PCA CASE NO. 2023-37

SEA SEARCH-ARMADA, LLC (USA)

Claimant

v.

THE REPUBLIC OF COLOMBIA

Respondent

STATEMENT OF DEFENSE

23 December 2024

Counsel for the Respondent
GAILLARD BANIFATEMI SHELBAYA DISPUTES
XTRATEGY LLP
AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO

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I. INTRODUCTION

1. The Republic of Colombia ("**Colombia**" or the "**Respondent**") submits this Statement of Defense in accordance with the procedural timetable set out in the Arbitral Tribunal's Procedural Order No. 4 of 12 September 2024.

2. It is Colombia's position that this arbitration should have never been commenced, first and foremost because the Claimant's Alleged Predecessors did not find the Galleon San José or its debris. The reason is simple: the Galleon is not at the coordinates the Claimant's Alleged Predecessors reported in 1982, even allowing for a margin of error.

3. As the Claimant has openly acknowledged, it has known for 30 years that the Galleon San José is not located at the coordinates reported in 1982. This is because the Claimant's Alleged Predecessors, intentionally – and in contravention of their obligations under the applicable legislation and their duty to act in good faith – reported to DIMAR coordinates they knew to be wrong, having knowledge that there was nothing there. The Columbus Report already showed as much: not even the anomaly reported by GMC is there.

4. Yet, the Claimant has hauled the Republic of Colombia into this arbitration employing a myriad of artificial and abusive tactics, including to name just a few, (***i***) inventing fanciful terms – that have no support in the law – such as "immediate vicinity", "pin-point coordinates", "Discovery Areas"– to manufacture a narrative that has no legal or factual ground; (***ii***) advancing ever shifting claims regarding the applicable margin of error to the 1982 reported coordinates, which the Claimant expands, retracts and expands again – as a rubber band – to cover gargantuan areas of the Colombian Atlantic, with the hope that the Galleon will fall within them; (***iii***) artificially attempting to bypass the Contracting Parties agreed conditions to consent to arbitration, by distorting the meaning of Article 10.18.1, and submitting that the very same rights it alleged Colombia had expropriated were somehow resurrected – Lazarus style – by the reinstatement of the Attachment Order, which was in place when the Claimant previously claimed expropriation.

5. As a result, Colombia has had to devote considerable human and economic resources to put an end to the Claimant's harassment and abusive litigation, of which the current arbitration is but the latest one. Indeed, as Colombia duly appraised the Tribunal on 8 August 2024, to defend itself in these proceedings, the Respondent has had to resort to interdisciplinary expertise involving the multiple technologies needed to properly delimitate the archaeological area in the case at hand, disbursing millions of dollars. As Colombia demonstrates in this submission – there can simply be no doubt – that the Claimant has no rights whatsoever to the Galleon San José. All of

the Claimant's pseudo – scientific contentions are predicated on distortions and generalizations which lack the most basic level of rigour.

6. It is the Respondent's position that the Tribunal lacks jurisdiction over this dispute and as a matter of fact and law the Claimant has not rights to the San José. Moreover, the Claimant has made no investment and does not qualify as an investor under the TPA. In addition, the Tribunal lacks jurisdiction *ratione temporis* over the Claimant's alleged breaches of Colombia's obligations under the TPA.

7. The Claimant's claims on the merits must equally fail. As Colombia shows in its submission, the Claimant has unduly expanded the scope of the substantive protections under the TPA, plainly disregarding the terms of the Treaty. Colombia did not agree to provide protection beyond what is expressly provided in the treaty. Furthermore, the Claimant's factual contentions regarding Colombia's alleged conduct and breaches are plainly wrong.

8. What is more, the Claimant has no qualms in presenting completely speculative and inflated calculations on the alleged damages suffered, which are wholly unsupported.

9. In sum, having failed to find the "treasure" of the Galleon, SSA has decided to seek a "treasure" in the form of damages in this arbitration based on wholly unwarranted claims. The Tribunal should not allow it.

II. BACKGROUND TO THE DISPUTE

A. SSA'S ALLEGED PREDECESSORS DID NOT FIND THE *GALEÓN SAN JOSÉ*, NOR WERE THEY EVER NEAR TO FINDING IT

10. Ever since 1982, SSA and its Alleged Predecessors have been selling the lie that they discovered the *Galeón San José* to anyone who will listen. This lie has been told to investors, politicians and State representatives, among others. This Arbitral Tribunal is no exception.

11. Indeed, throughout these proceedings, SSA has repeatedly claimed it has rights over the *Galeón San José*. With its Request for Arbitration, the Claimant argued that "*sonar recordings, magnetometer readings, visual observation, and videotapes of the wreck, all confirmed that GMC*

had located the San José",[1] and that Colombia had unlawfully expropriated SSA's alleged investment by *"retroactively deeming the San José as "Asset of National Cultural Interest."*[2]

12. Similarly, in the Amended Statement of Claim, the Claimant continued to argue that SSA's Alleged Predecessors allegedly discovered the *San José* in December 1981[3] and that such finding was then allegedly reported to the Colombian Authorities.[4] Blurred and poor-quality images from a side scan sonar and alleged magnetometer readings would be the conclusive evidence that the *Galeón San José* was found.[5] To make matters even worse, as explained by the Respondent's expert in magnetometry, Dr. Karem Oviedo, it is highly plausible that the magnetometer reading was caused by GMC's faulty methodology, specifically by the metal basket deposited by GMC in the area of the alleged finding.[6]

13. SSA's misconstruction of what truly happened has been reiterated by the Claimant over the course of these proceedings,[7] where, with no basis whatsoever, SSA has continued claiming a non-existent right over the *Galeón* and has progressively modified its narrative – unsuccessfully – to escape the irrefutable truth: SSA's Alleged Predecessors never discovered the *Galeón San José*, nor were they ever remotely close to finding it.

14. Despite having exhausted all avenues available in their attempt to trick local, foreign and international adjudicators – and now this Tribunal – into creating a non-existent right over the *Galeón San José*, SSA has not presented a single document where such a right was recognized, nor consolidated, on behalf of SSA or any of its Alleged Predecessors. Such a document simply does not exist.

15. This is because GMC never reported the discovery of the *San José*, and any right that could have ever been recognized on behalf of SSA or its Alleged Predecessors was based exclusively on GMC's own reports to Colombian authorities.

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1 *See* Claimant's Request for Arbitration, ¶ 18.

2 *See* Claimant's Request for Arbitration, ¶ 75.

3 *See* Amended Statement of Claim, ¶¶ 66-69.

4 *See* Amended Statement of Claim, ¶ 72.

5 *See* Amended Statement of Claim, ¶¶ 64-65, Figures 13 and 14.

6 Expert Report of Dr. K. Oviedo (**RER-6 [Oviedo]**), ¶¶ 43(a), 42(a)(d),45(b), Section III(1)(a)(b)(c).

7 Claimant's Request for Arbitration, ¶¶ 18, 75; Claimant's Response to Colombia's Article 10.20.5 Objections, ¶¶ 21, 23, 27-29, 36-38, 41-45; Claimant's Rejoinder to Colombia's Article 10.20.5 Objections, ¶¶ 30-45; Amended Statement of Claim, ¶¶ 64-72.

16. Particularly, on 18 March 1982, GMC submitted the *"Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia"* (the "**1982 Confidential Report**") to DIMAR.[8] The 1982 Confidential Report was not conclusive on a specific finding, much less one of a shipwreck.[9] The 1982 Confidential Report actually states that further marine exploration and substantial capital investments were required for the purposes of identifying a possible *"shipwreck"* located within a specific set of coordinates.[10]

17. Importantly, the 1982 Confidential Report does not make any reference to the *Galeón San José*. The reason for such an omission cannot be anything other than the fact that GMC never found the *Galeón San José*, nor was there any indication that it had been found by GMC. Otherwise, GMC would have expressed so in the 1982 Confidential Report, which was the only formal document with information on the coordinates of the alleged finding submitted to Colombian authorities.

18. In 1994, after conducting a survey and searching the area reported by GMC in 1982, Columbus Exploration confirmed the absence of any shipwreck or any trace of a shipwreck in the area reported by GMC. Columbus Exploration concluded that no items of interest could be found there, much less a shipwreck and even less likely, the *Galeón San José*.[11]

19. This was also confirmed during the verification campaign conducted in May 2022 by the Colombian Navy (the "**2022 Verification Campaign**"), which – once again – concluded that there were no signs of shipwreck or of other anomalies on the seabed at the coordinates reported by SSA's Alleged Predecessors in 1982.[12]

20. In fact, the Claimant itself has confessed in multiple letters that GMC did not find anything at the 1982 Coordinates.[13] Indeed, in a letter dated 19 November 2015, SSA informed the Ministry of

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8 *See* Confidential Report on the Underwater Exploration by the Glocca Morra Company in the Caribbean Sea, Colombia, 26 February 1982 (**Exhibit C-10**).

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

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

11 *See* Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), p. 15. *See also* **Section K** below.

12 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022 (**Exhibit R-34**) pp. 8-11.

13 Letter from SSA to the Minister of Culture, 19 November 2015 (**Exhibit R-27**), pp. 2-3, 5. *See also* Letter from SSA to the Presidency of Colombia, 4 September 2017 (**Exhibit R-30**), pp. 3, 9, 17, 20, 23.

Culture that it had no interest in participating in a verification operation of the 1982 Coordinates since it knew from the start that the shipwreck was not located there.[14] SSA later further confirmed in a letter to the Presidency of Colombia that for the past 34 years, it knew that there was no shipwreck at the coordinates reported in the 1982 Confidential Report.[15]

21. The fact that no shipwreck is located at the coordinates reported by GMC in 1982 is consistent with the fact that, after the submission of the 1982 Confidential Report, GMC, and then SSA Cayman, continued to request DIMAR for extensions of the authorization permit granted by the DIMAR to conduct underwater exploration in different areas off the coast of Cartagena.[16]

22. Since the rights conferred to SSA's Alleged Predecessors under Colombian law, and as stated in Resolution No. 354 and by the 2007 SCJ Decision, are strictly limited to the coordinates contained in the 1982 Confidential Report,[17] SSA does not have any property rights under Colombian law.

23. Nonetheless, faithful to its "rubber band" approach and faced with the irrefutable truth that nothing was ever found at the 1982 Coordinates, SSA in these proceedings has – yet again – presented a new location where the alleged "discovery" was found more than 40 years ago.[18]

24. Indeed, in its Amended Statement of Claim, the Claimant alleged that, due to *"the scale of error inherent in reporting geodetic coordinates (i.e., in latitude and longitude) at that time",*[19] the 1982 Coordinates were actually *"placed approximately 1.57 nautical miles or 2,890 meters east of the original coordinates reported by SSA, at bearing of 87.9°"* [20] (the "**Corrected 1982 Coordinates**"), as was registered by the reports of the DIMAR Inspectors on board the expeditions conducted by SSA Cayman in 1983 with Oceaneering International Inc. (the "**Oceaneering Expeditions**").[21] The Claimant goes so far as to claim that the Corrected 1982

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14 Letter from SSA to the Minister of Culture, 19 November 2015 (**Exhibit R-27**), p. 2.

15 Letter from SSA to the Presidency of Colombia, 4 September 2017 (**Exhibit R-30**), p. 17.

16 *See* DIMAR Resolution No. 025, 29 January 1982 (**Exhibit C-008**); DIMAR Resolution No. 249, 22 April 1982 (**Exhibit C-012**); DIMAR Resolution No. 203, 24 March 1983 (**Exhibit R-247**); DIMAR Resolution No. 331, 2 May 1983 (**Exhibit R-248**); DIMAR Resolution No. 531, 19 July 1983 (**Exhibit R-249**).

17 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 233-235.

18 Amended Statement of Claim, ¶ 102. *See also* Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 51.

19 Amended Statement of Claim, ¶ 102.

20 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 51.

21 Amended Statement of Claim, ¶ 102. *See also* Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**), p. 4.

Coordinates were *"recalculated"*, when in fact they are based on entirely new data obtained in the 1983 Oceaneering Expeditions.[22]

25. To recall, in 1983, SSA Cayman engaged Oceaneering International ("**Oceaneering**"), a subsea engineering firm, to carry out two expeditions between August and October 1983 in the alleged area of the 1982 Coordinates.[23] According to the Claimant, the objective behind these expeditions was to "*attempt to relocate and identify the shipwreck as that of the San José*."[24]

26. The first expedition conducted by Oceaneering during August and September 1983 was made on board the Heather Express vessel (the "**First Oceaneering Expedition**").[25] As mentioned by the Claimant in the Amended Statement of Claim, the vessel was equipped with state-of-the-art technology at the time, including a side scan sonar, a remotely operated vehicle ("**ROV**") equipped with a camera to take pictures and record video and special underwater diving suits to dive to great depths, among other things.[26] The navigation and positioning system used in the expedition – a Trisponder manufactured by Del Norte – was the most widely used system at the time.[27]

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22 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 54.

23 Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872 2 November 1983 (**Exhibit C-53**). *See also* 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) (**Exhibit C-23**); Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**).

24 Amended Statement of Claim, ¶ 94.

25 Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983 (**Exhibit C-53**). *See also* Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, (dated 28 August 1982 through 9 September 1982) (**Exhibit R-102**).

26 *See* Amended Statement of Claim, ¶ 95. *See also* Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, (dated 28 August 1982 through 9 September 1982) (**Exhibit R-102**), pp. 2-5.

27 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶¶ 22-23.

27. The logs annexed to the report prepared by the DIMAR inspector on board the Heather Express during the First Oceaneering Expedition recount that the vessel had major positioning difficulties and that, occasionally, the anchors had to be moved around to guarantee the ship's stability.[28]

28. Additionally, the DIMAR inspector's logs signal that the marks left by the Auguste Piccard submarine in 1981 led them to the anomaly site they had identified in 1981 on board the Auguste Piccard as follows:

> R.O.V. is launched, the bottom is at 686". In general, coralline formations and marks of the submarine A. Piccard can be observed through the T.V. screen indicating the proximity of the *San José*. [29]

29. The Report of the Inspector on board the Heather Express also indicates that the site of what they believed to be what GMC had characterized as the remains of the *San José* was recognized due to the identification of a metallic basket that had been left at that specific point by the crew of the Auguste Piccard:

> At a depth of 707 feet and in relative position B1 = 546 and B2 = 1,280 and A 21,784 meters from the Island station, the possible remains of the San Jose are located, making an identification due to a metal basket, with which they tried to obtain a sample on the previous occasion from the J.A. Piccard with negative results. All the action was recorded on videotape. [30]

30. The videotape mentioned above by the DIMAR Inspector shows a large rock formation with a metallic basket by its side, which was referred to as the identification item of the site visited by GMC in 1981.[31] Images of the basket shown in the videos taken on board the Heather Express are below:

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28 Annex A to the 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) (**Exhibit R-102**), pp. 10-16.

29 Annex A to the 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) (**Exhibit R-102**), p. 15 (emphasis added).

30 Annex A to the 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) (**Exhibit R-102**), pp. 9, 15 (emphasis added).

31 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) **Exhibit R-99**), min. 28:00-28:20, 43:54.

Image 1: Basket shown on video taken on board the Heather Express in September 1983.[32]

Image 2: Basket shown on video taken on board the Heather Express in September 1983.[33]

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32 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) **Exhibit R-99**), min. 28:08.

33 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) **Exhibit R-99**), min. 28:13.

Image 3: Basket shown on video taken on board the Heather Express in September 1983.[34]

31. Despite the difficulties faced by the First Oceaneering Expedition, the crew on board the Heather Express registered the coordinates for the site where they found the metal basket and the prints left by the Auguste Piccard, referred to as the "Target". These coordinates were expressed, using the UTM system,[35] as X= 491.543 m and Y=1.123.739 (the "**Target Coordinates**").[36]

32. In light of the difficulties hindering the First Oceaneering Expedition, Oceaneering conducted a second expedition on board the Seaway Eagle in October 1983.[37]

33. For the Oceaneering expedition on board the Seaway Eagle (the "**Second Oceaneering Expedition**"), DIMAR Inspectors Mr. Roberto Spicker and Mr. Lázaro del Castillo prepared

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34 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) (**Exhibit R-99**), min. 43:54.

35 As Dr. Mora explains, the UTM (Universal Transverse Mercator) system is a cartographic projection system based on a grid used to position points on the surface of the Earth. The UTM system divides the Earth in zones with a width of 6 degrees in longitude and extends from 80 degrees South to 84 degrees North in latitude. The UTM zones are numbered from 1 to 60. UTM coordinates are expressed in meters. *See* Expert Report of Dr. H. Mora (**RER-5 [Mora]**), fn. 10.

36 Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872 (**Exhibit C-53**), p.7.

37 *See* Status Report of the San Jose Project by Michael Costin, 21 September 1983 (**Exhibit R-101**).

another report to the Admiral Maritime and Port Director accompanied by a log of daily activities (the "**Inspectors' Report on board the Seaway Eagle**").[38]

34. Like the Heather Express, the Seaway Eagle was also equipped with state-of-the-art technology for underwater exploration.[39]

35. During the Second Oceaneering Expedition, video tapes were also taken, showing the "*main target*" registered in the Inspectors' Report on board the Seaway Eagle and the metallic basket identified by the Inspectors during the First Oceaneering Expedition as the metallic basket left at the site by the Auguste Piccard in 1981.[40]

36. The metallic basket was also pictured in one of the videos taken during the Second Oceaneering Expedition:[41]

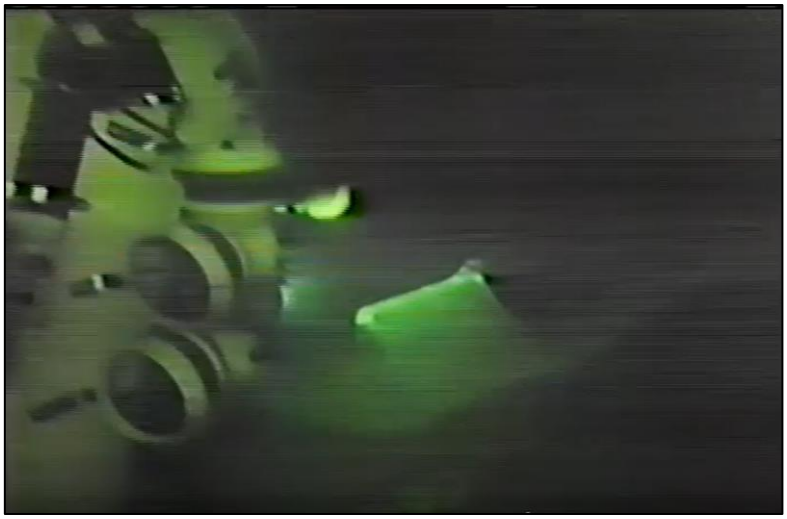

Image 4: Basket shown on video taken on board the Seaway Eagle in October 1983.[42]

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38 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**).

39 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**), p. 3; Annex B.

40 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) **Exhibit R-99**), min. 28:00-28:20, 43:54.

41 *See* Video registered on board the Seaway Eagle, (SAN_JOSE_SY2 NO_3_DATE_10_12) (**Exhibit R-99**), min. 21:06-21:50.

42 *See* Video registered on board the Seaway Eagle, (SAN_JOSE_SY2 NO_3_DATE_10_12) (**Exhibit R-104**), min. 21:06.

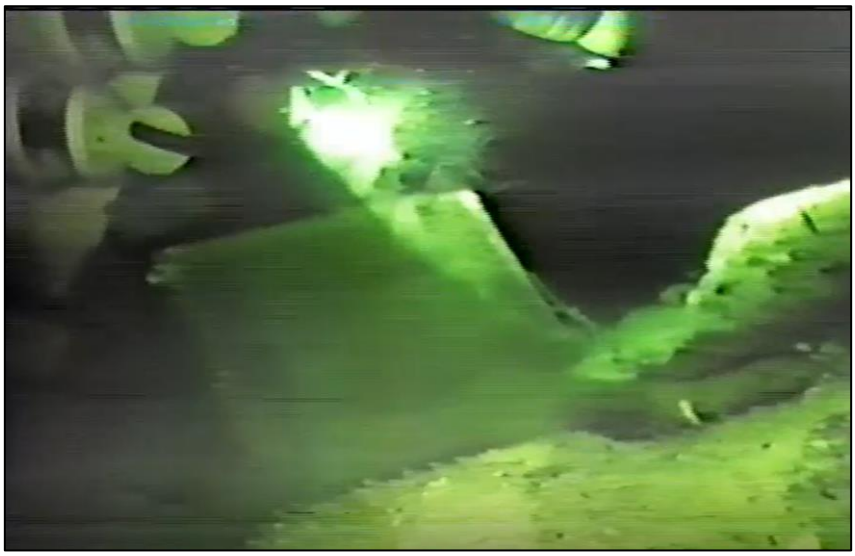

Image 5: Basket shown on video taken on board the Seaway Eagle in October 1983.[43]

37. The Inspectors' Report on board the Seaway Eagle also registered the coordinates of all the relevant points marked during the expedition.[44]

38. Importantly, the log registered for 21 October 1983 states that at 04:00, the vessel was repositioned over the *"main target"* at LAT 10.10.05N LONG 75.58.65W coordinates**.**[45] Dr. Mora has plotted the 1982 Coordinates, the Target Coordinates, [46] and the Corrected 1982 Coordinates, as follows:

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43 *See* Video registered on board the Seaway Eagle, (SAN_JOSE_SY2 NO_3_DATE_10_12) (**Exhibit R-104**), min. 21:41.

44 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**), pp. 2, 4, 7, 8, 9, 11, 13, 14, 17.

45 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**), p. 14.

46 In order to plot the Target Coordinates, Dr. Mora converted the UTM coordinates in the Report by the Colombian Navy Inspectors on board the Heather Express to geodesic coordinates. *See* Expert Report of Dr. H. Mora (**RER-5 [Mora]**), Appendix C.

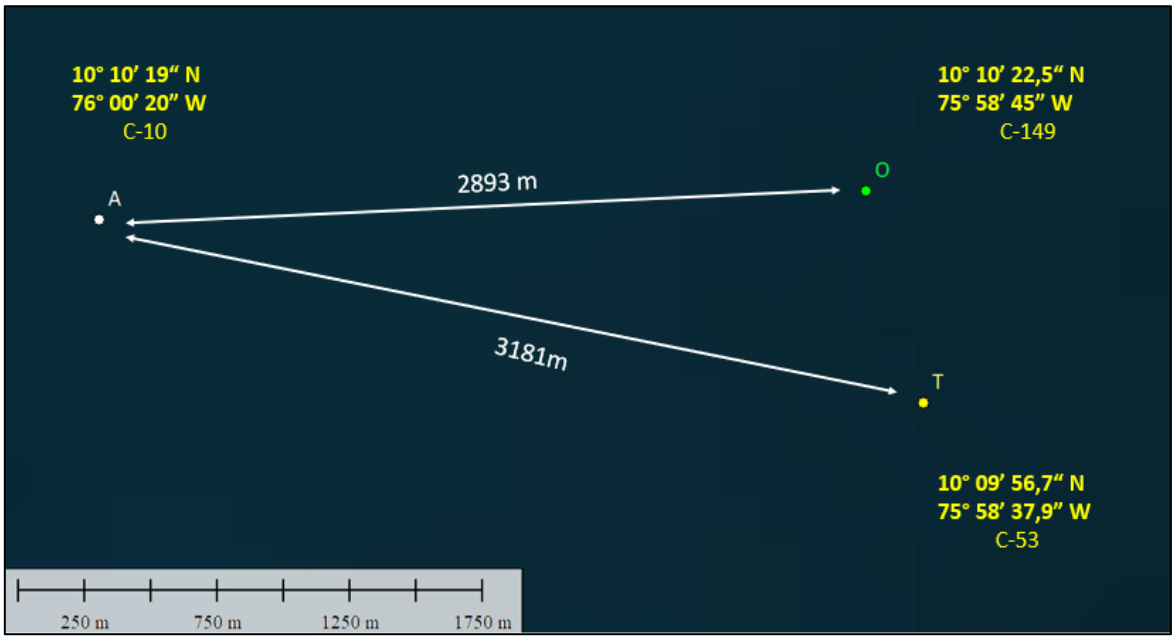

Image 6: Map showing the relative position of the 1982 Coordinates ("A"), the Target Coordinates ("T"), and the Corrected 1982 Coordinates ("O"), prepared by Dr. Hector Mora.[47]

39. As seen, the distances between the 1982 Coordinates and the coordinates registered in the course of the Oceaneering Expeditions is 3.181 m (coordinates obtained during the First Oceaneering Expedition) and 2.893 m (coordinates obtained during the Second Oceaneering Expedition). The Claimant and its expert, Mr. Morris, attempt to explain these distances by making vague references to the alleged "*margin of error in light of the technology available and methods used to locate the target at that time*."[48] As Dr. Mora explains, however, the Trisponder used by Glocca Morra was the most widely utilized positioning system at the time, which was known to produce trustworthy results.[49] According to Dr. Mora, a conservative estimation of the reasonable margin of error for the data obtained by Glocca Morra would be in the order of 100 meters.[50]

40. In an attempt to explain the drastic difference between the coordinates reported in the 1982 Confidential Report and those registered by the DIMAR inspectors on board the Heather Express and the Seaway Eagle, SSA Cayman's oceanographer, Mr. Costin, reported that the first stage of

47 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 53, Figure 5.

48 Amended Statement of Claim, ¶ 77.

49 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 23.

50 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 71.

Phase I of the expedition consisted of the "*relocation of the Sonar Targets*" because the "*navigation equipment used in other missions was found to be inadequately calibrated*".[51] As further explained below, it is impossible to determine whether Mr. Costin's statement is true, given the lack of underlying data to the 1982 GMC Expedition. If it were true, as Dr. Mora explains, the lack of adequate calibration would have invalidated any positioning data obtained by GMC.[52]

41. The gravity of these circumstances cannot be overstated. Indeed, Mr. Costin confirms that, at least as of October 1983, SSA Cayman was well aware that the coordinates that it had reported to the Colombian government were close to 3 kilometers away from the site of its alleged finding which, on close inspection, was not identified as a shipwreck, let alone the *San José.* However, despite being privy to this information, SSA Cayman never formally apprised the Colombian government of this material error, nor requested that the Colombian State amend the coordinates contemplated by Resolution No. 354.

42. In any case, despite no persuasive evidence that anything resembling the *Galeón San José* was discovered by SSA's Alleged Predecessors, the Republic of Colombia has been compelled to conduct yet another verification campaign. Out of an abundance of caution, Colombia commissioned this expedition to cover not only the 1982 Coordinates but also survey the area of the Corrected 1982 Coordinates.

43. To this end, in 2024, Colombia engaged Woods Hole Oceanographic Institution ("**WHOI**"), the world's leading, independent non-profit organization dedicated to ocean research, exploration and education, which is at the forefront of groundbreaking technological advancements in instrumentation and underwater robotic platforms that enable such discoveries and collection of oceanic data.[53]

44. WHOI was in charge of conducting a high-resolution seafloor survey using top-class and state-of-the-art equipment, such as a REMUS 6000 autonomous underwater vehicle ("**AUV**") equipped with an Edgetech 2205 dual frequency (120/410kHz) side scan sonar, a 4-24kHz spectrum sub-

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51 Status Report of the San Jose Project by Michael Costin, 21 September 1983 (**Exhibit R-101)**, p. 3.

52 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶¶ 36, 98.

53 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figure** 2, p. 7.

bottom profiler (SBP) and a 3-axis Ocean Floor Geophysics magnetometer – including high-resolution images of the anomalies detected over specific areas ("**WHOI's Survey**").[54]

45. WHOI's verification campaign covered 3 areas: (***i***) the specific area of the coordinates reported by GMC in the 1982 Confidential Report ("**Area 1**"), (***ii***) the area of the newly Corrected 1982 Coordinates ("**Area 2**") and (***iii***) the area where the *Galeón San José* was found by the Colombian government in 2015 ("**Area 3**"):[55]

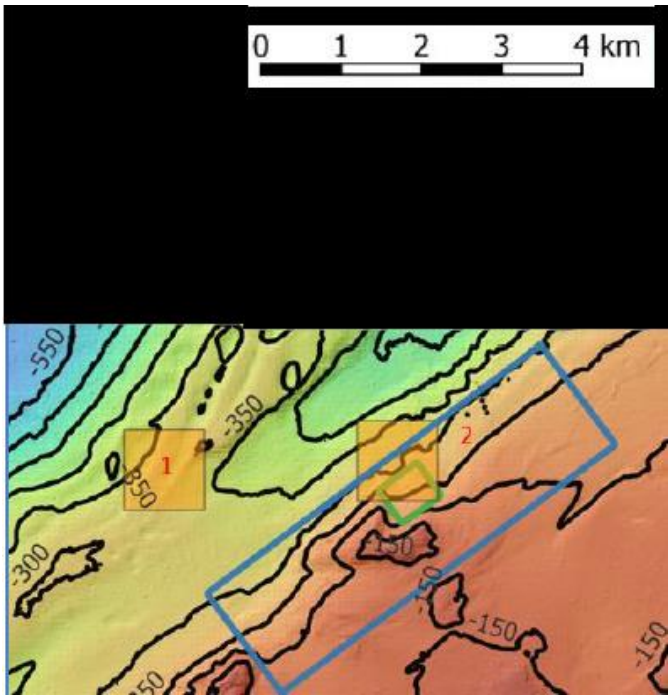

Image 7: Initial defined search areas. Area #1 positioned to the southwest. Area #2 showing the initial survey area (orange), expanded survey area (blue) and area of focus (green). Area #3 shows the area where the *Galeón* was discovered in 2015.

46. The areas ultimately surveyed over Areas 1 and 2 can be seen on the below map:

54 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figure** 2, p. 7.

55 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figure** 2, p. 7.

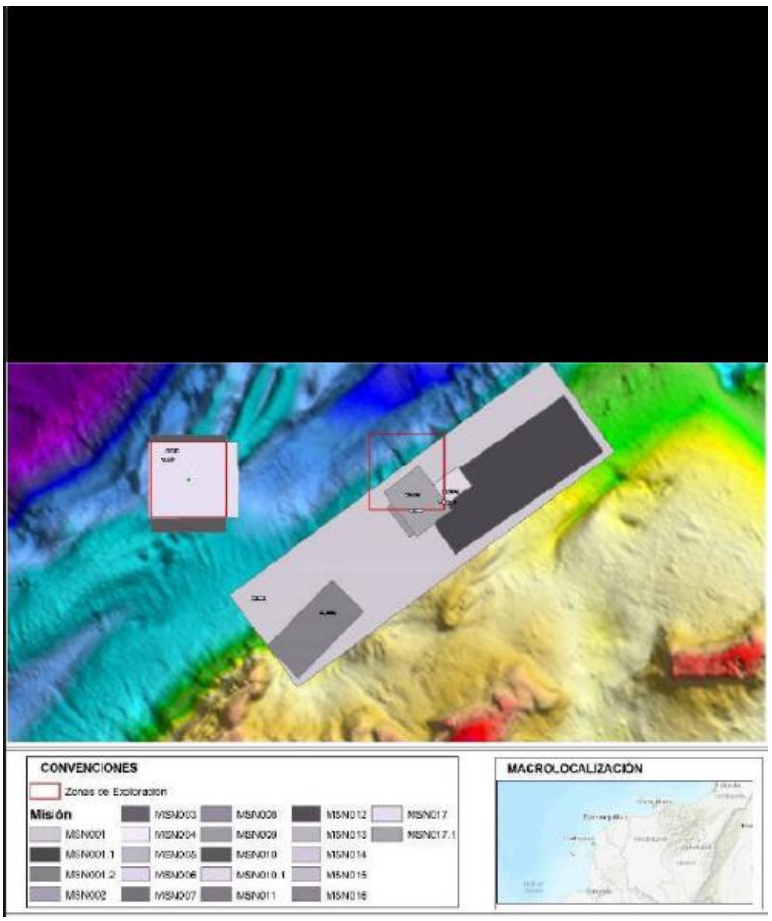

Figure 8. Map with the missions carried in WHOI's Survey over Area y and Area 2.[56]

47. As expected, the data gathered from the area of the 1982 Coordinates confirmed that no elements of interest were found at the location, much less signs of a shipwreck.[57] This was further confirmed by WHOI's Expert Report, which states that the analysis of the sonar data for Area 1 "*presented no identified targets of interest*",[58] as well as by Colombia's witness, hydrographer Mr. Juan Santana.[59]

48. Colombia's expert magnetometer, Dr. Oviedo, explains that the data collected by the side scan sonar used in WHOI's Survey over Area 1 shows no anomalies of human nature, but only natural

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56 Witness Statement of J. Santana (**RWS-3 [Santana]**), Image 4, ¶ 1.29.

57 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.32.

58 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p. 12.

59 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶1.32.

marks related to a rocky structure. The area also lacks geometric structures that could be related to anthropogenic objects. The image of the side scan sonar data from Area 1 is shown below:[60]

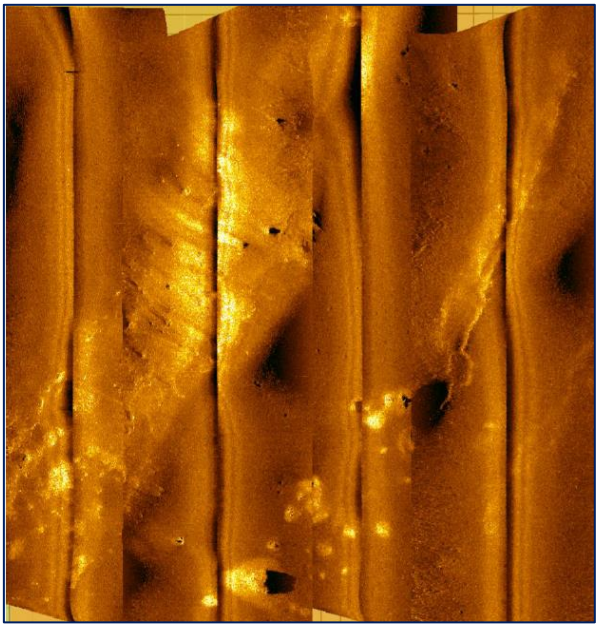

Image 9: WHOI's side scan sonar data "150m 410kHz Sidescan Sonar Data of Area #1. (MSN017-Box5)"[61]

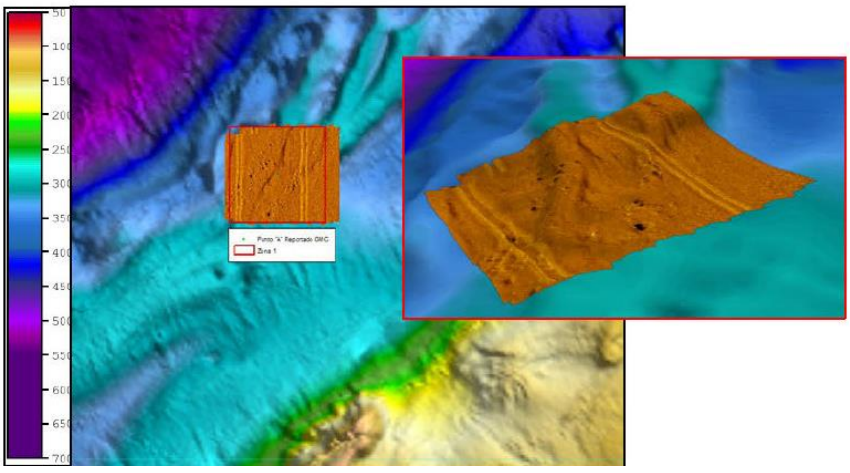

Image 10: Side scan sonar mosaic of Area 1.[62]

60 Expert Report of Dr. Oviedo (**RER-6 [Oviedo]**), ¶ 55.

61 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figure** 6, p. 12.

62 Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 6, ¶1.32.

49. Area 2, which corresponds to the Corrected 1982 Coordinates, is located east of the 1982 Coordinates and has an average depth of 200-240 meters.[63] The extent of Area 2 was defined in accordance with the coordinates logged in the Reports prepared by the DIMAR inspectors on board the Heather Express and the Seaway Eagle for the Oceaneering Expeditions,[64] as well as the characteristics of the area observed in the videos recorded during the Oceaneering expeditions.[65] The survey over Area 2 was conducted in Missions 1, 9, and 17 of WHOI's Survey.[66]

50. The data gathered by the side scan sonar in Area 2 during Mission 1 of WHOI's Survey showed that Area 2 coincided with the site characteristics reported by the DIMAR Inspectors on board the Oceaneering Expeditions.[67] Particularly, the side scan sonar data gathered in Area 2 showed multiple marks on the seabed with uniform linear shapes that would appear to have been caused either by the skis of the Auguste Piccard or by the dragging of the anchors of the Heather Express:[68]

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63 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.33.

64 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), Section V.1.

65 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) (**Exhibit R-99**); Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 2) (**Exhibit R-100**); Video registered on board the Seaway Eagle, (SAN_JOSE_SY2 NO_3_DATE_10_12) (**Exhibit R-104**); Video registered on board the Seaway Eagle (SAN_JOSE_SY2 NO_3_DATE_10_19) (**Exhibit R-105**); *See also* Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.34.

66 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p. 9.

67 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.35.

68 Witness Statement of J. Santana (**RWS-3 [Santana]**), Image 10, ¶ 1.38.

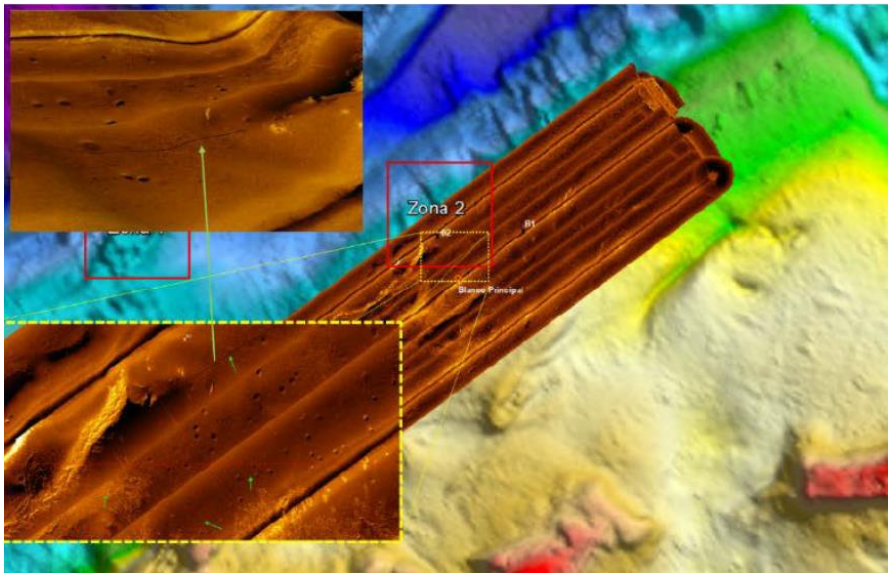

Image 11. Side scan sonar detections over Area 2, showing characteristics similar to the ones logged by the DIMAR Inspector's Report on board the Oceaneering Expeditions.[69]

51. Similarly, and most importantly, the coordinates registered for the "*main target*" by the Inspectors' Report on board the Seaway Eagle for the side-scan sonar registered an acoustic shadow with a similar appearance to the one allegedly recorded by Mr. Costin in December 1981, which may be seen below:

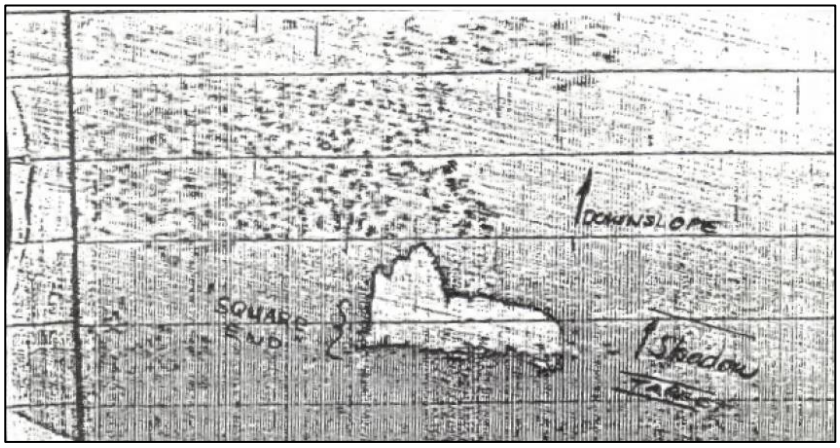

Image 12: Sonar reading of GMC's alleged discovery depicting an acoustic shadow. [70]

69 Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 10, ¶1.38.

70 Auguste Piccard – Data, Measurements and Observations (**Exhibit C-141**), p. 6.

52. The acoustic shadow registered by the side scan sonar during Mission 1 of WHOI's Survey over the same "*main target*" was as follows:

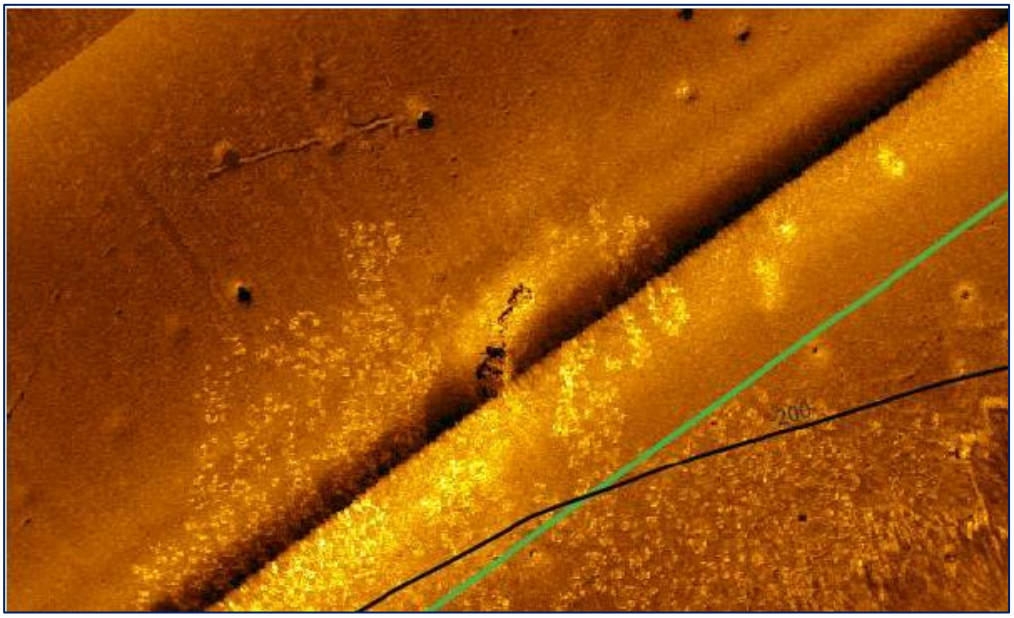

Image 13. Side scan sonar reading gathered on Mission 1 of WHOI's Survey over the "*main target*".[71]

53. As can be seen in the comparison below, the size and shape of the acoustic shadows supposedly obtained by GMC Inc. in 1981 and in Mission 1 of WHOI's Survey coincide:[72]

[71] Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p. 14.

[72] Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.42.

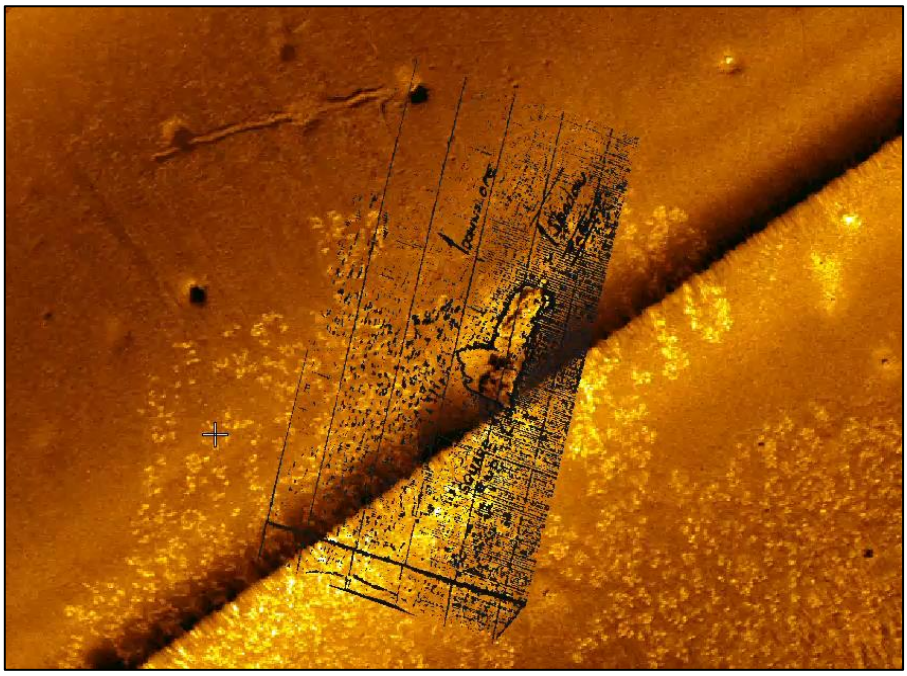

Figure 14: Comparison of sonar readings of 1981 and 2024 over GMC's alleged "Discovery"[73]

54. The animation of the overlap between the 1981 side scan sonar reading and the 2024 reading of GMC's alleged "Discovery" demonstrates with absolute certainty that they correspond to the same site and are enclosed within Mr. Santana's witness statement.[74]

55. Mission 9 was also conducted over Area 2 but included high resolution images.[75] In the high-resolution images taken during Mission 9 over the Corrected 1982 Coordinates, WHOI found the metal basket that had been abandoned by the crew of the Auguste Piccard at the site in 1981, also described by the Surveyor aboard the Seaway Eagle in the Second Oceaneering Expedition 1983 and appeared in the videos recorded by Oceaneering:[76]

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73 Witness Statement of J. Santana (**RWS-3 [Santana]**), Image 13.

