifact from the San José shipwreck.

24. According to Claimant, Article 26(4) of the UNCITRAL Rules establishes a particular standard for interim measures that are aimed at preserving evidence, as opposed to other types of objectives.¹⁶ Nonetheless, even if the Tribunal were to consider all of the various requirements for an order of interim measures that are listed in Article 26(3), it ought to conclude that they have been met since: "(i) the Requested Measures aim to preserve evidence that is relevant and material to the resolution of the dispute; (ii) if that evidence is not preserved, Claimant is likely to suffer harm not adequately reparable by an award of damages; (iii) the harm Claimant is likely to suffer substantially outweighs any harm to Colombia; (iv) there is a reasonable possibility that Claimant will succeed on the merits of its claims; (v) temporary relief is warranted pending the Tribunal's decision on the Application."¹⁷
25. With respect to the first requirement (item (i) in the preceding paragraph), Claimant submits that the Evidence to be created in the context of "Colombia's identification and recovery of the San José galleon's artifacts" is directly relevant and material to the present arbitration. That Evidence, it says, will *inter alia*, allow a more accurate categorization and valuation of the shipwreck and treasure over which Claimant asserts that it has rights.¹⁸ That Evidence will also be solely within Colombia's possession, custody and control.¹⁹
26. With respect to the second requirement (item (ii) in the list above), Claimant's argument is two-fold. Considering that "the preservation of evidence is inherently critical to maintain the integrity of the proceedings," "requests for the preservation of evidence do not require the same showing of severity of harm as other requests for provisional measures."²⁰ In any case, failing to grant Claimant's Application will "likely result" in "harm not adequately reparable by

¹⁶ Application, ¶¶17-18.

¹⁷ Application, ¶18.

¹⁸ Application, ¶¶19-20.

¹⁹ Application, ¶21.

²⁰ Application, ¶¶23-26.

an award of damages” because: (a) “the estimation of [Claimant’s] damages could be impacted by the very Evidence SSA seeks to preserve via the Requested Measures;” and (b) Respondent refused to give assurances otherwise.²¹

27. According to Claimant, although the Tribunal need not compare the harm that is likely to result to SSA if the Application is not granted with the harm that is likely to result to Respondent if it is granted (item (iv) in the list above), considering that preservation of evidence is not subject to the same showing of severity of harm as other sorts of measures, if the Tribunal were to compare the two harms, it would find in Claimant’s favour.²² In Claimant’s view, it is unclear that any harm would be caused to Respondent if the Application were granted, because the Application merely seeks to “confirm that Colombia is doing what it has told the Tribunal is its ‘main concern’ – the preservation of the San José shipwreck and its associated items and artifacts.”²³ Notwithstanding that Respondent would actually be in violation of the domestic injunction order that has been in place since 1994²⁴ if it were to salvage or extract items from the galleon, the Requested Measures do not seek to restrain Respondent from proceeding with the extraction altogether; they would simply establish a protocol for the preservation of evidence that is “transparent, accountable, and fair”.²⁵
28. Neither, says SSA, is the Tribunal required to find that Claimant has a “reasonable possibility” of success on the merits in the context of a request for interim measures aimed at the preservation of evidence (item (iv) in the above list).²⁶ Nonetheless, if the Tribunal considers that factor, Claimant submits that it has unquestionably satisfies the requirement.²⁷
29. Lastly, considering that Respondent may, in SSA’s words, “substantially advance its planned salvage operations” while Claimant’s Application is pending, Claimant also requests that the Tribunal issue “temporary relief with immediate effect, ordering Colombia to provide a written undertaking confirming that it is preserving, protecting from dissipation, and accurately recording and cataloguing any Evidence it recovers from the San José shipwreck until such time as this Tribunal has rendered its decision [on the Application].”²⁸

²¹ Application, ¶¶27-31.

²² Application, ¶¶32-35.

²³ Application, ¶33.

²⁴ Application, ¶34; **Exhibit C-26**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994; **Exhibit C-76**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995; **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997; **Exhibit C-91**, Colombia’s Challenge Of Injunction Order Before 10th Civil Court of the Circuit of Barranquilla, 16 December 2016; **Exhibit C-93**, Third Civil Court of the Circuit of Barranquilla, Judgment Lifting Injunction Order, 31 October 2017; **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019.

²⁵ Application, ¶34.

²⁶ Application, ¶36.

²⁷ Application, ¶¶37-38.

²⁸ Application, ¶¶41, 44.

B) RESPONDENT'S RESPONSE

30. In Respondent's view, the Application "is nothing more than a badly disguised document production request, in an attempt to access the coordinates where the Galeón San José is located."²⁹ According to Respondent, the Application is premised on a "panoply of misleading assertions and [...] misrepresented information" and fails to meet any of the cumulative requirements provided for in Article 10.20.8 of the TPA and Article 26 of the UNCITRAL Rules.³⁰ By granting the Application the Tribunal would prejudge the merits of the case because it would provide Claimant with more rights than it ever possessed.³¹ The Application should thus be dismissed in its entirety, with Claimant bearing all costs related thereto.³²
31. Furthermore, Respondent argues that no temporary relief is warranted pending the Tribunal's decision on the Application because: (i) "the factual premise of [the Application] (i.e., the extraction of items from the San José Galleon as soon as June 2024)" is erroneous; and (ii) Respondent has already assured Claimant that it will not conduct any intervention in the San José shipwreck in the upcoming months. Any intervention over the San José Galleon will be publicly announced and any evidence obtained will be "subject to the highest levels of conservation and protection."³³
32. While the Tribunal has the authority to order interim measures, it is not unfettered, and interim measures should not be granted lightly.³⁴ Rather, as the Tribunal in *Zeph Investments v. Australia* noted, interim measures can only be granted if five cumulative criteria are fulfilled: "(i) *prima facie* jurisdiction of the tribunal over the dispute; (ii) reasonable possibility of success of the requesting party's case on the merits; (iii) necessity, i.e., the requested measure must be necessary to prevent the requesting party from suffering harm or prejudice that is likely to occur and not susceptible to being adequately repaired by an award of damages; (iv) urgency, i.e., the actions susceptible of causing harm or prejudice must be likely to occur before the award is issued; (v) proportionality, i.e., the harm or prejudice likely to be inflicted on the requesting party must substantially outweigh the harm that is likely to result to the Respondent if the interim measure is granted."³⁵
33. In Respondent's view, Article 26(4) of the UNCITRAL Rules "does not undermine in any way Claimant's burden of proving that the Requested Measures comply with those

²⁹ Response, ¶12.

³⁰ Response, ¶3.

³¹ Response, ¶¶35-37.

³² Response, ¶¶1, 3, 5, 161.

³³ Response, ¶¶157-158.

³⁴ Response, ¶¶23-27.

³⁵ Response, ¶128.

requirements.”³⁶ Indeed, Claimant failed to demonstrate that the Requested Measures are necessary, urgent and proportional.³⁷

34. According to Respondent, the Requested Measures are not necessary to prevent irreparable harm because: ³⁸

a. The facts underlying the Application have no basis. Claimant grossly misconstrued the statements of Respondent's counsel made during the hearing on Respondent's Preliminary Objections under Article 10.20(5) of the TPA. When read in context and in good faith, it is evident that Respondent's counsel indicated that “the relevant authorities would conduct a scientific evaluation to ensure a responsible extraction, ‘if any,’ from the San José” (emphasis in the original).³⁹ Similarly, “Captain Escobar merely referred to the activities that are being conducted in preparation to carry out the campaigns, which are the incursions to the site that are going to be made with an eminent scientific purposes,” which again “do not involve any extraction or retrieval of items from the San José.”⁴⁰ Finally, the news articles regarding the alleged tampering with the San José provide no evidence of any alleged looting.⁴¹

b. “[I]n the current *status quo* of the San José Project no extraction or retrieval of items from the Galeón is being planned.” The San José Project was presented to the public in late February 2024 at a symposium in Cartagena (which Claimant could have attended but decided not to).⁴² The San José Project is “a multidisciplinary scientific investigation,” one of the principal goals of which is “to evaluate the threats to which the archaeological site and the operation are subject to, with the purpose of eliminating or mitigating them.”⁴³ The first phase of this project concerns “all the administrative and technical processes for the authorization of research activities and institutional coordination in accordance with Article 4 of Law 1675 of 2013.”⁴⁴ The second phase will include the analysis of the information collected “about the shipwreck and the environmental conditions where it is located.”⁴⁵ At present, “there is not even a schedule of activities regarding an eventual extraction of items since there is no certainty of any extraction even taking place.”⁴⁶

c. Compulsory constitutional and other legal provisions require Colombia to protect the Galeón San José. These include Articles 8, 63 and 72 of Colombia's Political Constitution of 1991, Article 4 of Law 357 of 1997, Articles 4 and 5 of Law 1675 of 2013,

³⁶ Response, ¶139.

³⁷ Response, ¶¶28-34.

³⁸ Response, ¶¶47-107.

³⁹ Response, ¶¶54-56.

⁴⁰ Response, ¶61.

⁴¹ Response, ¶65-74.

⁴² Response, ¶80.

⁴³ Response, ¶¶81, 85.

⁴⁴ Response, ¶79.

⁴⁵ Response, ¶86.

⁴⁶ Response, ¶85.

Articles 2.7.1.4.6 and 2.7.1.4.7 of Decree 1080 of 2015, as well as various provisions of criminal and disciplinary laws (e.g. Articles 239, 240, 241(13), and 269-1 of the Criminal Code).⁴⁷

- d. Respondent has not only disproven the evidence provided by Claimant, but has also “unequivocally proven that the Evidence is subject to a special protection regime under Colombian law, which renders the Requested Measures moot and unnecessary.”⁴⁸