74 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.43.

75 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), pp. 9-10, 14.

76 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figures** 9 and 10, p. 15. *See also* Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 14, ¶ 1.44.

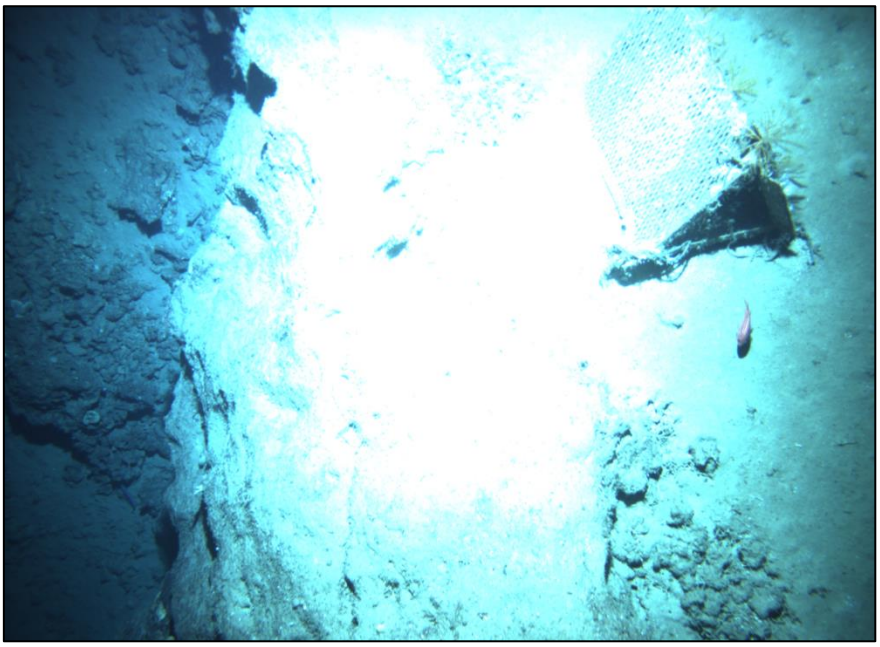

Image 15: Image captured by the AUV REMUS 6000 of the metal basket left by the Auguste Piccard at Target A.[77]

56. The coordinates registered by WHOI for the location of the metallic basket shown above coincide with the coordinates recorded by the DIMAR Inspector on board the Seaway Eagle for the "*main target*" as seen in the below map:[78]

77 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figures** 9 and 10, pp. 15. *See also* Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 14, ¶ 1.44.

78 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), F**igure 9**, p. 15. *See also* Statement of J. Santana (**RWS-3 [Santana]**), **Image** 15, ¶ 1.45.

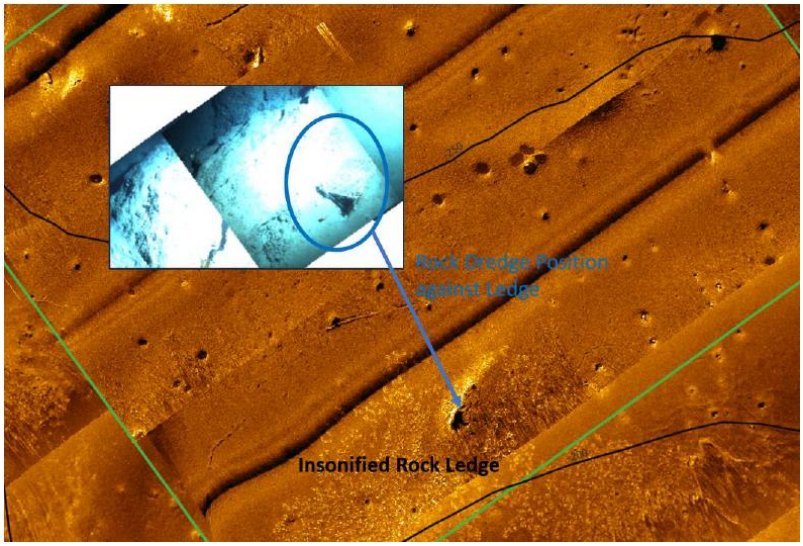

Image 16. Image of metallic basket pictured near "main target" included in WHOI's Survey.[79]

57. For the Tribunal's greater ease, below is a comparison between the basket pictures in the videos recorded by Oceaneering in 1983 and the picture taken by WHOI in Mission 9 of the Survey:

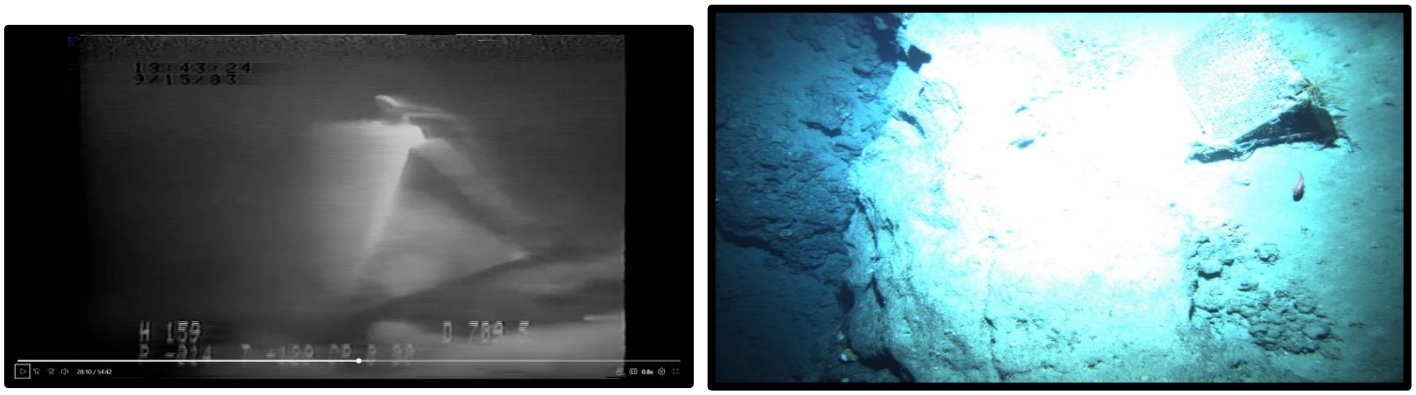

Image 17: Comparison between captures of the basket shown on video taken on board the Heather Express in September 1983[80] and the Image captured by the AUV REMUS 6000 of the metal basket left by the Auguste Piccard at Target A.[81]

79 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figure 9**, p. 15.

80 *See* Video registered on board the Heather Express, (SAN_JOSE_SY2 NO_3_SURVEY_EDIT_PARTE 1) (**Exhibit R-99**), min.28:13.

81 Statement of J. Santana (**RWS-3 [Santana]**), **Image** 16, ¶ 1.46.

58. Moreover, the survey conducted in Area 3, over the site where the DIMAR found the *Galeón San José* in 2015, shows a very different side scan sonar reading than that of Areas 1 and 2.[82] As seen in the image below, the side scan sonar reading of the archaeological site of the *Galeón San José* shows a substantial anomaly – with the presence of several objects with straight, uniform shapes, indicating the presence of a shipwreck:[83]

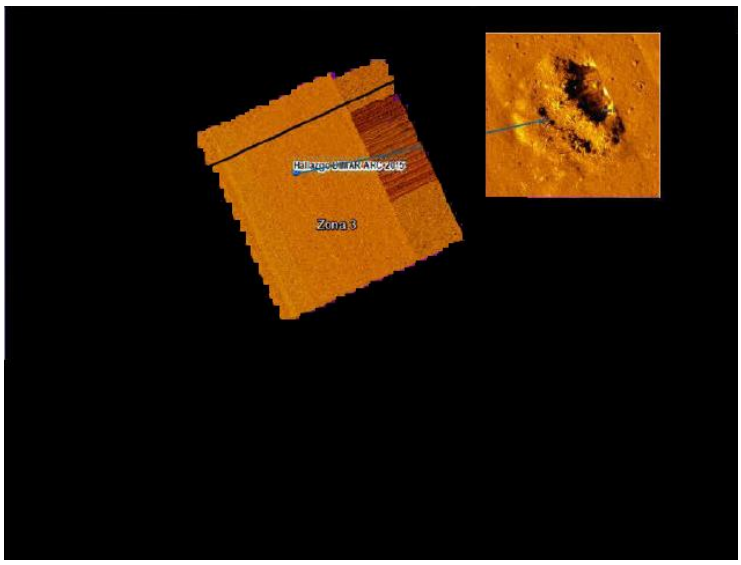

Image 18. Side scan sonar mosaic of the 2015 Discovery Site.[84]

59. Evidently, it is a different area from Areas 1 and 2, as can be easily concluded from the below comparison:

82 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.49.

83 Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 18, ¶ 1.49. *See also* Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 164-199.

84 Witness Statement of J. Santana (**RWS-3 [Santana]**), **Image** 18, ¶ 1.49.

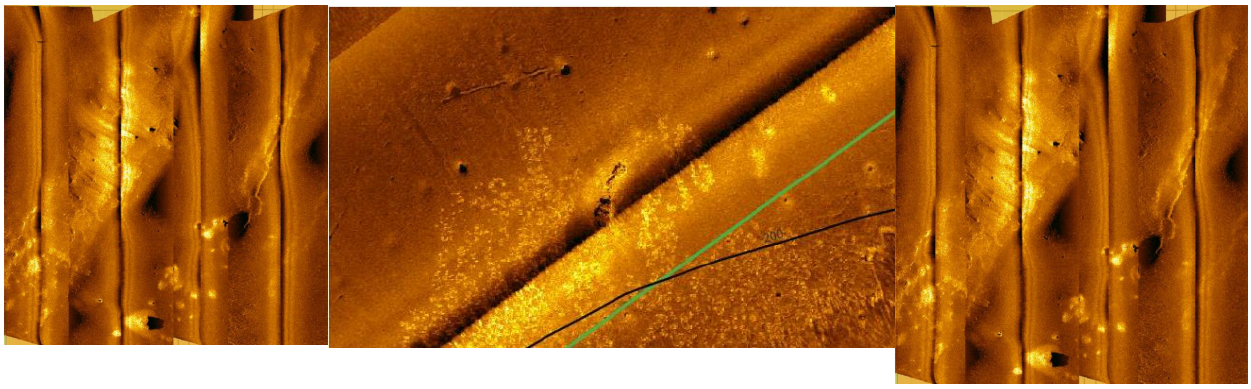

Image 17. comparison of Side scan sonar mosaics for Areas 1, 2 and 3.[85]

60. Considering the existing data, including that obtained by WHOI in the 2024 Survey, it is undisputable that neither SSA, nor any of its Alleged Predecessors, discovered a shipwreck or remains of a shipwreck, and much less the *Galeón San José*.

61. The data for Area 2 shown above conclusively establishes the site where SSA's Alleged Predecessors made the alleged "Discovery". This is simply undeniable. Moreover, WHOI's Survey over Area 2 demonstrates that the site where SSA's Alleged Predecessors always were is not near the 1982 Coordinates and even further away from the archaeological site of the *Galeón San José*.

62. In light of the above, the only logical conclusion to the current dispute is that SSA's Alleged Predecessors did not discover the *Galeón San José*, nor were they remotely close to doing so.

B. THE COLOMBIAN CARIBBEAN IS HOME TO MANY SHIPWRECKS

63. As one of Spain's most important ports during the colonial era, Cartagena served as an obligatory stop for many vessels that were sailing between Europe and the Americas. Notably, it was an obligatory stop for the galleons on the Tierra Firme route, which linked the ports of Cadiz and Seville with the ports of Cartagena, Portobelo, and Havana. According to the historian, Vincente Pajuelo, the galleonsof Tierra Firme – which travelled in fleets of several dozen ships per voyage – completed a total of 64 round trips on this route between the years 1550 and 1647. To put that in perspective, this meant that fleets of several dozen ships were making more than one trip from Spain to the Americas every two years, with a mandatory stop in Cartagena. As a consequence, the sea just off the coast of Cartagena was a very busy shipping lane. In the words of the

[85] Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), **Figures** 6, 8 and 13.

Respondent's expert witness, Professor Kris E. Lane, Colombia's Caribbean coast "*witness*[ed] *high traffic over several centuries*".[86]

64. In its capacity as a critical sea lane for the transatlantic trade, the Colombian Caribbean was no foreigner to periodic warfare. As Professor Lane argues, Colombia's Caribbean coast was not just a site for formal naval showdowns; it was also a site for much piracy and privateering.[87] Considered against this historical backdrop, and taking natural hazards and issues of ship maintenance into account, it is therefore unsurprising to learn that Colombia's Caribbean Sea is home to many shipwrecks. According to the Respondent's expert witness, Professor Carlos del Cairo, there are approximately 73 shipwrecks in and around Cartagena.[88] That this might be true was also underscored by the Supreme Court of Justice of Colombia in its decision dated 5 July 2007. In that decision, the Court accepted UNESCO's calculation that "*about a thousand vessels lie submerged in Colombian waters*".[89]

65. The early 1960s marked the development of underwater archaeology as a sub-discipline of archaeology, driven mainly by the shipwreck excavation works in Turkey of the late Professor George Bass.[90] As the Respondent's expert witness, Professor Luis F. Monteiro de Castro, explains, this led to the development of various techniques and technologies that made possible, and facilitated, the practice of underwater excavations.[91] Some examples include underwater breathing apparatus, single image photogrammetry, side-scan sonars, and submersibles. The growing prevalence of such sophisticated techniques and technologies, in turn, empowered

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86 *See* Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶ 314.

87 *See* Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶ 314.

88 *See* Expert Report of Carlos Del Cairo Hurtado (**RER-1 [Del Cairo]**), fn. 162.

89 Colombian Supreme Court of Justice, Judgment No. 08001-3103-010-1989-09134-001,5 July 2007 (**Exhibit C-28[EN]**), fn. 71 ("*Note that, according to UNESCO, "It is estimated that more than 3 million untraced shipwrecks are scattered on the ocean floor. The Dictionary of Disasters at Sea lists, for example, the wrecks of 12,542 merchant, passenger and warships that occurred between 1824 and 1962". Information folder, UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001, CLT/CH/INS/06/12, p. 3, to which it is added that, according to calculations on the matter, about a thousand vessels lie submerged in Colombian waters, which makes it even more difficult to make any reference to this subject, in the event that it is intended to be made*.") (emphasis added).

90 Expert Report of F. Monteiro (**RER-4 [Monteiro]**), ¶ 40.

91 Expert Report of F. Monteiro (**RER-4 [Monteiro]**), ¶ 40.

treasure hunters to participate in these underwater activities, which contributed to a global surge in interest in the exploration and salvage of shipwrecks.[92]

66. Given the number of shipwrecks that could be found in Colombia's Caribbean Sea, particularly in and around Cartagena, Colombia naturally received applications for its exploration permits. The applicants for these permits included Reynolds Aluminium Europe S.A., Friendship Company, and GMC Inc.[93]

67. The above further underscores the distinction, provided under Colombia's applicable laws, between an *explorer* and a *reporter*, and the crucial requirement under Colombia law for an explorer wishing to be recognized as reporter of a shipwreck – as was the case of GMC – to provide the exact coordinates of the alleged find. Simply put, a reporter cannot claim *reporter* rights over exploration areas – let alone vast exploration areas as the Claimant has done – but solely to findings at exact coordinates.

C. GMC INC. APPLIED FOR AND OBTAINED AN EXPLORATION PERMIT WITHIN THE STRICT PARAMETERS OF THE EXISTING COLOMBIAN LEGAL FRAMEWORK

68. SSA states in the Amended Statement of Claim that "*Resolution No. 0048 makes clear that DIMAR was issuing an exploration permit to GMC Inc. for the purpose of finding the San José*"[94]. Furthermore, SSA claims that "*It is undisputed that at the time it awarded the permit, DIMAR understood that GMC Inc. would be entitled to 50% of its discovery*".[95] These statements are untrue.

69. As Colombia shows in this section, by the time Glocca Morra Company Inc. ("**GMC Inc.**") applied for an exploration permit and DIMAR issued Resolution No. 48, some regulations protected cultural heritage that GMC Inc. should have been aware of, so it is completely false that they would be entitled, with any limitations, to 50% of whatever they discovered (**1**); from the plain reading of Resolution No. 48 it is clear that Resolution No. 48 was not specific to the *Galeón San José* (**2**); the allegation that GMC Inc. was incorporated with the specific purpose of searching for the *Galeón San José* is completely irrelevant for determining the scope of Resolution No. 48 (**3**);

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92 *See* Expert Report of F. Monteiro (**RER-4 [Monteiro]**), pp. 20-24.

93 *See* DIMAR Resolution No. 16 of 1974, 24 January 1974 (**Exhibit R-86**). *See also* DIMAR Resolution No. 128 of 1979, 28 February 1979 (**Exhibit R-88**); DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**).

94 Amended Statement of Claim, ¶ 34.

95 Amended Statement of Claim, ¶ 35.

Resolution No. 48 prescribed specific obligations on GMC Inc. and was circumscribed in scope and time; and SSA's Alleged Predecessors conducted three expeditions, none of which resulted in any definitive finding or formal declaration by GMC that the *Galeón* was found (**4**).

1. GMC Inc. was aware, or should have been aware, of the regulation of submarine exploration and the protection of cultural heritage under Colombian law

70. Respondent will conclusively show in this section that by the time GMC Inc. applied for an underwater exploration permit and DIMAR issued Resolution No. 48, GMC Inc should have been aware of the applicable regime regarding authorizations to explore submarine areas that clearly differentiated the exploration permits from the reporting of a finding (**a**); and that Cultural heritage was widely and robustly protected by Colombian law at the time that GMC Inc. applied for an authorization to begin its expeditions in the Colombian Caribbean (**b**).

a. Regarding authorizations to explore submarine areas

71. In Colombia, submarine exploration was authorized for the first time in 1952 through the issuance of Decree 3183, which organized the Colombian Merchant Fleet.[96] Then, in 1968, Decree 655 was enacted to establish regulations governing the exploitation of shipwrecks in the territorial sea and the nation's submarine continental shelf.[97] Decree 655 was the first legal instrument to introduce the concept of a *"reporter of shipwrecks that could comprise elements of historic, scientific, or commercial value."*[98]

72. By 1979, when GMC Inc. filed its request to DIMAR for an exploration permit,[99] the governing law regulating underwater exploration authorizations was Decree No. 2349. This Decree established DIMAR and defined its functions as a new authority. According to Article 3, those functions included the authority:

> 17. To regulate, control and authorize the marine and coastal exploration and construction. […]

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96 Decree 3183 of 1952, 20 December 1952 (**Exhibit R-73**).

97 Presidential Decree 655 of 1968 (**Exhibit R-58**), Article 1.

98 Presidential Decree 655 of 1968 (**Exhibit R-58**), Article 2.

99 Exploration Permit Request from Glocca Morra Company Inc. to DIMAR, 22 October 1979 (**Exhibit R-2**).

> 21. To regulate and authorize the recovery of shipwrecked species. [100]

73. In turn, Article 4 of Decree No. 2349 allocated, *inter alia*, the following functions to the Director General of DIMAR:

> To issue resolutions to: […]
>
> b) Authorize the activity and operation of foreign ships in Colombian waters and ports. […]
>
> d) Authorize the maritime and ports exploration, investigation, construction and exploitation. [101]

74. Concerning underwater explorations aimed at searching shipwrecks, Article 110 of Decree 2349 established:

> Article 110: The General Directorate of Maritime and Port Affairs is responsible for overseeing and controlling underwater explorations and the exploitation conducted by national or foreign individuals or legal entities to search for treasures and antiquities of any kind found in the territorial sea or on the Nation's continental shelf. [102]

75. In this context, it was expected that by the time GMC Inc. requested from DIMAR the exploration permit on 22 October 1979, GMC Inc. would have been aware of the regulations in force concerning the authorizations to explore the Colombian sea – particularly Decree 2349 – which was the basis upon which the General Director of DIMAR issued Resolution No. 0048 to authorize GMC Inc. to carry out underwater explorations within specific coordinates in the Colombian sea.[103]

76. Importantly, GMC Inc. was also expected to be aware that Decree 2349, in a separate provision – Article 111 – established regulations governing the reporting of discoveries of items of historical, scientific or commercial value. This provision required the reporter to provide the

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100 Decree-Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**), Article 3.

101 Decree-Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**), Article 4.

102 Decree-Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**), Article 110.

103 DIMAR Resolution No. 48 of 1980, 29 January 1980 (**Exhibit C-2**).

General Directorate of Maritime and Port Affairs with "*the geographical coordinates of the location*" of such discoveries.[104]

77. The distinction made in this early regulation between Article 110 and Article 111 clearly delineated two separate categories that the Claimant, over the years, has conveniently confused, in order to distort the rights derived from each of them: the category of an *explorer* within a designated area of the Colombian Caribbean Sea, and the status of a *reporter* of a discovery obligated to report its specific geographical location.

b. Cultural heritage was widely and robustly protected by Colombian law at the time that GMC Inc. applied for an authorization to begin its expeditions in the Colombian Caribbean

78. Since at least the 1930s, Colombia has been strongly and consistently committed towards protecting the different manifestations of culture in movable and immovable property, including by enacting restrictions to private property derived from the protection of cultural or natural interests.

79. As early as 1931, Colombia adopted Law 103 of 1931, declaring the archaeological objects of San Agustin, one of the largest necropolises of indigenous communities in the Americas, a national monument.[105] In a message to the Colombian Congress, the Colombian Government outlined the foundation of its policy for the protection of archaeological heritage, as follows:

> The concern of governments has always been to invigorate the national sentiment of the people. It is well known that peoples without nationality, without a sense of the historical past and a present and deeply rooted spiritual cohesion, disappear de facto as a Nation and are absorbed by foreign civilizations or inadequate to their racial temperament and cultural physiognomy. […]
>
> [This] is why archaeological monuments have been considered one of the most important manifestations of the past of a people and one of the structural bases most recently linked to nationality.[106]

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104 Decree-Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**), Article 111.

105 Law 103 of 1931, 10 October 1931 (**Exhibit R-67**).

106 Structure of the Colombian Academy of History, *"Boletín de historia y antigüedades No. 857* [Bulletin of history and antiquities No. 857]" (2013) (**Exhibit R-192**), p. 150.

80. The recognition that private property may be restricted to protect the public interest in preserving Colombia's cultural heritage of culture as something deserving of protection has its origin in the reform to the Political Constitution of 1886, through Legislative Act 1 of 1936, by which Article 10 of the Colombian Constitution was amended to include a clause stating that *"*[p]*roperty is a social function that implies obligations."*[107] As a result, since 1936, private property is not an absolute right under Colombian law, but may be subject to the general interest.

81. Moreover, at the time, there was a growing interest in protecting cultural heritage at the international level, which was embraced by Colombian national law. This was evidenced, *inter alia*, by the commitments acquired by several Latin American States in 1933 at the Seventh International Conference of American States to adopt the "Treaty for the Protection of Movable Monuments" (the "**1933 Treaty**").[108]

82. Accordingly, in Colombia's specific case, its interest in the protection of all its cultural heritage at the international level is evinced by the fact that it completed the internal proceedings required to adhere to the 1933 Treaty – including the approval of the relevant text by Congress. This interest was clearly stated, for instance, in the motivation of the bill of law submitted to Congress for the approval of the 1933 Treaty; the then Minister of Foreign Relations, Mr. Jorge Soto del Corral, stated:

> This bill is of interest to all areas of the country, since relics from the heroic times of the Republic, pre-Columbian era, and Colonial period are to be found everywhere. Moreover, the Convention also ensures that documents belonging to the national archives are not exported, a crucial clause for the defense of historical studies made on incontrovertible bases, and in which the moral patrimony of the Nation is interested.[109]

83. The Colombian Congress approved the 1933 Treaty by Law 14 of 1936. By incorporating the text into the Colombian legislation, the government demonstrated its commitment to the protection of movable objects of historical value and established the basis for subsequent developments. Namely, Article 1 of the 1933 Treaty expressly included objects from the pre-Columbian and colonial periods among the categories of movable monuments:

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107 Legislative Act No 1 of 1936, 5 August 1936 (**Exhibit R-71**), Article 10.

108 Treaty for the Protection of Movable Monuments, 15 April 1933 (**Exhibit RLA-101**).

109 Discussion of Law 14 of 1936, 22 January 1936 (**Exhibit R-74**).

> For the effects of this Treaty, the following shall be considered movable monuments:
>
> (a) From the pre-Columbian era: weapons of war or labor weapons, works of pottery, textiles, textiles, jewelry and amulets, engravings, designs and codices, quipos, costumes, ornaments of all kinds, and in general any movable object by its origin, or detached from any real estate, which authentically comes from that historical era.
>
> b) From the colonial period: weapons of war and work tools, costumes, medals, coins, amulets and jewelry, designs, paintings, engravings, plans and geographical charts, codices, incunabula and all rare books due to their scarcity, form or content, objects of goldsmithery, porcelain, ivory, tortoiseshell and lace, and in general all memorabilia that have historical or artistic value.
>
> c) From the time of the emancipation and the republic: those mentioned in the above paragraph that fit within it. […].[110]

84. Furthermore, Article 4 of the 1933 Treaty sought to prevent trade and exports of movable assets of historical value, as it provided that those in possession, at the time, of movable assets falling within the purview of Article 1 only had the right of usage over the assets and did not have full property rights. Article 4 also restricted international movements of these assets, providing that these could only be transmitted within State borders.[111] Therefore, not only were private property rights in movable assets listed in Article 1 of the Draft Treaty extremely restricted but also the potential export of such assets was prohibited.

85. Thus, it is clear that in Colombia, at least since 1936, there has been a concrete interest in the protection – at both the domestic and regional levels – of movable property from the colonial period.

86. Colombia further strengthened its legal framework protecting its archaeological and historical heritage by enacting Law 36 of 1936.[112] Pursuant to Law 36 of 1936, Colombia approved an important regional treaty among American States:[113] the Treaty on the Protection of Artistic and

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110 Law 14 of 1936, 22 January 1936 (**Exhibit R-69**), Article 2 of the Draft Treaty.

111 Law 14 of 1936, 22 January 1936 (**Exhibit R-69**), Article 4 of the draft Treaty ("*The countries of origin shall so arrange that an obligatory permit will be necessary for the exportation of any movable monument, which permit shall be granted only in case many other identical specimens or those having a value similar to the one to be exported are still in the country*").

112 Law 36 of 1936, 20 February 1936 (**Exhibit R-70**).

113 The Contracting Parties to the Roerich Pact are Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, the United States of America and Venezuela.

Scientific Institutions and Historic Monuments, also known as "the Roerich Pact",[114] which aimed at protecting archaeological and cultural heritage in times of conflict, as well as in times of peace.[115]Both Colombia and the United States are Contracting Parties to the Roerich Pact.

87. Crucially for this case, on 30 December 1959, Colombia enacted Law 163 of 1959, declaring as historical and artistic national heritage the monuments, pre-Hispanic tombs and *"other objects"*, resulting from natural or human activity that have a special interest for the study of civilizations and past cultures, history, art or for paleontological investigations.[116]

88. Law 163 of 1959 demonstrates the concrete will of Colombia in preventing movable monuments from being kept by private individuals. To this effect, Law 163 of 1959 created the Council for National Monuments, put in place administrative permits for various activities relating to movable monuments and provided strict sanctions for contraventions. During the first debate of the bill in Congress, the speaker stated:

> Undoubtedly, a law regulating the subject matter of the bill is a necessity that cannot be postponed, because mainly due to the lack of such law, many of our historical and artistic monuments of impossible recovery have been destroyed, and if the legal vacuum is not filled, surely all those treasures of the homeland, witnesses of its glories and pride of its good children, will continue to be destroyed.[117]

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114 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments "Roerich Pact", 15 April 1935 (**Exhibit RLA-102**).

115 *See* Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments "Roerich Pact", 15 April 1935 (**Exhibit RLA-102**) ("Preamble: "*The High Contracting Parties, animated by the purpose of giving conventional form to the postulates of the resolution approved on 16 December 1933, by all the States represented at the Seventh International Conference of American States, held at Montevideo, which recommended to "the Governments of America which have not yet done so that they sign the 'Roerich Pact', initiated by the 'Roerich Museum' in the United States, and which has as its object the universal adoption of a flag, already designed and generally known, in order thereby to preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples, 'have resolved to conclude a Treaty with that end in view and to the effect that the treasures of culture be respected and protected in time of war and in peace, have agreed upon the following Articles.*"; Article I: "*The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents. The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.*"; Article 2: "[…] *The respective Governments agree to adopt the measures of internal legislation necessary to insure said protection and respect*." (emphasis added)).

116 Law 163 of 1959, 1971 (**Exhibit R-77**), Article 1.

117 Legislative history of Law No. 163 of 1959, 1971 (**Exhibit R-59**), p. 20.

89. By virtue of Law 163 of 1959, Colombia became the exclusive holder of property rights over movable monuments. In order to determine the assets or objects considered as movable monuments, Article 7 of Law 163 of 1959 made a *renvoi* to the monuments enumerated in the draft Treaty on the Protection of Movable Assets of Historical Value that had been approved by Law 14 of 1936.[118]Moreover, Article 14 of Law 163 of 1959 expressly provided that the historical and archaeological monuments covered by it were excluded from the scope of Article 700 of the Colombian Civil Code:

> ARTICLE 14.- Findings or inventions consisting of historical or archaeological monuments are not considered to be included in Article 700 of the Civil Code, which shall be subject to the provisions of this Law. [119]

90. As confirmed by former Supreme Court Justice, Dr. Arturo Solarte, Law 163 of 1959 barred private individuals from acquiring property rights in movable assets of archaeological and historical value. Accordingly, no property rights could be asserted by private individuals by means of occupation, even if they had discovered the assets, as this would contravene express provisions of the law.

91. Article 14 of Law 163 of 1959 expressly excluded from the legal regime of treasure, the finding of property consisting of historical or archaeological monuments, that is, all those objects that, in general, are of special interest for the study of past civilizations and cultures, as well as of history or art, or for paleontological research. Among these objects are the movable monuments referred to in Law 14 of 1936. This means, then, that a private individual cannot acquire the right of ownership of the aforementioned goods by means of occupation, since the discovery or finding of such things does not confer any ownership over them, as legally they do not constitute treasure.[120]

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118 Law No. 163 of 1959, 30 December 1959 (**Exhibit R-77**), Article 7. *See also* Law 14 of 1936, 30 January 1936 (**Exhibit R-69**), Article 1 of the draft Treaty.

119 Law No. 163 of 1959, 30 December 1959 (**Exhibit R-77**), Article 14 (emphasis added).

120 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶¶ 37-39.

92. Decree No. 264 of 1963 further regulated Law 163 of 1959, reinforcing the protection of movable monuments and providing sanctions in case of violation of Colombia's protected archaeological and historical heritage, in line with international standards.[121]

93. In the international sphere, Colombia became a member of UNESCO in 1947. As a member, Colombia falls under the purview of the Organization's recommendations. While these instruments are not legally binding per se, they are adopted by the General Conference – the supreme governing body of the Organization – and therefore are endowed with recognized authority, as they are intended to influence and advance the development of national laws and practices of member States. Following Colombia's membership, the Organization adopted several recommendations related to the protection of movable cultural property and archaeological heritage, among which three bear particular relevance to the present issue:

(i.) The "Recommendation defining international principles to be applied to archaeological excavation" ("**Recommendation on Archaeological Excavations**"), adopted by the General Conference of the UNESCO at its ninth session, held in New Delhi from 5 November to 5 December 1956.[122]

(ii.) The "Recommendation concerning the Protection at National Level, of the Cultural and Natural Heritage" ("**Recommendation of Cultural and Natural Heritage at National Level**"), adopted by the General Conference of the UNESCO at its 17th session, held in Paris from 17 October to 21 November 1972.[123]

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121 Decree 264 of 1963, 12 February 1963 (**Exhibit R-78**), Article 26 ("*When individuals or private entities violate any of the prohibitions of Law 163 of 1959, or of this Decree, or fail to request the authorisation of the Council of National Monuments when required by the aforementioned Law or this Decree, they shall incur a fine*"). *See also* Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 5(c) ("*Each Member State should in particular:* […] *(c) Impose penalties for the infringement of these regulations;* […]").

122 *See* Recommendation on International Principle Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), p. 40.

123 *See* Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage (UNESCO, 1972) (**Exhibit RLA-108**), p. 146.

(iii.) The "Recommendation for the Protection of Movable Cultural Property" (**"Recommendation for the Protection of Movable Cultural Property"**), adopted by the General Conference of the UNESCO at its 20th session, held in Paris from 24 October to 28 November 1978.[124]

94. The **Recommendation on Archaeological Excavations** defined "*certain common principles which have been tested by experience and put into practice by national archaeological services*,"[125] which are also applicable to underwater excavations.[126] Indeed, the Recommendation expressly applies to any research aimed at the discovery of objects of archaeological character, including research carried out on the bed or in the sub-soil of inland or territorial waters of a Member State.[127] One of the objectives of the Recommendation is to ensure that national authorities responsible for the protection of the archaeological heritage adopt certain tested principles for the management and preservation of their archaeological heritage, including measures to avoid clandestine excavations and damage to the sites.[128]

95. Importantly, the Recommendation on Archaeological Excavations recognizes Members States' widest discretion to determine the public interest of objects found in their territory, providing in that regard:

> Property protected
>
> 2. The provisions of the present Recommendation apply to any remains, whose preservation is in the public interest from the point of view of history or art and architecture, each Member State being free to adopt the most

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124 *See* Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), p. 11.

125 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), p. 41.

126 *See* Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 1 ("*For the purpose of the present Recommendation, by archaeological excavations is meant any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed or in the sub- soil of inland or territorial waters of a Member State.*" (emphasis added)).

127 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 1.

128 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 29 ("*Each Member State should take all necessary measures to prevent clandestine excavations and damage to monuments defined in paragraphs 2 and 3 above, and also to prevent the export of objects thus obtained.*").

> appropriate criterion for assessing the public interest of objects found on its territory. In particular, the provisions of the present Recommendation should apply to any monuments and movable or immovable objects of archaeological interest considered in the widest sense.[129]

96. Other key elements introduced in this Recommendation include the importance given to the *in situ* preservation of monuments, providing that "[p]*rior approval should be obtained from the competent authority for the removal of any monuments, which ought to be preserved in situ.*"[130] Along this line, the Recommendation also encouraged States to *"consider maintaining untouched, partially or totally, a certain number of archaeological sites of different periods in order that their excavation may benefit from improved techniques and more advanced archaeological knowledge."*[131]

97. The **Recommendation concerning the Protection of Cultural Heritage at National Level**, which supplements the World Heritage Convention, highlights the risks to which cultural heritage is exposed in unequivocal terms, stating: "*each item of the cultural and natural heritage is unique and* [the] *disappearance of any one item constitutes a definite loss and an irreversible impoverishment of that heritage*."[132] Like the preceding UNESCO Recommendation, it calls upon Member States to take legal measures to protect cultural heritage "*individually or collectively*",[133] and emphasizes that existing measures should be supplemented "*by new provisions to promote conservation of cultural* […] *heritage and to facilitate the presentation*" of cultural objects. [134]

98. Among the legal measures listed in the General Principles on which the Recommendation is based, the Recommendation recognized that "[w]*here required for the preservation of the*

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129 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 2 (emphasis added).

130 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 8.

131 Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, 1956) (**Exhibit RLA-105**), ¶ 9.

132 Recommendation concerning Protection of Cultural Heritage at National Level (UNESCO, 1972) (**Exhibit RLA-108**), p. 146.

133 Recommendation concerning Protection of Cultural Heritage at National Level (UNESCO, 1972) (**Exhibit RLA-108**), ¶ 40.

134 Recommendation concerning Protection of Cultural Heritage at National Level (UNESCO, 1972) (**Exhibit RLA-108**), ¶ 41.

property", Member States "*might be empowered to expropriate a protected building or natural site subject to the terms and conditions of domestic legislation*."[135]

99. In turn, in the **Recommendation for the Protection of Movable Cultural Property**, the UNESCO includes the products of underwater archaeological exploration in the definition of "Movable Cultural Property":

> (a) "movable cultural property" shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including items in the following categories:
>
> (i) products of archaeological explorations and excavations conducted on land and under water;
>
> (ii) antiquities such as tools, pottery, inscriptions, coins, seals, jewelry, weapons and funerary remains, including mummies; […]
>
> (viii) items relating to history, including the history of science and technology and military and social history, to the life of peoples and of national leaders, thinkers, scientists and artists and to events of national importance; […]
>
> (ix) items of numismatic (medals and coins) and philatelic interest;[136]

100. As in the Recommendation on Archaeological Excavations, Article 2 of the Recommendation on Movable Cultural Property recognizes the widest discretion possible for Member States to define which objects of movable cultural property are worthy of protection:

> Each Member State should adopt whatever criteria it deems most suitable for defining the items of movable cultural property within its territory which should be given the protection envisaged in this Recommendation by reason of their archaeological, historical, artistic, scientific or technical value.[137]

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135 Recommendation concerning Protection of Cultural Heritage at National Level (UNESCO, 1972) (**Exhibit RLA-108**), ¶ 44.

136 Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), p. 12.

137 Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), ¶ 2.

101. The Recommendation on Movable Cultural Property further emphasizes the importance of prevention of damage and loss, and regulation for proper conservation,[138] – calling upon its Member States to adopt legislation to give effect within their respective jurisdiction to the principles and norms of the Recommendation.[139]

102. Furthermore, in 1968, Colombia approved the United Nations International Covenant on Economic, Social and Cultural Rights, whose Article 15(2) provides the duty of Contracting States to adopt steps to achieve the full realization of human rights to culture, including those "*necessary for the conservation, the development and the diffusion of science and culture*."[140] The obligation enshrined in Article 15 of the Covenant has been understood by the Committee on Economic, Social and Cultural Rights to be of a threefold nature: an obligation to respect, an obligation to protect and an obligation to fulfil. The latter of these obligations entails that States must take appropriate legislative, administrative and other measures aimed at the realization of the rights described in Article 15.1 (*i.e.*, the right to take part in cultural life).[141]

103. In parallel with the developments that took place in the 1960s and 70s, the Third United Nations Conference on the Law of Sea was hard at work, from 1972 to 1983, preparing the final draft of the United Nations Convention on the Law of the Seas – finalized and opened for ratification on 10 December 1982 (the "**UNCLOS**").[142]

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138 *See* Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), Preamble, ¶ 9, ¶ 12, and ¶ 15.

139 Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), Preamble ("*The General Conference recommends that Member States apply the following provisions by taking whatever legislative or other steps may be required, in conformity with the constitutional system or practice of each State, to give effect within their respective territories to the principles and norms formulated in this Recommendation*").

140 United Nations International Covenant on Economic, Social and Cultural Rights (1966) (**Exhibit RLA-106**), Article 15(2).

141 Committee on Economic, Social and Cultural Rights, General Comment No. 21 "Right of everyone to take part in cultural life (Art. 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009 (**Exhibit RLA-182**), ¶ 48.

142 *See* United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**).

104. The adoption of UNCLOS introduced major changes to the law of the seas, including provisions on the protection of archaeological and historical objects found underwater in the high seas[143] and contiguous zone (including territorial waters) of the Coastal States.[144]

105. Of particular relevance is Article 303, found in Part XVI (General Provisions) of UNCLOS. Article 303, *first* and foremost, imposes on all States a duty to protect archaeological and historical objects found at sea and *second*, authorises coastal States to regulate archaeological and historical objects found in their contiguous zone. To that effect, it provides:

> Archaeological and historical objects found at sea
>
> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33,[145] presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
>
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[146]

106. While Colombia is not a Contracting State to UNCLOS, it took an active part in the negotiation of the Convention and signed it upon its opening for signature on 10 December 1982 – in light of the importance it ascribed to most of the newly adopted provisions. Of special relevance to the

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143 *See* United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**), Article 149.

144 *See* United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**), Article 303(2).

145 United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**), Article 33 ("*In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured*").

146 United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**), Article 303.

subject matter in question, the International Court of Justice has recognized that, as argued by Colombia in a case before that court, "*Article 303, paragraph 2, of UNCLOS reflects customary international law*".[147] Thus, Colombia is in a position to assert control over the "*archaeological and historical objects found within its contiguous zone*" by virtue of this rule of customary international law.

107. Clearly, while applying for an authorization to explore for shipwrecks in the Colombian Caribbean, GMC Inc. was aware, or should have been aware, that exploration was highly regulated as regards to any potential archaeological or historical heritage; in fact, Colombia had expressly excluded from the scope of what could be considered "treasures" under domestic law all those items considered movable monuments pursuant to Laws 14 of 1936 and 163 of 1959. Moreover, Glocca Morra was aware or should have been aware that States at the global and regional level, including Colombia, had entered into various international obligations, pursuant to which they exercised normative jurisdiction to further strengthen the protection of archaeological, historical and cultural heritage.

2. Contrary to the Claimant's assertions, DIMAR Resolution No. 48 was not specific to the *Galeón San José*

108. In its Amended Statement of Claim, the Claimant alleges that, by issuing Resolution No. 048 of 1980 ("**Resolution No. 48**"), "*DIMAR Authorized SSA's Predecessor To Search For The San José*".[148] Further, the Claimant argues that DIMAR Resolution No. 0354 of 1982 ("**Resolution No. 354**"), which recognized GMC as the *"reporter"* of the coordinates reported in the 1982 Confidential Report, "*incorporated by reference the originating permit* […] *which made clear that DIMAR issued an exploration permit to GMC, Inc. to find the San José*."[149]

109. In yet another distortion of the facts and the law, the Claimant portrays its applications for exploration permits, as well as Resolution No. 48 and Resolution No. 354, as specifically

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147 International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, 21 April 2022 (**Exhibit RLA-214**), ¶¶ 182-186 ("[t]*aking into account State practice and other legal developments in this field, the Court is of the view that Article 303, paragraph 2, of UNCLOS reflects customary international law. It follows that Article 5 (3) of Presidential Decree 1946, in so far as it includes the power of control with respect to archaeological and historical objects found within the contiguous zone, does not violate customary international law.*").

148 Amended Statement of Claim, Section II.B.

149 Amended Statement of Claim, ¶ 85.

authorizing GMC to conduct the search of the *Galeón San José*, suggesting that certain rights regarding the *Galeón* were impliedly granted therein.

110. On 22 October 1979, Mr. Antonio José Gutiérrez Bonilla, on behalf of GMC Inc., requested an authorization *"to carry out marine exploration works in the Colombian Continental Shelf in the waters of the Atlantic Ocean, with the purpose of establishing the existence of shipwrecked species, treasures or any other element of historical, scientific or commercial value […]"* within the areas whose coordinates were specified in the request.[150] The request is worded in general terms, with no specific mention of the *Galeón San José*. In this request, GMC Inc. expressly accepted that it is subject to the demands of the DIMAR, particularly Decree No. 2349 of 1971 ("**Decree No. 2349**").[151]

111. In its subsequent communications with the DIMAR, GMC Inc. continued to generally refer to *"shipwrecks"*, without mentioning the *San José* specifically. In this regard, on 3 December 1979, GMC Inc. made an addendum to its application for an exploration permit – once again, without mentioning the *Galeón San José*.[152]

112. On 29 January 1980, DIMAR issued Resolution No. 48, authorizing GMC Inc. to carry out underwater exploration activities in certain areas.[153] Contrary to the Claimant's allegations, Resolution No. 48 explicitly refers to shipwrecks in general and is not limited to the *San José*. In this regard, Resolution No. 48 states that "*in a preliminary review of the request submitted by* [GMC Inc.]*,* [DIMAR] *required the submission of relevant documentary evidence to clarify the applicant's legal interest, as well as information regarding the technical system to be employed in the investigations aimed at locating the shipwrecked species subject to the exploration request, all of which were satisfied*".[154] Concordantly, in its operative part, Resolution No. 48 "*AUTHORIZES GLOCCA MORRA COMPANY INC. to carry out underwater exploration activities in*

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150 Antonio José Gutiérrez Bonilla (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 22 October 1979 (**Exhibit R-2**), p. 1.