35. Neither are the Requested Measures urgently required to prevent irreparable harm because “no extraction or retrieval of items from the San José has even been planned.”⁴⁹ Respondent explains that the first campaign scheduled for 2024 is aimed at determining the feasibility of any extraction; as such, it does not foresee any “planned excavation or extraction.”⁵⁰
36. According to Respondent, granting the Application would impose a disproportionate burden upon Colombia because it would “require Colombia to disclose protected information in terms of Article 10.21(3) of the TPA, granting SSA access to information it is not allowed to access under Colombian law.”⁵¹ Article 10.21(3) of the TPA provides that “[n]othing in this Section [Investment] requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information).”⁵² “Protected information” is defined at Article 10.28 as “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.”⁵³ The information to which the Requested Measures pertain fall within that definition, especially in light of Article 17 of Law 1675 of 2013, Article 4(1) of Decree 204 of 2022, Article 2.7.1.3.12 of Decree 1080 of 2015 and Article 5.5.1.7 of Resolution 0192-2020 of DIMAR.⁵⁴ Thus, granting the Application would not only “compromise Colombia’s constitutional and statutory authority to protect and preserve San José as part of its cultural heritage, but it would also oblige Colombia to act against its own laws relating to the confidentiality of information produced by – or in the custody of – public entities.”⁵⁵
37. Furthermore, Respondent considers that Claimant has no reasonable possibility of succeeding on the merits of the claim.⁵⁶ Claimant failed to identify “a single document which recognizes its purported property rights over the Galeón San José.”⁵⁷ The fact that the

⁴⁷ Response, ¶¶89-105.

⁴⁸ Response, ¶107.

⁴⁹ Response, ¶¶108-114.

⁵⁰ Response, ¶111.

⁵¹ Response, ¶¶115-136.

⁵² Response, ¶122.

⁵³ Response, ¶123.

⁵⁴ Response, ¶¶125-131.

⁵⁵ Response, ¶117.

⁵⁶ Response, ¶¶137-142.

⁵⁷ Response, ¶139.

Tribunal's Decision on Respondent's Preliminary Objections under Article 10.20.5 of the TPA was made on a *prima facie* basis and that the Tribunal underscored Claimant failed to request "a positive finding of jurisdiction" further supports Respondent's position.⁵⁸

38. Finally, "if the Tribunal were to order the Requested Measures, it would imply a clear pre-judgment of the case's merits, specifically on one of the issues that has been mainly disputed between the parties, which is whether SSA has any right whatsoever over the San José."⁵⁹ An order which "specifically involve[s] the San José and any information over the artifacts of the shipwreck, would be a clear pre-determination of the content of Claimant's right, which as the Tribunal itself stated is a matter 'for the merits phase of the proceedings'."⁶⁰

C) CLAIMANT'S REPLY

39. Claimant reiterates in its Reply that, per Article 26(4) of the UNCITRAL Rules, in the context of requests under the preservation of evidence prong of the UNCITRAL Rules, Article 26(3) requirements need to be fulfilled "only to the extent the Tribunal considers appropriate."⁶¹ In Claimant's view, Respondent's reliance on *Zeph Investments v. Australia*'s five prongs is inapposite because the tribunal in that case expressly stated that the claimant sought "neither the preservation of assets [...] nor the preservation of evidence."⁶²
40. Nonetheless, says SSA, even if the Tribunal were to apply the five criteria from *Zeph Investments v. Australia* it would find in favour of Claimant because: (i) the Evidence is relevant and material to the present proceedings (which Respondent does not appear to contest)⁶³; (ii) the failure to preserve Evidence will likely cause harm not adequately reparable by an award (which Respondent appears to contest in part)⁶⁴; (iii) the balance of harms weighs in favor of granting the Application; (iv) Claimant has a reasonable probability of success on the merits (Respondent does not appear to challenge the applicable standard)⁶⁵; (v) an interim order by the Tribunal would not pre-judge the merits of this arbitration; and (vi) temporary relief is warranted pending the Tribunal's decision on the Application.⁶⁶
41. Claimant further submits that while Respondent did not contest that the "harm caused by the destruction and dissipation of evidence cannot be compensated by damages,"⁶⁷ it did contest

⁵⁸ Response, ¶¶140-141.

⁵⁹ Response, ¶146.

⁶⁰ Response, ¶151.

⁶¹ Reply, ¶15.

⁶² Reply, ¶¶16-17.

⁶³ Reply, ¶20.

⁶⁴ Reply, ¶¶22-23.

⁶⁵ Reply, ¶¶42-43.

⁶⁶ Reply, ¶19.

⁶⁷ Reply, ¶22.

the “likelihood” of this occurring, importing “necessity” and “urgency” requirements that are external to the relevant provisions of the UNCITRAL Rules.⁶⁸

42. Even on the basis of the standard advocated by Colombia, however, SSA says that the Application should be granted. The Requested Measures are necessary because: (i) Respondent is indeed contemplating an extraction mission that would likely be completed before President Gustavo Petro leaves office in 2026 (whether it be labelled as “scientific”, “research”, “technical” or “training” is immaterial);⁶⁹ (ii) Respondent provided no evidence “to disprove public reports and criminal complaints about the tampering and looting of the site”⁷⁰ nor to “counter observations made by several underwater archeologists that the site has already been manipulated;”⁷¹ (iii) “[w]hatever rules and standards may exist under Colombia’s law for the protection of underwater cultural patrimony, those standards protect neither SSA’s interests in this dispute nor the integrity of these proceedings.”⁷²
43. The Requested Measures are urgent, says SSA, because Respondent’s representations to it and to the Tribunal are contradicted by the statements of its officials that “the extraction of materials from San José has begun or will begin shortly” and that the salvage of the wreck will occur by 2026.⁷³
44. The balance of harms weighs in Claimant’s favour because: (i) the Requested Measures do not require Respondent “to disclose the Evidence at issue (yet), but merely to take measures to preserve it;”⁷⁴ (ii) Respondent can still suggest alternate language to “the only Requested Measure Respondent appears to take issue with based on its supposed confidentiality concerns” which is that it “report to the Tribunal and the Parties on a bi-monthly basis on the progress of any Evidence recovered from the shipwreck;”⁷⁵ (iii) “to the extent that Respondent seeks to protect information from disclosure [...] it needs to provide particularized information as to which specific document(s) this would apply to, on what grounds, and whether such information can be redacted.”⁷⁶
45. Claimant also reiterated that its “case is eminently reasonable assuming the alleged facts are proven during the merits phase.”⁷⁷
46. Granting the Application would not pre-judge the merits because Claimant, in its word, “is not seeking a determination of its rights or of its claims on the merits, or indeed on the nature of its rights to the San José, but quite simply the preservation of the Evidence that is central to

⁶⁸ Reply, ¶23.

⁶⁹ Reply, ¶¶25-27.

⁷⁰ Reply, ¶28.

⁷¹ Reply, ¶31.

⁷² Reply, ¶33.

⁷³ Reply, ¶35.

⁷⁴ Reply, ¶38.

⁷⁵ Reply, ¶39.

⁷⁶ Reply, ¶40.

⁷⁷ Reply, ¶43.

the Tribunal's ability to resolve this dispute and make a reasonable determination of the quantum, should SSA prevail on the merits."⁷⁸

D) RESPONDENT'S REJOINDER

47. After reiterating that "interim measures are not to be granted lightly," that the party requesting them bears "the burden to prove that the situation is such as to warrant an order for interim relief," and that the existence of the Tribunal's discretion under Article 26(2)(a) "does not mean that Claimant is somehow relieved from the obligation to provide conclusive evidence [that] the requirements [under Articles 26(3)(a) and (b)] are met,"⁷⁹ Respondent submitted that 7 out of 8 factual exhibits that Claimant had filed with its Reply were "completely new" and that "none of those exhibits provide conclusive evidence to support the applicable legal standard."⁸⁰
48. According to Respondent, "exhibits C-122bis, C-126, C-127, C-128 and C-132 should not be given great evidentiary weight" as they are "simply news articles allegedly reporting the saying of Colombia's public officials in a clearly imprecise, incomplete, and misleading fashion."⁸¹ Rather, the latest and official statement on this matter came from the Ministry of Cultures on 14 May 2024 when it clarified that no intrusive activities are contemplated in the initial phase of the San José Project.⁸² Respondent's views on the substance of Exhibits C-130 and C-131 is expressed in its Response.⁸³
49. Finally, in Respondent's view, Claimant's Application is "unreasonable and unacceptable". On the one hand, the request made on 25 April 2024 is "far more intrusive [than the Application] since it requires Colombia to inform SSA, at least 60 days in advance, not only of interventions regarding the extraction of items but 'of any exploration, studies, intervention, recordings' from the scientific research project," which significantly encroaches on Colombia's sovereign rights.⁸⁴ Due to the early stages of the San José Project (which will be launched in Cartagena on 22 May 2024 and which will still be in the early stages in the second half of this year), Respondent cannot commit to a preservation protocol.⁸⁵
50. On the other hand, Colombia recalls that Claimant maintains the request for relief stated in its Application which presupposes a disclosure of a log of coordinates where the artifacts are identified, recovered or salvaged.⁸⁶

⁷⁸ Reply, ¶145.

⁷⁹ Rejoinder, ¶¶2-3.

⁸⁰ Rejoinder, ¶5.

⁸¹ Rejoinder, ¶10; see also Rejoinder, ¶¶5-9.

⁸² Rejoinder, ¶11; **Exhibit R-56**, Ministry of Cultures, Press release, 14 May 2024.

⁸³ Response, ¶¶66-73.

⁸⁴ Rejoinder, ¶17.

⁸⁵ Rejoinder, ¶¶18, 23, 24.

⁸⁶ Rejoinder, ¶19.

51. If, however, Claimant is merely requesting the preservation of Evidence and not its disclosure, then the Requested Measures are neither necessary nor urgent in Colombia's view, given that: (i) it has in place strong constitutional and statutory protections regarding its submerged cultural heritage; (ii) it has put in place a scientific project that seeks to protect all of the information related to the Galeón San José; and (iii) it will constantly be informing, consulting and updating the public regarding the San José Project (as it has done to date).⁸⁷ In sum, says Respondent, "Colombia already has the duty to preserve [the Evidence], and furthermore, every action taken related to the San José Project will be shared with the public, which includes SSA."⁸⁸