151 Antonio José Gutiérrez Bonilla (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 22 October 1979 (**Exhibit R-2**), p. 1 (stating "*we will submit to the demands of this Directorate, especially to those set forth in Decree No. 2349 of 1971*.")

152 Antonio José Gutiérrez Bonilla (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 22 October 1979 (**Exhibit R-2**). *See also* Letter from Luis Linero (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 19 December 1979 (**Exhibit R-90**) (referring only to the proposed vessels to carry out the "*exploration*" in the Colombian waters without any mention of the *Galeón San José*).

153 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**).

154 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), p. 3 (emphasis added).

the following specific areas detailed below […]"– [155] again, with no specific reference to the *San José.*

113. However, despite the clear language of Resolution No. 48, the Claimant insists on the DIMAR's reference to the *Galeón San José* in the Whereas of Resolution No. 48, attempting to bolster its claim that "*Resolution No. 48 makes clear that DIMAR was issuing an exploration permit to GMC Inc. for the purpose of finding the San José.*"[156] Claimant's contention is to no avail.

114. Indeed, the only reference that Resolution No. 48 makes to the *San José* is as follows:

> By resolution No. 173 of 1971, [DIMAR] recognized the company REYNOLDS ALUMINIUM EUROPE S.A. as reporter of the shipwrecked species called Capitana *San José*, located at the approximate location [coordinates][157]

115. The reason why the DIMAR had to contemplate Reynolds-Friendship and its alleged finding in Resolution No. 48 is straightforward: there was an overlap between the exploration area granted to Reynolds-Friendship and the area requested by GMC Inc. Under the applicable regime, in such situations, the State had an obligation to ensure certain priorities in favor of the holder of the first permit.

116. It is important to underscore that the regime applicable to Reynolds Aluminium's application for an exploration permit to search for the *San José* and to Friendship's subsequent negotiations to enter into a salvage contract with the DIMAR was provided under Decree No. 655 of 1968 ("**Decree No. 655**") and Resolution No. 182 of 1968 ("**Resolution No. 182**"). This regime followed the rationale of the laws on salvage – according to which if a shipwreck was indeed salvaged in the location reported by the reporter, then the reporter had a right to a remuneration for the mere fact of having reported the shipwreck. The contractors that effected the salvage would also have a right to remuneration.[158]

117. Moreover, under the regime applicable to Reynolds Aluminium, there could be several reporters of shipwrecks with overlapping areas, in which case the first reporter would have priority to enter

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155 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 1 (emphasis added).

156 Amended Statement of Claim, ¶ 34 (emphasis added).

157 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), p. 2.

158 Decree No. 655, 1968 (**Exhibit R-58**). *See also* DIMAR Resolution No. 182, 15 July 1968 (**Exhibit-79**).

a contract with the State to salvage a given shipwreck.[159] However, the reporter did not have to be the company conducting the salvage.

118. Clearly, the only reference to the *San José* in Resolution No. 48 related to an alleged finding not by the Claimant's Alleged Predecessor, but by a third company called Reynolds Aluminium Europe; the intention was to protect Reynolds' rights, not the Claimant's Alleged Predecessors'. If Reynolds had reported a different shipwreck, not the *San José*, this sole reference to the *Galeón* would have been substituted with whatever shipwreck Reynolds had reported.

119. Quite the opposite to what the Claimant argues, the DIMAR's treatment of Reynolds-Friendship belies the Claimant's contention. In stark contrast to Resolution No. 48, the resolutions issued by the DIMAR with regards to Reynolds Aluminium and Friendship were specific to the *Galeón San José*. In this regard, on 16 June 1971, DIMAR issued Resolution No. 173 of 1971 ("**Resolution No. 173**") by which it recognized Reynolds Aluminium as a reporter of the shipwreck of the "*Capitana San José*".[160]

120. Subsequently, Reynolds Aluminium assigned its rights to continue negotiations with the DIMAR to Friendship, reserving its rights as a reporter if the *Galeón San José* was found.[161] Thereafter, Friendship was granted a five-year exploration permit by DIMAR.[162]

121. On 21 December 1978, Friendship requested an extension of the exploration permit originally granted to Reynolds for an additional 3 years, on the basis that this was required in order to enter into a contract for the exploitation and salvage of the shipwrecks that it alleged to have found.[163] DIMAR denied Friendship's request for an extension, stating that the exploration permit did not need to be in force for Friendship to enter into a salvage contract with the State, thus confirming the separate nature of the exploration and salvage regimes under Colombian law, as further explained below.[164]

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159 *See* DIMAR Resolution No. 182, 15 July 1968 (**Exhibit-79**), Article 4 ("*When the areas of possible error of two or more reports overlap, and within them a shipwreck or shipwrecked species is located, the first reporter, based on the chronological date, shall have preferential rights for the exploitation contract.*").

160 DIMAR Resolution No. 173, 16 July 1971 (**Exhibit R-81**).

161 DIMAR Resolution No. 16, 24 January 1974 (**Exhibit-86**).

162 DIMAR Resolution No. 16, 24 January 1974 (**Exhibit-86**).

163 DIMAR Resolution No. 128, 28 February 1979 (**Exhibit-88**).

164 DIMAR Resolution No. 128, 28 February 1979 (**Exhibit-88**).

122. Therefore, by including the *Galeón San José* in Resolution No. 48, the DIMAR was merely publicising the existence of a report on the *Galeón* in an area that overlapped with the area of exploration requested by GMC Inc. Clearly, by no possible legal gymnastics could that mean that DIMAR was providing GMC Inc. with a specific authorization to search for the *Galeón*.

3. Equally irrelevant is the Claimant's allegation that GMC was incorporated with the specific purpose of searching for the *Galeón San José*

123. As with its baseless claim that Resolution No. 48 specifically authorized GMC Inc. to search for the *Galeón San José*, the Claimant places much emphasis on the alleged incorporation of GMC Inc., claiming that it was "*Formed to Search For the San José*".[165] Yet again, the Claimant's allegation does not advance its case.

124. ***First***, whether the GMC founders intended to incorporate it solely to search for the *San José* or to look for a variety of shipwrecks is irrelevant to the resolution of this case.

125. ***Second***, in any event, the Claimant's allegations are also not supported by the evidence they adduce. Indeed, GMC Inc's Certificate of Incorporation, dated 7 August 1979, provides as follows:

> I, THE UNDERSIGNED, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the General Corporation Law of the State of Delaware, do hereby certify as follow: […]
>
> **THIRD:** The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of Delaware.
>
> Without limiting in any manner the scope and generality of the foregoing, it is hereby provided that the corporation shall have the following purposes, objects and powers:
>
> To engage generally in the business of salvaging and rescue of vessels, crafts, cargoes, and property of any and all kinds and description whatever, in any part of the world, either directly or through other persons, firms, or corporations […][166]

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165 Amended Statement of Claim, Section II.A.(c).

166 GMC Inc., "*Certificate of Incorporation of Glocca Morra Company, INC"*, August 1979 (**Exhibit C-134**). (emphasis added).

126. Clearly, GMC Inc.'s articles of incorporation simply do not provide that the specific purpose of GMC Inc. was to look for the *Galeón*.

127. Similarly, that the Claimant commissioned historians "*to conduct further research to determine the location of the San José and its lost treasure*[167] does not advance the contention that GMC Inc. was specifically incorporated to search for the *Galeón San José*.

128. Moreover, the correspondence among the members of the historians allegedly commissioned by the Claimant is also wholly irrelevant. It also begs noting that the letter from Dr. Lyon of 21 September 1981, on which the Claimant relies upon, postdates the incorporation of GMC Inc. and cannot provide any insight as to the motives for which GMC Inc. was incorporated.[168]

129. This is also the case of the letter from Mr. Haskins to Mr. Spicka of 21 September 1981, which not only postdates the incorporation of GMC Inc. but also states, interestingly, that "*I think we should secure the Islands area (including Tesoro) for there are a number of earlier and interesting wrecks located here*".[169] Contrary to the Claimant's allegations, this confirms that the *Galeón San José* was not the only shipwreck of interest in the area.

130. ***Third***, GMC Inc.'s original application for an exploration permit further demonstrates that contrary to it *ex post* allegations, its sole intention was not to search for the *San José*. To recall, in its application to DIMAR, GMC Inc. requested four different areas comprised within specific coordinates.[170] As stated in Resolution No. 48, DIMAR granted the requested authorizations for three areas.[171] However, DIMAR denied GMC Inc.'s request to explore in the area comprised between keys Roncador, Serrana, Serranilla and Rosalinda.[172]

131. The fact that GMC Inc. requested permission to explore the area mentioned above is particularly significant. The area, which has been the subject of a border dispute with Nicaragua, is far from

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167 Amended Statement of Claim, ¶ 29. *See*, Letter from Jack Hanskins to James Maloney (Glocca Morra Company Inc.)., 13 October 1981 (**Exhibit C-139**). *See also,* Letter from Eugene Lyon, 21 September 1981 (**Exhibit C-7**). *See also,* Letter from Jack Haskins to James A. Spicka, 19 March 1981 (**Exhibit C-137**).

168 Letter from Eugene Lyon, 21 September 1981 (**Exhibit C-7**), p. 1.

169 Letter from Jack Haskins to James A. Spicka (Glocca Morra Company Inc.)., 19 March 1981 (**Exhibit C-137**), p. 2.

170 Antonio José Gutiérrez Bonilla (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 22 October 1979 (**Exhibit R-2**).

171 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 1.

172 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 2.

Cartagena and the area of the battle in which the *Galeón San José* sank. Evidently, either GMC Inc. was extremely mistaken about the possible location of the *Galeón* – despite the alleged studies it had supposedly conducted and commissioned – or it had a keen interest in exploring for other potential shipwrecks.[173]

132. In any event, whatever the thinking and subjective beliefs of the partners of GMC Inc. were at the time of incorporation, the truth remains that Resolution No. 48 is general in nature and did not grant any rights nor expectations over the *San José*.

4. Resolution No. 48 prescribed specific obligations on GMC Inc. and was circumscribed in scope and time

133. As already demonstrated, Resolution No. 48 was general in nature and authorized GMC Inc. to search for shipwrecks in general, not specifically for the *San José*, as it had done vis-à-vis Reynolds Aluminium.[174]

134. Moreover, Resolution No. 48 also imposed express obligations on GMC Inc., as the Claimant fully acknowledges.[175] These included, for instance, the duty *"*[s]*trictly to comply with the provisions* […] *set forth in Extraordinary Decree No. 2349 of 1971"*[176] and *"*[i]*mmediately to give notice*" to the DIMAR and to the *Instituto Colombiano de Bienestar Familiar* ("**ICBF**") of any shipwrecks found and their identification – in order to safeguard the existing rights of legitimately recognized reporters – by indicating the geographic coordinates of each shipwreck.[177] As in the entirety of Resolution No. 48, these obligations are written using general language, not limited to the *San José*.

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173 Antonio José Gutiérrez Bonilla (GMC Inc.). to Rear Admiral Maritime and Port Director (DIMAR), 22 October 1979 (**Exhibit R-2**).

174 DIMAR Resolution No. 16, 24 January 1974 (**Exhibit R-86**). Articles 1-4.

175 Amended Statement of Claim, ¶ 36.

176 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 3.A ("*The Company Glocca Morra Company Inc., is obligated to (a) strictly comply with the provisions established in Extraordinary Decree No. 2349 of 1971 and other related regulations*").

177 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 3.B ("*The Company Glocca Morra Company inc., is obligated to* […] *(b) notify immediately to the Dirección General Marítima y Portuaria and the Instituto Colombia de Bienestar Familiar of the shipwrecked species found and their identification, in order to safeguard the rights held by legitimately recognized reporters, indicating the geographical coordinates of each one*").

135. Finally, the authorization provided to GMC Inc. by Resolution No. 48 was specifically circumscribed to a precisely defined area of 22-by-15 nautical miles and was granted for a two-year term.[178]

5. SSA's Alleged Predecessors conducted three expeditions, none of which resulted in any definitive finding or formal declaration by GMC that the *Galeón* was found

136. In its Amended Statement of Claim, the Claimant recounts the expeditions it undertook in the search of the *Galeón San José* and goes to great lengths to describe in detail the vessels and equipment utilized to this end, underscoring the alleged findings made during each of the phases of exploration. Yet, what is evident – despite SSA's Alleged Predecessors' and the Claimant's efforts to present the expeditions as auspicious – is that GMC Inc. did not find anything relevant during Phases I (**a**) and II (**b**) and, whatever it found on Phase III, was certainly not the *San José*, as the Respondent further demonstrates (**c**).

a. Phase I of GMC Inc.'s expeditions was entirely unfruitful

137. According to the Claimant,[179] Phase I, conducted on board the Morning Watch, took place between June and September 1980.[180] Pursuant to Resolution No. 415 of 1980 (**"Resolution No. 415"**), DIMAR authorized GMC Inc. to operate the vessel Morning Watch, "*to conduct* "*submarine exploration with the object of finding shipwrecks at the coordinates described in article 1 of resolution No. 0048 of 29 January of this year, for a term of six (6) months* […]."[181] As is evident, Resolution No. 415, once again, expressly reinstated GMC Inc.'s obligation fully to comply with the provisions of Decree No. 2342 of 1971 and related norms.[182] It also bears noting, yet again, that, like Resolution No. 48 before it, Resolution No. 415 refers to shipwrecks

178 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**), Article 5.

179 Amended Statement of Claim, ¶¶ 38- 44.

180 Amended Statement of Claim, ¶ 40.

181 DIMAR Resolution No. 415 of 1980, 29 May 1980 (**Exhibit R-91**), Article 1.

182 DIMAR Resolution No. 415 of 1980, 29 May 1980 (**Exhibit R-91**), Article 2 ("*the company GLOCCA MORRA COMPANY INC., is obligated to comply as follows: 1.- To strictly comply with the provisionsset forth by Decree 2349 of 1971 and related regulations*").

("*especies náufragas*") in general and not to the *Galeón San José,*[183] as the Claimant would like this Tribunal to believe.

138. Per GMC's own words, as stated in the 1982 Confidential Report:

> Phase One of the operation, extending from June 1980 to September 1980, was essentially one wide area search/recon with the intention of locating and mapping potential anomalous objectives through Later Sonar Radar inside the area allowed by the license. Independent scientist studied all sonar and navigation information retrieved from this reconnaissance. Through this study and analysis of information, several hundred sonar targets were listed and described. The geology of the objects in the area was studied, especially so that areas with "hard bottoms" (reef or outcrops) could be identified. The hard bottom areas that could be positively identified as such, with information from sonar, were removed from the target list or at least given a lower priority[184]

139. SSA's Alleged Predecessors further reported that:

> This list [of sonar targets] was classified and organized such that approximately fifty (50) main objects were scheduled for future research in Phase Two of the search operation.[185]

140. It is interesting to note that, according to the Confidential Report, SSA's Alleged Predecessors conducted "[s]*urface and underwater surveys* […] *over* ***a wide area*** *off the Caribbean coast of Colombia during a reconnaissance project that lasted more than two years*" in the *"area permitted by the authorization"*.[186] The exploration area amounts to 10.6 times the city of Paris or 159,520 times the size of a football field – an extremely broad area for a company that was allegedly looking specifically for the *San José*. The following image illustrates with a yellow rectangle the area authorized in Article 1 of Resolution No. 48:

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183 DIMAR Resolution No. 415 of 1980, 29 May 1980 (**Exhibit R-91**).

184 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982 (**Exhibit C-10**), pp 1, 2. *See also* Amended Statement of Claim, ¶¶ 40-44.

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

186 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982, p. 12-13 (**Exhibit C-10**). ("*Phase One of the operation, extending from June 1980 to September 1980, was essentially one wide area search/recon with the intention of locating and mapping potential anomalous objectives through Lateral Sonar Radar inside the area allowed by the licence*").

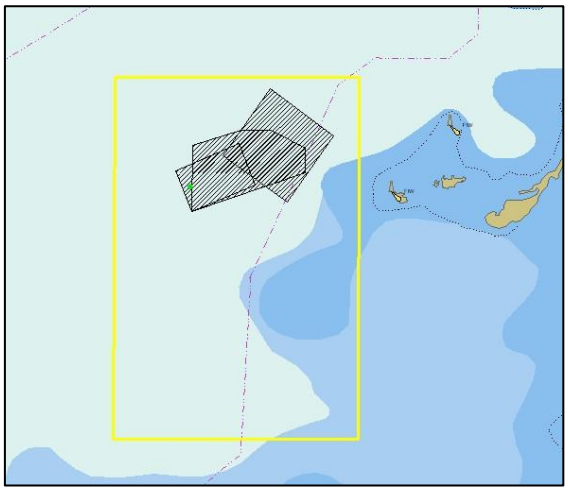

Image 19 - Map prepared by DIMAR showing the immediate vicinity number one, Article 1 Resolution No. 48[187]

141. To recall, in this search area there are – at the very least – three more shipwrecks, as Mr. Del Cairo demonstrates.[188] Therefore, the likelihood that more archaeological sites may be expected to be discovered is high. As both Dr. Lane[189] and Mr. Del Cairo[190] state, historical evidence suggests that many more ships might have gone down in the area.

142. Assuming, for the sake of argument, that GMC's alleged findings of anomalies were true and that they were indeed reviewed by independent experts – which information is not consigned in the 1982 Confidential Report – "*several hundred sonar targets*", which were then narrowed down to 50 anomalies, is a considerable number of targets for one shipwreck.[191]

143. In its Amended Statement of Claim, the Claimant relies on Mr. Morris' expert report to state that:

> The side scan sonar is a device that uses transmitted acoustic pulses, aimed underneath and to the side of a survey vessel to generate high resolution acoustic imagery of the seafloor[…] Since most of the seafloor is relatively

187 DIMAR, "*Map immediate vicinity of Num. 1, Art. 1 of Resolution No. 48*" (**Exhibit R-63**).

188 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 139-142.

189 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶ 314.

190 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 136-142. As Mr. del Cairo notes, some estimations made by academics suggest the existence of potential shipwrecks in the area ranging from 11 to 81 and up to 127.

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

> benign, consisting primarily of sand and mud, any objects lying on the seafloor can be easily distinguished from the seafloor because they lie on top of it and protrude upwards into the water column casting shadows when imaged from shallow angles. In addition, different materials reflect different amounts of acoustic energy. Shipwrecks and other manmade objects tend to show a difference in acoustic reflectivity because they are made of different materials than the surrounding seafloor.[192]

144. Be as it may, it is undisputed that during Phase I and after 3 months exploration, GMC Inc. had not found the *San José.*

145. Pursuant to Resolution No. 764 of 15 October 1980 ("**Resolution No. 764**"), DIMAR authorized GMC, to whom GMC Inc. had assigned the rights granted under Resolution No. 48,[193] to operate the vessel State Progress in Colombian waters of the Atlantic Ocean, "*conducting submarine exploration work to locate shipwrecks at the coordinates described in Article 1 of Resolution No. 48 of 29 January of this year, for six (6) months*".[194] Resolution No. 764, again, reiterates GMC's obligation to comply with Decree 2342 of 1971 and related norms and, again, uses general language not limited to the *San José*.[195]

146. Additionally, GMC Inc. requested DIMAR to extend the area of exploration and to modify the coordinates of Area 3 provided under Resolution No. 48.[196]

147. By Resolution No. 066 of 4 February 1981 (**"Resolution No. 66"**), DIMAR authorized the extension of the area granted by Resolution No. 48 for purposes of "*conducting operations of submarine exploration tending to establish the existence of shipwrecks*"[197] – as requested – but denied the request for authorization to include further areas, as it corresponded to an area which exploration had been granted to Expedition Unlimited Inc.[198] Resolution No. 66 had a validity

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192 Amended Statement of Claim, ¶ 41. *See also,* Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 18.

193 Letter from Luis Linero (GMC Inc.,). to Rear Admiral Maritime and Port Director (DIMAR) (**Exhibit R-3**). *See also,* DIMAR Resolution No. 753, 13 October 1980 (**Exhibit C-5**.

194 DIMAR Resolution No. 764, 15 October 1980 (**Exhibit R-92**), Article 1.

195 DIMAR Resolution No. 764, 15 October 1980 (**Exhibit R-92**), Article 2.1.

196 DIMAR Resolution No. 66, 1 February 1981 (**Exhibit C-6**), p. 1-2.

197 DIMAR Resolution No. 66, 1 February 1981 (**Exhibit C-6**), Article 1.

198 DIMAR Resolution No. 66, 1 February 1981 (**Exhibit C-6**), Article 2 ("*DENY the third area requested, since it corresponds to the area assigned to the company "EXPEDITIONS UNLIMITED INC*.").

until 29 January 1982, and made it clear that GMC had to comply with all the terms of Resolution No. 48.[199]

b. During Phase II, GMC Inc. collected no conclusive evidence of a shipwreck, and contaminated the site by leaving a metallic basket that could have distorted the readings of the magnetometer

148. Following Resolution No. 764, GMC commenced Phase II of its searches,[200] which took place between October 1980 to August 1981.[201] In the 1982 Confidential Report, GMC described Phase II as follows:

> During Phase Two, the sonar search area was essentially extended west and south of the original area. Several new targets of interest were identified during this search. Some of this information was examined during the field operations of Phase Two, while others were not analysed until Phase Three Operations.
>
> During Phase Two, the TREC was lowered to the ocean floor about twenty-five (25) times. TREC Is equipped with a television camera, a photo camera, a CTFM sonar (for continuous scan) and a small sound manipulator and basket underneath (basket arrangement) for the recovery of small objects. In addition, there are engines that allow surface operators to carry TREC to the ocean floor.[202]

149. As Mr. Morris explains in his expert report, the metal basket intended to be used for the recovery of small objects was then left throughout Phase II of GMC's expeditions.[203] Years later, the same basket was observed in the Expeditions conducted by Oceaneering between August and October 1983.[204] As WHOI has confirmed in the Survey conducted in 2024, the metal basket may still be found at the site investigated by the Auguste Piccard.[205] Crucially, as Dr. Oviedo explains, this

199 DIMAR Resolution No. 66, 1 February 1981 (**Exhibit C-6**), Articles 3, 5.

200 Amended Statement of Claim, ¶¶ 45-54.

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

202 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982, (**Exhibit C-10**), pp. 2-3 (emphasis added).

203 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 46.

204 Expert Report of J. Morris (**CER-1 [Morris]**), Figure 9.

205 *See* Expert Report of Woods Hole Oceanographic Institution (WHOI). (**RER-9 [WHOI]**), p. 15.

metal basket left at the site by the crew of the Auguste Piccard with no apparent explanation could have caused the "anomaly" registered by the magnetometer.[206]

150. The 1982 Confidential Report continues to state as follows:

> For several submersions of TREC, areas that contained manmade objects or otherwise generated on the surface were found. In the examination of the information from the navigation it was determined that there were three to six areas that contained Wood or other objects that appeared (on TV) to be foreign to the natural material structure of the ocean floor. These local areas were spread over a larger area of approximately one (1) square nautical mile. TREC Navigation is only approximate since it is operated by remote control attached by an umbilical cord approximately 5,000 feet long. The targets could have been in an area of approximately two (2) miles. Wood samples were recovered in various locations near these targets. Since the scope and recovery capabilities of the TREC objects are somewhat limited, Phase Two of the operation was completed with additional search sonar and operational plans and requirements for Phase Three of the project search.[207]

151. That is, according to the 1982 Confidential Report, no relevant findings were made during Phase II of GMC's operations, except for the unidentified wood samples that were collected for further study. According to Mr. Doty, one of the Claimant's witnesses who states that he participated in Phase II of the searches, the expedition had several difficulties, including an incident affecting the side scan sonar –[208] a crucial piece of equipment for underwater exploration, which allows for the observation of anomalies on the seabed by sending and receiving acoustic pulses.

152. In his witness statement, Mr. Doty describes having found *"piles of wooden planks"*, and further states that "[w]*e even discovered a cannon in the vicinity of those piles of wooden planks"*[209] and could see the *"proximal end of the cannon was shown with the body partially buried in sand and was at a depth of approximately 715 feet."*[210] According to Mr. Doty, this finding *"generated a lot of excitement with the survey team."*[211]

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206 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), 45(b), Section III(3)(g).

207 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982, p. 12-13 (**Exhibit C-10**), p. 4 (emphasis added).

208 Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 25.

209 Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 26.

210 Amended Statement of Claim, ¶ 51. *See also,* Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 26.

211 Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 26.

153. The recount merits several comments. ***First***, no cannon was mentioned by GMC in the 1982 Confidential Report, despite the alleged excitement caused by the "*video*" of the cannon; ***second,*** according to Mr. Doty's own account, the video of the purported cannon was "*distant, fuzzy and bouncing due to the rough seas*"; [212] and ***third,*** the Claimant has not provided the corresponding video for the alleged episode of the discovery of the cannon.[213] ***Finally***, and crucially, the alleged cannon was at a depth of "*approximately 715 feet*", which is approximately 218 meters deep.[214] Since Colombia has shown that the *Galeón San José* is in an area "*ranged from 500-650 meters of water depth*",[215] what Mr. Doty saw during Phase II was clearly not the *Galeón San José*.

154. As explained above, this was further confirmed by the WHOI Survey commissioned by the Respondent in 2024, which showed beyond any doubt that no shipwreck may be found at the coordinates reported by GMC Inc.,[216] nor at the site surveyed by the Auguste Piccard submarine in 1982. In fact, according to WHOI, the only elements to be found at the site surveyed by the Auguste Piccard are a *"rock formation as well as an anomalous dredge basket*"[217] – the basket that was deposited by the crew of the Auguste Piccard on the site and that according to Dr. Oviedo could have plausibly generated the reading in the magnetometer:

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212 Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 26.

213 The episode of the Discovery of the purported cannon does not appear in Exhibit C- 104.

214 Witness Statement of R. Doty (**CWS-1 [Doty]**), ¶ 26.

215 Expert Report of Woods Hole Oceanographic Institution (WHOI). (**RER-9 [WHOI]**),p. 8.

216 *See* Expert Report of Woods Hole Oceanographic Institution (WHOI). (**RER-9 [WHOI]**), p. 12 ("*Analysis of the sonar data presented no identified targets of interests*.").

217 *See also* Expert Report of Woods Hole Oceanographic Institution (WHOI). (**RER-9 [WHOI]**), p. 15. ("*Analysis of the sonar data presented no identified targets of interests*.").

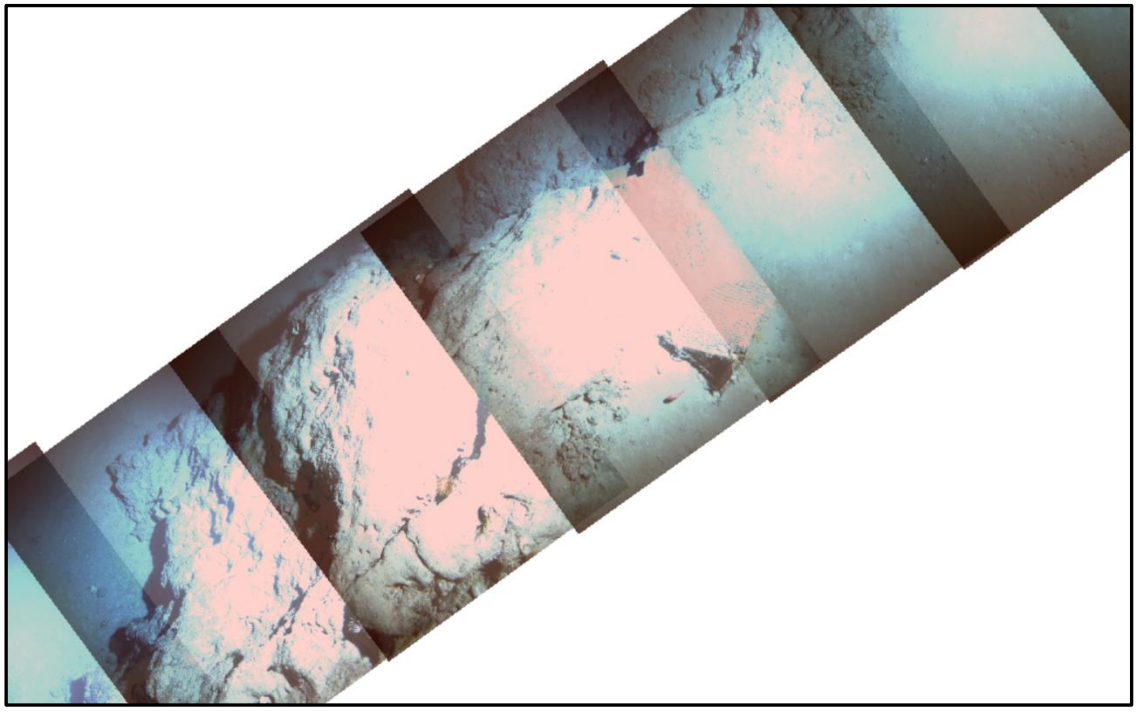

Image 20: Sequential raw images showing rock formation as well as anomalous dredge basket.[218]

155. The Claimant avers that, following Phase II, SSA "*reached out to prospective experts to begin planning the salvage of the shipwreck that the company knew it was close to confirming*".[219] The Claimant cites in support a letter addressed to Mr. Warren Sterns – who, according to Captain Swann's witness statement in this arbitration was one of "*SSA's Predecessor's executives*"[220] – from a company called International Submarine Engineering, dated 9 September 1981.[221] As is self-evident, the letter does not state, let alone confirm, that SSA had located the *Galeón*. Moreover, it is curious that, despite having collected no evidence at the time of a shipwreck, SSA Cayman was already eagerly trying to find a partner to salvage its yet non-existent "treasure". This speaks volumes of the Claimant's lack of scientific rigor and eagerness to move forward with its vision for the project at all costs, even despite not having a sliver of evidence to rely on.

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218 Expert Report of Woods Hole Oceanographic Institution (WHOI). (**RER-9 [WHOI]**), p. 15.

219 Amended Statement of Claim, ¶ 54.

220 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶¶ 53.

221 Letter from James R. McFarlane (International Submarine Engineering LTD) to Warren Stearns (SSA), 9 September 1981 (**Exhibit C- 138**).

Unsurprisingly, the proposal sent by International Submarine Engineering says nothing of the importance of preserving the archaeological site during the salvage operations.[222]

156. As Phase I, Phase II ended without GMC Reporting a finding of a shipwreck – let alone of the *San José*. [223]

D. THE 1982 CONFIDENTIAL REPORT SHOWS THAT SSA'S ALLEGED PREDECESSORS NEVER FOUND THE *GALEÓN SAN JOSÉ*

157. On 27 October 1981, DIMAR Issued Resolution No. 0755 of 1981 (**"Resolution No. 755"**) authorising GMC to operate the vessel State Wave and the submarine Auguste Piccard until 29 January 1982.[224] Not surprisingly, and in line with the previous authorizations, Resolution No. 755 does not mention that it is an authorization to search for the *San José* but rather refers to submarine exploration for the search of shipwrecks in general. Also, as in the previous resolutions, it reiterated GMC's obligations fully to comply with Decree 2349 of 1971 and related norms.[225]

158. Phase III took place between October 1981 to February 1982.[226] Per the information provided by GMC in the Confidential Report, the Auguste Piccard had windows for observation and was considered a highly sophisticated submarine at the time.[227] This notwithstanding, as pointed out by Dr. Oviedo, there are severe methodological flaws in the way that GMC Inc. conducted its survey, including failing to keep the required distance between the magnetometer and the Auguste Piccard to prevent the metal content in the Auguste Piccard from distorting the reading of the magnetometer and failing to use a control station to obtain accurate readings that filter out the daily variations in the Earth's magnetic field.[228]

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222 Letter from International Submarine Engineering Ltd. to Mr. Stearns, 9 September 1981 (**Exhibit C-138**).

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

224 Dimar Resolution No. 755, 27 October 1981 (**Exhibit R-93**).

225 Dimar Resolution No. 755, 27 October 1981 (**Exhibit R-93**), Article 2.

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

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

228 Expert Report of Dr. Oviedo (**RER-6 [Oviedo]**), ¶ 44(b), Section III(2)(d).

159. The title chosen by the Claimant for the relevant section of its Amended Statement of Claim is: "*Phase Three: SSA's Predecessor Confirms the Discovery of The San José In December 1981*".[229] There could hardly be a more misleading and plainly false statement. To start with, as demonstrated above, there was nothing to "confirm", since during Phase II the Claimant had not found evidence of a shipwreck, let alone the *Galeón San José*.

160. In its Amended Statement of Claim, the Claimant claims that "[o]*n 10 December 1981, the Auguste Piccard found a highly promising target in the area that GMC's historians and archaeologists had indicated would most likely contain the shipwreck"* [230] and alleges, by reference to the Confidential Report, that "[f]*urther investigation through sonar, magnetometers, visual observations, and carbon dating, among other investigations, indicated that the finding was a shipwreck closely corresponding to the size, shape, and age of the San José"*.[231]

161. The above assertions, however, are a far cry from what was stated in the 1982 Confidential Report about the *"finding"* made on 10 December 1981. GMC described the alleged finding as follows:

> On December 10, 1981, a large outcrop was recorded using the Side Scan Sonar aboard the AUGUSTE PICCARD. This target was investigated in several subsequent submarine dives and is shown in Figure 9 as Target "A". Target "A" appears to be a large rocky outcrop or reef covered by a thin layer of sediment and a diverse community of marine growth. A similar growth occurs on the low reefs in the immediate area. The Side Scan Sonar views of Target "A" are presented in Figures 5 and 6.
>
> Although the target appears to be a natural rocky formation, it has several features indicating it is not natural to the seabed. A defined magnetic anomaly (Figure 7) was recorded during passes over and across the target. Portions of the target have shapes covered by sediment and forms that are difficult to discern or explain in terms of natural phenomena.
>
> A few pieces of wood lodged in the hull during submarine operations in the area. Since the submarine was primarily descended in the downhill region of the target, it was believed that the samples came from the seabed area

229 Amended Statement of Claim, ¶¶ 55-70.

230 Amended Statement of Claim, ¶ 62.

231 Amended Statement of Claim, ¶ 63.

> within 5 to 100 meters west and north of the target. The wood samples were analyzed and declared to be over 300 years old.
>
> The AUGUSTE PICCARD was not equipped with a manipulator during this operation, so no other samples were collected. Figure 8 is a copy of a photograph of the seabed at a position of Target "A" taken by an external camera mounted on the bow of the submarine. The photograph is typical of other photographic and visual observations of the target.[232]

162. Each and every one of the alleged elements that the Claimant contends support the alleged finding of a shipwreck has been proven to be misleading if not plainly wrong, as the Respondent demonstrates below:

163. ***First***, the "*acoustic shadow*" indicated by the side scan sonar readings, which according to the Claimant "*revealed an image approximating the San José*", has been indeed shown to belong to a rocky formation in the seabed of the site surveyed by the Auguste Piccard.[233] Indeed, the acoustic shadow obtained by the crew of the Auguste Piccard was recorded by Mr. Costin as follows:

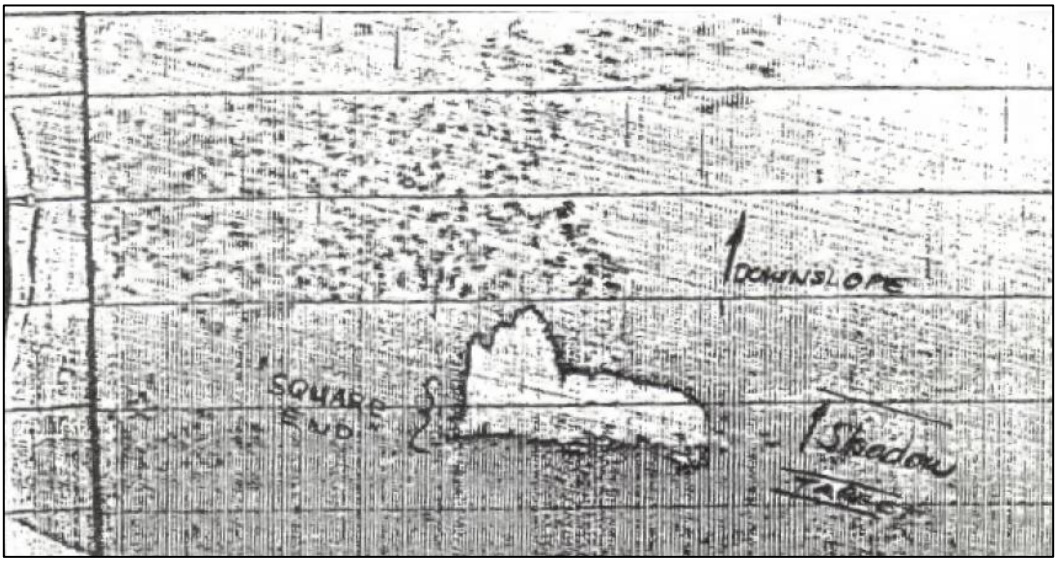

Figure 21: Acoustic shadow of the anomaly alleged by GMC Inc.[234]

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232 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982 (**Exhibit C-10**), p. 10-11 (emphasis added).

233 Amended Statement of Claim, ¶ 64.

234 Sonar Reading of Discovery, 10 December 1981 (**Exhibit C-106**).

164. As explained by the Respondent's witness, Mr. Juan Santana, during the WHOI 2024 Survey, the crew obtained acoustic images from the area surveyed by GMC Inc. in 1982. As Mr. Santana shows in his witness statements, the acoustic shadow reported by the Claimant coincides exactly with the images obtained using WHOI's equipment, as follows:

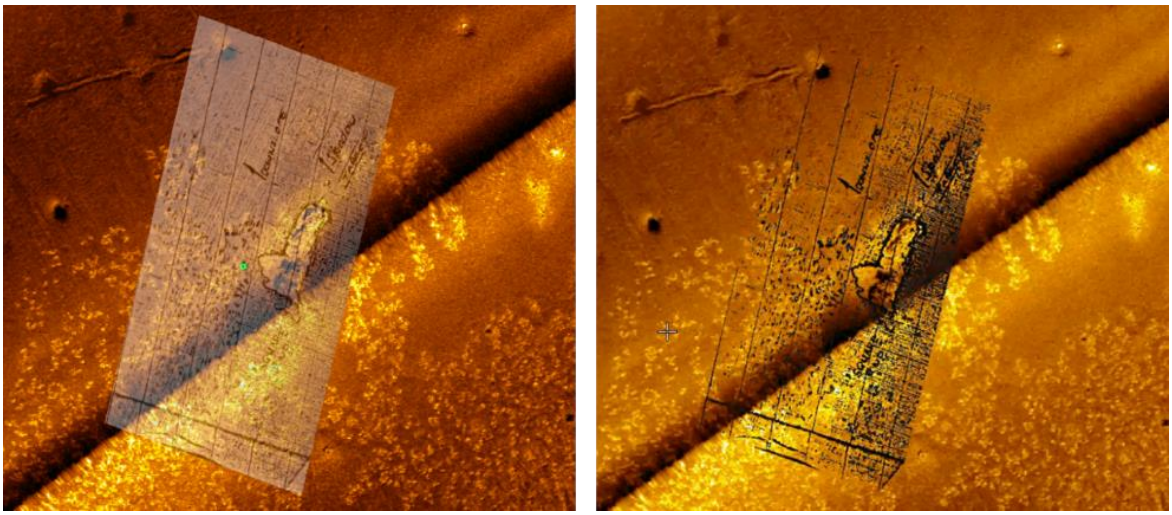

Image 22: Overlap between sonar images obtained by GMC Inc. in 1982 and WHOI in 2024. Some tracks left by the skis of the Auguste Piccard can be observed on the top left corner.[235]

165. As Mr. Santana explains, and as can be plainly observed in these images, the initial suspicions of the crew on board the Auguste Piccard have been now confirmed beyond a shadow of a doubt: GMC's alleged "anomaly" is, indeed, a rock. This finding would be even comical, had it not caused the Colombian government to spend incalculable resources throughout the decades both to defend itself from the Claimant's incessant legal actions and to finally dispel its vacuous claims with highly sophisticated technical evidence from WHOI.

166. ***Second*****,** similarly misleading and unsupported are the Claimant's drawn assertions and conclusions regarding a reading of the magnetometer that purportedly shows a "*spike in ferromagnetic material associated with shipwrecks*",[236] and Mr. Morris' assertion that the magnetic signature "*is indicative of multiple ferrous objects at that location such as iron cannons,*

235 Witness Statement of Mr. J. Santana (**RWS-3 [Santana]**), Image 13.

236 Amended Statement of Claim, ¶ 65.

shot, and anchors […] *consistent with a shipwreck site dating from the early 18th century.*"[237] The reading in question is as follows:

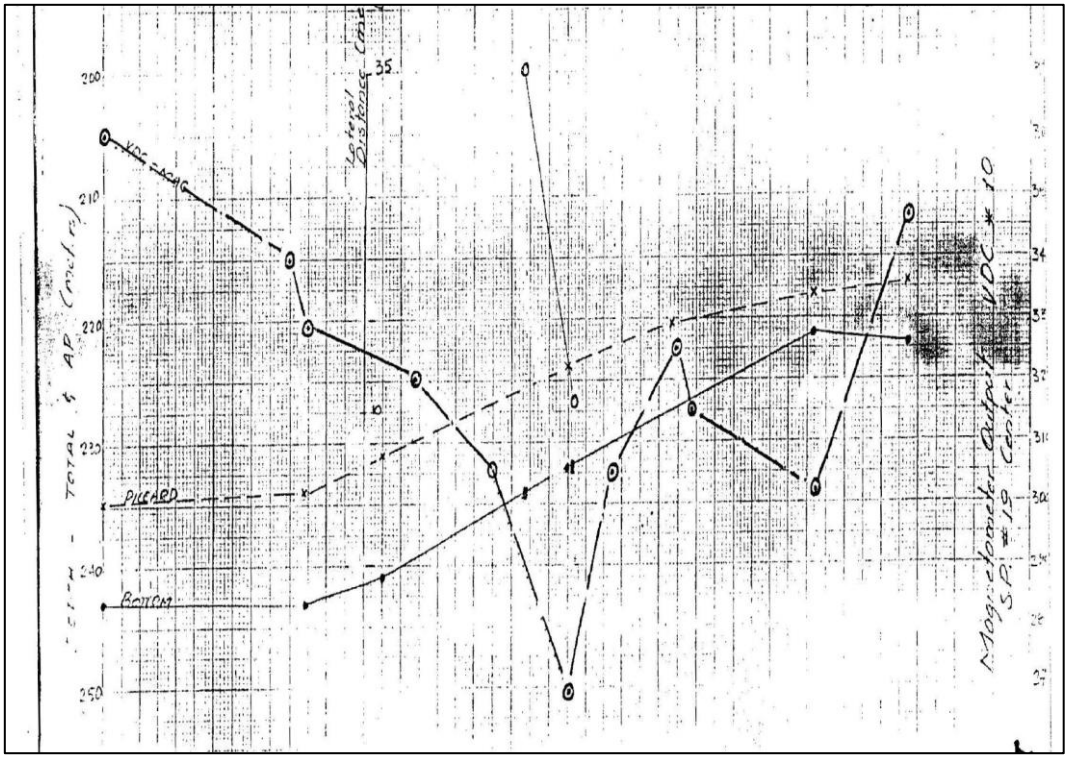

Image 23: Magnetometer reading recorded during Phase Three of the operations conducted by GMC Inc.[238]

167. According to Mr. Morris, this *"large multi-component, magnetic signature"* is *"indicative of multiple ferrous objects at that location such as iron cannons, shot and anchors."*[239] In her expert report, Dr. Oviedo cogently explains why Mr. Morris' assertions are deeply mistaken.

168. In the first place, it is not true that the magnetic signature anaylsed by Mr. Morris is "*multi-component*" (*i.e.*, showing various ferrous objects). As explained by Dr. Oviedo,[240] this is made

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237 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 47.

238 Mr. Costin, Auguste Piccard – Data, Measurements and Observations, December 1981 – January 1982 (**Exhibit C-141**), p. 20. *See* Expert Report of J. Morris (**CER-1 [Morris]**), Figure 8.

239 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 47.