V. DISCUSSION

52. The Tribunal's authority to order interim measures is not contested.⁸⁹ There also appears to be no disagreement regarding the general importance of preserving potentially relevant and material evidence.
53. That being said, Respondent has emphasized throughout its submissions that interim measures are extraordinary and should not be ordered lightly.⁹⁰ While the Tribunal agrees with that general sentiment, it finds that in the present case the Application is well-founded, as explained below.
54. Claimant does not seek to "restrain Colombia from proceeding with the extraction altogether".⁹¹ Rather, Claimant "seeks the preservation and cataloguing of any items that Colombia may identify or salvage from the San José shipwreck."⁹² Claimant's Application therefore falls squarely under Article 26(2)(d) of the UNCITRAL Rules and, as such, is not subject to the same requirements as other interim measures, as Article 26(4) of the UNCITRAL Rules makes clear. It is not necessary for the Tribunal to look beyond the clear words of the UNCITRAL Rules. In particular, Respondent has not made out a case, and the Tribunal is in no way persuaded, that it is necessary or appropriate in this case to apply to an interim measure under paragraph 26(2)(d) concerning preservation of evidence, the requirements in paragraphs 26(3)(a) and (b) of the UNCITRAL Rules concerning wholly

⁸⁷ Rejoinder, ¶21.

⁸⁸ Rejoinder, ¶25.

⁸⁹ Application, ¶12; Response, ¶23.

⁹⁰ See, e.g., Response, ¶24; **Exhibit RLA-51**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL Arbitration, Order on Interim Measures, 2 September 2008, ¶39; **Exhibit RLA-67**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶33; **Exhibit RLA-076**, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2 (Provisional Measures), 2 December 2015, ¶108; **Exhibit RLA-077**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (Decision on Request for Provisional Measures), 28 October 1999, ¶10.

⁹¹ Application, ¶34.

⁹² Application, ¶16.

different types of measures. It rather seems axiomatic that evidence that may be relevant and material ought to be preserved.

55. The multiple authorities filed by the Parties that concern interim measures of a different nature than those requested here are of little assistance. Among those is the decision on interim measures in *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia*, which features prominently in Respondent's submissions as "one of the few cases where the UNCITRAL Arbitration Rules (as in force as of 2021) have been applied in a decision on interim measures"⁹³. As pointed out by Claimant,⁹⁴ however, that case did not concern the preservation of evidence, but rather "measures to maintain or restore the *status quo*, and to prevent [Australia] from taking actions likely to cause current or imminent harm to [Zeph Investments] or prejudice the arbitral process."⁹⁵
56. The Tribunal considers the following statement by the tribunal in *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* to be instructive:⁹⁶

In this regard, in deciding whether to grant provisional measures, tribunals also generally look to **the nature of the provisional measures that are requested**, and the relative injury to be suffered by each party. **While some provisional measures** (such as, for example, preserving the *status quo* and ordering performance of a contract or other legal obligation) **typically require a strong showing of serious injury, urgency and a prima facie case, other provisional measures (such as preservation of evidence, enforcement of confidentiality obligations) are often unlikely to demand the same showings.**

(emphasis added).

57. This makes perfect sense in the Tribunal's view.
58. Certain interim measures under the Rules (e.g., measures *to maintain* or *restore* the status quo (Art. 26.2(a), *to take action* or *refrain from taking action* so as to ensure that that no harm is caused (Art. 26.2(b), or *to preserve assets* (Art. 26.2(c)), measures which effectively order a party to act or refrain from acting in a particular manner, often in order to protect a right claimed by another, do require showings of harm, proportionality, and a *prima facie* case on the merits.
59. The preservation of evidence differs from most of those sorts of measures. Preserving evidence is not undertaken for the sake of a right claimed by particular party, but seeks rather

⁹³ Response, ¶128.

⁹⁴ Reply, ¶17.

⁹⁵ **Exhibit RLA-65**, *Zeph Investments Pte. Ltd. v. The Commonwealth of Australia I*, PCA Case No. 2023-40, Procedural Order No. 2 on Claimant's Interim Measures Application, 17 November 2023, ¶12.

⁹⁶ **Exhibit CLA-95**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, ¶113. In a similar vein, the tribunal in **Exhibit CLA-97**, *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5, Claimant's Request for Provisional Measures, 19 September 2019, ¶15, recognized that different categories of provisional measures "engage[] distinct considerations".

to protect and preserve the purpose of the proceedings themselves. Moreover, measures to preserve evidence fall squarely within the Tribunal's overarching authority and responsibility to ensure that the arbitration is conducted fairly and efficiently, and in a manner to allow each party to present its case (Art. 17(1)), including with respect to the taking of evidence (Art. 27). It makes sense that an order to preserve evidence should not necessarily demand the same showings as certain other measures; and in fact, the UNCITRAL Rules state clearly that it does not – *unless* a Tribunal considers it appropriate to require such showings in the light of the particular circumstances of the case before it, which is not the case here.

60. Multiple media reports have been produced which demonstrate the fluidity of the current state of affairs and the uncertainty concerning the actual timeline and consequences of any "investigations" of the San José shipwreck. Claimant understandably fears that extraction of items from the shipwreck is potentially imminent. Respondent on the other hand contests the legitimacy of Claimant's concerns, emphasizing the early stage and the exploratory character of the so-called San José Project. It is impossible to be certain on the face of the record that either party is absolutely correct to take the position it does. The challenge for the Tribunal is to determine what if any measures are appropriate in such circumstances to protect both the Parties and these proceedings against what the Tribunal considers is the possible loss of potentially important evidence.
61. Ultimately, and even on the face of Respondent's exhibits, the Tribunal cannot but recognize that there exists an important measure of uncertainty as to the nature, scope and timing of the Project and of its potential impact on matters central to this arbitration. Whilst this uncertainty is perhaps both legitimate and understandable in the circumstances, given the Project, the fact of it cannot be ignored.
62. For example, in December 2023 it was reported that as of February 2024 relevant authorities would debate on the future of Galeón San José in order to "ensure the adequacy of the processes":⁹⁷

To achieve this purpose, in 2024 the archaeological site will be characterized, the research project will be formulated and mechanisms for the conservation analysis of materials will be established.

This year will also be key for the formation of a team of specialists that will be in constant contact with academia and national and international research centers. In this sense, **the first meeting will be held in February 2024, as an invitation from the Minister of Cultures, Arts and Knowledge, Juan David Correa, to broaden the debate on the future of the galleon, to ensure the adequacy of the processes.**

(emphasis added).

⁹⁷ **Exhibit R-50**, Ministry of Cultures, Press release, 14 December 2023 (Respondent's translation).

63. A February 2024 press release expanded on the Government's plans to make significant investments during 2024 in equipment necessary for the "recovery of objects" and other infrastructure, providing also a timeline for the "scientific investigation" (second semester of 2024):⁹⁸

The scientific investigation of the San José Galleon is a highly complex project to be carried out in the deep waters of the Colombian Caribbean. The preparation and execution of the project consists of the following components.

[...]

5. Robotics and electronics: will lead the aspects related to the adequacy and operation of the ROV to carry out archaeological exploration in deep waters and the recovery of objects.

[...]

During the year 2024, the Colombian State will invest 17,962 million pesos, which include the strengthening of its technical capacity with the adaptation of a remotely operated vehicle (ROV), which will be directed from the multipurpose vessel ARC "Caribe", which has dual capabilities (scientific and research development) and the conditions that the robot needs to descend to great depths, without losing stability.

During this year, investments will also be made in the existing infrastructure of the Centro de Investigaciones Oceanográficas e Hidrográficas del Caribe - CIOH, of the DIMAR, laboratory equipment will be purchased and some spaces will be adapted to have the technology and supplies required by the project's researchers, with emphasis on the stabilization of materials.

The scientific research, which is expected to begin in the second half of this year, will also require operational and logistical training.

(emphasis added).

64. On 5 March 2024 it was reiterated that:⁹⁹

The first exploration campaign, which is estimated for the beginning of the second half of this year, will also require operational and logistical training.

(emphasis added).

⁹⁸ **Exhibit R-42**, Press release of the Ministry of Cultures "Así será la investigación científica sobre el hallazgo del galeón San José", 23 February 2024 (Respondent's translation).

⁹⁹ **Exhibit R-51**, Ministry of Cultures, Press release, 5 March 2023 (Respondent's translation).

65. A further update followed on 19 March 2024, which referred to the Government's plans to make investments to adapt a laboratory for the "conservation of materials":¹⁰⁰

In light of the latest facts and reports on alleged irregular interventions in the discovery of the San José galleon, the Government of Colombia informs:

[...]

During the development of the research project to be carried out in 2024, the analytical and control parameters on the area of the Asset of Cultural Interest of the San José Galleon will be reviewed, in order to determine the state of hydrographic.

In this 2024, the Colombian State will invest 17,962 million pesos, which include:

- a). The strengthening of technical capacity with the adaptation of a remotely operated vehicle (ROV), from the multipurpose vessel ARC "Caribe".
- b). **The adaptation of a materials conservation laboratory** in the facilities of the Caribbean Oceanographic and Hydrographic Research Center of the General Maritime Directorate.
- c). A permanent process of scientific divulgation and dissemination to multiple interested publics.

(emphasis added).

66. On 14 May 2024, while stating that the investigation is still in its early stages, the Ministry of Cultures noted that later phases could include the collection of archaeological materials and sampling:¹⁰¹

Subsequent phases of investigation will depend on the results of this first stage of characterization and **may include collection of archaeological materials, sampling**, conservation activities and specialized analysis, among others.

(emphasis added).

67. The Tribunal infers from the signature of an agreement between the *Ministerio de las Culturas, las Artes y los Saberes*, the *Ministerio de Defensa* and the *Instituto Colombiano de Antropología e Historia* (ICANH) that the San José Project may last for at least 5 years.¹⁰²

¹⁰⁰ **Exhibit R-43**, Ministry of Cultures, Press release, 19 March 2024 (Respondent's translation).

¹⁰¹ **Exhibit R-56**, Ministry of Cultures, Press release, 14 May 2024 (Respondent's translation).