240 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶ 42(a), Section III(3)(j)

plain by comparing the reading analyzed by Mr. Morris and that included in Mr. Swann's witness statement:

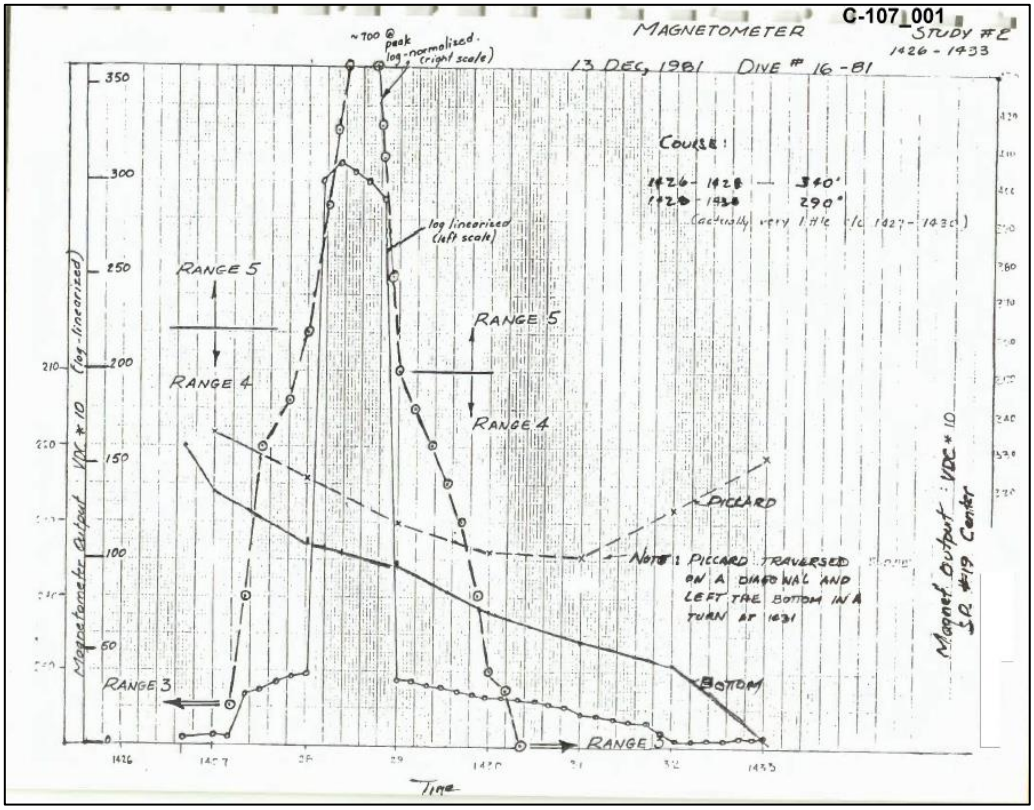

Figure 24: Magnetometer reading from 13 December 1981.[241]

169. As Dr. Oviedo explains, the second reading clearly shows that there was a single peak, indicating the presence of a single ferrous object. In this regard, Dr. Oviedo explains that the smaller irregularities seen in the reading analyzed by Mr. Morris could have been caused by the stabilization of the magnetometer but are not indicative of other apparent anomalies.[242]

170. Secondly, Mr. Morris' assertions that the reading is indicative of the presence of objects *"such as iron cannons, shot and anchors*", and that this is "*consistent with a shipwreck site dating from the early 18th century*" is misleading. Indeed, as Dr. Oviedo observes, and as Mr. Morris himself

241 Magnetometer Graph of Discovery, 13 December 1981 (**Exhibit C-107**); Mr. Costin, Auguste Piccard – Data, Measurements and Observations, December 1981 – January 1982 (**Exhibit C-141**), p. 21.

242 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶ 42(a)

acknowledges, the readings were made in a scale of voltage, not in magnetic field units.[243] As Dr. Oviedo explains, this makes it impossible to apply the standardized mathematical operations required to infer what type, shape and size of an object could have generated a given magnetic reading.[244] These calculations must also consider factors, such as the sensitivity of the magnetometer and the distance between the magnetometer and the object of interest –[245] elements which have not been included in the 1982 Confidential Report and that are apparently unknown to Mr. Morris. Therefore, from the magnetic readings, neither GMC Inc. nor Mr. Morris could have possibly inferred the type of object that led to the reading.

171. Finally, as regards the reading of the magnetometer, Dr. Oviedo observed that Mr. Morris himself states that the metal basket that was originally deposited by the crew of the Auguste Piccard to collect samples was then left at the site throughout the survey conducted.[246] In fact, the same basket was also found at the site by the WHOI 2024 Survey, and photographed as follows:

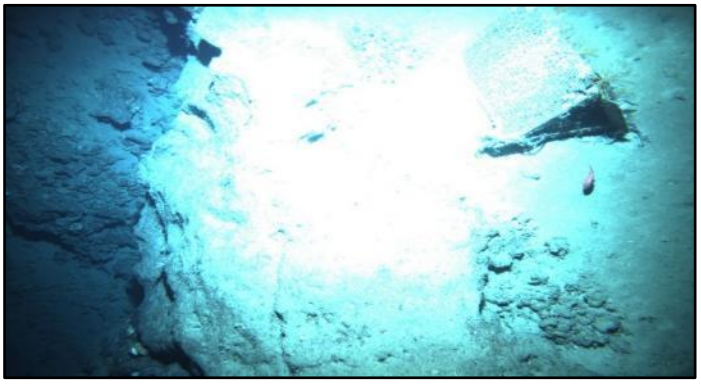

Image 25: Metal basket found at the site surveyed by the Auguste Piccard by the WHOI 2024 Survey.[247]

172. In this light, it is also noteworthy that the basket was originally placed at the site surveyed by the Auguste Piccard to collect samples for analysis, which begs the question of why the basket was abandoned at the site by GMC. Considering that this may have been the only item generating

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243 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶38(a)(b); Section III (1)(b). *See also* Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 47.

244 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶ 38(A), Section III (1)(a)(b); Section VI(A).

245 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶¶ 17, 44(b), Section III(2)(d), Section III (1)(B).

246 Expert Report of K. Oviedo (**RER-6 [Oviedo]**), ¶ 43(a). *See also* Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 46.

247 *See* Witness Statement of Mr. J. Santana (**RWS-3 [Santana]**), Image 14.

the reading of the magnetometer, it might be worth asking whether GMC Inc. may have deliberately left the basket behind in order to generate the *"anomaly"* reported to the Colombian authorities. The grave consequences of this cannot be understated.

173. ***Third***, similarly, in his witness statement, Mr. Swann states that they made contact with what was "*unquestionably* […] *the remains of a part of a shipwreck*".[248] Nonetheless, these anecdotical accounts cannot be considered evidence of a shipwreck, much less one with archaeological value.[249] Mr. del Cairo has thoroughly rebutted SSA's reliance on indirect data of this sort. From an archaeological standpoint, these statements are simply useless to establish the existence of a shipwreck and might even reflect bias in the surveyor.[250]

174. Moreover, key witnesses of the facts have publicly stated their disbelief that GMC Inc.'s finding was, indeed, the *San José*. In fact, in 2007, Mr. Costin stated in an interview with the Seattle times:

> Another oceanographer, Mike Costin, who worked on a commercial submarine brought in by Sea Search for one of the company's early, booze-filled expeditions, also has his doubts.
>
> "We found something, but I don't think it was the *San José*," he said.[251]

175. That is: the Claimant's officials' themselves confirm that GMC Inc. did not find the *San José.* This should be the end of this story.

176. ***Fourth***, the Claimant recounts that certain wood samples were taken from the "*hull of the Auguste Piccard*" for radiocarbon analysis.[252] Further, the Amended Statement of Claim refers to a letter from Dr. Lyon (one of the historians engaged by GMC) to the Stearns Company of 11 February 1982,[253] from which it arises that Dr. Lyon sent the wood samples collected by GMC Inc.

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248 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶¶ 39-42.

249 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 42, 86, 145.

250 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 145-151.

251 The Seattle Times, "*Colombia fights U.S. diver over gold-filled shipwreck*", 3 June 2007 (**Exhibit R-181**).

252 Amended Statement of Claim, ¶ 67.

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

to Beta Analytics for radiocarbon dating.[254] According to the Claimant, Beta Analytics dated the piece of wood as likely being 300 years old, while providing no evidence to this effect.[255]

177. On the basis of the same letter, the Claimant further alleges that Mr. R. Duncan Mathewson, an "*independent marine archaeologist*" analyzed the wood samples and inferred at first sight that the oak "*was consistent with the wood that would have been used to build the San José*".[256] The relevant excerpts of Mr. Lyon's letter read as follows:

> This is written to serve as an update on the progress of research on the target found in the search area by Sea Search/Armada on or about 11 December last.
>
> It has been reported to me that, on or about 13 December 1981, the submersible Auguste Piccard struck a part of the above-mentioned target mound. Evidently at that time, pieces of wood became lodged in the submersible's propellor mounting.
>
> I caused pieces of this wood, forwarded to Marianne Banigan in Miami, to be radiocarbon dated by Beta Analytics Inc of Miami. Dr. Jerry Stipp reported that the two samples displayed an average age of 365 years plus or minus fifty years, from a base year of 1950. This gave the wood an age range of from 1535 to 1635, with a mean of the year 1585. This range, plus other errors inherent in the process, make radiocarbon dating a generally useful if imprecise tool. These dates do, however, point to a colonial dating for the wood and any ship that might have been built from it.
>
> The two major wood pieces were then submitted to R. Duncan Mathewson, marine archaeologist for examination and forwarding to a Federal Forestry laboratory for identification and analysis. Mathewson's initial opinion was that the one sample appeared to be red cedar and the other white oak. The oak sample, he stated, appeared quite similar to the white oak recovered from the 1622 vessel Santa Margarita, built in Viscaya. The *San José*ph was also built in Viscaya. Mathewson is rendering a written first report and is doing point-by-point analysis of the wood. […] [257]

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254 Amended Statement of Claim, ¶ 68.

255 Amended Statement of Claim, ¶ 68.

256 Amended Statement of Claim, ¶ 69.

257 Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 (**Exhibit C-9**) (emphasis added).

178. The alleged evidentiary value of the samples of wood collected by GMC Inc. on the site and the respective radiocarbon analysis merits several remarks:

179. To commence, it is undisputed that the wood pieces were trapped in the hull of the Piccard and dislodged by one member of the crew, Mr. Danny Epp, "*who was carrying out the underwater inspection of the hull at that time found some pieces of wood in the prop shaft void space, including one large piece that looked fashioned by man.*"[258] As explained by Mr. del Cairo, Mr. Epp's handling of the unknowingly recovered pieces, in and on itself, threatens the validity of the radiocarbon analysis, as it potentially contaminated the sample. Indeed, wood samples sent for radiocarbon analysis need to be treated with care, with appropriate protection (including latex gloves and sterile bag) and with a strict chain of custody, throughout which the necessary precautions need to be implemented before the sample reaches the laboratory.[259]

180. In this regard, there is no description, let alone evidence, of the chain of custody of the samples of wood collected by GMC. In fact, Dr. Lyon simply states that he sent the pieces of wood to a Ms. Marianne Banigan (affiliation unknown) in Miami, who then sent the two major pieces to Mr. R. Duncan Mathewson, a marine archaeologist, for examination.[260] No description is made of the chain of custody or the procedures to avoid the contamination of the samples that should have been followed with respect to sensitive material, such as an ancient piece of wood.

181. The complete absence of proper protocols is glaringly evident in Figure 21 of Mr. Swann's witness statement:

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258 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶ 45.

259 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶ 122.

260 Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 (**Exhibit C-9**), p. 1.

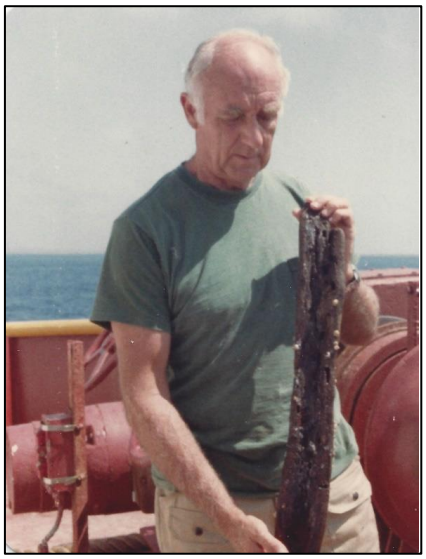

Image 26: historian Commander Cryer manipulates a wood sample obtained by the crew of the Auguste Piccard.[261]

182. The image starkly depicts Commander Cryer handling the wood sample collected by the crew of the Auguste Piccard with an evident disregard for contamination prevention measures. As candidly described by Mr. Swann, "*the wood was handled by Commander Cryer and Helmut, who inspected it immediately*", *i.e.,* without any precautions.[262] As Mr. del Cairo notes, the lack of protocol prompts any observer to put into question the credibility of this analysis.[263]

183. In this regard, it is worth mentioning that DIMAR had no evidence that GMC had submitted any piece of wood together with the 1982 Confidential Report.[264] In fact, the only piece of wood that DIMAR had was delivered to Columbus on 10 June 1994, measuring 9 centimeters in length and 3 centimeters in width.[265]

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261 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), Figure 21.

262 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶ 46.

263 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 121-125.

264 Letter from DIMAR to ANDJE, 25 November 2024 (**Exhibit R-233**).

265 Letter from Fabio Echeverry (Consorcio Roberto Ávila Garavito, Columbus Exploration Limited Partnership and Columbus America Discover) to Vice-Admiral Gilberto E. Roncancio (DIMAR) delivering elements of shipwrecked antiquities, 10 June 1994 (**Exhibit R-166**).

184. Additionally, in his letter to Mr. Stearns, Dr. Lyon explained his reasoning to establish the purported date of the wood samples, as follows:

> Mike Costin has now reported that more precise measurements of the target mound have yielded an estimated size of 143.5' by 35'. This corresponds with the size of a thousand-ton ship.
>
> Only a very few wooden colonial vessels were built in that size in the sixteenth century. It is only after mid-1600s that an arms race began which led rapidly to the construction of war and merchant vessels of the 700 to 1000-ton size. The number of guns the larger ships could carry also increased correspondingly, and dramatically. Thus, this size mound, if proven to be colonial, likely dates after 1670.[266]

185. Dr. Lyon's conclusion about the date of the shipwreck based on the dimensions of the wood sample is completely wrong. [267] Mr. del Cairo has demonstrated that the piles of timber and the pieces of wood to which SSA refers as evidence of a shipwreck from the 18th century do not support his claim. Mr. del Cairo has now identified the patterns and characteristics of timber used in Spanish vessels in the planks and the timber piles which Claimant alleges prove its hypothesis.[268] In his expert opinion, these timbers could correspond to a recent archaeological site and not necessarily a shipwreck.[269]

186. In an attempt to bolster its allegation that it found the *San José*, the Claimant relies on Mr. Swann's recount that the news of the finding spread out and that, whilst the State Wave was docked for repairs, the then President Mr. Turbay Ayala came on board and asked Mr. Swann for the whereabouts of "[his] *treasure*".[270] This only underscores the manner in which GMC. was unduly fueling the collective belief that GMC had found the *San José* when they had clearly not. Indeed, Mr. Swann himself explains that, at the time, they believed that further exploration works would be necessary to fully identify the *San José*: "[w]*e then continued our agreed search diving with the intent of verifying the identity of our target as the San José*".[271] Clearly, the

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266 Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 (**Exhibit C-9**), p. 1.

267 Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982 (**Exhibit C-9**), pp. 1-2.

268 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 113-114.

269 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 115-117.

270 Amended Statement of Claim, ¶ 70. *See also,* Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶ 49.

271 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶ 52.

anecdotical reference to Mr. Turbay Ayala's visit does not advance the Claimant's case nor does it prove that GMC had actually found the *San José*.

187. In addition, the Claimant – again relying on Mr. Swann's testimony – asserts that, around March 1982, the "*Colombian authorities began to pressure SSA's Predecessor to formally disclose its findings*".[272] The Claimant also contends that "*as a result,* [GMC] *suspended its exploratory work and began preparing a report to submit to DIMAR*".[273] It is unclear why the Colombian authorities would pressure GMC to disclose the 1982 findings if, according to the 1982 Confidential Report, there were no clear findings and further exploration was needed.[274] Moreover, Mr. Swann's testimony does not show that GMC hurried to finalize and submit the 1982 Confidential Report. Quite to the contrary, Mr. Swann states that: "*while the report was drafted towards the end of February 1982, it was not submitted to Colombian authorities until March*".[275]

188. To the contrary, the facts indicate that the timing for the submission of the 1982 Confidential Report was in GMC's interests, not Colombia's. As agreed by the parties, GMC submitted the 1982 Confidential Report only a few days before the expiry of its exploration permits. In this light, the reason for the submission of the 1982 Confidential Report, albeit the weakness of the evidence included therein, is evident: GMC was desperate to preserve its exploration rights, even though it could not prove that it had identified any particular shipwreck, let alone the *Galeón San José*.

1. The 1982 Confidential Report did not refer to the *San José*

189. In the Amended Statement of Claim, the Claimant states that it submitted the 1982 Confidential Report "*pursuant to Resolution No. 0048, which, as noted above, DIMAR had issued for the express purpose of finding the San José.*"[276] This assertion is completely false.

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272 Amended Statement of Claim, ¶ 71. *See also,* Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), ¶ 51.

273 Amended Statement of Claim, ¶ 71.

274 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982, pp. 12-13 (**Exhibit C-10**).

275 Witness Statement of Captain J. Swann (**CWS-2 [Swann]**), fn. 14.

276 Amended Statement of Claim, ¶ 72.

190. ***First***, as shown, it is false that Resolution No. 48 was for "*the express purpose of finding the San José*".[277] As explained above, Resolution No. 48 authorized GMC Inc. to explore certain areas to find *"shipwrecks"* in general, not specifically the *San José*.[278]

191. ***Second***, the 1982 Confidential Report makes no reference to the *Galeón San José* or the so-called "Discovery Area" that the Claimant refers to in its Amended Statement of Claim but which language does not appear in the 1982 Confidential Report.[279] In its Amended Statement of Claim, the Claimant alleged that GMC did not report specific coordinates, but that it rather referred to a "Discovery Area".[280] The Claimant bases this concept on the 1982 Confidential Report – *i.e.,* its own document – as follows:

> As indicated in Figure 9, there are several large and small targets of unknown composition in an area of just one mile by half a mile. The main targets, in bulk and interest, are slightly west of the 76th meridian and are centered around target "A" and its surrounding areas, located in the immediate vicinity of 76˚ 00' 20" W, 10˚ 10' 19" N.[281]

192. This vague description does not substantiate the Claimant's assertions regarding a distinct "Discovery Area". The use of non-specific terminology and indefinite location information undermine the credibility of the Claimant's argument. This further reinforces the Respondent's position that the concept of a "Discovery Area" is unsubstantiated and a fabrication.

193. ***Third***, as further explained below, it is plainly false that Colombia, through its judicial system, declared or confirmed in favor of the Claimant any right over the *Galeón San José* nor recognized rights over an area, let alone a "Discovery Area". Contrary to the Claimant's assertions, the interpretation of the 2007 SCJ Decision is not that it "*recognized Claimant's rights by express reference to the 1982 Report. Notably, the 1982 Report does not describe the location of its discovery as a pinpoint but as an area*".[282] Rather, the correct interpretation is that the 2007 SCJ Decision significantly narrowed the scope of the 1994 Judgment, ruling that the Claimant is

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277 Amended Statement of Claim, ¶ 72.

278 DIMAR Resolution No. 48, 29 January 1980 (**Exhibit C-2**).

279 Colombia's Reply to Claimant's response to Colombia's submission pursuant to Article 10.20.5 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America, ¶ 36.

280 Amended Statement of Claim, ¶ 73.

281 Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia 18 March 1982, PDF pp. 12-13 (**Exhibit C-10**).

282 Amended Statement of Claim, ¶ 74.

entitled only to the assets that remain legally susceptible to being classified as treasure, "*which are located in 'the coordinates referred to in the 'Confidential Report on Underwater Exploration carried out by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982' Page 13 No. 49195 Berlitz Translation Service', without including spaces, zones, or diverse areas*."[283]

194. ***Fourth***, the Claimant's attempt to unduly expand the so-called "Discovery Area" by vaguely referring to the "*inherent margin of error in light of the technology available and methods used*" by GMC is technically flawed.[284] As elaborated by Dr. Mora, the margin of error of the Decca Trisponder used by GMC was merely of 100 meters.[285] Considering other elements that could have affected the margin of error in the Claimant's measurements, such as the fact that GMC Inc. calculated positioning data using paper charts, the aggregate margin of error for the measurement would be no greater than 400 meters.[286] Finally, despite the Claimant's repeated assertions that the change from the WGS-72 to the WGS-84 positioning system altered the accuracy of the measurements, as calculated by Dr. Mora, the difference between both is merely of 19 meters.[287]

195. Furthermore, contrary to the Claimant's assertions, "*the law in force at the time SSA discovered the wreck*" did not "*contemplate*[] t*he possibility of a 'margin[] of error'*".[288] At the time when Resolution No. 354 was issued, Decree No. 2324 was regulated by DIMAR Resolution No. 148 of 1982 ("**Resolution No. 148**"). Resolution No. 148, enacted by DIMAR on 10 March, expressly required companies authorized to carry out exploration work to "*report the discoveries of treasures or antiquities it makes, indicating the exact position where they are located*."[289] This requirement, in force at the time when Resolution No. 354 was issued, mandated the indication

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

284 Amended Statement of Claim, ¶ 77.

285 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶¶ 69-71.

286 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 79.

287 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 92.

288 Amended Statement of Claim, ¶ 77. *See also,* Letter from Danilo Devis (SSA) to Mariana Garcés Córdoba (Ministry of Culture),) 20 May 2015, (**Exhibit C-35**), pp. 9-12.

289 DIMAR Resolution No. 148, 10 March 1982 (**Exhibit R-94**) (emphasis added).

of the exact position of the treasures or antiquities discovered, leaving no room for an *"acceptable"* margin of error.[290]

196. The foregoing was confirmed by the Supreme Court of Justice in its 2007 Decision, in which explicitly states:

> As in Resolution 0148 of March 10, 1982, it was provided that 'The concessionary company is obliged to report the discoveries of treasures or antiquities that it makes, indicating the exact position where they are found.'[291]

197. Therefore, contrary to the Claimant's assertions, the 1982 Confidential Report did not confer any direct or indirect rights over the *Galeón San José*.

E. DESPITE THE CLAIMANT'S VARIOUS APPLICATIONS TO EXTEND THE EXPLORATION PERMIT, THE ALLEGED FINDING REMAINED UNCONFIRMED AND UNIDENTIFIED

198. In this section Colombia will show that CMC's claims to have an exclusive right over a salvage contract are misleading and lack any basis (**1**); and that the Oceaneering expeditions confirmed that the coordinates originally reported by GMC were fraudulent and proved that GMC did not find the Galeón San José (**2**).

1. GMC claims to have "an exclusive right" over a salvage contract, despite lacking any basis for this under Colombian law

199. Even before the Confidential Report was officially submitted to the Colombian authorities, on 12 March 1982, GMC sent a letter to DIMAR with potential terms for a salvage contract.[292] In a letter of 22 July 1983, the U.S. legal counsel for SSA Cayman and GMC insisted on its request, claiming that it had been privy to "*rumors circulating in the United States that the* [Colombian] *government is considering awarding the contract to another party*".[293] The alleged rumours seem to stem from a conversation referred to in a letter from a Mr. Wharton Williams Aberdeen, who

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290 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 116.

291 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), p. 70 (emphasis added).

292 Letter from James Maloney (GMC) to DIMAR, 12 March 1982 (**Exhibit R-5**).

293 Letter from Robert O. Case (Walsh, Case, Coale, Brown & Burke Lawyers) to Lilian Suarez Melo (Legal Secretary of Presidency of Colombia), 22 July 1983 (**Exhibit C-146**), p. 1.

had allegedly been contacted "*by the Swedish group who have been discussing the San Jose Project with the Colombian government*."[294] In its letter, GMC claimed that "[u]*nder Colombian law Glocca Morra/SSA has the exclusive right to salvage the shipwreck located by it pursuant to its exclusive license*."[295]

200. Unsurprisingly, GMC did not point to a single provision of Colombian law that provided such a right. The reason is simple: there was and there are none. As a matter of Colombian law, as existing both at the time that Resolution No. 048 and Resolution 354 were issued, the Colombian State had no obligation to enter into a contract with GMC for the salvage of its alleged findings.[296]

201. At the time that Resolution 048 was issued, thus granting GMC's requested exploration permit, the regulation in force for maritime explorations and shipwrecked goods was Decree-Law 2349 of 1971. As explained above, Decree-Law 2349 of 1971, which created DIMAR, also set the legal framework for maritime explorations and the treatment of shipwrecked goods.[297] According to its Article 114, which regulated the salvage and exploitation of shipwrecked goods, "*any natural or legal person, national or foreign, may enter into contracts with the Nation for the recovery and exploitation of the items of historical, scientific or commercial value found in the shipwrecked goods, on the areas that have been the object of a duly accepted notice.*"[298] As is evident, the provision does not provide any restrictions, preferences or *"exclusive rights"* in favor of the person that discovered the shipwrecked goods.

202. Moreover, Colombian law, as existing at the time, expressly entitled the State to enter into agreements with either domestic or foreign public or private entities "*for the specific purpose of ensuring the use or provision of technical assistance* […]."[299]

203. In accordance with the above, Resolution No. 048 was strictly restricted to exploration activities, stating that "*the company GLOCCA MORRA COMPANY INC., requests a permit for submarine exploration in the Colombian Continental Platform in the waters of the Caribbean Sea*" and,

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294 Ric Wharton (Wharton Williams Aberdeen) to Jim Richard (Private Investment Services), 24 July 1983 (**Exhibit C-147**), p. 1.

295 Letter from Robert O. Case (Walsh, Case, Coale, Brown & Burke Lawyers) to Lilian Suarez Melo (Legal Secretary of Presidency of Colombia), 22 July 1983 (**Exhibit C-146**), p. 1.

296 Law 24 of 1959 (**Exhibit R-76**); Decree-Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-001**); DIMAR Resolution No. 148 of 1982, 10 March 1982 (**Exhibit R-94**).

297 Decree Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**).

298 Decree Law No. 2349 of 1971, 3 December 1971 (**Exhibit R-1**), Article 114 (emphasis added).

299 Law 24 of 1959 (**Exhibit R-76**), Article 1.

accordingly, resolving to "*AUTHORIZE the company GLOCCA MORRA COMPANY – INC., to perform submarine exploration operations*" in the area within the listed coordinates.[300]

204. Subsequently, the DIMAR Resolution 148 of 1982 was adopted,[301] also providing distinct frameworks for exploration permits, on the one hand, and exploitation and recovery contracts, on the other, which were awarded separately. In this regard, Article 7 of DIMAR Resolution 148 set forth the requirements and procedures needed to "*obtain the exploration permit in marine and submarine areas on the continental shelf and seabed*".[302] Furthermore, Article 7 states that, after the request has been duly analyzed, the DIMAR will authorize the exploration activities, which "*exploration work must begin within a period of no more than six (6) months*."[303] The alleged preference or exclusivity for the execution of a salvage contract with the State that SSA invokes is nowhere to be found.

205. In relation to exploitation and recovery contracts, Article 8 of Resolution 148 provided that the denouncer of any alleged shipwrecked antiquity "*must enter into a contract with the State*" as a condition precedent to undertaking exploitation and recovery activities. This is far from establishing an obligation of the State to enter into a contract with the denouncer, as the Claimant would have it. Notwithstanding SSA's attempt to rewrite the clear provisions of Colombian law in force at the time, Resolution 148, as Decree-Law 2349 of 1971 before it, did not provide any right of preference, let alone exclusivity.[304]

206. In accordance with the above, Resolution No. 354, which recognized GMC as the "*reporter*" in relation to the coordinates reported in the 1982 Confidential Report, did not contain any direct nor indirect reference to potential salvage activities to be undertaken by GMC, thus showing that submarine exploration was subject to a self-contained regime separate from other activities.[305]

207. Subsequent developments in the legal framework confirm this understanding. Namely, Decree 12 of 1984 regulated Article 710 of the Civil Code, which established the legal framework applicable to shipwrecked goods, and Articles 110 and 111 of Decree 2349 of 1971, which had

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300 DIMAR Resolution No. 48 of 1980, 29 January 1980 (**Exhibit C-2**).

301 DIMAR Resolution No. 148, 10 March 1982 (**Exhibit R-94**).

302 DIMAR Resolution No. 148, 10 March 1982 (**Exhibit R-94**), Article 77 (emphasis added).

303 DIMAR Resolution No. 148, 10 March 1982 (**Exhibit R-94**), Article 7.

304 DIMAR Resolution No. 148, 10 March 1982 (**Exhibit R-94**), Article 8.

305 *See* DIMAR Resolution No. 354, 3 June 1982 (**Exhibit C-13**), Article 1.

created the DIMAR[306]. In line with the previous regime, Articles 4 and 5 of the Decree 12 of 1984 maintained the separate treatment of exploration and salvage of findings.

208. Specifically, Article 4 of Decree 12 of 1984 provided that "*any foreign national natural or legal person, has the right to request from the authorities, permission or concession to explore in search of shipwrecked antiquities*". [307] At the same time, it prescribes that the payment of its participation "*will be borne by the person with whom the salvage is contracted*", and that the salvage of the findings may be "*carried out directly by the Nation*".[308]

209. To further eradicate any doubt, Article 5 of Decree 12 of 1984, on its part, expressly provides that *"the granting of an exploration permit or concession shall not generate any right or privilege for the concessionaire in relation to the eventual recovery of the reported shipwrecked antiquities*".[309] A consistent language was adopted in Article 192 of Decree 2324 of 1984, which was adopted to reorganize the General Maritime and Port Directorate and regulate, among others, maritime and coastal explorations.[310] Pursuant to Article 192 of Decree 2324: "*the granting of an exploration permit or concession shall not generate any right or privilege for the concessionaire, in relation to the eventual recovery of the shipwrecked antiquities reported*".[311]

210. The same approach was later adopted in Law 26 of 1986, which also regulates the exploration and salvage of findings in an autonomous and differentiated manner,[312] and more recently in Law 1675 of 2013.[313]

211. Therefore, since 1982 onwards, Colombian law has consistently provided for the separate treatment of exploration and salvage permits, not limiting the Colombian State's ability to engage a private or public entity of its choice to undertake the salvage activities.

212. The above understanding was confirmed by the Court of Barranquilla in a Decision of 12 April 1993, issued in the context of constitutional protection proceedings (*tutela*) initiated by Mr.

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306 Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**).

307 Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**), Article 4 (emphasis added).

308 Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**), Article 4.

309 Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**), Article 5.

310 Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**).

311 Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**), Article 192.

312 Law 26 of 1986 (**Exhibit R-117**), Articles 3-5.

313 Law 1675 of 2013 (**Exhibit R-191**). *See* in particular Article 11.

Danilo Devis Pereira, for himself and on behalf of SSA Cayman. In these proceedings, Mr. Devis sought to prevent the Colombian State from disclosing the coordinates of Glocca Morra's alleged finding in the context of the negotiations of a contract for the verification of said finding. In its judgment, the Tribunal reasoned and concluded as follows:

> The following conclusions are derived from the provisions transcribed above: […] The possibility or ability of the Colombian State to enter into contracts for the recovery and exploitation of the elements of historical, scientific or commercial value found in the shipwrecked species, on the areas that have been subject to notice duly accepted. This possibility or power to enter into contracts may be with any natural or legal person, national or foreign. […]
>
> From the foregoing we infer: 1st - The person who obtained the authorization for the underwater exploration has the obligation to report the shipwrecked species, indicating the geographic coordinates where they are found. 2nd - The power of the State to enter into contracts for the salvage of these shipwrecked species, without there being any privilege with the denouncer to carry out this salvage contract with him.[314]

213. Consequently, the Tribunal of Barranquilla dismissed Mr. Devis' claim.[315]

214. As further explained below, this understanding was more recently confirmed by the Council of State in its judgment of 13 February 2018, which found that the applicable legal framework clearly differentiated between the (***i***) exploration; (***ii***) report of a discovery (*denuncio*) and (***iii***) salvage, as being three distinct stages subject to distinct regimes.[316] In this line, the Council of State concluded that "*the **report*** [of a discovery] *and* [its] ***recovery** could be carried out by two different natural or legal persons, without the legal order providing for a preferential right of the person filing the report to enter into a contract for the salvage of the species subject to discovery*."[317]

215. Based on the foregoing, the Colombian State did not have, nor has ever had, the obligation to enter into a contract for the exploitation and salvage of the alleged findings reported by GMC in the 1982 Confidential Report. This was later confirmed by SSA's own conduct, by withdrawing all

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314 Tribunal of Barranquilla, Labor Chamber, Judgment Ref No. 051, 12 April 1993 (**Exhibit R-161**), pp. 19-21.

315 Tribunal of Barranquilla, Labor Chamber, Judgment Ref No. 051, 12 April 1993 (**Exhibit R-161**), pp. 19-21.

316 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), ¶ 252.

317 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), ¶ 253 (emphasis in original).

the claims related to Colombia's alleged failure to grant SSA a salvage contract from the proceedings before the Colombian Supreme Court.

216. As further explained below, this did not prevent SSA from baselessly insisting on its alleged right to a salvage contract, despite having failed to prove to the Colombian government any conclusive evidence that its alleged findings were, indeed, the *Galeón San José*.

2. The Oceaneering Expeditions confirmed that the coordinates originally reported by GMC were fraudulent and proved that GMC did not find the *Galeón San José*

217. Mindful of the deficiencies in its alleged finding and the weakness of the evidence submitted before the Colombian government, the Claimant acknowledges that, "*in an effort to accelerate the execution of a salvage contract, SSA Cayman invested additional funds to attempt to relocate and identify the shipwreck as that of the San José*".[318] To this effect, the Claimant engaged Oceaneering, which it described as a "*specialized subsea engineering firm*".[319]

218. Despite the Claimant's allegations, Oceaneering did not "*confirm*[] *the San José shipwreck's location*".[320] The Respondent rectifies the Claimant's inaccurate account of the two expeditions conducted by Oceaneering, from 28 August 1983 to 18 September 1983 (**a**) and from 11 to 25 October 1983 (**b**). To the contrary, what Oceaneering's expeditions confirm is that the coordinates originally reported by GMC (***i***) did not correspond to the area where GMC had made its alleged finding, and (***ii***) that, even after the two additional expeditions, GMC's alleged discovery was yet to be identified as a shipwreck, let alone the *San José*.

a. Despite facing technical difficulties, Oceaneering's First Expedition reached a "Target" more than 3 kilometers away from the coordinates reported by GMC

219. In a feat of extraordinary temerity, the Claimant claims that, following the First Oceaneering Expedition conducted by Oceaneering from 28 August to 18 September 1983 on board the Heather Express, there was "*no doubt*"[321] that the DIMAR inspectors on board the expedition

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318 Amended Statement of Claim, ¶ 94 (emphasis added).

319 Amended Statement of Claim, ¶ 94.

320 Amended Statement of Claim, ¶ 105.

321 Amended Statement of Claim, ¶ 98.

"*believed that they had found the San Jose.*"[322] However, the Claimant's claims are disproven by the report prepared by one of the DIMAR officers on board the Heather Express, Mr. Carlos Prieto. Far from the conclusive expedition described by the Claimant, Mr. Prieto's report shows that the First Oceaneering Expedition located Glocca Morra's alleged finding at a distance of more than 3 kilometers from what had been reported in the 1982 Confidential Report and reiterated that the identification of the alleged anomaly as a shipwreck would prove difficult.

220. In the Amended Statement of Claim, the Claimant inaccurately alleges that the First Oceaneering Expedition "*encountered a number of weather-related difficulties*".[323] As consistently reported by Mr. Prieto, the main "*difficulties*" encountered by the Oceaneering expeditions were several issues with the equipment on board the Heather Express. Indeed, vital elements such as the side scan sonar, meant to obtain acoustic images of the relevant site, and one of the beacons used for positioning purposes, were out of service during a significant part of the campaign.[324]

221. On 3 September 1983, a mere five days after the expedition commenced, Mr. Prieto reported:

> As a summary of problems to date [we have the following: 1º. The [side scan sonar] has been worked on for repair, but with negative results, it will be checked tonight at the anchorage of Islas del Rosario. 2º. A new Trinsponder [sic] was installed in the Laguito building - but it is not working so far. 3º. The batteries of the Trinsponder [sic] installed in the Island present failures in their charge. We will proceed tonight to charge them. 4º. It has been noted that there is no Echo Sounder (for use at depth). 5º. The personnel are tired and frustrated.[325]

222. Mr. Prieto's conclusion is further supported by Oceaneering's Report of Positioning, which recorded various malfunctions of vital equipment, including the side scan sonar.[326]

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322 Amended Statement of Claim, ¶ 98.

323 Amended Statement of Claim, ¶ 96.

324 Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), p. 2 (stating, about the side scan sonar, that "[i]*n the current operation, this equipment encountered many problems and was practically unusable*.").

325 Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), pp. 10-11.

326 *See* e.g. Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), pp. 9, 16 ("*Side scan still not working, will do ROV survey.* […] *Test side scan, still no go.* […] *Enroute to work area – no Trispo data. […] Lay out side scan sonar. Running side scan lines – data no good*.").

223. This notwithstanding, after various days of navigating across a broad area,[327] on 5 September 1983, the Heather Express found what appeared to be the tracks left by the Auguste Piccard submarine on the seabed, "*which could indicate that* [they] *were close to the site*." [328] Oceaneering's Report of Positioning reflects the UTM coordinates of the "Target", located at X=491.543 meters ad Y=1.123.739 meters.[329]

224. It is not surprising that the Claimant conveniently glosses over this fact. Indeed, Dr. Mora, the Respondent's expert in geodesy, has converted the UTM coordinates for the "Target" found at the First Oceaneering Expedition – which coincides with the site reported by GMC, as shown by the tracks of the Auguste Piccard – to geodesic coordinates, which are 10°09'56.7" N and 75°58'37.8'.[330]

225. As explained by Dr. Mora, this position is approximately 3.181 meters away from the coordinates reported by GMC in the 1982 Confidential Report.[331] Contrary to the Claimant's allegations, this is far beyond the reasonable "margin of error" for the positioning system existing at the time, which Dr. Mora estimates to be less than 400 meters, even considering the aggregate effect of all the individual components of a reasonable margin of error for the equipment and the methodology used by the Claimant.[332]

226. Therefore, far from confirming the Claimant's alleged finding, the First Oceaneering Expedition confirms the fact now known to the Respondent, that GMC knowingly communicated the wrong coordinates of its alleged finding to the Colombian government, fraudulently inducing the Colombian government to spend incalculable time and resources defending itself from a baseless claim arising from a falsehood.

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327 Dr. Mora plotted the route followed by the Heather Express. *See* Expert Report of Dr. H. Mora (**RER-5 [Mora]**), Appendix C, Figure 15.

328 *See* Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), p. 12. *See also* page 13.

329 *See* Report of Positioning prepared by Marinav Oceaneering, 2 November 1983 (**Exhibit C-53**), p. 7.

330 *See* Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 53, Appendix B.

331 *See* Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 53, Figure 5.

332 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 79.

227. Interestingly, Mr. Costin, the oceanographer hired by GMC to attend the Auguste Piccard expeditions, was also on board the Heather Express. In his report, Mr. Costin describes what he calls "Phase 1" of the First Oceaneering Expedition, stating that:

> It was a necessary step in which the target had to be relocated and established within the navigation system, which was installed on board the Heather Express motorboat for this mission.
>
> The navigation equipment used in other missions was found to be inadequately calibrated, resulting in that only a small yet inexact area was known to contain the target.[333]

228. Mr. Costin's vague description gives rise to various questions:

229. ***First***, as explained by Dr. Mora, the utter lack of underlying data to the 1982 Confidential Report makes it impossible for even a highly qualified expert like himself to determine whether Mr. Costin's statements are true.[334]

230. ***Second,*** if Mr. Costin's statements were true, they should have been reflected in the 1983 Confidential Report. However, the only mention of calibration issues contained therein related to the submarine navigation equipment, with a margin of error estimated at 50 meters.[335] This is far from justifying the distance of over 3 kilometers uncovered by the First Oceaneering Expedition between the coordinates as reported and the site surveyed by the Auguste Piccard. The resulting hypothesis is not flattering for GMC. Indeed, the Claimant itself has insisted on the alleged professionalism and experience of the crew on board the Auguste Piccard, which makes it hard to believe that the crew failed to adequately calibrate the equipment – which, as Dr. Mora explains, is the most basic step before undertaking any measurement.[336] In this light, Mr. Costin's statements come across as nothing other than an attempt to explain away GMC's fraudulent conduct in the 1982 Confidential Report.

231. ***Third***, as explained by Dr. Mora, if it were true that the navigation equipment used by GMC was inadequately calibrated, this would amount to a grossly negligent and grave mistake, which

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333 Status Report of the San Jose Project by Michael Costin, 21 September 1983 (**Exhibit R-101**), p. 3.

334 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 35.

335 Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982 (**Exhibit C-10**), pp. 7-8.

336 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 37.

would have rendered the data obtained by GMC invalid.[337] In this light, even if Mr. Costin's allegations were true, the Claimant's filing of the 1982 Confidential Report was improper.

232. ***Fourth***, and again assuming that Mr. Costin's explanation were true, GMC's lack of transparency regarding this invalidating flaw in the data that it had submitted to the Colombian State is shocking. Mr. Costin's report proves that, by October 1983 at the latest, the Claimant was well aware that the coordinates contained in the 1982 Confidential Report were vastly wrong. This notwithstanding, the Claimant continued to insist on its alleged rights, dragging Colombia though various fora, including this arbitration.

233. Lastly, the Claimant's statement that the DIMAR report "*leaves no doubt that* [the DIMAR inspectors]*, their superiors, and the crew believed that they had found the San Jose*" is disingenuous and belied by the evidence on the record.[338] Quite to the contrary, Mr. Prieto makes it clear that whether the alleged finding was the *San José* was merely GMC's hypothesis, which was subject to confirmation.[339] In the introduction to his report, for instance, Mr. Prieto states that the purpose of the expedition was "*to make explorations and if possible extract a sample of the remains of a vessel found within the authorized area and which they assume to be the San José*."[340]

234. In this light, the Claimant's attempt to rely on the First Oceaneering Expedition to artificially bolster the credibility of the alleged finding of 1982 is nothing short of reckless.

b. Oceaneering's Second Expedition further demonstrated that the coordinates reported by GMC were fraudulent

235. The Second Oceaneering Expedition conducted by the Oceaneering crew from 11 to 25 October 1983, on board the Seaway Eagle vessel, was also unsuccessful as to the identification of the *Galeón*, and further demonstrates that the coordinates initially reported by GMC in 1982 were fraudulent.

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337 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶¶ 7, 41.

338 Amended Statement of Claim, ¶ 98.

339 *See* e.g. Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), p. 3 ("*pictures were taken of what seems to be the San José*").

340 Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), p. 1.

236. ***First***, the Claimant's claim that the Second Oceaneering Expedition had confirmed the location of the *San José* shipwreck is unfounded.[341] The opposite is true: as stated by Mr. Prieto during the Second Oceaneering Expedition, the DIMAR inspectors on board the Seaway Eagle never confirmed or even opined that the potential shipwreck was, indeed, the *Galéon San José*.[342] Rather, in his main takeaways from the Second Oceaneering Expedition, Mr. Del Castillo emphasized that it "*will be very difficult*" to reach such a conclusion:

> 1) With the equipment currently available, it will be very difficult to locate any object that will determine the identification of the shipwreck, which is the objective of this exploration or expedition.
>
> 2) The coral layers that cover the possible wreck are more than two or three feet thick.
>
> 3) The definitive position of this target is 10.5 miles from Rosario Island, that is to say, it is in the territorial sea of the Republic of Colombia. [...] 21,915 meters from the Yeye Island of the Rosario Islands and 52,134 meters from the Nautilus Building of the Laguito in Cartagena.
>
> 4) The wood samples found and coral with metal remains [...] Indicate that under the thick coral layer of the main target, there is indeed a possible shipwreck.[343]

237. A similar conclusion was reached once again by Mr. Costin who, in a report dated October 1983, informed the DIMAR of the discoveries made to that date and "*recommend*[ed] *the use of more sophisticated equipment and techniques to be able to reach a positive identification*."[344] Mr. Costin provided further details on the thickness and hardness of the sediment covering the alleged finding, emphasizing that, against their initial impression that "*penetration would be easy and we would discover what lies beneath* [the layer of sediment]", the exposed surfaces had a "*layer* [of sediment with] *an approximate thickness of 1 foot (30 centimeters) or more and is*

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341 *See* Amended Statement of Claim, ¶ 105 (describing the ensuing developments as "[f]o*llowing Oceaneering's confirmation of the San José shipwreck's location*").