¹⁰² **Exhibit R-51**, Ministry of Cultures, Press release, 5 March 2023 ("*This Monday, Colombia took a new step in the research project for the discovery of the San José galleon: the signing of the framework agreement between the Ministry of Cultures, Arts and Knowledge, the Ministry of Defense (through its executing entities: the Colombian Navy and the General Maritime Directorate - DIMAR) and the Colombian Institute of Anthropology and History – ICANH.*

This means that the signatory entities have committed during the next five years to make available the financial, physical, technical, administrative and other resources needed to develop all the activities required for the scientific research

This is, however, juxtaposed with an article filed by Claimant (the accuracy of which Respondent contests)¹⁰³ which refers to Colombia's intentions "to recover the wreck before [President Gustavo Petro's] term ends in 2026."¹⁰⁴

68. The Tribunal also takes due and respectful note of Respondent's counsel's representations that the San José Project is in its early stages,¹⁰⁵ and that Colombia "will not conduct (and is not planning to conduct) any intervention in the coming months."¹⁰⁶ Nonetheless, even when added to the evidence submitted by Colombia, that does not entirely dissipate what we refer to above as the fluidity and uncertainty surrounding the Project and its potential impact on the arbitration, such as to justify a dismissal of Claimant's Application or render the Requested Measures moot.
69. The Application concerns not only items that are "recovered" or "salvaged" from the San José shipwreck, but also items that are "identified". The term "Evidence" as defined at paragraph 19 of the Application includes any object "identified, recovered or salvaged," as well as different types of recordings which do not presuppose an actual extraction (or "recovery" / "salvage") of items. Thus, the statement of 14 May 2024 that "the initial phase of the project of investigation of Galeón San José will be exploratory and does not contemplate intrusive actions" is of limited assistance to Respondent's attempt to rebuff the Application.¹⁰⁷ Indeed, this article states that:

In this sense, and taking into account that due to the type of contexts studied and the methods and techniques used, archaeological investigations take time and are slow. Therefore, this roundtable established the first steps to be taken in the characterization phase of the discovery of the Galeón San José:

[...]

2. Recording: **the images collected help to build an inventory of the archaeological evidence on the seabed.** This will allow a classification of the materials and their origin.

(emphasis added).

70. Per Article 17(1) of the UNCITRAL Rules, the Tribunal is bound to conduct the proceedings in a manner that "avoid[s] unnecessary delay and expense and provide[s] a fair and efficient process for resolving the parties' dispute." It would amount to an inefficient use of the Parties'

project on the San José galleon, as well as other studies on submerged cultural heritage in Colombian waters." (Respondent's translation)).

¹⁰³ Rejoinder, ¶10.

¹⁰⁴ **Exhibit C-126**, Jim Wyss, "Colombia Accelerates Plan to Recover Billions in Sunken Treasure," Bloomberg, 3 November 2023.

¹⁰⁵ Response, ¶¶85, 111.

¹⁰⁶ **Exhibit R-47**, Email from the Respondent to Claimant's counsel 23 April 2024.

¹⁰⁷ **Exhibit R-56**, Ministry of Cultures, Press release, 14 May 2024 (Respondent's translation).

and the Tribunal's resources if the requests outlined in the Application were to be debated every so often whenever a potential "intervention" is suspected.

71. Furthermore, the fact that the San José Project may be in its early stages, or that (as noted above) Colombia will not "conduct [...] any intervention in the coming months,"¹⁰⁸ does not prevent Respondent from committing to an Evidence Preservation Protocol (contrary to what Respondent argues).¹⁰⁹ In the Tribunal's view, practically speaking, knowing that it has an Evidence Preservation Protocol to respect for purposes of the present proceedings may in fact assist Respondent to craft approaches and to choose and apply methodologies that allow for seamless compliance with such a Protocol.
72. The Tribunal is comforted by the representations of Respondent's counsel that Colombia "is taking and will continue to take the necessary measures to protect and preserve the Galeón San José."¹¹⁰ On that basis, and in view of Respondent's submissions and supporting evidence, this Decision should therefore impose a fairly limited practical burden on Respondent beyond that to which it says it is subject in any event under its own constitutional and legislative regime. Stated differently, the burden effectively imposed by this Decision would seem to arise to the extent that it requires measures to record and preserve evidence in a manner and form appropriate for purposes of this case that may not be identical to the substantial measures which Colombia says that it intends to take in any event.
73. Considering moreover the clarifications and caveats below, the Tribunal is not persuaded that by granting the Application it would be requiring Respondent "to act against its own laws relating to the confidentiality of information produced by – or in the custody of – public entities."¹¹¹
74. Nor does the Tribunal consider that by granting the Application it would be affecting a "fundamental change to [the *status quo*], by improving the Claimant's situation," as was the case in the *Phoenix Action, Ltd. v. The Czech Republic* decision relied on by Respondent.¹¹²
75. The Tribunal is conscious of Respondent's assertion that "Claimant is seeking to access documents and information prematurely, despite there being a specific phase in these proceedings in which the parties can request the production of documents."¹¹³ That is not, however, the result of the present Decision (and indeed as emphasized by Claimant¹¹⁴). While an interim order for the preservation of evidence may "[ensure] that both [p]arties have

¹⁰⁸ **Exhibit R-47**, Email from the Respondent to Claimant's counsel 23 April 2024.

¹⁰⁹ Rejoinder, ¶18.