342 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October1983 (**Exhibit C-149**), p. 1 ("*some coral configurations have been located at the bottom of the sea which have determined the possibility of finding there the remains of an old Galéon. The possible wreck has been called the main target for all purposes, as we are not sure of its name and the mission of this expedition or operation is: To identify the wreck which is in a known geographical location*".)

343 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October1983 (**Exhibit C-149**), pp. 3-4.

344 Status Report of the San Jose Project by Michael Costin, 21 October 1983 (**Exhibit R-106**), p. 2.

extremely hard."[345] Crucially, Mr. Costin also noted that the sediment in the "*interior part does not seem to be solidified, but is rather soft. This suggests that its origin is recent, perhaps from only a couple of centuries.*"[346] This finding would be incompatible with the identification of the *Galeón*, which was at the time already close to three hundred years old.

238. Once again, Mr. Costin confirmed that "*the exterior has the appearance and hardness of cement*", for which reason "*it has not been possible to examine the exposed areas of the target that are beneath this layer*."[347] According to Mr. Costin, this layer of sediment was "[t]*he greatest obstacle, that prevented the identification of the main target*".[348]

239. ***Second***, the Second Oceaneering Expedition further confirmed that the coordinates reported by GMC in 1982 were fraudulent and did not correspond to the real location of the site of the alleged finding. Namely, on 21 October 1983, the crew on board the Seaway Eagle found what Mr. Del Castillo, one of the DIMAR inspectors on board, called the "Main Target", located at 10°10'05"N and 75°58'65"W.

240. Indeed, as the Claimant acknowledges, "*though Oceaneering had found precisely the same target at the same location as identified by SSA's Predecessors, the Navy Officials allocated that location different latitudinal and longitudinal coordinates, approximately 1.57 nautical miles from the target area coordinates reported by SSA's Predecessors in the 1982 Report.*"[349] Dr. Mora also calculated this distance, arriving at a distance of 2,893.72 meters.[350]

241. Therefore, there are three readings for the site allegedly found by GMC in 1982 that were recorded within a period of one year, using comparable technology and positioning systems: (***i***) the coordinates reported by GMC in the 1982 Confidential Report;[351] (***ii***) the position registered

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345 Status Report of the San Jose Project by Michael Costin, 21 October 1983 (**Exhibit R-106**), p. 3.

346 Status Report of the San Jose Project by Michael Costin, 21 October 1983 (**Exhibit R-106**), p. 3 (emphasis added).

347 Status Report of the San Jose Project by Michael Costin, 21 October 1983 (**Exhibit R-106**), p. 3.

348 Status Report of the San Jose Project by Michael Costin, 21 October 1983 (**Exhibit R-106**), p. 4.

349 Amended Statement of Claim, ¶ 102.

350 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 52.

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

during the First Oceaneering Expedition,[352] and (***iii***) the position registered by Mr. Del Castillo during the Second Oceaneering Expedition, in October 1983.[353] These positions are plotted by Dr. Mora as follows:

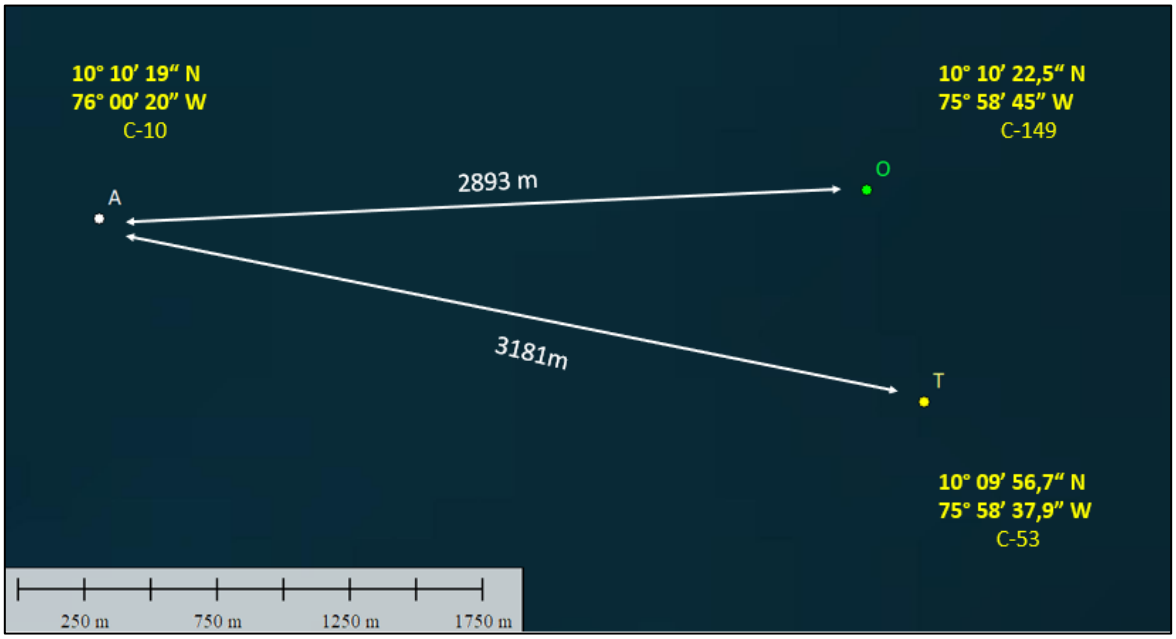

Image 27: Map showing the relative position of the 1982 Coordinates ("A"), the Target Coordinates ("T"), and the Corrected 1982 Coordinates ("O"), prepared by Dr. Hector Mora.[354]

242. According to the Claimant, these differences are attributable to "*the scale of error inherent in reporting geodetic coordinates*", further claiming that "[w]*hile it was possible to go back to precisely the same location, the precise coordinates associated with that location could vary based on the manner in which the location was identified*".[355]

243. Without any technical support for its allegations, the Claimant attempts to explain the 1.57 nautical mile difference between the coordinates reported by GMC and those recorded by the

352 Report by Inspector on Board the MN. Heather Express to Admiral Maritime and Port Director, 29 September 1988 (dated 28 August 1983 through 9 September 1983) (**Exhibit C-23**), pp. 14, 16. See also Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983 (**Exhibit C-53**), pp. 7, 17.

353 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October1983 (**Exhibit C-149**) , p. 4.

354 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), Figure 5.

355 Amended Statement of Claim, ¶ 102.

DIMAR inspectors in the Second Oceaneering Expedition by claiming that this "*reflects the scale of error inherent* [to] *geodetic coordinates*".[356] This is wrong.

244. The Claimant omits that the concept of "margin of error" is a measurable term of art in geodesy. As Prof. Dr. Hector Mora explains, all positioning systems have a margin of error, composed by various elements, including the equipment used and the positioning method.[357] However, an "error" inherent to any measurement taken by using equipment that was reasonably well used is distinguishable from a mistake, which may invalidate the measurement obtained.[358] Dr. Mora made the required calculations for each of the elements that make up the margin of error of the Decca Trisponder equipment and the methods used by GMC (including using paper charts), arriving at a total margin of error of the equipment and methods used by Glocca Morra that is under 400 meters.[359] As Dr. Mora cogently states in his Expert Report: "*it is simply not true that a difference in the order of magnitude of 2.894 meters may be explained as an "error" within the acceptable margin of error for a geodesic measurement*."[360]

245. In fact, this discrepancy was one of the elements that led the Council of State to conclude, many years later, that GMC had not furnished sufficient evidence that it had found the *Galeón San José*. As the Respondent explains below, in 2018 the Colombian Council of State issued a Unification Decision by which it decided on a class action against DIMAR Resolution 354. Among other elements, the Council of State based its decision on the discrepancy among the coordinates reported by GMC and by the DIMAR inspectors.[361] The Council of State illustrated this discrepancy as follows:

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356 Amended Statement of Claim, ¶ 102.

357 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 56.

358 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 57.

359 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 79.

360 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ 80.

361 Council of State, Full Administrative Litigation Chamber, Unification Judgment CE-SU 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), ¶¶ 106-108.

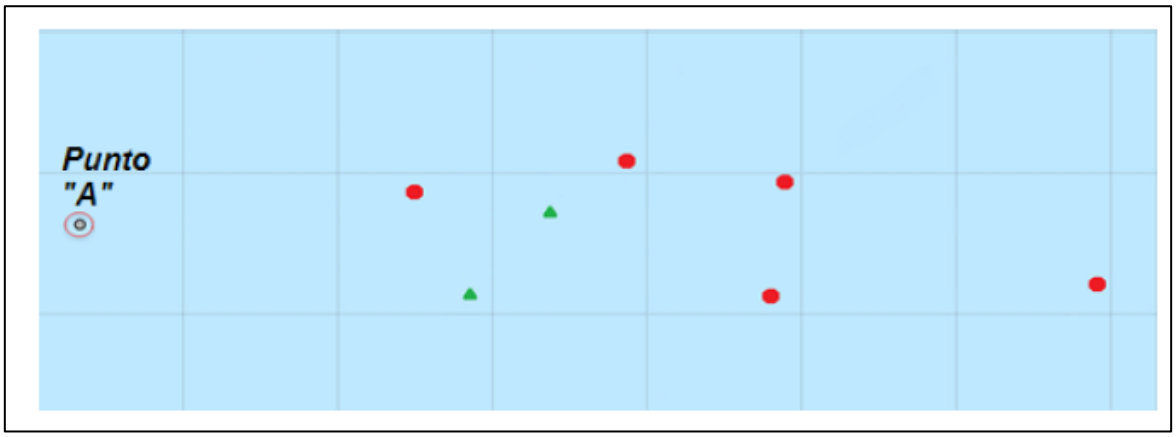

Image 28: Image of routes followed by Heather Express and Seaway Eagle.

246. The points in red show the path covered by the Heather Express during the First Oceaneering Expedition, while the green triangles show the route followed by the Seaway Eagle in the Second Oceaneering Expedition – both paths, which largely coincide, are far from the coordinate reported by GMC, illustrated with "Point 'A'" ("Punto 'A'").

247. In light of the above, far from confirming the Claimant's allegations as regards to its alleged discovery of the *Galeón San José*, the Oceaneering Expeditions, if anything, cast an even larger shadow on their credibility. As explained above, the data recently obtained by WHOI in the survey commissioned by Colombia demonstrates the Claimant's fraudulent practices beyond any doubt.

F. THE MINUTES OF THE COMMISSION ON SHIPWRECKED ANTIQUITIES SHOW THAT COLOMBIA WAS UNCONVINCED THAT GLOCCA MORRA'S ALLEGED FINDING WAS THE *GALEÓN SAN JOSÉ*

248. In the Amended Statement of Claim, the Claimant alleges that, following the Oceaneering Expeditions, "*Colombian authorities advanced their plans to salvage the San José shipwreck, fist by progressing negotiations for a salvage contract with SSA Cayman*".[362] According to the Claimant, the minutes of the Commission on Shipwrecked Antiquities (the "**Commission**") from this period "*patently reflect that the Colombian authorities understood SSA Cayman to have found the San José shipwreck.*"[363] Nothing could be farther from the truth.

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362 Amended Statement of Claim, ¶ 110.

363 Amended Statement of Claim, ¶ 110.

249. The Commission was created by the President of Colombia on 24 January 1984.[364] Pursuant to Decree 29 of 1984, the Commission's functions comprised advising the Colombian government in all matters relating to shipwrecked antiquities, including opining on the use of salvaged shipwrecked antiquities and suggesting methods to supervise their exploration and exploitation.[365] As is evident, the Commission's mission was not limited to the *San José* – rather, its tasks extended to any and all potential shipwrecks in Colombian waters.

250. GMC's alleged finding was not the only potential shipwreck that was being considered by the Commission at the time. As regards the *San José* alone, by November 1983, over fifteen companies had submitted requests for exploration permits allegedly searching for the *Galeón*.[366] In fact, in the minutes from the period that the Claimant describes in its Amended Statement of Claim, between January 1984 and November 1987, the Commission expressly addressed at least nine other requests for the exploration and/or salvage of shipwrecked antiquities, in addition to Glocca Morra's:

- At the meeting of 9 February 1984, the Commission discussed a request by the company Fathom Line to be authorized to conduct exploration and salvage operations in the area of the Salmedina lighthouse.[367] Fathom Line had reported having found shipwrecks in twenty locations.[368]

- During the meeting of 24 May 1984, the Commission received a request for exploration submitted by the British Magellan Consortium Salvage consortium, for the concession of an exploration area close to the Islas del Rosario archipelago.[369]

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364 Prior to the formalization of the Commission on Shipwrecked Antiquities, a Committee on Shipwrecked Species advised the government on all matters related to shipwrecked antiquities. *See* Minutes of the Meeting of the Commission on Shipwrecked Species, 08 November 1983 (**Exhibit C-150**). *See also* Minutes of the Meeting of the Commission on Shipwrecked Species, 08 November 1983 (**Exhibit C-152**).

365 *See* Decree 29 of 1984, 24 January 1984 (**Exhibit R-112**), Article 2.

366 Minutes of the Meeting of the Council of Ministers, 8 November 1983 (**Exhibit R-108**), pp. 12-13.

367 Minutes of the Meeting of the Commission Shipwrecked Antiquities, 09 February 1984 (**Exhibit C-155**), p. 1.

368 Minutes of the Meeting of the Council of Ministers, 17 March 1983 (**Exhibit R-95**), p. 5.

369 Minutes of the Meeting of the Commission Shipwrecked Antiquities, 24 May 1984 (**Exhibit C-159**), p. 1.

- In the meeting of 14 June 1984, the Commission addressed a request for an exploration and salvage permit placed by Consortium Salvage Ltd., a British company with ties to the British Maritime Museum.[370]

- During the meeting of 6 September 1984, the Commission discussed a request for salvage of shipwreck antiquities submitted by Taylor Diving and Salvage Co.[371]

- During the meeting of 29 July 1985, the Commission discussed a request for exploration submitted by Payan Camargo y CIA, which was dismissed.[372]

- On 4 February 1987, the Commission discussed a proposal for exploration and salvage presented by Mr. Murphy, a marine archaeologist from the United States.[373]

- In the meeting of 3 April 1986, the Commission addressed a request for salvage of a shipwreck of historic value for the U.S. in San Andrés's Archipelago and Providencia.[374]

- On 22 April 1987, the Commission addressed a letter from the Ambassador of the United Kingdom, Mr. Richard A. Nelson, informing the United Kingdom's interest in participating in the search and salvage of shipwreck antiquities in the San Andrés Archipelago, Providencia and Cartagena.[375]

- On 20 May 1987, the Commission discussed a letter from the United States Navy regarding the recovery of the remains of the U.S.N. Kearsarge.[376]

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370 *See* Minutes of the Meeting of the Commission Shipwrecked Antiquities, 14 June 1984 (**Exhibit C-160**), p. 2.

371 *See* Minutes of the Meeting of the Commission Shipwrecked Antiquities, 06 September 1984 (**Exhibit C-164**), p. 1.

372 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 26 July 1985 (**Exhibit C-174**), p. 1.

373 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 4 February 1987 (**Exhibit C-178**), p. 3.

374 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 03 April 1986 (**Exhibit C-177**). *See also* Minutes of the Commission on Shipwrecked Antiquities (**Exhibit R-123**), p. 2.

375 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 22 April 1987 (**Exhibit -181**), p. 2.

376 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 20 May 1987 (**Exhibit R-257**), p. 1.

- On 9 November 1987, the Commission addressed a proposal to conduct salvage works in the Archipelago of San Andrés and Providence by the Hollywood Adventure Films.[377]

251. In this light, despite the Claimant's attempt to portray the Claimant's alleged finding as the Commission's sole concern, it is clear that the Commission's discussions, including as regards the draft salvage contract, were directed at strengthening the institutional framework for the treatment of shipwrecked antiquities in general – not specifically for the Claimant and its unidentified discovery.

252. Contrary to the Claimant's allegations, the minutes of the Antiquities Commission show the Colombian government's persistent doubts that Glocca Morra's alleged finding was the *Galéon San José*. In line with the findings of the DIMAR inspectors following the Oceaneering Expeditions, the Commission consistently referred to Glocca Morra's alleged finding in hypothetical terms, as a "*potential shipwreck*", "*a shipwreck*", "*the wreck declared by* [Glocca Morra]" and similar expressions that convey the uncertainty surrounding the alleged finding and its identity.

253. Indeed, this arises from the documents on which the Claimant itself relies. For instance, the minutes of the meeting of 16 January 1984 state that the Commission "*proceeded to open the envelope* […] *which contains the position reported by the Sea Search Armada Company for the possible rests of a shipwreck that is presumably a Galeón*".[378] The plans for the creation of a naval museum for the adequate treatment of historical and archaeological species discussed by the Commission as a separate point in the agenda was merely based on the hypothesis that the Claimant's finding was, indeed, eventually confirmed to be the *Galeón* – something which, as shown in this submission, did not occur at the time and has been now completely debunked.

254. In this same vein, the minutes of the meeting held on 23 January 1984 state that "*gentlemen from the Company Sea Search Armada had expressed their desire to make a presentation for the Commission on legal and technical aspects related to the salvage of the remains of the shipwreck reported by them*".[379] Again, not the *San José*.

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377 *See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 9 November 1987 (**Exhibit R-123**), p. 2.

378 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 16 January 1984 (**Exhibit C-153**), p. 2 (emphasis added).

379 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 23 January 1984 (**Exhibit C-154**), p. 1 (emphasis added).

G. COLOMBIA WAS ENTITLED TO CONSIDER PROVIDERS FOR AN EVENTUAL OPERATION REGARDING THE IDENTIFICATION AND SALVAGE OF A SHIPWRECK IN THE AREA

255. Despite the Claimant's baseless attempts at criticizing Colombia's treatment of a potential identification and salvage contract for the alleged finding of the *San José*, contemporaneous evidence shows that, despite not having an obligation to do so, Colombia negotiated with SSA Cayman in good faith, repeatedly informing SSA Cayman of its doubts concerning the identity of Glocca Morra's alleged finding (**1**). This notwithstanding, in line with Colombian law, Colombia legitimately decided to prioritize State-to-State arrangements that better accommodate the State's concerns, including as regards a potential conflict of interests affecting SSA Cayman's ability to undertake the task (**2**).

1. The Respondent negotiated a potential salvage contract with SSA Cayman in good faith

256. As explained above, neither GMC nor SSA Cayman were entitled to any rights to a salvage contract as a matter of Colombian law. This notwithstanding, the Colombian government duly considered GMC and later SSA Cayman's proposal to negotiate a salvage contract, dedicating considerable time and expense to negotiating such a contract in good faith.

257. Indeed, in a letter of 1 February 1984, SSA "ratified" its request of 12 March 1982 that a salvage contract be executed.[380] The letter from SSA was briefly addressed at the Commission's meeting of 9 February 1984.[381] Over the subsequent months, and despite GMC not being entitled to an "exclusive right" to a salvage contract, the Colombian government conducted negotiations with GMC in good faith, treating GMC as a potential supplier of salvage services.

258. In his response of 13 February 1984, Rear Admiral Gustavo Angel Mejía informed SSA that that the Colombian government was "*currently studying the terms of reference for the elaboration of a new contract, to be used in the agreements for the salvage of shipwrecked antiquities*", also clarifying that "*the report of a shipwrecked antiquity and its recognition by the* [DIMAR] *does not imply any right to recovery by the reporter.*"[382] It appears that the negotiations in this regard

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380 Letter from Francisco Afanador (Sea Search Armada) to Admiral Maritime and Port Director (**Exhibit R-7**) p. 1.

381 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 9 February 1984 (**Exhibit C-155**).

382 Letter from Gustavo Angel Mejia (DIMAR) to Francisco Afanador (Sea Search Armada), 13 February 1984 (**Exhibit R-8**), p. 1.

continued: in a letter to the Secretary of the Presidency of 16 February, Mr. Mejía informed the Presidency that he had met with representatives of Sea Search Armada, who had expressed that "[t]*he Company is keenly interested in the salvage of the denounced remains, even should these not belong to the SAN JOSE*."[383] Therefore, despite its *ex post* allegations, the Claimant was well aware that the Colombian authorities were unconvinced that the alleged discovery made by Glocca Morra was the *Galeón San José*, as SSA claimed it to be.

259. The Claimant also misrepresents the discussions maintained by the Antiquities Commissions between April and June 1984. Namely, the Claimant alleges that during this period "*the Antiquities Commission discussed a series of plans to strengthen Colombia's position to enter into a salvage contract with SSA Cayman*".[384] According to the Claimant, these "plans" included (***i***) proposing to create an institution with legal status to act as the Colombian counterpart to negotiate and execute a salvage contract;[385] (***ii***) proposing that the Bank of the Republic take responsibility for this task and reviewing the draft salvage contract[386] and (***iii***) proposing that the Bank of the Republic act as an "umbrella organization" in charge of the recovery of shipwrecked goods.[387] What the Claimant omits is that, contrary to its portrayal of all the measures adopted by the Commission over the relevant period as being signs of "progress" towards the execution of a salvage contract with SSA, neither the *Galéon San José* nor the Claimant were mentioned in any of the relevant minutes. Rather, the Commission's efforts were aimed at putting in place a solid framework for the treatment of shipwrecked antiquities in general.

260. On August 1984, the DIMAR sent SSA Cayman a draft contract for the salvage of shipwrecked antiquities. Contrary to the Claimant's allegations that the mere fact that the Respondent negotiated a salvage contract entailed the recognition that the alleged findings were, indeed, the *San José*, the draft contract emphasized the need for SSA Cayman to identify the finding as being the *San José* prior to the commencement of the salvage activities. Indeed, determining the "*exact location of the species*" (also called "*verification*") was described as "*the first material activity in*

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383 Letter from Gustavo Angel Mejia (DIMAR) to Lilian Suarez Melo (Legal Secretary of the Republic of Colombia), 16 February 1984 (**Exihibit R-113**), p. 2 (emphasis added).

384 Amended Statement of Claim, ¶ 118.

385 Amended Statement of Claim, ¶ 118(a)

386 Amended Statement of Claim, ¶ 118(b).

387 Amended Statement of Claim, ¶ 118(c).

the execution of the contract", and as a "*indispensable requirement for the performance to proceed*".[388]

261. During September 1984, as the Claimant acknowledged, SSA Cayman and the Colombian State continued to negotiate the salvage contract in good faith.[389] This notwithstanding, the Colombian government was still doubtful as to the identity of the *San José*. In this regard, the minutes of the Commission belonging to that period conclusively show that the Commission continued considering that it was crucial to fully identify the alleged shipwreck as being the *San José* before any salvage efforts were undertaken.

262. In the meeting of 19 October 1984, the Commission agreed to respond to SSA's proposal on the potential salvage agreement by, *inter alia*, (***i***) "*reminding the Company once again of the difference between the phases of exploration and exploitation or salvage and that currently SEA SEARCH ARMADA is acting as a possible contractor of the Nation during the Second Phase*"; (***ii***) the area where the potential shipwreck was located would only be determined "[o]*nce the confidential report had been verified by DIMAR*".[390] Similar observations were made at the meeting of 31 October 1984.[391] The revised terms for the salvage contract were sent to SSA Cayman on 2 November 1984.[392]

263. As described by the Claimant,[393] the good faith negotiations with SSA Cayman continued until June 1985, with exchanges of information and mutual efforts to arrive at an agreeable draft salvage contract. This notwithstanding, the Colombian government remained unconvinced that the alleged finding reported by SSA Cayman was the *San José*, and became increasingly weary of any potential conflicts of interests that could taint the negotiations with SSA Cayman.

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388 Draft's Clauses for a Contract related to the salvage of Shipwrecked Species, August 1984 (**Exhibit C-16bis**), p. 3.

389 Amended Statement of Claim, ¶ 122.

390 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 19 October 1984 (**Exhibit C-165**), p. 1.

391 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 31 October 1984 (**Exhibit C-166**), ¶ 4.

392 Letter from Gustavo Angel Mejia (DIMAR) to James A. Richard (Sea Search Armada) (**Exhibit C-19**).

393 *See* Amended Statement of Claim, ¶¶ 125-131.

264. Ultimately, as further explained below, the uncertainty surrounding the identification of the finding that had been reported as the *San José* led the Colombian government to prospect other potential contractors, particularly States, for an eventual salvage contract.

2. Contrary to the Claimant's claims, the MoU entered with Sweden does not support its contention that SSA had found the San Jose

265. In its Amended Statement of Claim, the Claimant argues that "*the fact that Colombia was expending considerable resources to find a salvage operator indicate*[s] *that it believed SSA Cayman had indeed found the San José shipwreck.*"[394] However, the documents show that the opposite is true: Colombia's priority was to obtain a contractor to assist, precisely, with the identification of the alleged shipwreck, which would necessarily precede any potential salvage operations.

266. In this regard, in the meeting of 29 July 1985, the Commission resolved to send a letter to the National Geographic Society "*indicating the country's interest, related to verifying whether the shipwreck denounced as the possible 'San José' could be confirmed by the company*".[395]

267. At the meeting of 6 November 1985, the Commission read the letter sent to Dr. Wilbur E. Garret of the National Geographic Society, "*in which the Government expresses its interest in knowing if the Galeón that is the subject of the complaint is in fact the San José, and for which it would like to know if National Geographic Magazine can carry out the identification work.*"[396] Should the National Geographic Society be unable or unwilling to help, the Commission agreed to contact the company Occidental de Colombia Inc. to take on "*the requested identification*".[397]

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394 Amended Statement of Claim, ¶ 132.

395 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 26 July 1985 (**Exhibit C-174**), p. 2. The letter was read out loud at the meeting of 1 November1984 (*See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 6 November 1985 (**Exhibit C-175**), p. 1). On 4 December 1984, the Commission followed-up on the potential collaboration with the National Geographic Magazine in the identification of the *Galeón San José*, using an individual submarine operated by one of the National Geographic Magazine's associated in the West Coast of the United States (*See* Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 04 December 1985 (**Exhibit C-176**), p. 1.

396 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 6 November 1985 (**Exhibit C-175**), p. 1.

397 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 6 November 1985 (**Exhibit C-175**), p. 1.

268. Likewise, on 3 April 1986, the Commission considered asking the Cartagena Oceanographic Hydrographic Research Center (CIOH) to assist with the identification process.[398] In this meeting, the Commission proposed "*the elaboration of a term sheet for the preparation of a contract for the Identification and Salvage of Shipwrecked Antiquities, which would contemplate the identification phase as a contractual condition when the salvage contract is awarded*."[399]Several months later, the discussion of this point was resumed at the Commission's meeting of 18 February 1987, in the presence of the then President of the Republic of Colombia, Dr. Virgilio Barco Vargas. After being informed of certain rumours that arose in Washington, D.C. that an American citizen would oversee the alleged salvage of certain treasures coming from the *Galéon*, President Barco Vargas established a set of guidelines for the Commission's treatment of the issue of the identification and salvage agreement going forward:

> a) Negotiation for recovery should be carried out on a government-to-government basis.
>
> b) The countries that possess the technology required for the salvage work should be investigated and the existence of any interest in this matter should be explored.
>
> c) In case equipment is brought to the country to identify the *Galeón*, an extensive area where other shipwrecked antiquities may exist should be explored as far as possible.
>
> d) The search for a solution to the identification problem should be accelerated, completing the stages of least cost for the country.[400]

269. As these guidelines evince, the President's concerns in relation to the conclusion of an eventual identification and salvage contract were twofold: (***i***) ensuring that no conflict of interests would exist and (***ii***) ensuring the availability of the equipment required to resolve "*the identification problem*" and for the salvage activities.

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398 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 3 April 1985 (**Exhibit C-177**), p. 1.

399 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 3 April 1985 (**Exhibit C-177**), p. 1.

400 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 18 February 1987 (**Exhibit C-179**), pp. 1-2.

270. In the same meeting, the Commission determined "*the need to bring into the country an underwater archaeologist to determine the possibility of using the means available to the Navy to identify the Galeón*".[401]

271. Around this period, Colombia's concerns were aggravated when, in April 1987, Dr. Watts, a marine archaeologist whose assistance was sought by Colombia, confirmed that "[t]*he graphics from the side scan sonar do not clearly demonstrate the existence of the vessel*" and that "[i]*t is not possible to identify the remains of the shipwreck with the means available to Colombia.*"[402] Furthermore, as recorded in the minutes of the Commission's meeting of 20 May 1987, the CIOH of the DIMAR conducted an expedition to the coordinates reported by Glocca Morra, finding no clear indicia of the remains of a shipwreck at that location.[403]

272. At this juncture, the Commission discussed the terms of the Memorandum to be sent to the embassies of selected countries.[404]

273. Accordingly, in May 1987 the Colombian Minister of Foreign Affairs wrote to the Swedish Ambassador to invite the Swedish government to express its interest in participating in the identification and eventual salvage of the shipwreck reported by GMC. In this letter, Colombia clearly transmitted its lack of certainty as to the identity of the alleged finding, informing the Swedish Ambassador that Colombia would not be liable should no relevant findings be made:

> In the vicinity of the Rosario Islands, an area of Colombia's territorial sea in which there is a great wealth of shipwrecks, it has been reported that there exists an object lying on the seabed, at a depth of about 250 meters, which could be the San Jose Galleón.
>
> However, since the search for and identification of the property is part of the work to be carried out by the contractor, the Government does not guarantee nor assume responsibility for the existence, nature and identity of the reported object or the profitability of the salvage.
>
> However, should the project prove unsuccessful, it will give priority to the contractor to obtain permits for the exploration of adjacent underwater areas, in which there are indications of the existence of shipwrecks, and

401 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 18 February 1987 (**Exhibit C-179**), p. 2 (emphasis added).

402 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 22 April 1987 (**Exhibit C-181**), p. 3.

403 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 20 May 1987 (**Exhibit C-182**).

404 Minutes of the Meeting of the Commission on Shipwrecked Antiquities, 22 April 1987 (**Exhibit C-181**).

> where historical evidence suggests that the battle that resulted in the sinking of the *San José* took place.[405]

274. In the same letter, the Colombian government clarified the scope of the tasks to be performed by the Swedish government were the contract concluded, including: "*a) identification; b) detailed historical and archaeological study of the shipwreck site; c) eventual recovery or salvage of the shipwreck site; d) preservation of the salvaged values*."[406] The Colombian government clearly expressed that the alleged remains were still unidentified and, therefore, the salvage contract was "eventual".

275. During the ensuing months, the Commissions sought to discuss a potential agreement with several foreign governments, including the United States, Sweden, Brazil, the United Kingdom, France, Italy, Norway, the Netherlands and Japan.[407]

276. As regards Colombia's proposal to the United States, Colombia corrects the Claimant's misrepresentation that "[n]*otably, Colombia did not ask the U.S. to look anew for the San José, but rather to prepare a salvage operation*."[408] Colombia's message to the United States discussed "*a government-to-government arrangement to search for and recover the Spanish treasureship* '*San Jose*'".[409] Moreover, in line with the previous correspondence with Sweden, the message expressly clarified that Colombia did not guarantee that a shipwreck – let alone the *San José* – would be located at the relevant coordinates: "[e]*ven though the prospective contractor will be responsible for the search and identification of the ship, the GOC will neither guarantee nor assume responsibility for the existence, nature, and identity of either the searched object or the salvaged object*."[410]

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405 Letter from Julio Londoño Paredes (Ministry of Foreign Affairs) to Karl Warnberg (Swedish Embassy), 26 May 1987 (**Exhibit R-121**), p. 1.

406 Letter from Julio Londoño Paredes (Ministry of Foreign Affairs) to Karl Warnberg (Swedish Embassy), 26 May 1987 (**Exhibit R-121**), p. 1 (emphasis added).

407 Minutes of the Meeting of the Advisory Committee on Shipwrecked Antiquities, 4 February 1988 (**Exhibit C-183**).

408 Amended Statement of Claim, ¶ 146.

409 Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987 (**Exhibit C-57**, p. 1 (emphasis added).

410 *See* Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987 (**Exhibit C-57**), pp. 1-2.

277. In this context, the Claimant's allegation that the term "identification" always "*refers to the identification and cataloguing of the items found aboard the shipwreck*"[411] is disingenuous. In its context, it is evident that Colombia's concern was to determine whether the Claimant's unidentified alleged finding was, as claimed by the Claimant, the *Galéon San José*.

278. Among other offers, the Colombian government received an offer from SSA Cayman, submitted as the "Institute of the Americas".[412] Clearly, this proposal did not adequately address any of the Colombian's concerns as regards: (***i***) the identification of the alleged shipwreck as the *San José*, which remained an open question to the Colombian government but was treated as a *fait accompli* by SSA Cayman and (***ii***) the potential conflict of interests for SSA Cayman to conduct the identification activities.[413]

279. On 2 March 1988, the Commission resolved to reject all the proposals that did not contemplate Colombia's requirement for a government-to-government solution, which comprised the proposals received from the United States (namely, through the "Institute of the Americas"), Denmark, and the Netherlands.[414] The Commission also resolved to hold meetings with the governments of Sweden, France and tentatively Italy, to further discuss their proposals.[415] This resolution was confirmed on 8 March 1988 by the newly appointed Council for the Award of Contracts on Antiquities and Shipwrecked Goods (the "**Council**"). During the meeting of 8 March 1988, the Council agreed on the text of the letters to be sent to the nations with which

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411 Amended Statement of Claim, ¶ 147.

412 *See* Proposal to Find and Salvage Colonial Maritime Artifacts in the Vicinity of Cartagena, Colombia from IOTA to Ministry of Foreign Affairs, 15 October 1987 (**Exhibit R-122**). *See also* Minutes of the Meeting of the Advisory Committee on Shipwrecked Antiquities, 4 February 1988 (**Exhibit C-183**).

413 According to the IOTA Proposal, the main concerns were to define: (i) "where" should the salvage activities be conducted which, according to IOTA, should comprise all the alleged findings reported by SSA Cayman that had not been recognized by the DIMAR and (ii) "how" would these activities be carried out, in terms of the governmental, organizational and financial challenges that the salvage operations would face (*See* Proposal to Find and Salvage Colonial Maritime Artifacts in the Vicinity of Cartagena, Colombia from IOTA to Ministry of Foreign Affairs, 15 October 1987 (**Exhibit R-122**), pp. 11-12). Conspicuously the question of "what" would be salvaged was neither asked nor answered by the IOTA. *See* Proposal to Find and Salvage Colonial Maritime Artifacts in the Vicinity of Cartagena, Colombia from IOTA to Ministry of Foreign Affairs, 15 October 1987 (**Exhibit R-122**).

414 Minutes of the Meeting of Advisory Committee on Shipwrecked Antiquities, 20 March 1988 (**Exhibit C-185**).

415 Minutes of the Meeting of Advisory Committee on Shipwrecked Antiquities, 20 March 1988 (**Exhibit C-185**), p. 3.

negotiations would continue, which included a series of technical considerations to prevent an eventual contractor from damaging the goods to obtain payment.[416]

280. The proposals subsequently received by the Colombian government only increased its doubts as to the identification of the *San José*. For instance, on 14 April 1988, Colombia received a letter from MICOPERI, an Italian company that had been contacted by the Italian government, which expressed its belief that it would be necessary to divide the project into two phases: an identification phase and a phase for salvage and ancillary activities. According to MICOPERI, "*it is necessary to proceed with a sure identification of the object found within the given coordinates in order to be absolutely certain that the object found is the 'San José'*".[417]

281. In regard to the negotiations with the Swedish government, conducted with the participation of the Sveriges Investeringsbanken (the "**SIV**"), the Swedish national investment bank, a point of discussion was the high risk that the *San José* would not be found at the reported coordinates. Indeed, in a letter of 6 April 1988, the Investeringsbanken expressed its position that, since the project was "a *high-risk project*", it would be necessary for the search area to extend to 900 square nautical miles to "*minimize risk exposure to the largest possible degree*", in the understanding that other shipwrecks could be found in the area, should the identification of the *San José* prove unsuccessful.[418]

282. Finally, on 18 July 1988, the Colombian government entered into a Memorandum of Understanding with the Kingdom of Sweden (the "**MoU**"), to formally establish the terms for the negotiation of a future contract.[419] In line with the previous correspondence between the governments, the MoU evinces (***i***) Colombia's doubts regarding the existence of a shipwreck at the coordinates reported by GMC and, accordingly (***ii***) Colombia's understanding that it was necessary to proceed with the identification of the *Galeón* as a matter of priority. Various excerpts of the MoU demonstrate this.

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416 Minutes of the Council for Awarding Contracts on Antiquities and Shipwrecked Goods, 8 March 1988 (**Exhibit C-186**), p. 4.

417 Proposal for identification and salvage of the Galeon San Jose from MICOPERI to Ministry of Foreign Affairs, 14 April 1988 (**Exhibit R-124**), p. 2.

418 Letter from Harry Schein (Sveriges Investeringsbanken) to Colombian Government, 06 April 1984 (**Exhibit R-114**), pp. 1-2.

419 Memorandum of Understanding on Agreements Reached Between Negotiators from Colombia and Sweden, Prior to the Date of Contract Award, 18 July 1988 (**Exhibit C-59**).

283. Indeed, throughout the MoU, the potential finding is discussed in hypothetical terms. In the "Evaluation" section, for instance, the MoU provided that "[a]*ll the historical goods shall be the property of Colombia and the Swedish Government shall recognize the claimant's rights (5% of the gross value), if the shipwrecked goods are found within the reported area*."[420] In the same vein, the MoU provided for the creation of an Evaluation Committee to assist the Commission, which would be integrated by "[o]*ne institution for Colombia, one institution for Sea Search Armada and two selected by the preceding institutions*." Additionally, "[i]*n the event that shipwrecked goods are found within the area reported by Glocca Morra, which rights were assigned to Sea Search Armada*", the Evaluation Committee would also include "[o]*ne institution for Sea Search Armada*".[421]

284. Moreover, the search area contemplated in the MoU was not restricted to the coordinates reported by GMC in 1982. In this regard, although the MoU provided that the identification tasks would commence at the coordinates reported by GMC, the total area to be covered "*for the works of identification and salvage of the San José*" was an area of 100 square nautical miles.[422] Contrary to the Claimant's allegations, this does not "*reflect*[] *Colombia's contemporaneous assessment of the size of the debris field resulting from the San José shipwreck*."[423] As shown, several passages of the MoU indicate Colombia's belief that a shipwreck would not be found at the coordinates reported by GMC. What the large surface area contemplated in the MoU shows, rather, is Colombia's suspicion that nothing of value would be found at the coordinates reported by GMC – a suspicion that has been now confirmed beyond any doubt.

285. Indeed, the fact that any salvage operation would be necessarily subject to a positive identification of the *San José* was further in subsequent developments. In a legal opinion of 7 September 1988 issued by Colombian law firm Prieto, Vallejo y Asociados to the SIV, regarding SSA Cayman's alleged rights over eventual findings, Messrs. Prieto and Vallejo opined:

> Any claim from SEA SEARCH ARMADA is depending on the fact that *GALEÓN* SAN JOSE and its belongings are actually found within the declared coordinates submitted to the maritime Authority of Colombia (herein after referred simply as DIMAR) on March 18 of 1982 by GLOCCA MORRA

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420 Memorandum of Understanding on Agreements Reached Between Negotiators from Colombia and Sweden, Prior to the Date of Contract Award, 18 July 1988 (**Exhibit C-59**), ¶ 1(2) (emphasis added).

421 Memorandum of Understanding on Agreements Reached Between Negotiators from Colombia and Sweden, Prior to the Date of Contract Award, 18 July 1988 (**Exhibit C-59**), ¶ 3 (emphasis added).

422 Memorandum of Understanding on Agreements Reached Between Negotiators from Colombia and Sweden, Prior to the Date of Contract Award, 18 July 1988 (**Exhibit C-59**), ¶ 5.

423 Amended Statement of Claim, ¶ 155(c).

> COMPANY, and recognised formally by DIMAR, on behalf of the colombian [sic] Government, by Resolution 354 of June 3, 1982 (Attached as document No. 1). The denounced coordinates correspond to a quadrilateral of one (1) mile by half (1/2) mile. Any right of a reporter has a positive condition precedent: That the *GALEÓN* and its belongings must actually be found within such specific denounced area.[424]

286. The uncertainty surrounding the identification of the *Galeón* was also reflected in the draft agreement negotiated between Colombia and Sweden in May 1989 (the "**Draft Agreement**"). The clauses in the draft agreement speak for themselves as to the parties' understanding that (***i***) the salvage could not proceed until after the identification of the alleged shipwreck as the *Galéon San José* had been completed and (***ii***) there was a high risk that no antiquities would be found at the coordinates reported by Glocca Morra – a risk that, in the draft, was to be borne by Sweden.

287. Indeed, Clause One of the Draft Agreement provided:

> The Government of Colombia and the Government of Sweden hereby agree, subject to the specifications and conditions to be detailed in the documents and contract complementary to the present document, the general conditions under which the project of search, identification, salvage and eventual recovery of the *Galeón* San Jose, its antiquities and shipwrecked values and the performance of other related and complementary activities, as agreed below, will be carried out.[425]

288. Further, the Draft Agreement released Colombia from any liability in the event that no findings were made at the reported coordinates:

> Notwithstanding the provision of the coordinates denounced by the Glocca Morra Company, which assigned all its rights as denouncer of a possible finding related to the wreck of the *Galeón* San Jose to the Sea Search Armada of the Cayman Islands, British West Indies, in accordance with Article 113 of Decree 2324 of 1984 and Resolution 354 of 1982 of the General Maritime and Port Directorate of the Ministry of National Defense and where the San Jose *Galeón* is said to be located, COLOMBIA does not guarantee or assume any responsibility whatsoever as to the existence or not of said *Galeón* in that place, within such coordinates, nor as to the nature or entity of the object denounced, nor as to the values or importance of the antiquities and shipwrecked species believed to be on board the *Galeón* or scattered in the

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424 Letter from Juan Manuel Prieto and Felipe Vallejo (Prieto Vallejo Abogados) to Mr. Harry Schein (Sveriges Investeringsbank), 7 September 1988 (**Exhibit R-127**), p. 1 (emphasis in original).

425 Draft Agreement between the Government of Colombia and the Kingdom of Sweden for the development of the project for find, identification, rescue and eventual salvage of the Galeon San Jose, 30 May 1989 (**Exhibit R-132**), Clause First (emphasis added).

> surroundings of the shipwreck, nor will it know the profitability of the salvage in question, as SWEDEN and its executing entities understand it.[426]

289. Unfortunately, negotiations between the Swedish and Colombian governments reached an end shortly after. Despite the Claimant's reference to baseless "*accusations of corruption and corporate piracy*",[427] the reason for the Swedish government's withdrawal, as communicated in a Diplomatic Note of 18 July 1989, was the existence of certain restrictions in Swedish law that did not allow the contract to proceed as a State-to-State arrangement.[428]

290. At the Council's meeting of 18 January 1991, the Secretary General to the Presidency, Dr. Fabio Villegas Ramírez, informed the other attendees that:

> [G]iven the technical characteristics and complexity of the contracting of the work related to the San Jose project, it had been considered convenient to carry out the procurement process in two stages. The first of these would correspond to the location and identification of the San Jose *Galeón* and once the wrecked species had been identified, the subsequent phase related to the salvage, rescue, preservation of historical and cultural values, construction of a museum, etc., will follow.[429]

291. The Colombian Presidency later communicated this decision to the Minister of Trade.[430]

292. Given the difficulties of successfully achieving a contractual arrangement that would adequately address the Colombian government's concerns, the Commission considered the possibility that the Navy could conduct the activities required for the identification and localization of the *San José*. As stated in the minutes of the meeting of 10 February 1992, the Navy had expressed that "*it is willing to carry out the phase for the localization and characterization of the anomaly reported by GLOCCA MORRA/SEA SEARCH ARMADA*" and was therefore "*taking responsibility over this project.*"[431] Unfortunately, as discussed at the Commission's meeting of 24 June 1992,

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426 Draft Agreement between the Government of Colombia and the Kingdom of Sweden for the development of the project for find, identification, rescue and eventual salvage of the Galeon San Jose, 30 May 1989 (**Exhibit R-132**), letter D (emphasis added).

427 Amended Statement of Claim, ¶ 156.

428 *See* Diplomatic Note No. C-58-98, 18 July 1989 (**Exhibit R-136**).

429 Minutes of the Council for Awarding Contracts on Antiquities and Shipwrecked Goods, 18 January 1991 (**Exhibit R-145**), p. 2 (emphasis added).

430 Letter from Fabio Villegas Ramirez (Presidency of Republic of Colombia) to Juan Manuel Santos Calderón (Ministry of Trade), 28 January 1992 (**Exhibit R-152**).

431 Minutes of Meeting of the Commission on Shipwrecked Antiquities, 10 February 1992 (**Exhibit R-154**), pp. 1-2.

the Navy lacked the equipment required to conduct these activities by itself. Consequently, the Commission resolved to return to the previous scheme, setting out once again to analyze the alternatives available to engage an external provider for localization and identification services.[432]

293. In light of the above, the Claimant's allegations as regards to Colombia's management of the potential identification and salvage contract for the alleged wreck of the *San José* hold no water. Contrary to the Claimant's portrayal of Colombia's efforts to obtain a salvage agreement as confirmation of Colombia's belief that GMC had found the *San José*, a closer look at the contemporaneous documents reveals that Colombia was persistently concerned by the lack of evidence of the *San José*'s identity. It was this lack of certainty that led Colombia *first* to undertake negotiations with what it considered to be trustworthy governmental counterparts, fully within the applicable framework under Colombian law and *second* to pursue the identification of the *Galeón* as a separate project, prior to moving forward with any salvage activities.

H. THE ISSUANCE OF THE 1984 DECREES DID NOT IMPINGE ON THE CLAIMANT'S RIGHTS UNDER RESOLUTION NO. 354

294. According to the Claimant, *"while Colombia was negotiating the salvage contract with SSA Cayman, it was also, behind SSA Cayman's back, attempting to change its laws concerning shipwreck reporting and recovery to reduce the proceeds owed to reporters"* and eliminating their alleged preferential rights to a salvage contract with the Colombian State.[433] The Claimant contends that this modification of Colombian law was done through the issuance of Decree No. 12 of 1984 ("**Decree 12**") and Decree No. 2324 of 1984 ("**Decree 2324**") (together, the "**1984 Decrees**").

295. Colombia demonstrates in this section that Decree 2324 was a regulation of general application that in no way targeted SSA (**1**); and that, in any event, the 1984 Decrees are immaterial to the Claimant's case since the Constitutional Court declared the provisions cited by the Claimant as unconstitutional. The fact that the Constitutional Court found the 1984 Decrees to be

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[432] Council for Awarding Contracts on Antiquities and Shipwrecked Goods Decree, 24 June 1992 (**Exhibit R-155**).

[433] Amended Statement of Claim, ¶¶ 107, 109.

unconstitutional shows, if anything, that Colombia abides by the Rule of Law, and that the Claimant suffered no prejudice (**2**).

1. Contrary to the Claimant's assertion, Decree 2324 was a regulation of general application that did not target SSA

296. Preliminarily, the Respondent notes that the Claimant has not furnished any evidence in support of its claim that the 1984 Decrees were targeted at the Claimant and issued "behind its back". As is evident, Colombia need not consult with the Claimant before exercising its regulatory powers.

297. Moreover, contrary to the Claimant's allegations, the 1984 Decrees were of general application and were not intended to specifically target SSA Cayman. In fact, the President of Colombia issued the 1984 Decrees to align the domestic regulatory framework with international law developments, particularly those concerning the Law of the Sea.

298. Indeed, on 10 December 1982, the UNCLOS was adopted, profoundly reshaping the international legal framework for maritime activities.[434] Although Colombia has yet to become a party to the Convention, Colombia actively participated in the negotiations – having also signed the treaty on the very day it opened for signature. In response to these changes in international law, Colombia updated its domestic legislation on maritime activities, with the President of Colombia issuing the 1984 Decrees to reorganize DIMAR and further develop maritime law regulations in Colombia.[435]

299. As is evident, the 1984 Decrees were not aimed at reducing any of the alleged rights of SSA's Alleged Predecessors but were instead the result of Colombia's efforts to align its domestic legislation with international developments in the Law of the Sea.

300. Further, neither of the 1984 Decrees applied retroactively, hence they did not affect pre-existing rights. Specifically, Article 196 of Decree 2324 and Article 9 of Decree 12 both stated that they would become effective as of the date of their issuance.[436]

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434 United Nations Convention on the Law of the Sea (1982) (**Exhibit RLA-111**).

435 *See* Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**); Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**).

436 Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**), Article 196; Decree No. 12 of 1984, 10 January 1984 (**Exhibit R-6**), Article 9.

2. In any event, the Constitutional Court's decision on the unconstitutionality of Decree 2324, shows that the Claimant has suffered no prejudice

301. The President of Colombia issued Decree 2324 pursuant to the authority granted by Article 1 of Law 19 of 1983, which authorized the reorganization of decentralized entities affiliated with the Ministry of Defense, including DIMAR.[437]

302. Mr. Danilo Devis, SSA's attorney and shareholder, submitted a constitutional review motion challenging the constitutionality of Articles 188 and 191 of Decree 2324.[438] Article 188 provided that:

303. Shipwrecks that were not or have not been salvaged per the terms indicated in article 710 of the Civil Code shall be considered shipwrecked antiques, which shall have the special nature indicated in the following article, and shall belong to the Nation.[439]

304. Meanwhile, Article 191 of Decree 2324 stated that:

> **Exploration permit and reporting**. Any natural person or legal entity, whether national or foreign, has the right to request the competent authority a permit or concession to explore in search of shipwrecked antiques in the areas referred to in the previous article, provided that they submit geographical, historical, nautical or other reasons that the authority deems sufficient. Likewise, they have the right to have their request resolved.
>
> If, in the exercise of the permit or concession, any discovery is made, it must be reported to the competent authority, indicating the geographic coordinates where it is located and submitting satisfactory evidence of its identification. Once recognized as the reporter of such a discovery, subject to current legal regulations, they will be entitled to a five percent (5%) share of the gross value of anything subsequently salvaged at the coordinates. […]
>
> If the salvage is conducted directly by the Nation, the five percent (5%) share to the reporter will be paid by the Nation. The Government shall establish the terms and conditions for this payment.[440]

305. In his motion for constitutional review, Mr. Devis argued that the President of Colombia had exceeded the powers granted by Congress under Law 19 of 1983, and that Articles 188 and 191

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437 Congress of Colombia, Law 19 of 1983 (**Exhibit R-103**), Article 1.

438 Colombian Constitutional Court, Judgment C-102/94, 10 March 1994 (**Exhibit C-24**), p. 4.

439 Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**), Article 188.

440 Decree Law No. 2324 of 1984, 18 September 1984 (**Exhibit C-18**), Article 191.

of Decree 2324 were unrelated to the reorganization of DIMAR but rather created new rights in favor of the State concerning shipwrecks – which were unauthorized under the applicable framework at the time.[441] In a ruling dated 10 March 1994, the Constitutional Court declared that Articles 188 and 191 of Decree 2324 were unconstitutional,[442] finding that, indeed, the two provisions were unrelated to DIMAR's reorganization and that the President had exceeded the powers conferred by Law 19 of 1983.[443]

306. As is evident, the Constitutional Court's decision was purely formal, as it did not involve a substantive analysis of Articles 188 and 191. Furthermore, the declaration of unconstitutionality meant that the 1984 Decrees were no longer part of the applicable legal framework. In the words of the Constitutional Court:

> In this order of ideas, the Constitutional Court, applying the final part of Article 6 of Decree 2067 of 1991, will proceed to remove from the legal system, for exceeding the material limit indicated in the enabling law (19 of 1983), not only the accused paragraphs of Articles 188 and 191 of Decree 2324 of 1984, but also the rest of the legal provisions of which they form part, as they are covered by the same defect of unenforceability.[444]

307. Since Articles 188 and 191 of Decree 2324 were declared unconstitutional, they could not have had any impact whatsoever on SSA Cayman's alleged rights. If anything, the Constitutional Court's decision shows that Colombia abides by the Rule of Law and that the Claimant has suffered no prejudice as a result of the issuance of the 1984 Decrees.

I. COLOMBIA COMMISSIONED THE COLUMBUS REPORT IN VIEW OF THE LACK OF EVIDENCE AND ABSENCE OF IDENTIFICATION OF THE SHIPWRECK ALLEGEDLY FOUND BY GMC

308. The Claimant has gone to great lengths in attempting to challenge the Columbus Report by questioning its probative value[445] and presenting the Columbus Report as something Colombia came up with just *"two-days after losing the Civil Court Action"*.[446] SSA's adjective-ridden and defective description of these circumstances leading to the release of the Columbus Report,

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441 Colombian Constitutional Court, Judgment C-102/94, 10 March 1994 (**Exhibit C-24**), p. 4.

442 Colombian Constitutional Court, Judgment C-102/94, 10 March 1994 (**Exhibit C-24**), p. 17.

443 Colombian Constitutional Court, Judgment C-102/94, 10 March 1994 (**Exhibit C-24**), pp. 14-15.

444 Colombian Constitutional Court, Judgment C-102/94, 10 March 1994 (**Exhibit C-24**), p. 16 (emphasis added).

445 Amended Statement of Claim, ¶ 168.

446 Amended Statement of Claim, ¶ 167.

which stems from a selective account of the facts, does not and cannot dent the relevance and materiality of the Columbus Report, as Colombia has demonstrated. [447]

309. To recall, first and foremost, Colombia's objective in commissioning the Columbus Report was to confirm whether or not GMC had made a finding at the coordinates it reported in the 1982 Confidential Report and – if there was a finding – if it was indeed the *Galeón San José*.[448] Contrary to Claimant's baseless claims[449], the Columbus Report fully supports the Respondent's position that, based on scientific evidence, no shipwreck, let alone the *Galeón San José*, could be found at the coordinates provided by GMC in the 1982 Confidential Report.[450]

310. Colombia's commissioning of the Columbus Report demonstrates Colombia's respect for the rule of law of any potential rights of GMC. Indeed, in commissioning the Columbus Report, Colombia's aim – given to the wholly insufficient evidence presented by GMC – was to confirm whether any shipwreck was located at the coordinates reported in the 1982 Confidential Report. Colombia's objective was the very opposite of the Claimant's bogus assertions that Colombia's intention in commissioning the report was to deny any possible rights of the Claimant. Evidently, the government was obliged to make sure whether GMC had any rights at all, as a matter of law, and would not have spent considerable human and economic resources in a verification campaign if its intention was not to abide by the law.

311. The Columbus Report is of the utmost significance, as it allowed Colombia to unequivocally challenge and scientifically disprove the hypothesis that the *Galeón San José* was located in the area GMC had reported in the 1982 Confidential Report (the "**Hypothesis**").[451] As demonstrated by Colombia, and further confirmed by the WHOI Report,[452] relying on the Columbus Report, Colombia showed that the Claimant has no rights whatsoever over the *Galeón San José* and that

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447 *See* Colombia's Article 10.20.5 Submission, ¶¶ 57-62, 110, 111, 153, 154, 157, 178, 186, 223. *See also* Colombia's Reply under Article 10.20.5 Submission, ¶¶ 65-68, 136, 257.

448 Contract No. 544 of 1993 between Colombia and Columbus Exploration, 21 October 1993 (**Exhibit R-10**), Clause 1.

449 Amended Statement of Claim, ¶¶ 167-172.

450 Letter from President's Office to DIMAR informing of Press Release, 8 July 1994 (**Exhibit R-011**), pp. 2-3.

451 Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982 (**Exhibit C-10**), p. 13.

452 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p. 12.

this Tribunal lacks jurisdiction *ratione materia* regarding the Claimant's alleged rights to the *San José*.[453]

312. Claimant submits that, through the exploration works developed pursuant to DIMAR's authorizations, it discovered the *Galeón San José*, [454]which it reported to Colombia in the 1982 Confidential Report.[455] Nevertheless, as Colombia has demonstrated, the 1982 Confidential Report does not refer to the *Galeón San José*. In fact, the 1982 Confidential Report expressly concluded that:

> Glocca Morra Co. believes from an operational point of view that the next step in the plan for a successful conclusion of the venture, will be either a submersion team, backed with a full support team, or a submersible (?) tied up with a man, that could be brought to the site of the shipwreck. Sea Search Armada is willing to assist with the substantial additional capital needed to carry out the identification and rescue of the shipwreck as soon as you reach an agreement with the Maritime and Port Director General, to start such an operation in the vicinity of target 'A'.[456]

313. The quote clearly shows that GMC determined that further marine exploration and substantial capital investments were required for the purpose of identifying what had been supposedly found in the reported coordinates. The Claimant's Alleged Predecessors' own words reveal that the alleged discovery of the *Galeón San José* was far from certain and that further exploration for the purposes of identification was needed.

314. Evidently in 1993, far from being a certainty or a fact capable of granting Claimant any right, GMC's alleged discovery of a shipwreck or the *Galeón San José* at the coordinates reported in the 1982 Confidential Report was, at its best, a mere hypothesis that required further exploration and verification. If GMC had provided sufficient evidence of its finding and identified the *San José*, Colombia would not have had to commission the Columbus Report because of the lack of evidence and the absence of identification of the shipwreck found by GMC.

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453 Respondent's Submission pursuant to Article 10.20.5, ¶¶ 148-151.

454 Claimant's Response to Colombia's Article 10.20.5 Objections, ¶¶ 27-40.

455 Claimant's Response to Colombia's Article 10.20.5 Objections, ¶¶ 41-50.

456 Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, 26 February 1982 (**Exhibit C-10**), p. 13 (emphasis added).

1. The True Motives Behind the Decision to Commission the Columbus Report and the Procedure Advanced to that End Militate in Favor of its Probative Value

315. As thoroughly demonstrated during the preliminary objections phase and in the relevant sections of this submission,[457] SSA's statements concerning the identity of its Alleged Predecessors' alleged discovery are defective at best. The Claimant has not and cannot prove that it had found the *Galeón San José*. Furthermore, prior to the results of the Columbus Report, neither the Respondent nor the Claimant had any certainty regarding GMC's purported finding.

316. After concluding that the uncertainty surrounding the findings of a shipwreck under the 1982 Confidential Report warranted further localization and identification surveys aimed at localising, as far as 1986, Colombia decided to undertake a project to achieve this goal, which ultimately led to the Columbus Report.

317. Colombian authorities had, for nearly a decade, expressed the need to confirm the location and identity of GMC's reported finding. Indeed, in 1986, four years after the 1982 Confidential Report, and three years before the Civil Court Action, the Commission of Shipwrecked Antiquities stated that the identification of the *San José* was a precondition for any potential salvage contract.[458]

318. Quite plainly, as shown by Colombia, the efforts leading to the commission of the Columbus Report underscore Colombia's awareness for verification of the alleged finding reported by GMC in 1982 as a necessary condition for entering on, and arranging, any potential salvage operations.

319. Further, on 4 February 1987, the Commission on Shipwrecked Antiquities expressly provided:

> It was concluded that the most important thing to be done before defining the recovery is to carry out a full identification of the *Galeón*. At this point, the technical capabilities that the Navy may have to assist in the execution of this work are discussed.[459]

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457 *See* Expert Report of C. del Cairo (**RER-1 [del Cairo]**), Sections IX-X; Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p.12.

458 Commission on Shipwrecked Antiquities, Meeting Minutes No. 24, 3 April 1986 (**Exhibit C-177**), p. 1. *See also* Commission on Shipwrecked Antiquities, Meeting Minutes No. 21, 6 November 1985 (**Exhibit C-175**), p. 1.

459 Commission on Shipwrecked Antiquities, Meeting Minutes No. 025, 4 February 1987 (**Exhibit C-178**), p. 2 (emphasis added).

2. The Colombian government's decision to entrust the location and identification tasks to a third party was undertaken with the participation and supervision of independent experts

320. As shown by the Commission's meeting minutes and the Government's communications with experts, Colombia's objective to confirm whether or not GMC had made a finding at the coordinates it had reported in the 1982 Confidential Report led the Colombian Government to contact experts to evaluate Colombia's capabilities to confirm the identity of the purported shipwreck with its own resources, and to define the means and elements to determine whether the alleged finding was or was not the *San José*.[460] Accordingly, Colombia contacted independent experts from the Getty Conservation Institute in the first half of 1989. The institute would arrange for a selected group of specialists to meet with the Colombian Government to consider the various tasks.[461]

321. Following discussions with specialists recommended by the Getty Conservation Institute, Ecopetrol, a Colombian state owned enterprise that represented the Government during the discussions, recommended that the Colombian Government procure a contract with the Institute of National Archaeology ("**INA**") and with the Ocean Sciences Research Institute ("**OSRI**") – non-profit organizations dedicated to the advancement of marine sciences.[462] The purpose of this contract was to structure the terms of reference of a tender process to select a company which would carry out a survey for the location and identification of the anomaly reported by GMC, to aid the Government with the pre-selection of the bidders, to evaluate the proposals, and to help supervise the operations. [463] Consequently, the Commission on Shipwrecked Antiquities requested Ecopetrol to carry out the necessary arrangements to secure a proposal from said organizations.[464]

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460 Letter from Luis Monreal (Getty Conservation Institute) to Rodolfo Segovia (Commission of Shipwrecked Antiquities), 18 April 1989 (**Exhibit R-129**), p.1. *See also* Letter from Luis Monreal (Getty Conservation Institute) to Jorge Bendeck Olivella (Ecopetrol), 18 April 1989 (**Exhibit R-130**), p. 4.

461 Letter from Luis Monreal (Getty Conservation Institute) to Germán Montoya (Presidency of the Republic of Colombia), 30 January 1989 (**Exhibit R-128**).

462 Letter from Jorge Bendeck (Ecopetrol) to Mr. Fabio Villegas (Presidency of the Republic of Colombia), 3 September 1990 (**Exhibit R-139**).

463 Letter from Jorge Bendeck (Ecopetrol) to Mr. Fabio Villegas (Presidency of the Republic of Colombia), 3 September 1990 (**Exhibit R-139**).

464 Commission on Shipwrecked Antiquities, Meeting Minutes No. 002, 14 September 1990 (**Exhibit R-140**), p. 2.

322. In September 1990, Ecopetrol contacted OSRI.[465] The intention behind these discussions was to procure OSRI's services to manage the *Galeón San José* project, aimed at testing whether the anomaly reported by GMC was genuine and whether it was, indeed, a shipwreck.[466] In its proposal, OSRI included in its scope of works to assist the Colombian Government in preparing bid specifications, recommending appropriate entities or individuals to carry out localization and identification tasks, and overseeing and auditing all project activities.[467]

323. The very day after OSRI filed its proposal, SSA wrote to OSRI with information regarding its contract with Colombia, expressing that it intended to defend its alleged rights over the *San José*. In a letter signed by the Institute of the Americas' ("**IOTA**") lawyer, Mr. Lauane Addis, IOTA alleged that the Respondent was trying to expropriate SSA's interests. Additionally, IOTA threateningly informed OSRI of its knowledge of OSRI's conversations with the Colombian Government. IOTA further requested *"information evidencing that no relationship exists"* between OSRI and Colombia, claiming that, were that to be the case, OSRI *"may want to know that SSA intends to protect its interests".*[468]

324. This is one of the several – and recurrent – intimidatory tactics that the Claimant customarily deployed against the various potential contractors the Colombian Government approached or engaged to investigate whether there was indeed a shipwreck at the coordinates reported by GMC or explore areas of the Caribbean in search of the *Galeón San José*, as the Respondent demonstrates in this memorial.

325. Despite SSA's insidious communication, OSRI and the Colombian Government continued their discussions, which led OSRI to present a formal and final proposal.[469] As explained before, as an advisor, OSRI would, *inter alia*, recommend the necessary works to carry out a proper identification of the shipwreck by a third party, provide the terms and conditions for a public

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465 Letter from Jorge Bendeck (Ecopetrol) to Mr. Richard Cassin (OSRI), 24 September 1990 (**Exhibit R-141**).

466 Letter from Jorge Bendeck (Ecopetrol) to Mr. Richard Cassin (OSRI), 24 September 1990 (**Exhibit R-141**).

467 Ocean Sciences Research Institute, Proposal to the Government of Colombia to Advise and Assist the Government on a project to find and identify the wreck of the *San José*, 7 November 1990 (**Exhibit R-142**), p. 2.

468 Letter from Lauane C. Addis (IOTA) to Richard C. Cassin (Ocean Sciences Research Institute) (**Exhibit R-143**), p. 3.

469 Ocean Sciences Research Institute, Revised Proposal to the Government of Colombia to Advise and Assist the Government on a project to find and identify the wreck of the *San José*, 17 December 1990 (**Exhibit R-144**), pp. 2-3.

tender, and generally assist in the tender process.[470] Once proposals were received, OSRI would support the Government in evaluating the proposals and selecting the contractor.[471]

326. On 22 March 1991, the Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values (the "**Counci**l") awarded the contract for the preparation of the terms and conditions of the tender process to OSRI.[472] The Government and OSRI executed the contract on 6 September 1991. Under the contract, OSRI's undertook, among others, to:

> a.) Critically review all historic data concerning the *Galeón San José*; b.) scientifically study known data concerning the sinking of the *Galeón San José* and the works carried out for its localization and identification; c.) review and evaluate the available data from Glocca Morra/Sea Search Armada concerning the reported coordinates, the side-scan sonar results, the videos of the reported anomaly, and every other which it deemed necessary; d.) gather and analyse of existing and available cartography concerning the *Galeón San José*'s search area; e.) study the videotape of the anomaly reported by Glocca Morra/Sea Search Armada through an image processing system; f.) assist the Nation, by request, on the announcement and publication of the request for bids.[473]

327. On 26 November 1991, OSRI submitted its first report on the procedure for selecting the contractor in charge of localization and identification efforts, outlining the process for the announcement of the project, the request for proposals, the reception and review of these bids, as well as the prospective recommendation of a suitable contractor to the Government. OSRI's proposed protocol was aimed at ensuring that Colombia received technical services of the highest quality by trying to attract the interest of the most qualified entities in the international

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470 Ocean Sciences Research Institute, Revised Proposal to the Government of Colombia to Advise and Assist the Government on a project to find and identify the wreck of the *San José*, 17 December 1990 (**Exhibit R-144**), pp. 2-3.

471 Ocean Sciences Research Institute, Revised Proposal to the Government of Colombia to Advise and Assist the Government on a project to find and identify the wreck of the *San José*, 17 December 1990 (**Exhibit R-144**), pp. 2-3.

472 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Meeting Minutes, 22 March 1991 (**Exhibit R-146**), p. 5.

473 Contract between OSRI and the Republic of Colombia for the purposes of receiving consultancy services, 6 September 1991 (**Exhibit R-147**), p. 1.

community.[474] The procedure for the selection would be objectively established in order for OSRI to recommend a company that complied with ethical, technical and efficiency standards.[475]

328. The process would be twofold, ensuring that technical aspects were separated from economic aspects, yet prevalent.[476] The selection of the third party, which the Colombian Government would commission to locate and identify the purported anomaly, would be advanced based on these standards, nothing less.[477]

329. On 16 January 1992, OSRI presented its Confidential Technical Report along with specifications and recommendations for the localization and identification of the *San José*.[478] OSRI noted that, from a technical and scientific standpoint, SSA's Alleged Predecessors had not obtained physical proof that could indicate that the characteristics of the seafloor were those of a shipwreck.[479] In fact, OSRI found that there was "*no conclusive evidence that the main anomaly discovered by* [SSA] *in 1981, and explored in 1983, was associated to the remains of the Galeón San José*."[480] Indeed, the site corresponding to the reported coordinates had not been verified, thus there was no confirmation of the identity of the purported anomalies.[481] Remarkably, OSRI stablished that the absence of adequate identification was due to SSA's lack of scientific rigor:

> Although SSA/Glocca Morra spent several million dollars of its investors' money, and deployed some of the most advanced technology available at the time, its lack of rigor in the application of that technology and its neglect to carry out proper mapping and research made it impossible to conclusively

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474 Ocean Sciences Research Institute, Methodology for Processing Bids and Selecting the Contractor, 26 November 1991 (**Exhibit R-148**), p. 2.

475 Ocean Sciences Research Institute, Methodology for Processing Bids and Selecting the Contractor, 26 November 1991 (**Exhibit R-148**), p. 2.

476 Methodology for Processing Bids and Selecting the Contractor by OSRI, 26 November 1991 (**Exhibit R-148**), pp. 4-5.

477 Methodology for Processing Bids and Selecting the Contractor by OSRI, 26 November 1991 (**Exhibit R-148**), p. 5.

478 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**).

479 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 11.

480 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), pp. 61-62.

481 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), pp. 11, 61-62, 68.

> prove that the promising anomalies discovered were or were not the *Galeón* San Jose.[482]

330. In fact, OSRI found that "*the treasure hunters made no organized attempt to take significant measures of the main anomaly in the seafloor, of producing a useful map of the site. No grid system was made to facilitate the activities, nor was a photo-mosaic produced"*, which turned out to be quite relevant bearing in mind that SSA's maps and hand-drawn sketches were "*unconvincing"*.[483] Something was clear for the experts concerning SSA's operations: "*because they were only looking for treasures, not knowledge, they found the scientific method irrelevant*."[484]

331. Notably, a technical report issued by an independent, highly specialized and scientific third-party in 1992 demonstrated that GMC's – and the Claimant's claim – on the alleged finding of the *San José* are not more than what they are today: a work of speculation marked by scientific inaccuracy, one which cannot survive the scrutiny of scientifically motivated reviewers.

332. The facts backing OSRI's conclusion were evident 30 years later and still hold true today. For example, OSRI highlighted that SSA Cayman had not produced concrete evidence, and that its anecdotical accounts of the finding were merely that – thus, not conclusive.[485] Moreover, OSRI considered that SSA's[486] wooden sample could not be associated with a shipwreck beyond reasonable doubt, as it could not be reasonably linked to anthropic evidence:

> However, this "timber" had two indentations that roughly divided it into two parts. It seems reasonable that such indentations were either the grip marks of the sampling apparatus, or that the "timber" is one half of a wooden member with hollow fasteners. It is not possible to determine from the photograph whether the fasteners, if that is what they are, were of wood (possibly 18th century), or iron […]. We found no indication that the Sea Search Armada placed this test item under the scrutiny of a professional archaeologist with specialized training in shipbuilding. Similarly, the wood

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482 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 68.

483 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 62.

484 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 62.

485 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 62.

486 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 63.

> sample was not adequately identified with respect to wood species and site of origin.[487]

333. Needless to say, Mr. Del Cairo has re-demonstrated this and other scientific inaccuracies, which infringe upon the core of Claimant's claim.[488] SSA's Alleged Predecessors never found the *San José*, nor evidence which could support their claim of having found, in the imprecise words of Mr. Morris, a site which any qualified underwater archaeologist would consider indicative of an 18th century shipwreck.[489]

334. The Confidential Technical Report was more than conclusive as to the lack of proper identification. The Report included recommendations pertaining to the Colombian Government's conditions for executing a contract aimed at, precisely, locating and identifying the anomaly. For this purpose, Colombia – through an independent contractor – would endeavour to confirm, inside a defined polygon based on the reported coordinates and extending over 1.5 miles, the identity of either that anomaly or any other present in the area.[490]

335. OSRI stressed that the new search for the anomaly required the application of state-of-the-art technology, which entailed careful mapping of all potential anomaly locations.[491] Particularly, the anomaly had to be relocated using a precision navigation system, and the seabed in that area would be surveyed to determine whether the anomaly could be found.[492]

336. Incidentally, OSRI recommended having an expert designated by SSA Cayman during the operation.[493] The Commission on Shipwrecked Antiquities studied this possibility, which deemed convenient only for the identification stage, a step that, in view of the results provided by the

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487 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 63 (emphasis added).

488 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 109-118.

489 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 11.c.

490 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), pp. 11-12.

491 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), pp. 11-12.

492 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 38.

493 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**), p. 70.

Columbus Report, did not occur.[494] Considering that SSA's alleged rights are limited to the existence of a shipwreck at the coordinates, the fact of having considered this possibility in a restricted manner, besides being entirely reasonable, further demonstrates the correctness with which the Government pursued the *San José* project.

337. The Commission on Shipwrecked Antiquities reviewed the Confidential Technical Report the same day that it was submitted by OSRI and in the presence of its representatives. Considering that the attempts to localise the anomaly could render negative results, and the identification phase could be unnecessary, the Commission on Shipwrecked Antiquities considered the possibility of splitting these stages in order to reduce costs.[495] However, due to implementation difficulties, the Commission on Shipwrecked Antiquities finally opted for the originally planned course, agreeing to open an international public bid to award the contract.[496]

338. Not only did the Colombian Government receive initial independent technical assessments with the purpose of defining the proper course of action but it also decided not to employ its own resources for the sake of technical integrity. Remarkably, the steps stemming from that decision would also reflect an in-depth technical assessment, which, from a scientific perspective, demanded a lengthy and painstaking review of proposals that ultimately warranted the engagement of the Consortium Roberto Avila Garavito, Columbus Exploration Limited Partnership and Columbus America Discovery Group Inc ("**Columbus Exploration**").

3. Colombia went to great lengths to obtain an independent and highly qualified contractor to test the Hypothesis through a transparent tender process

339. On 29 December 1992, the Council issued Resolution No. 1, providing for the reception of bids from 1 February 1993 to 15 March 1993.[497] The object of the prospective contract was *to "locate anomalies that may exist on the seabed, in an area of the Caribbean Sea to be determined based*

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494 Commission on Shipwrecked Antiquities, Meeting Minutes No. 002, 21 January 1992 (**Exhibit R-151**), p. 10.

495 Commission on Shipwrecked Antiquities, Meeting Minutes No. 001, 16 January 1992 (**Exhibit R-150**), p. 12.

496 Council for the Adjudication of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Meeting Minutes, 24 June 1992 (**Exhibit R-155**), p. 2.

497 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Resolution No. 1, "Whereby the opening of a public bidding process is ordered", 29 December 1992 (**Exhibit R-156**), Articles 1-2.

on coordinates to be provided by the Nation, and to establish, if the identity of said anomalies correspond to the remains of the Galeón San José or any other shipwreck."[498]

340. The terms and conditions for the bids were published by the Council and the scope of works were as follows:

(i.) The localization of seafloor anomalies in a radius of 1.5 Nautical Miles, whose center would be fixed based on the coordinates provided by the Nation. Localization works had to be carried out by employing a precision navigation system. The contractor would inspect any anomaly in the area of interest, with the purpose of determining whether further analysis was necessary. At the request of the Nation, the contractor would have to examine those anomalies with a significant likelihood of being of cultural origin and corresponding to the *San José* or any other shipwreck.

(ii.) By request of the Nation, the Contractor would proceed to establish the identity of the anomaly through archaeological sampling, if necessary.

(iii.) The analysis of any artifact of archaeological significance, ensuring any appropriate and necessary conservation efforts. These artifacts would have to be turned over to the Nation at any event, and the contractor would not acquire any right whatsoever over the retrieved goods, nor would it retain any preferential rights over potential salvage contracts. This task would be performed at the request of the Nation.[499]

341. The terms and conditions also incorporated technical requirements, ranging from proven experience in localization, inspection and exploration of seabed anomalies, search and salvage of shipwrecks, as well as maritime archaeology works[500] to a detailed technical proposal – including a project schedule, a description of the operational planning, a methodology for quality

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498 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Resolution No. 1, "Whereby the opening of a public bidding process is ordered", 29 December 1992 (**Exhibit R-156**), Article 1.

499 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Resolution No. 1, 29 December 1992 (**Exhibit R-156**), Article 1.

500 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No. 1, Terms and Conditions, 1 February 1993 (**Exhibit R-158**), Articles 3.3, 4.1.10.

control and assurance, a description of the systems and technology to be deployed and an account of the applicability of such systems to the project objectives.[501]

342. Colombia would conduct an extensive analysis of every bid, clearly prioritizing the technological capabilities.[502] In the scope of OSRI's work, it would use a team of experts in a wide array of disciplines to assess the technical suitability of each bid.[503]

343. Importantly, per Article 3.2 of the terms and conditions, the Nation and any potential bidder should hold a mandatory meeting for the participants to understand the scope of the works fully.[504] This meeting was held on 27 January 1993. One of the issues that raised reasonable doubts among the attendees was the potential impact of the ongoing litigation on the project. Consistently, the Nation assured that the project was completely independent of the litigation.[505] Notably, the Nation stated that the contract would be limited to the localization of the target, unless the Nation indicated otherwise[506] and that the Nation's archaeological interest was of utmost importance.[507]

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501 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No. 1, Terms and Conditions, 1 February 1993 (**Exhibit R-158**), Article 4.1.8.

502 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No. 1, Terms and Conditions, 1 February 1993 (**Exhibit R-158**), Article 6.6.

503 Plan for the Evaluation of Proposals Submitted to the Government of Colombia to Locate and Identify the *Galeón San José*, 26 February 1993 (**Exhibit R-159**), p. 4.

504 Council for the Tender of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No. 1, Terms and Conditions, Article 3.2.

505 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No.1, Meeting Minutes of the Mandatory Meeting, 27 January 1993 (**Exhibit R-157**), pp. 18-19.

506 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No.1, Meeting Minutes of the Mandatory Meeting, 27 January 1993 (**Exhibit R-157**), p. 17.

507 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No.1, Meeting Minutes of the Mandatory Meeting, 27 January 1993 (**Exhibit R-157**), p. 18.

344. On 30 March 1993, the bidders submitted their proposals to the Colombian Government.[508] Colombia received four proposals, including those prepared by the consortium composed by Roberto Ávila Garavito and the Columbus-America Discovery Group.[509]

345. OSRI carried out a technical review of the bids. However, it concluded that the proposals lacked the necessary information to allow them to conclusively determine which bidder had the highest probability of success. Given that the proposals presented posed such issue, OSRI resolved to conduct on-site inspections of each bidder's or their corresponding subcontractor's facilities and equipment.[510]

346. OSRI's assessment of the Columbus-America Discovery Group's proposal showed that Columbus had participated in the salvage of the *S.S. Central America*, which at the time, was the only wooden-hulled ship rescued at such a significant depth of 8,000 feet.[511] Moreover, OSRI identified that Columbus also pioneered many techniques in the areas of optimal search, deep-sea robotics, data collection, storage and analysis, recovery, preservation, display of cultural materials, multi-media publishing and dissemination of information for the benefit of the public.[512]

347. Columbus Exploration further provided documentation that demonstrated its ability to develop innovative technological solutions for the location of shipwrecks of decayed and weathered wooden hulls sunk in deep and salty water environments.[513] Its proposal conveyed a flexible plan

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508 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No.1, Minutes of the Opening of the Ballot Box and Closing of the Public Bidding Process, 30 March 1993 (**Exhibit R-160**).

509 Council for the Awarding of Contracts for Historical Research and Recovery and/or Preservation of Antiquities and Shipwrecked Values, Public Bidding Process No.1, Minutes of the Opening of the Ballot Box and Closing of the Public Bidding Process, 30 March 1993 (**Exhibit R-160**).

510 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 2.

511 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), pp. 13-14.

512 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 14.

513 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 18.

that would allow it to adapt both equipment and technical personnel to the requirements of the site.[514]

348. Additionally, OSRI concluded that Columbus' bid offered the most advanced expertise and technologies in every assessment category.[515] Only Columbus and Seahawk, one of the remaining bidders, offered better technology than that employed by GMC and demonstrated actual expertise in maritime archaeology.[516] Since it was determined that Seahawk's proposed equipment had the potential to create archaeological damage,[517] OSRI's recommendation was to engage Columbus.[518]

349. On 2 August 1993, the Commission of Shipwrecked Antiquities evaluated OSRI's report, agreed with the majority of its conclusions and submitted Columbus and Seahawk's proposals for the approval of the Council's – with Columbus's bid on the first order of preference.[519]

350. The facts surrounding Colombia's decision to commission the Columbus Report speak for themselves. The Respondent considered that GMC's alleged findings were wholly inconclusive and that the localization and identification of GMC's purported finding was an essential step prior to any potential salvage activities. It took measures through a technical, independent and serious process to assess whether the *San José* or any shipwreck actually laid at the coordinates reported by GMC with the highest possible degree of certainty. As demonstrated, Colombia went to great length to ensure that any assessment will be conducted by independent and highly qualified technical experts at all times. Clearly, SSA's accusations regarding the apparent lack of technical

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514 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 18.

515 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), pp. 53-54.

516 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 53.

517 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 53.

518 Ocean Sciences Research Institute, Confidential Report Concerning the Analysis of Bids, Public Bidding Process No. 001, 30 July 1993 (**Exhibit R-163**), p. 54.

519 Commission on Shipwrecked Antiquities, Meeting Minutes No. 002, 2 August 1993 (**Exhibit R-164**), pp. 4-3.

value of the Columbus Report[520] is strongly belied by critical technical reviews from third parties, which Colombia responsibly procured.

1. The Columbus report evidenced that GMC's alleged finding of a shipwreck at the coordinates reported in the 1982 Confidential Report had no basis

351. On 21 October 1993, Colombia and Columbus Exploration entered into Contract No. 544, pursuant to which Columbus Exploration undertook the conduct of an oceanographic investigation to evaluate the Hypothesis of GMC's alleged discovery at the coordinates reported in the 1982 Confidential Report.[521]

352. More specifically, Columbus Exploration was tasked with testing the Hypothesis of the finding of the *Galeón San José* through an *in situ* study, bathymetric sounding and an examination of the wood sample that was presented as part of the target in the Confidential Report.[522] The scientific methodology used for the investigation of the Hypothesis included: understanding the hypothesis, posing questions, defining the necessary tools and equipment, formulating a plan of execution, calibrating the tools and equipment, conducting the investigation and analyzing the data.[523]

353. Regarding the operations carried out, the Columbus Report recounts that the selected team analyzed the coordinates and materials provided by Colombia to define the oceanographic study area. [524] The research plan involved a two-phase survey in the area of the coordinates. Particularly, the study involved, in both phases, the deployment of sub-surface bathymetry, side scan sonar and the ROV to determine the existence or absence of anomalies. [525] The results of

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520 Amended Statement of Claim, ¶ 167.

521 Contract No. 544 of 1993 between Colombia and Columbus Exploration, 21 October 1993 (**Exhibit R-10**).

522 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 12-16.

523 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), p. 4.

524 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 8-9.

525 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 8-12.

the side scan sonar, ROV and subsurface bathymetric surveys did not indicate anomalies consistent with or similar to the target posed by the Hypothesis. [526]

354. On 7 July 1994, the Colombian Government issued a press release ("**1994 Press Release**") in regard to the results of the analysis conducted by Columbus Exploration over the evidence presented by GM in 1982,[527] making it clear that Columbus Exploration had not found anything at the coordinates reported in the 1982 Confidential Report. The Press Release reads as follows:

> The Government of Colombia, after reviewing the evidence presented by Columbus Exploration, Inc. following their exploration of the area whose coordinates were furnished by the Nation to the contractor, being the same coordinates informed in 1982 by the Glocca Morra Company, Inc. (Sea Search Armada), has concluded that no shipwreck is located thereto (and consequently no traces of the *Galeón San José* either). […]
>
> The scientific analysis of the area resulted in identifying a rather flat ocean bed of very old and consolidated clay, covered by a thin layer of white non-consolidated mud. The nonexistence of a shipwreck in the area was evident.[528]

355. On 5 August 1994, Columbus Exploration submitted its final report dated 4 August 1994, containing the oceanographic study results developed under Contract No. 544 of 1993 ("**Columbus Report**").

356. Columbus' conclusions fully support Colombia's understanding that no shipwreck is located at the coordinates reported by GMC in the 1982 Confidential Report. After describing the scientific methodology used for the research plan, how the operation was developed, what the equipment, methods and procedures were, as well as the results obtained, the Columbus Report provides an Executive Summary that makes it patent that no shipwreck could be located at the coordinates reported by GMC. [529]

357. The conclusions of the Columbus Report are as follows:

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526 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 10, 11.

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

528 Letter from President's Office to DIMAR informing of Press Release, 8 July 1994 (**Exhibit R-11**), pp. 2-3 (emphasis added).

529 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R–12**), p. 15.

5. Executive Summary

Columbus Exploration examined written documents, videos, and a sample of materials furnished by the Nation, and expressed as part of the Hypothesis.

To examine the Hypothesis, Columbus Exploration carried out an *in situ* study using a ship from the Colombian Navy (the ARC *Malpelo*), subsoil profiles, bathymetric sounding, sideway sonar, an ROV equipped with cameras, and a side sweeping sonar by target sectors, and carried out an examination of a wood sample that was proposed as part of the target.

A comparison of the data collected during the study with the approaches of the Hypothesis reveals:

- The sea is significantly deeper at the coordinates than the depths in the videos presented with the Hypothesis.[530] There are no, either in the area of the coordinates or near them, depths matching those appearing in the video recordings.

- No sonar target was found, either in the area of the coordinates or near them, equal to the relief, size, and reflectivity that was expressed in the Hypothesis.

- The visual inspection of side sweeping sonar by sectors with the ROV did not reveal evidence to corroborate the Hypothesis nor of any shipwreck and confirmed that the depth of the sea bottom in the area of the coordinates differ from the depth expressed in the Hypothesis.

- In the area of the coordinates, Columbus Exploration found a seabed mainly composed of a calcareous hard clay formation that provides an environment for digging local fauna. The multiple traces, footprints, and excavations that are visible through the ROV cameras show that the sediment has been penetrated by a multitude of small animals, which is not consistent with the conditions of impenetrable incrustations expressed in the hypothesis.

530 The difference in the depths of the sites is a very telling distinction as it evidences the existence of two distinct zones with heterogeneous morphology and diverse underwater environments.

- The wood sample presented in the Hypothesis does not correspond to a species used in the construction of ships: it is not oak, pine tree, beech tree or fir tree. The most probable thing is that it is a root.

- The wood sample was alive and grew up subsequently at the beginning of the atmospheric tests with atomic bombs dating the 1950s. It corresponds to the modern age.

- The sediment extracted from the sides of the piece of wood presented in the Hypothesis is not similar to the sediment taken from the area of the coordinates nor to the sediment collected from the nearby islands. The absence of marine calcium carbonate shows that it does not belong to the area of the coordinates and also shows that it is probable that does not belong to any marine environment (salt water). [531]

358. Given that the findings of the Columbus Report are fatal to the Claimant's claim, the Claimant desperate attempts to undermine the Columbus Report comes as no surprise. As the Respondent demonstrates, however, the Claimant's half-baked arguments are easily dismissed.

359. ***First,*** in regard to the Columbus Report, the Claimant alleges that neither the Report nor Contract No. 544 mentions GMC or SSA Cayman's search or findings, nor the 1982 Report. [532] It also avers that the Columbus Report does not indicate which coordinates were searched. [533] The Claimant's allegations are ludicrous: the Claimant cannot seriously make these allegations by conveniently ignoring the entirety of the discussions, and the process that led to the issuance of the Columbus Report.

360. As demonstrated by the Respondent throughout the process behind the awarding of the contract underlying the Columbus Report, it was made abundantly clear that the anomaly to be located and identified was that reported by GMC. Therefore, whether the Columbus Report mentioned specifically GM or not is completely immaterial. In any event and contrary to the Claimant's assertions, the Columbus Report expressly mentions, on the front page of the report, the coordinates reported by GMC in the 1982 Confidential Report and expressly refers to the

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531 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R–12**), pp. 15-16 (emphasis added).

532 Amended Statement of Claim, ¶ 168(c)

533 Amended Statement of Claim, ¶ 168(d)

evidence provided by GMC with the 1982 Report to prove its alleged finding.[534] In fact, the front page of the report reads as follows:

> FINAL REPORT TO THE NATION OF COLOMBIA ON AN OCEANOGRAPHIC SURVEY
>
> IN THE AREA OF
>
> LATITUDE 10° 10' 19" NORTH
>
> LONGITUDE 76° 00' 20" WEST
>
> AUGUST 4, 1994

361. A perfunctory look at the coordinates included on the front page of the Columbus Report demonstrates that they are the exact same coordinates included by GMC in the 1982 Confidential Report.[535]

362. Moreover, the final report provided by OSRI, in its capacity as auditor of Contract No. 544 (the "**Auditor's Report**"), similarly contains multiple references to GMC and the license obtained by GMC to explore the Colombian Caribbean and the findings reported by GMC in the 1982 Confidential Report. For example, the Auditor's Report expressly states that after three hours of sailing, the personnel who took part in the expedition "*arrived 'precisely above the site of the coordinates reported by Sea Search Armada'*".[536] OSRI also mentions that the first big surprise is that *"the region around the coordinates' site is deeper than the one reported by Sea Search Armada, and that the topography does not look like the one in the video submitted by Sea Search in support of its claim".*[537]

363. In light of the above, there can be no doubt that the oceanographic study undertook by Columbus, and audited by OSRI, was conducted precisely at the coordinates where Claimant's Alleged Predecessors argue to have located the *San José*.

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534 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 1, 3.

535 Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia, 26 February 1982 (**Exhibit C-10**), p. 1.

536 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 11.

537 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 11.