¹¹⁰ **Exhibit R-45**, Email from Respondent to Claimant's counsel, 19 April 2024.

¹¹¹ Response, ¶117.

¹¹² Response, ¶¶36, 145; **Exhibit RLA-67**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶37.

¹¹³ Response, ¶113.

¹¹⁴ Reply, ¶38.

an equal ability to exercise their right to seek the production of relevant documents,”¹¹⁵ the Parties here are assured that the Tribunal is not making any determination at this time with respect to production of documents or the allocation of the burden of proof. Rather the Tribunal is merely endeavouring to preserve evidence that may be relevant and material to the case and that accordingly may be subject to production – questions that the Parties will have the opportunity to address in due course.¹¹⁶

76. The Tribunal is also mindful of Respondent's concern about producing to Claimant, or otherwise disclosing, a “log of the coordinates at which any and all objects or artifacts are identified, recovered or salvaged as part of Colombia's expedition(s) to the San José shipwreck,” which is one of the components of “Evidence” that Claimant seeks to have the Tribunal preserve.¹¹⁷ While the Tribunal considers it essential that these coordinates be accurately recorded and preserved, as will be seen below, the Tribunal is not ordering in this Decision that those coordinates be disclosed. Again, that question will be addressed should it be raised in due course in the context of the arbitration.
77. The Tribunal wishes to make clear that this Decision is in no way to be read as signifying any lack of confidence in any measures that Respondent has adopted or may adopt to protect and preserve the Galeón San José in accordance with its domestic regime, nor of course any uncertainty regarding its compliance with such measures. The present Decision is issued in the context of this arbitration, for purposes of this arbitration, under the terms of the particular Treaty and Rules applicable to this arbitration, with a view to preserving the rights of the disputing parties as claimed (and still to be determined) in this arbitration, by preserving evidence that may be relevant and material to the resolution of the dispute in this arbitration.
78. The Tribunal also wishes to emphasize that it is mindful of the confidentiality provisions of the TPA contained in Articles 10.21, 10.28, 22.2 and 22.4 noted in section III (“Applicable Treaty Provisions and Rules”) above, which it takes very seriously. The Tribunal clarifies that the information resulting from this Decision and the Evidence Preservation Protocol, as explained below, is protected by those confidentiality provisions subject as may be the case to a decision of the Tribunal in respect of the application of such provisions or, as noted, the matter of production of documents and evidence, should such questions be raised in due course in this arbitration.
79. Lastly, considering the Tribunal's conclusions as set out below, and in reliance on the representations and good faith of Respondent and its counsel, the Tribunal considers that Claimant's request for “temporary relief with immediate effect” is uncalled for at this juncture.

¹¹⁵ **Exhibit CLA-97**, *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5, Claimant's Request for Provisional Measures, 19 September 2019, ¶1111.

¹¹⁶ At such time, the Tribunal will consider as necessary the provisions of Articles 10.21(3), 10.28, 22.2(a) and 22.4 of the TPA.

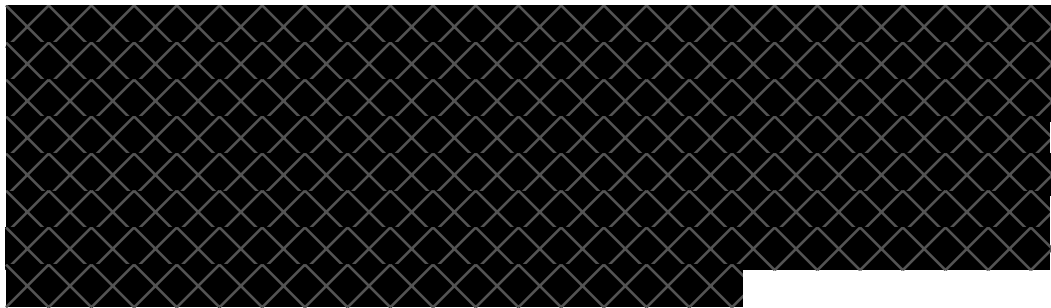
¹¹⁷ Application, ¶19.

VI. DECISION and ORDER

80. The Application is granted, in the following terms and manner:

- a. The Parties shall attempt to agree on terms of an Evidence Preservation Protocol, including an accurate catalogue of the Evidence, along the lines of, though not necessarily identical to, the Requested Measures set out in the Application, and shall revert to the Tribunal with any agreement within one week of the date of this Decision.
- b. In the event that an agreement is reached and the Tribunal so notified by that date, the agreement will be incorporated into a Supplementary Decision and Order for an Evidence Preservation Protocol to be issued by the Tribunal.
- c. In the event that an agreement is not reached or the Tribunal is not notified of an agreement by that date, the Tribunal will issue a Supplementary Decision and Order for an Evidence Preservation Protocol in terms to be set out by the Tribunal.

d.



[Signatures on the following page]

PLACE OF ARBITRATION: LONDON, UNITED KINGDOM

DATE: 3 JUNE 2024

THE ARBITRAL TRIBUNAL:



Mr. Stephen Jagusch KC



Dr. Claus Von Wobeser



**Mr. Stephen L. Drymer
(Presiding Arbitrator)**