364. ***Second,*** the Claimant asserts that although a Colombian naval officer was aboard every SSA ship that searched for and found the *Galeón* – and Colombia presumably reviewed all sonar readings, scientific surveys and analyses of wood samples shared with it – the Columbus Report makes no attempt to reconcile these contradictory results. [538] The contention is surprising at the very least. First, the Colombian naval officers who were on board every SSA ship never accepted that the *Galeón* had been found by SSA. On the contrary, its assertions are derived from the information transmitted by GMC during the expeditions. [539] Second, the premise and objective of the Columbus Report was not to reconcile the results obtained by GMC and reported in the 1982 Confidential Report, but to do everything within its reach, with the best equipment, techniques and personnel, to confirm or reject the Hypothesis of the discovery of the *Galeón* at the reported coordinates. This is what it effectively did, as reflected in the results and conclusions of the operation of the Columbus Report and the Auditor's Report.

365. Moreover, and importantly, the results of the Columbus Report actually demonstrate that the representations made by GMC in the 1982 Confidential Report regarding its purported findings could not at all be reconciled.

366. Further, in regards to the alleged lack of efforts of the Colombian Government to understand the correlation between the information provided by GMC and Columbus's findings, it is worth noting that the results of the Columbus Report concluding that there was no shipwreck at the coordinates provided by GMC are supported by the Auditor's Report, as well as by the technical report of one of the participants of the expedition, Captain Carlos A. Andrade Amaya from Colombia – who was the scientific, technical and academic representative of the Colombian Navy in the Columbus campaign ("**Andrade's Report**"). [540]

367. To recall, on 31 December 1993, Colombia contracted with OSRI to provide services as Contract No. 544-93 auditor. [541] The role of OSRI was to perform the contract's auditing, supervising and

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538 Amended Statement of Claim, ¶ 168(g).

539 Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983 (**Exhibit C-149**).

540 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), p. 8.

541 Contract No. 544 of 1993 between Colombia and Columbus Exploration, 21 October 1993 (**Exhibit R-10**). *See also* Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 6.

controlling that Columbus Exploration complied with its contract and ensuring that Columbus answered all the questions related to the Hypothesis. [542]

368. On 3 August 1994, OSRI issued its final audit report. According to the Auditor's Report, the scope of Columbus Exploration's work was:[543]

- To locate (with a precision navigation system) the anomalies that may exist at the bottom of the Caribbean Sea within a circumference with a radius of 1.5 nautical miles, whose center will be fixed based on the coordinates (76° 00' 20"W/10° 10' 19" N) provided by the Government, which in turn were the coordinates located in the 1982 Confidential Report.
- To inspect and identify any anomalies of interest located in the area indicated.
- To take samples, when necessary, under archaeological supervision.
- To analyze any artifacts that may be of archaeological significance, if any such items were recovered during the excavation.

369. As explained in the Auditor's Report, Columbus Exploration used the most advanced appropriate technology available for the operation, which was managed by a team of technicians with extensive experience in seabed exploration. [544] The Auditor's Report also contained the results of the activities conducted at sea by Columbus Exploration under the supervision of OSRI[545] and included the daily chronicle of the expedition. [546]

370. The Auditor's Report provided the following conclusions on the operation:[547]

- The depth of the site of the coordinates reported by SSA is 100 meters deeper than the initial depth reported to Colombia. The depth indicated by GMC in the videos when their ROV was directly in front of the reported anomaly corresponds to 207 meters (681 feet). The depth in the center of the coordinates reported by GMC in 1982 is over 274 meters (900 feet), much deeper than the depth where the anomaly was located.

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542 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 4.

543 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 7.

544 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), pp. 10-11.

545 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 6.

546 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 6.

547 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), pp. 14-15.

- The extensive bottom survey around the coordinate site revealed that the bottom is relatively flat, with no features of interest. For the Auditor, it was worth noting that with a sonar system with a high resolution, as the IMAGENEX they were using, the Columbus team could have easily detected objects only a few centimeters in size.[548]

- The side scan sonar inspection of the entire area around the coordinates site indicated that there was very little tomography, and the only anomaly that was present was a large tube of approximately 10 by 0.5 meters. According to the Auditor, no other anomalies, natural or cultural, were detected. In fact, the bathymetry indicated a very flat bottom, with almost no tomography.[549]

- The nature of the site of the coordinates reported in 1982 was totally different from the site shown in the videos presented by GMC. While the video shows an anomaly that they claim is up to 15 meters high, the actual site of the coordinates reported in 1982 by GMC was a very flat patch of blue clay covered by a few centimeters of sediment and without a single feature.

- There was no natural or cultural anomaly at the site of the coordinates or near the site.

- There was no shipwreck at the site of the coordinates or near the site.

371. A second round of inspections produced exactly the same data and conclusions:[550] the *Galeón* is not located at the site of the coordinates reported by GMC.

372. In addition, in line with the Columbus Report and the Auditor's Report, Andrade's Report provided the following conclusion of the operation:

> […] the bottom in the area of the coordinates has an average depth of about 290m, it is composed of a somewhat irregular, rather flat bottom composed mainly of clays and very little mud on it, in which he did not find any anomaly of cultural character as described by GMC in the reports made in 1982. [551]

373. Captain Andrade concluded the following results of the verification campaign that:

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548 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 12.

549 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p. 14.

550 Ocean Sciences Research Institute, Final Audit Report, 3 August 1994 (**Exhibit R-168**), p 13.

551 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), p. 1.

- The sonar did not find anything; the video shows that there is nothing of a cultural nature on the site.

- Columbus did not find any anomaly that could be related to a shipwreck at the site of the geographical coordinates reported by GMC in 1982. At the site of the reported coordinates and the surrounding areas that could be explained as an "approximation error" or "low precision", the verification campaign could not trace any anomaly.

- The depth of the area reported in 1982 is much deeper than expected. In the area, there are depths of around 290 meters.

- The seabed is composed of clay instead of mud because the reflection is very strong. [552]

374. As can be seen, three diverse sources confirm the fact that no anomalies were identified at the coordinates reported by GMC in 1982. As stated before, clearly it is not possible to reconcile the irreconcilable.

375. ***Third***, as the Respondent has amply demonstrated above, the existence of ongoing legal proceedings at the time that the Columbus Report was commissioned has no impact whatsoever on its probative value. The Government commenced actions to have the findings of GMC verified as early as 1987, prior to GMC's commencement of litigation before the domestic Courts in 1989, and have made it abundantly clear that the survey should be maintained independent from the proceedings.

376. ***Fourth***, equally unavailing is the Claimant's allegation that the Columbus Report claims that it analyzed not only the coordinates that GMC reported in 1982 but also *"an area hundreds of times greater"* than the coordinates to avoid any errors in coverage. [553] And yet, in 2015, Colombia claimed to have found the *Galeón San José* just over three nautical miles from the coordinates listed in the 1982 Report.[554] The Auditor's Report clarifies that the operations to be performed under the contract with Columbus Exploration were inside a defined polygon, based on the reported coordinates, extended only over 1.5 miles radius from the reported coordinates. [555] Besides, Colombia had not disclosed the coordinates of the discovery of the *Galeón San José* in

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552 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**).

553 Amended Statement of Claim, ¶ 168 (f).

554 Amended Statement of Claim, ¶ 168 (f).

555 Ocean Sciences Research Institute, Confidential Technical Report, Specifications and Recommendations, 16 January 1992 (**Exhibit R-149**).

2015. Therefore, it is unclear for the Respondent on what basis SSA affirms that the *Galeón San José* was found three nautical miles away from the coordinates reported by GMC on the 1982 Confidential Report.

377. ***Finally,*** the Claimant casts doubts on the expertise of Mr. Thomas Thompson, the founder of Colombus Exploration, by saying that he has been jailed in the U.S. for not revealing the location of certain coins of an unrelated shipwreck.[556] Clearly the expertise of a person is not called into question because of his imprisonment on the basis of contempt of court, as is the case of Mr. Thompson. The Claimant's choice to resort to character assassination in lieu of scientific and legal arguments speaks volumes to the weakness of its case. In fact, as the Claimant shows below, what is clear and has become abundantly clear through these proceedings is that GMC knowingly reported false coordinates of its alleged finding.

378. In light of the above, the Claimant's contention that Colombia has made no attempt to rehabilitate the Columbus Report during the Preliminary Objections phase rings hollow.[557]

379. Colombia has always referred to the Columbus Report and its technical and scientific value to demonstrate that no anomaly, let alone any shipwreck, is located at the coordinates reported by GMC in the 1982 Confidential Report.

2. GMC lied about the exact location of the finding in the 1982 Confidential Report

380. In June 1994, the members of the Columbus campaign held meetings to analyze the data found versus the documents provided by GMC with the 1982 Confidential Report. From that analysis, they concluded that the site reported by GMC in the 1982 Confidential Report and the site where the Columbus campaign was conducted were not the same site that GMC had visited, made videos of and photographed. [558]

381. This conclusion was reached more than 30 years ago and is now backed up but the WHOI's verification expedition.

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556 Amended Statement of Claim, ¶ 169.

557 Amended Statement of Claim, ¶ 172.

558 Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**Exhibit R-12**), pp. 8, 15.

382. It is therefore ironic that the Claimant alleges in the Amended Statement of Claim that the expedition underlying the Columbus Report was not done at the location reported by the 1982 Confidential Report, as the Columbus Report failed to find the landmarks found in the area reported by the 1982 Confidential Report.[559] However, as mentioned before, this is because GMC purposefully did not report the exact location of the anomaly they identified to the Colombian authorities, and SSA is fully aware of that.

383. In fact, since 24 August 2015, SSA acknowledged that, for over 20 years, it had known that the coordinates reported in 1982 were false since they knew, from the beginning, that there was no shipwreck – let alone any anomaly at the coordinates they reported in the 1982 Confidential Report.[560] SSA also reiterated this understanding on 4 September 2017, when SSA recognized that for the past 34 years, it knew that there was no shipwreck at the coordinates reported in the 1982 Confidential Report.[561] Also, on 19 November 2015, SSA expressed that it had no interest in participating in a verification of the shipwreck at the coordinates reported in 1982 since it knew, from the start, that the shipwreck was not located at the 1982 Coordinates:

> SSA reiterates what it stated in its communication of 19 October, regarding its non-participation in the verification of the shipwreck at the coordinates referred to in the 18 March 1982 report, on the grounds that since that day the reporter left perfectly and clearly established the location of his finding in a place different from the coordinates where the verification will be carried out. Therefore, it does not make sense to propose to it that, assuming its costs, it verifies the same thing that he has repeated for 33 years, that is, that its discovery is not in those coordinates but in its immediate vicinity.
>
> […] the Minister of Culture suspended these dialogues, warning that they would not be resumed if the same thing that the discoverer had established since 1982 when he reported the shipwreck was verified, and which was verified in 1994 by the Nation's contractors, that is, the non-existence of

559 Amended Statement of Claim, ¶ 170.

560 Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015 (**Exhibit R–25**), p. 3 ("But out those dialogues only a first and only meeting was held on May 19, because on July 28 they were canceled by the Minister of Culture, when she conditioned their continuity to the verification of the existence of a fact whose non-existence is known by all since March 18, 1982, when, according to the then in force article 112 of decree law 2349 of 1971, which authorized margins of error in the indication of the coordinates, the discoverer reported its finding, leaving perfectly and clearly established that the shipwreck was not at the coordinates he indicated, but in its immediate vicinity. And it is precisely in those exact coordinates, in which we all know that the reported shipwreck is not found, where its existence will be verified." (Emphasis added)).

561 Letter from Sea Search Armada, LLC to Colombia, 4 September 2017 (**Exhibit R–30**).

> shipwrecks in the exact coordinates referred to in the "Confidential Report on Submarine Exploration.[562]

384. Additionally, on 12 July 2019, in a letter to the Vice President of Colombia, SSA once again admitted that since 1982, it had known that there was no shipwreck in the area of the coordinates:

> For such rejection you invoke a fact recognized by all since 1982: the non existence of shipwrecks in the specific coordinates mentioned in that report, in which it was perfectly established that the discovery was not made in those coordinates, but in their immediate vicinity […].
>
> The joint verification of the maritime areas reported in 1982 was also rejected on the basis of another one carried out in 1994 by Columbus Exploration Inc., in which the presence of a SSA observer was denied, and was carried out exclusively in the precise coordinates included in their report, to conclude the same thing that we have all known for 37 years: that there is nothing in those coordinates. [563]

385. It is worth noting that Claimant does not even address this crucial issue in the Amended Statement of Claim. Accordingly, GMC lied about the exact location of the find in the 1982 Confidential Report.

J. THROUGH ITS JUDICIAL SYSTEM, COLOMBIA HAS GUARANTEED THE CLAIMANT'S UNDETERMINED RIGHTS TO THE ALLEGED FINDING IN THE REPORTED COORDINATES BUT NEVER CONFIRMED SSA'S ALLEGED RIGHTS OVER THE *GALEÓN SAN JOSÉ*

386. From January 1989 to July 2007, SSA Cayman and Colombia were engaged in litigation before the Colombian courts. Throughout its submissions, the Claimant has made several misrepresentations concerning the legal proceedings before the Colombian courts.[564] First, the Claimant mischaracterises the process of cassation, conflating the terms "cassation" and "appeal", and thus ignoring the key differences between these remedies as a matter of Colombian law (**1**). Further, contrary to what the Claimant argues, litigation before the Colombian courts always referred to undetermined shipwrecks at the reported coordinates, not the *Galeón San José* (**2**). Finally, the Respondent sets the record straight, clarifying that

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562 Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015 (**Exhibit R–27**) (emphasis added).

563 Letter from SSA LLC to the Vice-President of Colombia, 12 July 2019 (**Exhibit C-41**) (emphasis added).

564 *See* Amended Statement of Claim, ¶¶ 189-190.

Colombia's Supreme Court of Justice did not uphold SSA's Alleged Predecessors' alleged rights (**3**).

1. SSA mischaracterises the process of cassation under Colombian law

387. In its Amended Statement of Claim, the Claimant erroneously relies on a 1994 Judgment issued by the 10th Civil Judge of the Circuit of Barranquilla, that was subsequently annulled on cassation.[565] In this section, the Respondent provides below a brief overview of the Colombian judicial system in order to correct the Claimant's mischaracterization of the Colombian legal order.

388. The Colombian judicial system is primarily divided into three judicial systems: (***i***) the "ordinary" judicial system, responsible for solving civil and commercial disputes; (***ii***) the contentious administrative system, which handles disputes between the State and private individuals and entities; and (***iii***) the constitutional system, which handles lawsuits challenging the constitutionality of Colombian laws and reviews judicial decisions related to the protection of fundamental constitutional rights.

389. Each of these jurisdictions has a high court serving as its highest authority. According to Article 116 of the Political Constitution of Colombia "*the Constitutional Court, the Supreme Court of Justice, the Council of State* […] *administer justice*".[566] In this regard, the Supreme Court of Justice (the "**SCJ**") is the highest authority in civil matters, the Council of State is the supreme authority in administrative litigation jurisdiction and the Constitutional Court is the highest authority on constitutional matters.

390. The domestic judicial proceedings between the Claimant and Colombia concerned a civil matter. Accordingly, these were conducted before the ordinary jurisdiction.[567]

391. The judicial civil process in Colombia has two instances, as Article 31 of the Political Constitution of Colombia provides: "*every judicial ruling may be appealed or consulted, except for the exceptions established by law*".[568]

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565 *See* Amended Statement of Claim, ¶ 205.

566 Political Constitution of Colombia, (1991) (**Exhibit R-245**), Article 116.

567 The courts that entertained SSA's lawsuits were: (i) 10th Judge of the Barranquilla Circuit; (ii) Superior Tribunal of Barranquilla, and (ii) the Supreme Court of Justice, all part of the civil jurisdiction.

568 Political Constitution of Colombia, (1991) (**Exhibit R-245**), Article 31.

392. The decision of the first instance is thus subject to appeal, which allows "*the superior* [court] *to examine the issue decided in the first instance ruling and either revoke or modify it*".[569] On appeal, the second instance judge is not limited in its jurisdictional activity and must examine the appealed decision in its entirety, addressing all relevant legal aspects, not merely those raised by the appellant.[570]

393. In the case at hand, the first instance was handled by the 10th Civil Judge of the Circuit of Barranquilla (the **"10th Civil Judge of Barranquilla**" or "**10th Civil Judge**"), and the second instance by the Civil Chamber of the Tribunal of Barranquilla (the "**Second Instance Tribunal**").

394. Following the 1997 Judgment of the Second Instance Tribunal of Barranquilla, cassation proceedings before the SCJ ensued. In its Amended Statement of Claim, the Claimant incorrectly describes cassation proceedings under Colombian law as an "*appeal*".[571] This conflation ignores the key differences between both remedies.

395. ***First***, "cassation" is an extraordinary remedy that seeks to challenge second instance judgments exclusively on the grounds established by law. It allows the review of the legality of decisions of lower courts based on specific alleged errors[572] and does not entail a *de novo* review of a case. In this sense, "*casar*", as defined by the Pan-Hispanic Dictionary of Legal Spanish of the Royal Spanish Academy, means "*to annul a judicial decision by upholding a cassation petition*".[573]

396. As an extraordinary remedy, cassation has the following main characteristics: (***i***) it does not constitute an appeal regarding the parties' dispute, but a review of the lower court's decision; (***ii***) it applies only to judicial decisions, typically those rendered in ordinary proceedings; (***iii***) it is based exclusively on the grounds expressly set forth in the law; and (***iv***) the review conducted by the SCJ acting as the cassation adjudicator is limited to the objections raised by the petitioner.[574]

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569 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 132.

570 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 173.

571 Amended Statement of Claim, ¶¶ 189-190.

572 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶ 166, 168, 173.

573 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

574 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 165. It is important to clarify that the procedural legislation governing the remedy of cassation at the time SSA and Colombia filed their respective

397. ***Second***, a cassation decision annuls the second instance judgment, rendering it without effect prospectively.[575] When acting as a cassation adjudicator, the SCJ issues a substitution to the judgment to correct the errors made in the second instance, resulting in the annulment of the challenged aspects.[576] In other words, the SCJ adopts the role of the second instance judge.

398. ***Third***, when the SCJ overturns a judgment, it does so in its role of unifying national jurisprudence, and as the highest court of the civil jurisdiction.[577] Therefore, the SCJ not only rectifies any existing legal errors, but also establishes precedents that must be observed by all judges across Colombia in civil cases.[578]

399. In sum, as explained by Colombia's expert and former Supreme Court Justice, Dr. Arturo Solarte, once the SCJ renders a cassation judgment, the second instance decision is annulled and immediately loses its legal effects.[579] Consequently, the parties can no longer rely on or assert upon claims based on the aspects of those previous decisions that were rendered ineffective by the cassation judgment.[580]

400. In light of the above, SSA's arguments attempting to revive the 1994 Judgment of the 10th Civil Judge of Barranquilla or the 1997 Second Instance Judgment of the Tribunal of Barranquilla – namely that the 1994 Judgment grants SSA rights over the coordinates reported in the 1982 Confidential Report and in additional areas –[581] must be rejected.

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cassation lawsuits (the Code of Civil Procedure), was subsequently modified and replaced in 2012 by the General Code of Procedure. Accordingly, the explanation of the remedy of cassation is provided under the framework of the Code of Civil Procedure, which was the legislation in force at the relevant time.

575 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

576 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

577 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶ 179, 180.

578 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

579 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

580 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 182.

581 Amended Statement of Claim, ¶ 205.

2. Litigation before the Colombian courts always referred to undetermined shipwrecks at the reported coordinates, not the *Galeón San José*

401. In this section Colombia shows that SSA Cayman commenced litigation before the Colombian Courts to protect an undetermined right, not a specific right over the Galleon San José (**a**); and that in 1994, the 10th Civil Judge of Barranquilla issued an Attachment Order over undetermined items and not specifically over the Galleon San José (**b**).

a. SSA Cayman commenced litigation before the Colombian Courts to protect an undetermined right, not a specific right over the *Galeón San José*

402. **On 13 January 1989**, SSA Cayman filed a claim against the Republic of Colombia and the DIMAR before the 10th Civil Judge of Barranquilla, requesting the Judge to declare:

> FIRST. That the goods of economic, historical, cultural, or scientific value that qualify as treasures and are located on the Colombian continental shelf or its exclusive economic zone at the coordinates and adjacent areas referred to in [page 13 of] Confidential Report [of 1982] do not belong to the Nation, in whole or in part.
>
> SECOND. That the goods referred to in the previous paragraph belong entirely to the declarant society [Glocca Morra].
>
> THIRD. That if the goods […] are located at the coordinates and adjacent areas mentioned, but are not found on the Colombian continental shelf or its exclusive economic zone, but rather in the Colombian territorial sea, only 50% of those goods belong to the claimant society, and the other 50% belongs to the Nation.
>
> FOURTH. That as a consequence of the previous declarations, the reporter company has the authority or power to recover or retrieve those goods, as their sole owner, without any limitation, if they are found on the Colombian continental shelf or exclusive economic zone; or the defendant is required to deliver 50% ownership to the reporter company, immediately upon their recovery or retrieval, if they are within the Colombian territorial sea.
>
> FIFTH. That as a duly recognized reporter of treasures, by Resolution No. 0354 of June 3, 1982 of the General Maritime and Port Directorate, in the area established in the previous petitions, the plaintiff company has a privilege or right of preference to contract with the defendant for their

> recovery or rescue, in the event that such goods are found in the Colombian territorial sea, and without prejudice to its rights as claimant.[582]

403. In its Amended Statement of Claim, SSA argues that Mr. Jack Harbeston, the then managing director of SSA Cayman, "*authorized the company to pursue litigation against Colombia to enforce its rights over the San José shipwreck*".[583] However, as may be seen above, SSA Cayman's claims as submitted before the 10th Civil Judge of Barranquilla did not mention the *Galeón San José*. Instead, SSA Cayman requested a declaration of unspecified rights to the ownership and recovery of undetermined items.[584]

404. **On 21 March 1990**, the 10th Civil Judge of Barranquilla dismissed SSA Cayman's claims and instructed the company to withdraw its request for a preferential right to enter a salvage contract with DIMAR, so the case could proceed before the civil courts. In this regard, the 10th Civil Judge held that salvage claims, due to their nature, fall under the jurisdiction of administrative courts and that a failure to withdraw the request for a preferential right would result in the dismissal of the entire lawsuit on grounds of lack of jurisdiction.[585] SSA Cayman complied with the Judge's instructions and filed an amended lawsuit.[586]

405. Regarding the proceeding before the 10th Civil Judge, SSA stated in its Amended Statement of Claim that "*Colombia's conduct during these proceedings drew sharp rebuke from its own courts*",[587] alleging that, on 12 August 1993, the 10th Civil Judge of Barranquilla sanctioned Colombia due to the President's absence at a conciliation meeting.[588] Unsurprisingly, the Claimant conveniently omits that Colombia explained at the time that the President could not attend due to emergency meetings addressing a natural disaster in a different municipality.[589] In fact, contrary to the Claimant's insinuations of misconduct, the 10th Civil Judge acknowledged

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582 SSA Cayman Complaint filed before the 10th Civil Court of the Circuit of Barranquilla, 13 January 1989 (**Exhibit C-61**), pp. 1-2.

583 Amended Statement of Claim, ¶ 157.

584 SSA Cayman Complaint filed before the 10th Civil Court of the Circuit of Barranquilla, 13 January 1989 (**Exhibit C-61**), pp. 1-2.

585 10th Civil Judge of the Circuit of Barranquilla, Decision regarding a reconsideration motion against the admission of the lawsuit, 21 March 1990 (**Exhibit R-138**), p. 6.

586 10th Civil Judge of the Circuit of Barranquilla, Judgement, 6 July 1994 (**Exhibit C-25**), p. 2**.**

587 Amended Statement of Claim, ¶ 163.

588 Amended Statement of Claim, ¶ 163.

589 10th Civil Judge of the Circuit of Barranquilla, Judgment, 12 August 1993 (**Exhibit C-72**), p. 5.

"*the importance of these meetings for the Country and the need for the President's presence there*".[590]

406. **On 6 July 1994**, the 10th Civil Judge of Barranquilla issued a judgment (the "**1994 Judgment**") declaring that 50% of the (undetermined) goods to be found at the 1982 Confidential Report coordinates belonged to SSA Cayman:

> [T]he items of economic, historic, cultural, and scientific value that qualify as treasures which are found at the coordinates and surrounding areas referred to in the 'CONFIDENTIAL REPORT ON SUBMARINE EXPLORATION' in the Caribbean Sea of Colombia presented by the Glocca Morra Company, dated 16 February 1982 belong, jointly and indiviso, in equal shares (50%), to the Colombian Nation and the Sea Search Armada society .[591]

407. As it will be shown, in reaching this conclusion, the 10th Civil Judge erroneously interpreted Law 163 of 1959, which provides for the protection of Movable Monuments under Colombian law. Specifically, as further explained below, the 10th Civil Judge mistakenly held that this law applied only to items located on national land or underground but not to shipwrecks or objects located on the national seafloor.[592]

408. Following Colombia's appeal against the first instance ruling,[593] **on 7 March 1997**, the Superior Court of Barranquilla issued its final decision (the "**1997 Judgment**"), upholding the 1994 Judgment of the 10th Civil Judge of Barranquilla.[594]

b. In 1994, the 10th Civil Judge of Barranquilla issued an Attachment Order over undetermined items and not specifically over the *Galeón San José*

409. Colombia demonstrates in this section that SSA requested the attachment of the undetermined items that could be considered treasure, whose ownership was subject to litigation (**i**); the 10th Civil Judge of Barranquilla explained that the Attachment Order covered undetermined goods, not the Galleon San José (**ii**) and the Attachment Order did not enjoin the Republic of Colombia

590 10th Civil Judge of the Circuit of Barranquilla, Judgment, 12 August 1993 (**Exhibit C-72**), p. 5.

591 10th Civil Judge of the Circuit of Barranquilla, Judgement, 6 July 1994 (**Exhibit C-25**), p. 33.

592 10th Civil Judge of the Circuit of Barranquilla, Judgement, 6 July 1994 (**Exhibit C-25**), p. 18.

593 Colombia's Appeal to the 10th Judge of the Circuit of Barranquilla, Judgment, 26 August 1994 (**Exhibit C-187**).

594 Superior Court of the Judicial District of Barranquilla, Judgment, 21 June 1995 (**Exhibit C-76**), p. 8.

from taking measures to recover the items, nor from accessing the coordinates reported by the Claimant (**iii**).

i. SSA requested the attachment of the undetermined items that could be considered treasure, whose ownership was subject to litigation

410. **On 10 August 1994**, SSA Cayman requested that the 10th Civil Judge of Barranquilla issue an attachment order or "*secuestro*" over "*the movable property of economic, historical, cultural and scientific value that has the quality of treasures, whose property is subject to litigation*".[595] SSA added that it would provide the exact coordinates of such items at the time of the enforcement of the order.[596]

411. The attachment order does not mention the *Galeón San José*, nor could it refer – or be directly linked – to it, since no reference to the *Galeón San José* was made in the 1994 Judgment of the 10th Civil Judge of Barranquilla.[597]

412. Further, SSA claims that it requested the attachment order to protect its rights from Colombia's "*extrajudicial*" conduct, including commissioning the Columbus Report.[598] As the Respondent has demonstrated, these allegations are completely baseless, since the coordinates reported by GMC did not correspond to its alleged finding.

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595 SSA Cayman Attachment Request before the 10th Civil Judge of the Circuit of Barranquilla, 10 August 1994 (**Exhibit C-74**), p. 1 (emphasis added).

596 SSA Cayman Attachment Request before the 10th Civil Judge of the Circuit of Barranquilla, 10 August 1994 (**Exhibit C-74**), p. 1.

597 SSA Cayman Attachment Request before the 10th Civil Judge of the Circuit of Barranquilla, 10 August 1994 (**Exhibit C-74**).

598 Amended Statement of Claim, ¶ 173 (alleging that "[g]*iven Colombia's extrajudicial conduct, including commissioning the Columbus Report and issuing the Columbus Press Release, on 10 August 1994, SSA Cayman sought to protect its rights to the treasure in the Discovery Area, as recognized by the Civil Court Decision, by requesting an injunction* […]."*)*.

ii. The 10th Civil Judge of Barranquilla explained that the Attachment Order covered undetermined goods, not the *Galeón San José*

413. **On 12 October 1994**, the 10th Civil Judge issued an attachment order (the "**Attachment Order**") ordering the seizure of undetermined items, as requested by SSA. Specifically, the Attachment Order resolved:

> To order the seizure of the items that have the nature of treasure, that are rescued or removed from the area determined by the coordinates indicated in the "Confidential Report on underwater exploration" in the Caribbean Sea of Colombia presented by the company Glocca Morra Company, dated 26 February 1982, which is an integral part of resolution number 0354 of 3 June 1982 of the General Maritime and Port Administration of Colombia.[599]

414. Notably, the Attachment Order did not mention nor concern the *Galeón San José*. Indeed, the 10th Civil Judge of Barranquilla expressly clarified that the proceedings were not about the salvage or the localization of the *San José,* and that the identification of the shipwreck was immaterial since the proceedings related to the protection of the rights of GMC at the reported coordinates:

> The Judge deems it convenient to clarify a situation of a procedural legal nature, which due to the public notoriety of these proceedings has helped to create confusion around it and that now the parties intend to include or bring to the file; these proceedings are not about the salvage, finding or discovery of the site of the shipwreck or the remains of the so-called "Galeón *San José*" or whether or not it is located at the reported coordinates or in its surroundings or in a place other or different from the indicated by those coordinates, it was about establishing, according to Colombian law, whether the report of the discovery of assets made by Glocca Morra Company and accepted by Colombia (through resolution 0354 of 1982), granted this foreign company and its assignees the property rights over the assets (treasures) that are found in the reported site, regardless of whether they concern the remains of the mentioned *Galeón* or of any other ship.
>
> For the purposes of these proceedings, it is immaterial whether the remains that are claimed to be located at that site correspond to that vessel or to any other that may have sunk in that location during the colonial era, the speculations or assertions made by the parties regarding these circumstances cannot be considered by the court, even if this official had become aware of them prior to issuing the ruling on August 17th; the interview referred to by the Nation's attorney is not part of the proceedings,

599 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 5.

> not even now that a copy of the corresponding magazine has been submitted to the record.[600]

iii. The Attachment Order did not enjoin the Republic of Colombia from taking measures to recover the items, nor from accessing the coordinates reported by the Claimant

415. SSA argues that the Attachment Order "*prohibits Colombia from taking any measures to recover goods from the shipwreck area reported by SSA's Predecessors*" [601] and that it "*prevented Colombia from accessing the area reported by SSA's Predecessors*".[602] This reiterated assertion is unwarranted. In fact, in its judgment, the 10th Civil Judge clearly stated that Colombia was free to salvage any assets at the reported coordinates, which salvage efforts did not have to be necessarily undertaken with SSA Cayman:

> [The rescue of the goods] will not (once the corresponding judgement is confirmed) necessarily be subject to an administrative contract. The Nation would not be ordered to contract the rescue with the Claimant Company or with whoever they designate, the physical apprehension of those goods would simply be authorized by the means deemed necessary for that purpose.[…]
>
> [T]he special factual circumstances present in this process do not prevent the Judge from ordering such a measure to make it effective when these circumstances change, whether due to the rescue or extraction by the parties involved in the process or by any third party unrelated to it. […]
>
> [T]hat the recovery be allowed directly by the claimant was one of the requests in the claim, which was denied in the [1994] Judgement and therefore the judge cannot revisit that procedural aspect.[603]

416. In fact, SSA Cayman requested that, along with the Attachment Order, the 10th Civil Judge of Barranquilla order the DIMAR to authorise the operation of naval devices for the rescue.[604] The

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600 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 2 (emphasis added).

601 Amended Statement of Claim, ¶ 7.

602 Amended Statement of Claim, ¶ 10.

603 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), pp. 3-5 (emphasis added).

604 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 4.

10th Civil Judge, however, ruled that an attachment procedure simply could not encompass rescue operations:

> [I]n the present case, it is not possible to consider that the tasks of extraction, cleaning, classification, appraisal, and other operations necessary for the recovery of those assets from the sea floor are an integral part of a simple attachment procedure; therefore, they would be an ancillary task that requires a different type of legal and procedural framework.[605]

417. Thus, the Attachment Order only covered the seizure of items classified as treasure that were recovered or removed from the area reported in the 1982 Confidential Report. Nowhere in its judgment did the 10th Civil Judge prohibit Colombia from taking measures to recover the items or accessing such area.[606] Yet, the Claimant had no compunction in misrepresenting the scope of the order in its pleadings and in its various threatening communications directed to third parties that were willing to support Colombia's surveys or to contract with it, as shown in this memorial.

3. Colombia's SCJ did not uphold SSA's Alleged Predecessors' Rights. On the contrary, Colombia's SCJ clarified the precise scope of Claimant´s rights

418. Colombia will show in this section that the SCJ did not uphold SSA's Alleged Predecessor's but rather limited those rights. To do this, Colombia will present a brief recap of the cassation complaint (**a**); the fact that the 2007 SCJ Decision makes it patent that SSA's undetermined rights are strictly restricted (**b**); and that SSA misrepresents the nature and content of the 2007 SCJ Decision (**c**).

a. Cassation Complaint

419. Both SSA and Colombia pursued the extraordinary cassation remedy to challenge the 1997 Second Instance Judgment of the Superior Court of Barranquilla. SSA filed one cassation lawsuit ("**SSA Cassation Complaint**"), while Colombia submitted two separate cassation lawsuits (**"Colombia's Cassation Complaints**").

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605 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 4.

606 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 5.

i. SSA's allegations in its Cassation Complaints

420. SSA's Cassation Complaint was based on a single count, challenging the 1997 Judgment for failing to recognize the plaintiff's right to the totality of the treasure discovered in areas corresponding to the Colombian continental shelf, where, according to GMC, the country's rights were limited to the exploration and exploitation of natural resources.[607]

421. The SCJ dismissed this count on the grounds that Colombia has full rights over the continental shelf, limited only by express provisions of domestic or international law, none of which imposed restrictions on Colombia's rights over submerged cultural heritage.[608]

ii. Colombia's allegations in its Cassation Complaint

422. Both of Colombia's Cassation Complaints had similar counts challenging the 1997 Judgment.

423. ***First***, Colombia alleged the nullity of the 1997 Judgment for lack of jurisdiction, given that the proceedings should have been heard by the administrative contentious courts.[609]

424. ***Second***, Colombia argued a breach of substantive law due to deficiencies in the Superior Court's evidentiary assessment, including: (***i***) the absence of evidence proving the plaintiff's status as assignee of the rights of its predecessors; (***ii***) the lack of proof establishing the exact location of the treasure; (***iii***) the non-existence of the treasure since its acquisition is prohibited by law; and (***iv***) the absence of rights acquired by the claimant over the alleged treasures, as such rights required entering into a contract to carry out the respective salvage.[610]

425. ***Third*****,** Colombia argued that several laws had been breached, including: Articles 685, 699, 700, 701, 704, 706 and 710 of the Civil Code; Articles 63, 70, 72, 101 and 102 of the Political Constitution; Law 14 of 1936; Law 163 of 1959; Law 397 of 1997; and Decree 655 of 1968. According to Colombia, the 1997 Judgment did not recognize: (***i***) that the property in question belongs to the Colombian Nation, as part of its cultural, archaeological and artistic heritage; (***ii***) that there was no physical or material apprehension of the wreck but the reference to some

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607 Amended Statement of Claim, ¶ 190.

608 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 196.

609 *See* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 17-19.

610 *See* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 58-60.

coordinates, which does not establish rights, only expectations; and (***iii***) that the goods were not "*buried or hidden*", since their concealment was not intentional, and therefore the goods have been lost by their owner and thus belong to the Colombian Nation.[611]

426. The SCJ dismissed the first and the second counts. However, the third count, concerning the violation of Article 14 of Law 163 of 1959 was successful. As a result, the SJC annulled ("*casó*") the 1997 Judgment. The SCJ issued a substitute judgment, as part of the 2007 Judgment, which corrected the 1997 Judgment.[612]

b. The 2007 SCJ Decision did not uphold SSA's Alleged Predecessors' Rights. The 2007 SCJ Decision makes it patent that SSA's undetermined rights are strictly restricted

427. Following the SCJ's finding of a direct violation of Article 14 of Law 163 of 1959, a substitute ruling was issued as part of the 2007 SCJ Decision (the "**Substitute Ruling**"). This Substitute Ruling, as summarized by Dr. Solarte, rectified the violation committed by the 1997 Second Instance Judgment.[613]

428. The fundamental conclusions of the Substitute Ruling are outlined in the operative part of the 2007 SCJ Decision:

> FIRST: **TO PROVIDE** full and unequivocal protection to the national cultural, historical, artistic and archaeological heritage, including submerged heritage to each and every one of the properties correspond or correspond to ''movable monuments'', according to the description and reference established in article 7 of Law 163 of 1959, which are subject to and governed by the protectionist regime contemplated therein, as well as by the constitutional and legal norms that, with the same and specific purpose, have been subsequently issued, characterized by the amplitude and generality of the protection granted, for which reason they are expressly excluded from the declaration of ownership contained in the second point of the operative part of the first instance ruling, issued in the present proceedings by the 10th Civil Judge of Barranquilla on June 6, 1994,.

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611 *See* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 74-81.

612 *See* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 209-235.

613 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 260.

> SECOND: With observance of the previous resolution, the aforementioned point of the first instance ruling is **MODIFIED**, in the understanding that the property recognized therein, in equal parts, for the Nation and the plaintiff, refers exclusively to the assets that, on the one hand, due to their own characteristics and features, according to the circumstances and the guidelines indicated in this ruling, are still susceptible of being legally qualified as treasure, in the terms of article 700 of the Civil Code and the restriction or limitation imposed on it by article 14 of Law 163 of 1959, among other applicable legal provisions and, on the other hand, those referred to in Resolution 0354 of June 3, 1982, issued by the General Maritime and Port Directorate, that is, those which are located 'at the coordinates referred to in the 'Confidential Report on Underwater Exploration carried out by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982' […], without including, therefore, spaces, zones or diverse areas.
>
> THIRD: Without prejudice to the determinations adopted in the two previous points, **CONFIRM** in the remaining and pertinent aspects, the aforementioned judgment of first instance.[614]

429. This excerpt from the operative part of the 2007 SCJ Decision makes it evident that, contrary to the Claimant's allegation that the SCJ upheld SSA's Alleged Predecessors' rights, the 2007 SCJ Decision substantially modified the rights previously granted to SSA by the 1994 Judgment and subsequently by the 1997 Judgment. In this context, the SCJ introduced two pivotal modifications to SSA's rights: the application of the legal framework for the protection of cultural heritage (***i***); and the delimitation of the location of the goods to the specific coordinates referred to in the 1982 Confidential Report (***ii***).

i. The 2007 SCJ Decision applied the legal regime on cultural heritage protection

430. The first significant modification to SSA's rights stems from the direct violation of Article 14 of Law 163 of 1959. According to the SCJ, the Superior Court of Barranquilla – in upholding the 1994 Judgment – violated Article 14:

> [T]he direct breach of substantive law, concerning Article 14 of Law 163 of 1959, arises because the confirmation of the first-instance judgment by the Tribunal implied that the declaration of ownership made therein, despite being based exclusively on the legal institution of treasure, included goods that, by mandate of the referred provision, were expressly excluded from the notion set forth in Article 700 of the Civil Code, therefore, such goods

614 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 234-235 (emphasis added).

> could not qualify as treasure, nor be subject to such recognition, with all the legal implications that this entails. [615]

431. The Court recalled that the concept of treasure set forth in Article 700 of the Civil Code had been modified and restricted by Article 14 of Law 163 of 1959. This modification reduced the scope of the concept, excluding "*movable monuments*" that are part of national historical and artistic heritage, and as such are subject to special legal protection – and later also becoming the subject of constitutional protection.[616]

432. This modification – which Justice Ortiz downplayed –[617] was so significant that the SCJ decided to annul the 1997 Judgment and proceeded to provide full and unequivocal protection to the national cultural, historical, artistic and archaeological heritage, including submerged heritage.

433. In granting protection to the national cultural, historical, artistic and archaeological heritage, the SCJ analyzed the evolution of the legal framework governing the treasure and emphasized the critical limitations imposed by the rules protecting the Nation's cultural heritage. Notably, the Court underscored that the "*institute derived from private law of treasure has undergone relevant transformations, adjustments and corresponding limitations, to the point that its scope of action, once more extensive, has been reduced or limited significantly*".[618]

434. Justice Solarte explains that, among these transformations, the SCJ highlighted the one introduced by Law 163 of 1959 and the subsequent norms of "*identical content and scope*", notably Decree 1397 of 1989, which regulated Law 163 of 1959. The Court then referenced the 1991 Constitution, which incorporated the protectionist criterion of the previous norms, under which Law 397 of 1997 was later enacted.[619]

435. Regarding regulations enacted after 1982, such as Law 397 of 1997, the SCJ clarified that these regulations did not apply to the resolution of the Cassation Complaint. However, the SCJ noted their relevance for the substitute ruling, reiterating its ongoing commitment to providing "*full*

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615 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 212.

616 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶ 227-229.

617 *See* Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), p. 25, ¶ 79 (referring to the amendment as "*only one modification*").

618 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 125.

619 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 210.

and unequivocal protection for the cultural, historical, artistic and archaeological heritage, including submerged heritage".[620] To achieve this, the SCJ emphasized the need to "*exclude any individual items that constitutes – or will constitute – part of this heritage, particularly, the 'movable monuments' defined by Law 163 of 1959*".[621]

436. To protect the national cultural, historical, artistic and archaeological heritage, including submerged heritage, the SCJ excluded from the ownership rights that had been previously acknowledged by the 10th Civil Judge of Barranquilla all items that conform – or could potentially constitute – cultural heritage, including submerged cultural heritage, and particularly the movable monuments referred to in Law 163 of 1959. Concordantly, the Court also restricted these ownership rights to "*the assets that, due to their characteristics and features, as the case may be, are susceptible of being classified as treasure*".[622] This classification was subject to a significant restriction imposed by the understanding of treasure at the time, which prioritized safeguarding the country's cultural heritage as a higher interest that judges and authorities must protect.

437. In practical terms, the reduction of the property rights recognized to SSA carries significant consequences. First, SSA has no rights over any goods classified as movable monuments under Article 1 of Law 14 of 1936 and is therefore excluded from the concept of treasure by Article 14 of Law 163 of 1959. These goods include:

> From the colonial period: weapons of war and work tools, costumes, medals, coins, amulets and jewelry, designs, paintings, engravings, plans and geographical charts, codices, incunabula and all rare books due to their scarcity, form or content, objects of goldsmithery, porcelain, ivory, tortoiseshell and lace, and in general all memorabilia that have historical or artistic value.[623]

620 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 222.

621 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 232.

622 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 233.

623 Congress of Colombia, Law 14 of 1936, 22 January 1936 (**Exhibit R-69**), Article 1 of the draft treaty (emphasis added).

438. Importantly, this also includes goods that become part of Colombia's cultural heritage through subsequent regulations.[624]

439. In this regard, it is patent that the ownership rights granted to SSA were vastly limited by the protective regime recognized by the SCJ. This demonstrates that the 2007 SCJ Decision did not uphold SSA's Predecessors' Rights in the manner that the Claimant submits[625].

ii. The delimitation of the location of the item to the specific coordinates referred to in the 1982 Confidential Report

440. The second major modification to SSA's rights concerns the delimitation of the location of the alleged discovery. In the second paragraph of the operative part of the 2007 SCJ Decision, the SCJ held:

> **SECOND**: […] the property […] recognized, in equal parts, for the Nation and the plaintiff, is referred only and exclusively to the assets […] which are located at ''the coordinates referred to in the Confidential Report on Underwater Exploration carried out by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982" […] without including, therefore, spaces, zones or diverse areas. [626]

441. SSA and Justice Ortíz openly disregard the 2007 SCJ Decision on this point by presenting an erroneous interpretation of the SCJ's decision that is convenient to SSA. Indeed, according to SSA:

> The Supreme Court's exclusion of "other spaces, zones, or areas" thus cannot be read to exclude, as Colombia argues, spaces and areas that the 1982 Report itself included. Indeed, doing so would put Resolution No. 0354, which fully integrated the 1982 Report, at odds with itself. This reading is confirmed by Justice Ortíz, who explains that "DIMAR decided to 'recognize' GMC as the reporter of treasures or shipwrecked species in the area referred to in the 1982 Report".[627]

442. Subsequently, the Claimant concludes that:

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624 *See* Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 6.

625 Amended Statement of Claim, ¶¶ 189-207.

626 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 234-235 (emphasis added).

627 Amended Statement of Claim, ¶ 206.

> Accordingly, the 2007 Supreme Court Decision upheld SSA Cayman's rights to the entirety of the Discovery Area […].[628]

443. In turn, Justice Ortíz supports SSA's interpretation of the 2007 SCJ Decision with an incomplete and inaccurate argument, asserting that "[t]*he Supreme Court confirmed that the location of the treasure had been recognized by the DIMAR*".[629] Justice Ortíz further claims that "*the Court stated that the location was not disputed in the ordinary proceeding simply because they accepted the credibility of Resolution No. 0354".*[630]

444. Justice Solarte provides the correct interpretation of the 2007 SCJ Decision on this point and clarifies the scope of this relevant modification.

445. ***First***, there is no certainty that the finding reported by GCM is a treasure. While the 2007 SCJ Decision references the existence of a "finding", it does not establish that it qualifies as a treasure. Its classification depends on the restrictions that the SCJ established, regarding what types of goods may be considered treasures.[631]

446. ***Second***, regarding the location of the items, both SSA and Justice Ortíz conveniently omit that Resolution 354, whose legality was neither challenged nor reviewed by the Court, was issued pursuant to Resolution 148. This is a critical factor underpinning the shift between the instant decisions and the 2007 SJC Decision concerning the location of the goods.

447. Resolution 148 was enacted by DIMAR on 10 March 1982 to amend the DIMAR Manual approved by Resolution No. 891. Pursuant to Article VII, Resolution 148 expressly required the company authorized to carry out exploration work to "*report the discoveries of treasures or antiquities it makes, indicating the exact position where they are located*".[632] The foregoing means that Resolution 148, in force at the time when Resolution 354 was issued, required the reporter to indicate the exact position of the treasures or antiquities discovered.[633]

448. The 2007 SCJ Decision explicitly recognized the foregoing:

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628 Amended Statement of Claim, ¶ 207 (emphasis added).

629 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), ¶ 87.

630 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), ¶ 87.

631 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶¶ 230-233.

632 DIMAR Resolution No. 148 of 1982, 10 March 1982 (**Exhibit R-94**) (emphasis added).

633 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶¶ 117-118.

> As in Resolution 0148 of 10 March 1982, […] 'The concessionary company is obliged to report the discoveries of treasures or antiquities that it makes, indicating the exact position where they are found,'[. Therefore] it must be understood that for the recognition contained in the several times cited Resolution 0354 of 3 June of the same year, the DIMAR complied with that requirement and that, therefore, this last act of the entity allowed to infer that before DIMAR the existence of the finding was proven at the precise coordinates that were supplied to the entity.[634]

449. Based on the above, Justice Solarte provides a clear conclusion on this crucial aspect:

> Against this background, it must be understood that what was stated by the Supreme Court of Justice in the second paragraph of the substitute ruling issued on 5 July 2007, insofar as it resolved that the right recognized to the plaintiff's company is referred only and exclusively to the goods that "are found at 'the coordinates referred to in the '[1982] 'Confidential Report' […]", ''''without including, therefore, spaces, zones or diverse areas.[635]

450. ***Third***, it is evident that there was a substantial modification concerning the location of the potential treasures for which the Claimant sought recognition under Resolution 354. Specifically, the 1994 Judgment, upheld by the Tribunal of Barranquilla, declared that the plaintiff owned 50% of the assets of economic, historical, cultural and scientific value that qualified as treasures "*located at the coordinates and surrounding areas referred to in the 'CONFIDENTIAL REPORT ON SUBMARINE EXPLORATION' in the Caribbean Sea of Colombia*" whether "*these coordinates and surrounding areas are located in the Caribbean Sea of Colombia*" or not, and whether "*these coordinates and their surrounding areas are located or correspond to the territorial sea, or the continental shelf or the exclusive economic zone of Colombia"*.[636]*"*

451. By contrast, the SCJ significantly narrowed the scope of SSA Cayman's rights, ruling that the plaintiff was entitled only to assets that (***i***) could still be legally classified as treasure, (***ii***) located at the specific coordinates (in the 1982 Confidential Report) *"'without including, therefore, spaces, zones or diverse areas."*

452. In sum, for the reasons explained above, the interpretation of the 2007 SCJ Decision adopted by SSA and Justice Ortíz is plainly wrong. As demonstrated, Resolution 148 served as the legal basis

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634 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 70 (emphasis added).

635 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 117.

636 10th Civil Judge of the Circuit of Barranquilla, Judgment No. 08001-3103-010-1989-09134-01, 6 July 1994 (**Exhibit C-25**), p. 33.

for the SCJ to modify and amend the lower court's rulings regarding the location of the goods by requiring that the exact position of the discovery to be indicated in the report. Accepting the Claimant's claim that the Court confirmed its rights over the reported coordinates and additional areas would be tantamount to rendering the final portion of the operative part of the 2007 SCJ Decision devoid of effect.

c. SSA misrepresents the nature and content of the 2007 SCJ Decision

453. Several inaccuracies asserted by SSA and supported by Ortíz must be clarified. In order to do this, Colombia presents that the 2007 SCJ Decision was not about the Galleon *San José*, as the Supreme Court expressly stated in its Decision so the Court did not recognize SSA's alleged rights over the San José (**i**) and the fact that the Court, acting as a cassation adjudicator, neither confirms nor invalidates the judgments of the judges of instance (**ii**).

i. The 2007 SCJ Decision was not about the *Galeón San José*, as the Supreme Court expressly stated in its Decision. Therefore, the Court did not recognize SSA's alleged rights over the *San José*

454. The Claimant wants the Tribunal to believe that the dispute before the Colombian local courts, including the 2007 SCJ Decision, was about the *Galeón San José*.[637] Not only, as mentioned above, did SSA Cayman's claims never mention the *Galeón*, but the SCJ explicitly emphasized in the 2007 SCJ Decision that there was no evidence to prove that the 1982 Confidential Report corresponded to a specific vessel or shipwreck – let alone the *San José*. In fact, the *Galeón* was only briefly mentioned in the 2007 SCJ Decision, where the SCJ stated:

> [T]here is no evidence in the record to prove that the report submitted by Glocca Morra Company to DIMAR [...] corresponds to a specific or precise shipwreck and, even less, that it is inexorably or undeniably the ''*Galeón San José*''.[638]

637 Amended Statement of Claim, Section D.

638 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 226 (emphasis added).

455. In the Amended Statement of Claim and Justice Ortíz' report, several assertions are made alleging a purported recognition of rights over the *Galeón San José* following the 2007 Judgment. For instance, Justice Ortíz states:

> 60. The Supreme Court held, in 2007, that items that could be found at the bottom of the Colombian Caribbean Sea following the shipwreck of the *San José Galeón*, or of another vessel 300 years after it sank, can be characterized and identified as treasure due to the fundamental reason that after that time, it is no longer possible to identify an owner.[639]

456. With respect to this assertion, Justice Solarte clarified:

> [T]he phrase contained in paragraph 60 of Gloria Ortíz's Expert Report has no basis in the content of the judgment issued by the Supreme Court of Justice […].
>
> On page 188 of the Court's judgment, which corresponds to quotation 80 of Ortíz's Report, included in the referred paragraph 60, the statement incorporated in the above-transcribed paragraph is not made. In fact, nowhere in the judgment does the Court indicate that the finding by Sea Search Armada's predecessors corresponds to the *San José Galeón*. In the aforementioned page, the Court analyses whether the concealment of the goods or elements that are considered treasure must have been done voluntarily. In addition, in order to qualify goods as treasure, the impossibility to identify the owner due to the passage of time is not enough, because, as stated above, the Supreme Court of Justice's decision indicates other additional requirements that must be met for a good to be qualified as treasure.[640]

457. In the same line, Justice Ortíz also alleges that:

> 100. […] [I]t is clear that when the DIMAR issued Resolution No. 0354 and recognized GMC's rights as the reporting entity of treasure, it could be understood under applicable legislation that the goods contained in the shipwreck of the *San José Galeón* could be classified as treasure under Article 701 of the Civil Code.[641]

458. In this regard, Justice Solarte clarified:

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639 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), ¶ 60.

640 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶242-243.

641 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), ¶ 100.

> Regarding the statement in paragraph 100 […], several clarifications must be made.
>
> The first is that, in 1982, Law 163 of 1959 was in force, which granted broad protection to movable monuments that are part of the cultural, historical and artistic heritage, to the extent that Article 14 of that Law considered that the regime of discovery of treasures of the Civil Code was inapplicable to this type of goods. This protection has subsequently been extended by all regulations, including constitutional ones, that have been enacted on the subject, as has already been mentioned.
>
> The second is that nowhere in the Supreme Court's judgment is there any reference to the alleged rights of Sea Search Armada in relation to the Galeón *San José*, since neither the report filed before the DIMAR nor the action brought before the ordinary jurisdiction made any reference to that particular vessel.
>
> And thirdly, the rules applicable to the report of a shipwreck made in 1982 did not allow the goods in question to be classified as treasures within the meaning of Article 700 of the Civil Code, since it would be indispensable to apply preferentially the rules governing the protection of cultural heritage in order to determine whether the provisions on treasures contained in the Civil Code were residually still be applicable. [642]

459. As demonstrated by Colombia, it is simply false that the 2007 SCJ Decision recognized the Claimant's Alleged predecessors' rights over the *San José*, and the Tribunal should dismiss all statements by the Claimant alleging that the 2007 SCJ Decision recognized any rights in favor of SSA over the *Galeón San José*.

ii. The Court, acting as a cassation adjudicator, neither confirms nor invalidates the judgments of the judges of instance

460. Justice Ortíz errs in asserting that "[t]*he Supreme Court confirmed the lower court's decisions almost in their entirety, with only one modification"*[643], for the reasons explained by Justice Solarte in his Report.

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642 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶279 (emphasis added).

643 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), p. 25, ¶ 79.

461. The SCJ, acting as cassation adjudicator, does not confirm or invalidate "*the judgments of the judges of instance*".[644] Due to the extraordinary nature of the remedy of cassation, the SCJ cannot modify the decisions of the tribunals from lower courts unless the counts brought before the SCJ meet the rigorous legal requirements. However, as previously explained, if the SCJ overturns ("*casa*") a second instance judgment, it then renders a substitute ruling, acting in its capacity as a second instance judge.[645]

462. In this context, even if, in the third paragraph of the operative part the SCJ "*confirm*[ed] *the remaining and pertinent aspects of the aforementioned judgment of first instance*", this does not imply that the Court "*endorsed*" or "*ratified*" the findings of the instance judges. Instead, this pertains to matters that were outside of the scope of the Court's remit on cassation.[646]

463. Some of the aspects that the SCJ neither confirmed nor invalidated are:

- **The validity of Resolution No. 354**. The Court did not reaffirm the validity of Resolution No. 354. This issue was not debated in cassation, and, in any case, it would have fallen outside the Court's jurisdiction.[647]

- **The assignment of rights in favor of SSA Cayman**. The Court did not uphold the validity of the assignment of rights in favor of SSA Cayman or its right to sue.[648]

- **The existence of a treasure**. The Court did not recognize the existence of a treasure at the coordinates denounced in the 1982 Confidential Report.[649]

- **The validity of the Attachment Order**. Contrary to Justice Ortíz´s conclusion, according to which "[b]*y ruling that the attachment injunction was valid and upholding it, the Supreme Court simply maintained its validity and, with it, its binding nature*"[650], the SCJ expressly

644 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 250.

645 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 250.

646 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 250.

647 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶ 262.

648 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶ 265-266.

649 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶¶267-270.

650 Expert Report of Gloria Ortíz (**CER-5 [Ortíz]**), ¶ 115.

stated that the 1994 Attachment Order, upheld by the 1997 Second Instance Judgment, challenged in cassation, **was not part of the substitute ruling issued by the Court**.[651]

464. In any case, it is important to note that the Court did clarify that what was decided in the 2007 SCJ Decision did not contradict the determination of the 1994 Attachment Order, insomuch as "*the attachment ordered applied, exclusively, to 'the items that have the quality of treasures' (order of October 12, 1994), without including, therefore, any different object and, much less, any that conforms to the historical, cultural or archaeological heritage,* […] *which in this case cannot be the object of any appropriation by private individuals, with all that this implies*".[652]

465. In this respect, it is contrary to the cassation technique to assert that the Court affirms or overturns aspects of the second instance decision that were not subject to its review, or that, although reviewed, did not constitute a sufficiently significant violation of the law to warrant nullifying the second instance decision.

K. PRIOR TO SSA'S ALLEGED INVESTMENT, THE PROTECTION OF CULTURAL HERITAGE UNDER COLOMBIAN LAW HAD BECOME EVEN MORE ROBUST

466. Between 1983 and 2008, Colombia strengthened its legal framework for the protection of cultural heritage through several key legal instruments. The two most significant regulatory milestones were the Political Constitution of Colombia, enacted in 1991 and Law 397 of 1997. Other relevant instruments issued during this period include Law 45 of 1983, Law 63 of 1986, Law 319 and Law 340 of 1996, Law 472 of 1998 and Law 1185 of 2008.

467. As Justice Linares explains when providing his interpretation of the 2007 SCJ Decision, the legislative and constitutional developments subsequent to Law 163 of 1959 did nothing more than reaffirm the protection of historical or archaeological heritage.[653] Indeed, the protection of the Cultural Heritage of the Nation was expressly included, as such, in the 1991 Political

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651 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶160; *See also* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 209.

652 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**) ¶160; *See also* Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 209.

653 Expert Report of A. Linares (**RER-3 [Linares]**), ¶143.

Constitution of Colombia. The Respondent provides below a chronological, succinct description of the legal instruments that are of most relevance to the matter.

1. Law 45 of 1983

468. Law 45 was enacted on 15 December 1983 to approve the "*Convention Concerning the Protection of World Cultural and Natural Heritage*"[654], more commonly known as the World Heritage Convention, adopted in Paris in 1972 by the General Conference of UNESCO.

469. In that regard, Law 45 of 1983 was a treaty-approving law that authorized the Colombian government to adhere to the referred Convention. Therefore, the 38 articles that make up the Convention were adopted into Colombian law. Some of the most relevant provisions of Law 45 are the following:

- **Article 1**, which defines cultural heritage for purposes of the Convention. The notion of cultural heritage includes monuments, which are defined as "*architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science*".[655]

- **Article 4**, which establishes the duty of each of the State parties to the Convention to ensure the "*identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage*".[656]

- **Article 8**, which creates an Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage.

- **Article 15**, which establishes the Fund for the Protection of the World Cultural and Natural Heritage.

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654 Convention Concerning the Protection of the World Cultural and Natural Heritage (1983) (**Exhibit RLA-107**).

655 Law 45 of 1983, 15 December 1983 (**Exhibit R-110**), Article 1. *See also* Convention Concerning the Protection of the World Cultural and Natural Heritage (1983) (**Exhibit RLA-107**).

656 Law 45 of 1983, 15 December 1983 (**Exhibit R-110**), Article 4. *See also* Convention Concerning the Protection of the World Cultural and Natural Heritage (1983) (**Exhibit RLA-107**).

470. Law 45 of 1983 is still in force in the Colombian legal system and remains a central piece of the protection of cultural heritage under Colombian law.

2. Law 63 of 1986

471. Law 63 was enacted on 20 December 1986 to approve the *"Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property"*[657] adopted in Paris in 1970.

472. Law 63 of 1986 was also a treaty-approving law that authorized the Colombian government to adhere to the referred Convention. Therefore, the 26 articles that comprise the Convention were adopted by Law 63. Below are some of the most relevant Articles of the Convention:

- **Article 1**, which provides the definition of "cultural property":

> Property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
>
> a) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
>
> b) Products of archaeological excavations (including regular and clandestine) or archaeological discoveries;
>
> c) Elements of artistic or historical monuments or archaeological sites which have been dismembered;
>
> d) Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
>
> e) Objects of ethnological interest;
>
> f) Property of artistic interest, such as:

657 Law 63 of 1986, 20 November 1986 (**Exhibit R-120**). *See also* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) (**Exhibit RLA-236**).

i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

ii) original works of statuary art and sculpture in any material;

iii) original engravings, prints and lithographs ;

g) original artistic assemblages and montages in any material;[658]

- **Article 2**, which recognizes the problem of "*illicit import, export and transfer of ownership of cultural property as one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property*",[659] and establishes the commitment of the State parties to the Convention "*to oppose such practices*".[660]

- **Article 6 and Article 7**, which prescribe duties on the State parties to combat illicit practices. Amongst others, the State parties to the Convention have the duty to "*prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate*" or to "*prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention*".[661]

473. Law 63 of 1986 is still in force in the Colombian legal framework.

3. Political Constitution of Colombia

474. Importantly, since 1991, cultural heritage has been constitutionally protected in Colombia. The Political Constitution of Colombia, enacted on 4 July 1991, stands as one of the most significant normative milestones issued to date regarding the protection of cultural heritage in Colombia. With its enactment, the concept of cultural heritage was formally incorporated into the domestic legal framework, elevating its protection to a constitutional level.[662]

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658 Law 63 of 1986, 20 November 1986 (**Exhibit R-120**), Article 1.

659 Law 63 of 1986, 20 November 1986 (**Exhibit R-120**), Article 2.

660 Law 63 of 1986, 20 November 1986 (**Exhibit R-120**), Article 2.

661 Law 63 of 1986, 20 November 1986 (**Exhibit R-120**), Articles 6 and 7.

662 Expert Report of Justice A. Linares (**RER-3 [Linares]**) ¶ 143.

475. The Colombian Constitution includes several articles dedicated to safeguarding the Nation's cultural heritage, outlining both the responsibilities and limitations associated with its protection: A few of these provisions are listed below:

- **Article 8** states that "[i]*t is the obligation of the State and of individuals to protect the cultural and natural wealth of the Nation*."[663]

- Concerning the archaeological heritage of the Nation, **Article 63** expressly states:

> Property for public use, natural parks, communal lands of ethnic groups, reservation lands, the archaeological heritage of the Nation and other property determined by law, are inalienable, imprescriptible and unseizable.[664]

- Crucially, regarding cultural and archaeological heritage, **Article 72** establishes:

> The cultural heritage of the Nation is under the protection of the State. The archaeological heritage and other cultural assets that make up the national identity belong to the Nation and are inalienable, unseizable and imprescriptible. The law shall establish the mechanisms to reacquire them when they are in private individuals' hands and regulate the special rights that ethnic groups settled in territories of archaeological wealth may have.[665]

- In turn, Article 333 allows the law to limit "*the scope of economic freedom when required by the social interest, the environment and the cultural heritage of the Nation*".[666]

476. Justice Linares, discussing Article 72 of the Colombian Constitution, highlights that this provision reinforces the protection of historical or archaeological property by prohibiting its commercialization and appropriation by private individuals.[667] Justice Linares emphasizes that Colombia's approach to protecting submerged cultural heritage aligns with international legislation on this matter:

> This is how a good number of national legislations, among them that of Colombia – article 72 of the Political Constitution of 1991 – has reserved for the State the ownership of goods of historical, cultural or archaeological

663 Political Constitution of Colombia (1991) (**Exhibit R-245**), Article 8.

664 Political Constitution of Colombia (1991) (**Exhibit R-245**), Article 63 (emphasis added).

665 Political Constitution of Colombia (1991) (**Exhibit R-245**), Article 72 (emphasis added).

666 Political Constitution of Colombia (1991) (**Exhibit R-245**), Article 333.

667 Expert Report of Justice A. Linares (**RER-3 [Linares]**) ¶ 139.

> value, also making them inalienable, unseizable and imprescriptible, with which it has been intended to signify, among other tasks, the impossibility of their commercialization and, therefore, their acquisition by private individuals. Hence, they are not susceptible of being appropriated by virtue of any means of acquiring ownership, ad exemplum, through the "...discovery of a treasure", understood as '...a kind of invention or find', in terms of article 700 of the Civil Code." [668]

477. Likewise, it is crucial to mention that the movable monuments regulated by Law 163 of 1959 are the same items that make up the cultural heritage of the Nation, subject to the protection established in Article 72 of the Colombian Constitution. This was recognized by the 2007 SCJ Decision and explained by Justice Linares:

> [T]hese, as well as the "movable monuments", make up the so-called historical and artistic heritage of the Nation, in harmony with the provisions of subsequent regulations aimed at providing analogous and undisputed protection to such heritage, by way of illustration, Article 72 of the Political Constitution, the canons that make up Law 397 of 1997 and those that make up Decree 833 of 2002.[669]

4. Law 319 of 1996

478. Law 319 was issued on 20 September 1996 to approve the "*Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*" – the so-called *"Protocol Of San Salvador"*[670] – adopted in San Salvador in 1988.

479. Through the enactment of this law, Colombia adhered to the Additional Protocol. Thus, the 22 articles that comprise the Additional Protocol were adopted by Law 319. Among the most important provisions of Law 319 are the following:

- **Article 1**, which establishes the obligation for the State parties to "*adopt the necessary measures, both domestically and through international cooperation* […] *for the purpose of achieving, progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol."*[671]

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668 Expert Report of Justice A. Linares (**RER-3 [Linares]**) ¶ 133.

669 Expert Report of Justice A. Linares (**RER-3 [Linares]**) ¶ 133.

670 Law 319 of 1996, 20 September 1996 (**Exhibit R-172**). *See also* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – Protocol Of San Salvador (1988) (**Exhibit RLA-235**).

671 Law 319 of 1996, 20 September 1996 (**Exhibit R-172**), Article 1.

- **Article 2**, whereby the State parties undertake to adopt legislative or other measures, as may be necessary, to ensure that the rights enshrined in the Convention are effectively realized.[672]

- **Article 14**, which recognizes "*the right of everyone to take part in the cultural and artistic life of the community*"[673] and establishes States' obligation to take the necessary steps to ensure the full exercise of this right, which "*shall include those necessary for the conservation, development and dissemination of science, culture and art*."[674]

480. Law 319 of 1996 is still in force in the domestic legal framework.

5. Law 340 of 1996

481. Law 340 was enacted on 26 December 1996 to approve the "*Convention for the Protection of Cultural Property in the Event of Armed Conflict*",[675] adopted in the Hague in 1954.

482. Law 340 of 1996 was also a treaty-approving law. Thus, the 21 articles that comprise the Convention were adopted by Law 340. Some of the most important provisions of Law 340 are below:

- **Article 1** defines the term cultural property as:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above;
>
> (b) buildings whose main and practical purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

672 Law 319 of 1996, 20 September 1996 (**Exhibit R-172**), Article 2.

673 Law 319 of 1996, 20 September 1996 (**Exhibit R-172**), Article 14.

674 Law 319 of 1996, 20 September 1996 (**Exhibit R-172**), Article 14 (emphasis added).

675 Law 340 of 1996, 26 December 1996 (**Exhibit R-173**). *See also* Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (**Exhibit RLA-236**).

> (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centers containing monuments.". [676]

- **Articles 2, 3,** and **4** establish that cultural property shall be protected, safeguarded and respected.[677]

- **Article 8** establishes a special protection to place "*a limited number of refuges intended to shelter movable cultural property in the event of armed conflict*".[678]

483. Law 340 of 1996 is still in force in the Colombian legal framework.

6. Law 397 of 1997

484. Law 397 of 1997, widely regarded as a significant normative milestone, is known as the General Law of Culture. Enacted on 7 August 1997, was designed to implement Articles 70, 71 and 72 of the Political Constitution of Colombia and to issue rules on cultural heritage, to promote cultural activities and to provide incentives for cultural development. Additionally, Law 397 also created the Ministry of Culture.

485. Among the relevant provisions set forth in Law 397 of 1997 and related to cultural heritage are Articles 1, 2, 4, 5, 6 and 9:

- **Article 1** sets forth the principles and definitions that govern the content of Law 397, including the *"obligation of the State and of individuals to value, protect and disseminate the Cultural Heritage of the Nation"*.[679]

- **Article 2** establishes the role of the State in relation to culture:

> ARTICLE 2. The functions and services of the State in relation to culture shall be carried out in accordance with the provisions of the preceding Article, bearing in mind that the primary objective of the State policy on the matter is the preservation of the Cultural Heritage of the Nation and the support and encouragement of persons, communities and institutions that develop

676 Law 340 of 1996, 26 December 1996 (**Exhibit R-173**), Article 1.

677 Law 340 of 1996, 26 December 1996 (**Exhibit R-173**), Articles 2-4.

678 Law 340 of 1996, 26 December 1996 (**Exhibit R-173**), Article 8.

679 Law 340 of 1996, 26 December 1996 (**Exhibit R-173**), Article 1.

> or promote artistic and cultural expressions at the local, regional and national levels. [680]

- **Article 4** defines the Cultural Heritage of the Nation as follows:

> ARTICLE 4. The cultural heritage of the Nation is constituted by all the cultural goods and values that are an expression of the Colombian nationality, such as tradition, customs and habits, as well as the set of immaterial and material goods, movable and immovable, that have a special historical interest, artistic, aesthetic, plastic, architectural, urban, archaeological, environmental, ecological, linguistic, sonorous, musical, audiovisual, filmic, scientific, testimonial, documentary, literary, bibliographic, museological, anthropological and the manifestations, products and representations of popular culture. [681]
>
> The provisions of the present law and its future regulations shall be applied to the assets and categories of assets that being part of the Cultural Heritage of the Nation belonging to the pre-Hispanic, Colonial, Independence, Republic and Contemporary periods, are declared as assets of cultural interest, according to the valuation criteria determined for such purpose by the Ministry of Culture.
>
> **PARAGRAPH 1.** The properties declared as national monuments prior to the present law, as well as 105 properties that are part of the archaeological heritage, shall be considered properties of cultural interest.[682]

- **Article 5** establishes the policy objectives of the State in relation to the cultural heritage of the Nation:

> ARTICLE 5. State policy regarding the cultural heritage of the Nation shall have as its main objectives the protection, conservation, rehabilitation and dissemination of such heritage, with the purpose that it serves as a testimony of the national cultural identity, both in the present and in the future.[683]

- **Article 6** defines archaeological heritage:

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680 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 2 (emphasis added).

681 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 4. This Article was modified by Law 1185 of 2008 (**Exhibit-244**), Article 1.

682 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 4 (emphasis added).

683 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 5 (emphasis added).

> ARTICLE 6. The archaeological heritage includes movable or immovable property originating from disappeared cultures, or belonging to the colonial era, as well as human and organic remains related to those cultures. Likewise, geological and paleontological elements related to the history of man and his origins are also part of such heritage.[684]

- **Article 9** defined "submerged cultural heritage" as follows:

> ARTICLE 9. Belong to the cultural or archaeological heritage of the Nation, due to their historical or archaeological value**,** which shall be determined by the Ministry of Culture, the cities or cemeteries of missing human groups, human remains, shipwrecked species consisting of ships and their crew, and other movable property lying within them, or scattered on the seabed, found on the marine soil or subsoil of inland waters, the territorial sea, the continental shelf or exclusive economic zone, whatever their nature or state and the cause or time of sinking or shipwreck. The remains or parts of vessels, equipment or goods found in similar circumstances, also have the character of shipwrecked species.[685]

486. The definition of submerged cultural heritage was later amended which was replaced by a new definition of a subsequent Law, Law 1675, enacted in 2013. Law 397 of 1997 is in force in the domestic legal framework, having been further developed,[686] supplemented,[687] and amended[688] by several instruments.

7. Law 472 of 1998

487. On 5 August 1998, the Congress of Colombia enacted Law 472 to implement Article 88 of the Political Constitution of Colombia, concerning the exercise of popular ("class") and group actions.

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684 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 6 (emphasis added).

685 Law 397 of 1997, 7 August 1997 (**Exhibit R-214**), Article 9 (emphasis added).

686 *See* Decree 358 of 2000, 6 March 2000 (**Exhibit R-72**); Decree 833 of 2002, 26 April 2002 (**Exhibit R-85**); Decree 2941 of 2009, 6 August 2009 (**Exhibit R-89**).

687 *See* Law 1882 of 2018 (**Exhibit R-107**) and Law 2070 of 2020 (**Exhibit R-260**).

688 *See* Law 797 of 2003 (**Exhibit R-258**); Decree 2106 of 2019 (**Exhibit R-259**); Law 2294 of 2023 (**Exhibit R-109**); and Law 2319 of 2023 (**Exhibit R-109**).

488. Law 472 includes explicitly in Article 4(f) a collective right to defend the cultural heritage of the Nation, stating that "[c]*ollective rights and interests are, among others, those related to* […] *the defense of the cultural heritage of the Nation*".[689]

489. This law is currently in force within the Colombian legal framework.

8. Law 1185 of 2008

490. The Congress of Colombia issued Law 1185 on 12 March 2008 to amend Law 397 of 1997, the General Law of Culture.

491. Crucially for this case, Law 1185 of 2008 modified the definition of Cultural Heritage of the Nation set forth in Article 4 of Law 397 of 1997 to explicitly provide that "*items that make up the archaeological heritage belong to the Nation and are governed by the special regulations on the subject*."[690]

492. Further, Law 1185 amended the definition of archaeological heritage established in Article 6 of Law 397 of 1997, as follows:

> Archaeological heritage comprises those vestiges that are the product of human activity and those organic and inorganic remains that, through the methods and techniques of archaeology and other related sciences, make it possible to reconstruct and make known the origins and past socio-cultural trajectories and guarantee their conservation and restoration. For the preservation of paleontological heritage, the same instruments established for archaeological heritage will be applied.
>
> In accordance with articles 63 and 72 of the Political Constitution, archaeological heritage property belongs to the Nation and is inalienable, imprescriptible and unseizable. [691]

493. Finally, Law 1185 introduced the National System of Cultural Heritage of the Nation, consisting of the network of public entities at both national and territorial levels responsible for managing the Nation's cultural heritage. The National System of Cultural Heritage of the Nation is coordinated by the Ministry of Culture and is comprised of the following entities:

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689 Congress of Colombia, Law 472 of 1998 (**Exhibit R-174**), Article 4.

690 Law 1185 of 2008, 12 March 2008 (**Exhibit R-244**), Article 1.

691 Law 1185 of 2008, 12 March 2008 (**Exhibit-244**), Article 3.

> [t]he Ministry of Culture, the Colombian Institute of Anthropology and History, the General Archive of the Nation, the Caro y Cuervo Institute, the National Council of Cultural Heritage, the Departmental and District Councils of Cultural Heritage and, in general, the state entities that at national and territorial level develop, finance, promote or execute activities related to the cultural heritage of the Nation.[692]

494. Law 1185 of 2008 is currently in force in the domestic legal framework.

495. In light of the above, it is unquestionable that the protection of cultural heritage is a critical point under Colombian law. In that regard, it was expected that the Claimant was aware of the referred legal instruments, which existed at the time it made its alleged investment in 2008.

L. SSA UNWARRANTED AND UNSUCCESSFUL ATTEMPTS TO ENFORCE ITS PURPORTED RIGHTS OVER THE *GALEÓN SAN JOSÉ* BEFORE THE U.S. COURTS

496. SSA started a campaign to enforce its purported rights over the *Galeón San José* before U.S. Courts by alleging Colombia had already expropriated them of their investment since 2010.[693] In the Amended Statement of Claim, SSA downplays the importance of the admissions made before U.S. Courts by alleging SSA discontinued the proceedings.[694] This is false.

497. In this section, Colombia sets the record straight by showcasing that in 2010, SSA commenced time-barred litigation before the U.S. District Court for DC, alleging that Colombia had deprived it of its property rights to 50% of the alleged treasures in the *Galeón San José* by failing to sign a salvage contract (**1**); that the U.S. District Court for DC dismissed the claim by acknowledging that since Colombia's first attempts to take full ownership of the *San José* site occurred in 1984, SSA's conversion claim accrued at that time (**2**); and that the Second Lawsuit of SSA before the U.S. Courts, was summarily dismissed, and SSA did not appeal the court's judgment (**3**).

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692 Law 1185 of 2008, 12 March 2008 (**Exhibit-244**), Article 2.

693 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**)

694 Amended Statement of Claim, ¶ 219.

1. In 2010, SSA commenced a time-barred and unsuccessful litigation before the U.S. District Court for DC, alleging that Colombia had deprived it of its property rights to 50% of the alleged treasures in the *Galeón San José* by failing to sign a salvage contract

498. In 2010, in its initial submissions before the U.S. District Court for DC (the "**First Lawsuit of SSA before U.S. Courts**"), SSA argued that Colombia had expropriated SSA's alleged rights over the *Galeón San José* and acted in an unfair and inequitable manner.[695] The references to expropriation were both explicit and numerous. Notably, in its Complaint, SSA stated:

> Subsequently in 1984 the Colombian Parliament enacted a law giving Colombia all rights to treasure salvaged from the *San José* site eliminating all of SSA's property rights in the treasure (the "Seizure Law").[696]

499. This assertion leaves no doubt that SSA's claim against the Republic of Colombia was one for an alleged expropriation. Therefore, as identified by SSA itself, 1984 is the earliest point in time that SSA alleges that the Republic of Colombia performed acts constituting expropriation or taking of SSA's rights over the *Galeón San José*.

500. SSA further contended that Colombia expropriated its assets through a bill that later became Law 26. According to SSA, in 1986:

> President Betancourt sent to the parliament a bill drafted by his Legal Secretary, Lilliam Suarez. The bill was enacted as Law 26. Its purpose was to expropriate SSA's properties in the guise of a legal act. Following enactment, Law 26 was applied retroactively to SSA, although such an action was in clear violation of Colombia's Constitution.[697]

501. Indeed, in its complaint before the U.S. courts, SSA consistently reiterated its claim that the Colombian Government attempted to expropriate its assets. In this regard, SSA argued before the U.S. Court that, on 21 September 1984, "[…] *Lilliam Suarez* [President Betancourt's legal

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695 SSA v. The Republic of Colombia (Civil Action No. 1:10-cv-02083), Sea Search Armada's Opposition to Colombia's Motion to Dismiss, 27 June 2011 (**Exhibit R-184**), p. 16 (arguing that the "[c]*ourt must find that Colombia expropriated and taken SSA's "rights in property taken in violation of international law*."").

696 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 12 (emphasis added).

697 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 26 (emphasis added).

secretary] *was working behind the scenes to expropriate SSA's properties* […]".[698] According to SSA's own account, a year later, in 1985, it was "[f]*earful of Executive and Legislative actions to expropriate its property."*[699]

502. In SSA's version of events as filed with the U.S. Courts, in 1987 "[…] *German Montoya, as a member of the Antiquities Commission, was involved in yet another attempt by the GOC to take over SSA's targets."*[700] SSA described this attempt in the following words:

> Colombia through its agency Ecopetrol has negotiated commercial arrangements to deprive of SSA of its rights under its agreement with Colombia, and Ecopetrol has been able to employ its control over the *San José* to secure financing of its operations (thereby enabling it to supplement and enhance its property in the United States via SSA's property on the *San José*).[701]

503. SSA further alleged that, on 27 April 2010, Colombia restricted SSA's access to the site of GMC's by allegedly requiring prior approval for visits and threatening military action to prevent SSA from attempting to access its property.[702] Specifically, SSA argued that:

> The actions by Ecopetrol and the threat of force by the Navy make it clear that there is a continuing course of conduct by Colombia to deprive SSA of its property and Ecopetrol has been able to employ its access to the *San José* to obtain funding from Swedish financiers in order to fund its operations in the United States and elsewhere.[703]

504. In conclusion, SSA asserted that:

> By its actions Colombia has intentionally exercised dominion and control over SSA's chattels which intentional dominion by Colombia so seriously

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698 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 23 (emphasis added).

699 United States District Court for the District of Columbia , Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 25 (emphasis added).

700 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 27 (emphasis added).

701 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018)**, ¶ 27.

702 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 75.

703 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 75 (emphasis added).

> interferes with SSA's right to control the chattels that SSA is deprived of its chattels.[704]

2. The U.S. District Court saw through SSA's attempt to manipulate its understanding of the concept of expropriation in order to circumvent the applicable statute of limitations

505. Despite SSA's insistence on the alleged existence of separate and independent expropriatory acts by the Republic of Colombia, the U.S. District Court for DC recognized SSA's attempts to tailor its claim so as to skirt the applicable statute of limitations. In this regard, the court ruled that the expropriation occurred in 1984, stating:

> Since Colombia's first attempts to take full ownership of the *San José* site occurred in 1984, SSA's conversion claim accrued at that time […] The statute of limitations for the conversion claim, accordingly, expired in 1987.[705]

506. Additionally, the U.S. District Court for DC was not swayed by SSA's narrative that the 2007 Cassation Judgment of the Colombian Supreme Court and subsequent actions could renew the accrual date of SSA's expropriation claim for it not to be time barred. The U.S. District Court for DC firmly rejected SSA's argument, holding as follows:

> […] Plaintiff cannot skirt around the fact that the allegations throughout the rest of the Complaint show that the conversion, <u>if it occurred, began in 1984</u>.[706]

507. The U.S. District Court for DC's decision was later affirmed by the Court of Appeal.[707] Notably, SSA did not file a petition for a writ of certiorari to the Supreme Court of the United States, and the U.S. District Court for DC's decision thereafter possessed *res judicata* effect.

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704 United States District Court for the District of Columbia , Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-018**), ¶ 94.

705 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-019**), p. 7.

706 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-019**), p. 8 (emphasis added).

707 United States Court of Appeals for the District of Columbia, Judgment, 8 April 2013 (**Exhibit R-189**).

508. Contrary to SSA's false claim that it withdrew its cases in U.S. courts against Colombia,[708] Colombia was victorious, as the U.S. District Court for DC's dismissal of SSA's lawsuit of April 2010 was affirmed by the Court of Appeal.[709]

3. In 2013, SSA filed yet another claim before the U.S. District Court for DC, alleging tortious interference by Colombia with its purported rights to enter into a salvage contract for 50% of the alleged treasures from the *Galeón San José*

509. Dissatisfied with its resounding failure to obtain any relief from the U.S. District Court for DC,[710] on 25 April 2013, SSA filed a new lawsuit claiming that Colombia had tortiously interfered with its contract and business relationship (the "**Second Lawsuit of SSA before US Courts**").[711]

510. In response, Colombia's counsel filed a motion to dismiss, arguing that SSA's repetitive lawsuit was based on the same facts as its April 2010 lawsuit before the same court and violated the principle of *res judicata.*[712] On this basis, Colombia simultaneously filed a motion for sanctions against SSA's legal team.[713]

511. The U.S. District Court for DC granted Colombia's motion to dismiss, ruling as follows:

> Because the Court finds that the plaintiff's previous and current lawsuits against the defendant arise from the same nucleus of facts, such that the

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708 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 108 (stating that "*SSA abandoned its claims in the U.S Litigation at Colombia's request as a condition for resumption of negotiation*."). Amended Statement of Claim, ¶ 223 (stating that "[h]*opeful to find an amicable way to enforce the 2007 Supreme Court Decision, SSA took Colombia at its word and withdrew both the US Litigation and the IACHR petition*").

709 United States Court of Appeals for the District of Columbia, Judgment, 8 April 2013 (**Exhibit R-189**).

710 United States Court of Appeals for the District of Columbia, Judgment, 8 April 2013 (**Exhibit R-189**).

711 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Complaint, 25 April 2013 (**Exhibit R-190**).

712 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Colombia's Motion to Dismiss, 5 May 2014 (**Exhibit R-195**), p. 9 (arguing that "[t]*he factual allegations are lifted verbatim from the earlier (dismissed) Complaint; only the causes of action have changed. The law does not permit this kind of second bite at the apple, and res judicata plainly bars the present lawsuit*.").

713 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Colombia's Motion for Sanctions, 5 May 2014 (**Exhibit R-194**).

> plaintiff should have pleaded its tortious interference claims in its first lawsuit against the defendant, the amended complaint must be dismissed.[714]

512. The Second Lawsuit of SSA before the U.S. District Court for DC was summarily decided, as the judge found that SSA's submissions in the Second Lawsuit were based on the *"same nucleus of facts"* as those in the First Lawsuit.[715] Although the court did not impose sanctions on SSA's counsel, it did observe that, "[t]*his case presents a closer case for sanctions than usual, but ultimately sanctions are unwarranted under the circumstances presented by the defendant."*[716]

513. On 9 February 2015, shortly after Colombia's motion to dismiss was granted in the Second Lawsuit, SSA filed a motion to amend or alter the court's judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.[717] This motion is typically used to allow the court to correct or address any errors in its decision. In its motion, SSA conceded that:

> [It] does not contend that there has been an intervening change in the law nor that there is new evidence available (since the exhibits hereto were already in SSA's possession); rather, based on the Court's discussion in footnote 3 of its Order dismissing this matter, the Court should consider the accompanying evidence of SSA's dealings with Sea Trepid in order to prevent manifest injustice.[718]

514. It is important to emphasize that the likelihood of SSA prevailing at this stage was effectively zero, a fact that was also apparent to SSA. On 20 February 2015, SSA filed a motion to withdraw its Motion to Alter or Amend the Court's Judgment, with prejudice.[719] This further underscored the lack of merit in their prior motion.

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714 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Judgment, 30 January 2015 (**Exhibit R-197**), p. 13 (holding that "*Colombia's Motion to Dismiss is GRANTED*.").

715 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Judgment, 30 January 2015 (**Exhibit R-197**), p. 10.

716 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Judgment, 30 January 2015 (**Exhibit R-197**), p. 12 (emphasis added).

717 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, SSA's Motion to Alter or Amend Judgment, 9 February 2015 (**Exhibit R-24**).

718 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, SSA's Motion to Alter or Amend Judgment, 9 February 2015 (**Exhibit R-24**), p. 9.

719 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, SSA's Withdrawal of Its Motion to Alter or Amend Judgment, 20 February 2015 (**Exhibit C-80**).

515. Both cases – the First Lawsuit of SSA before the U.S. District Court for DC filed in 2010, decided on 24 October 2011,[720] and confirmed on appeal in April 2013,[721] as well as the Second Lawsuit of SSA before the U.S. District Court for DC filed in 2013 and decided on 30 January 2015[722] – demonstrate that SSA had full opportunity to present its arguments before the U.S. courts. In each instance, SSA's claims were dismissed definitively.[723]

516. In conclusion, the assertion that SSA withdrew from pursuing its claims at Colombia's behest is grossly false.[724] In the First Lawsuit of SSA before the U.S. courts, SSA never withdrew its claim, and SSA lost on appeal with prejudice. In the Second Lawsuit of SSA before the U.S. Courts, the U.S. District Court for DC, notably, summarily dismissed SSA's repetitive claim, and SSA did not appeal the court's judgment. Instead, SSA filed a Motion to Alter or Amend, which, as explained above, was destined to fail. It is in this context that it becomes clear that SSA's counsel violated their duty of candour to this Tribunal by arguing that:

> […] SSA abandoned its claims in the U.S. Litigation at Colombia's request as a condition for a resumption of negotiations.[725]

517. Such a statement is misleading for two additional reasons. ***First***, Colombia never promised *"resumption of negotiations."* Instead, Colombia has been open to dialogue. The terms "negotiation" used by SSA, and "dialogue" consistently used by Colombia, reflect distinct

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720 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-019**).

721 United States Court of Appeals for the District of Columbia, Judgment, 8 April 2013 (**Exhibit R-189**).

722 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Judgment, 30 January 2015 (**Exhibit R-197**).

723 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-019**), p. 11 (holding that "[t]*he Court will issue a contemporaneous order that grants the Defendant's 12(b)(6) Motion and dismiss the case with prejudice*."). United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, Judgment, 30 January 2015 (**Exhibit R-197**), p. 14 (stating that "*the case is CLOSED*.")

724 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 108 (stating that "*SSA abandoned its claims in the U.S Litigation at Colombia's request as a condition for resumption of negotiation*."); Amended Statement of Claim, ¶ 223 (stating that "[h]*opeful to find an amicable way to enforce the 2007 Supreme Court Decision, SSA took Colombia at its word and withdrew both the US Litigation and the IACHR petition*").

725 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 108.

concepts, which SSA has inaccurately conflated. This is evident through Colombia's letter from 22 December 2014 in which it stated:

> […] I [the Minister of Culture] would like to reiterate the position established for several years now by the Colombian Government, in the sense that there is no possibility of dialogue until court actions of any kinds cease on a definitive basis.[726]

518. ***Second***, the testimony of witness Juan Manuel Vargas confirms Colombia's position that it did not request the withdrawal of any foreign or international lawsuits in exchange for a "*resumption of negotiations*". Colombia was not engaged in negotiations but open to dialogue once the court cases against Colombia became final,[727] which they did in the United States once the U.S. District Court in DC ruled twice in favor of Colombia.

519. Additionally, in their Amended Statement of Claim, SSA asserted that:

> Hoping to find an amicable way to enforce the 2007 Supreme Court Decision, SSA took Colombia at its word and withdrew both the US litigation and the I petition.[728]

520. As outlined in this Statement of Defense, Colombia has not deviated from its commitment to respect the 2007 Supreme Court Judgment. As recently confirmed by the 3rd Judge of the Circuit of Barranquilla, the 2007 Supreme Court Judgment grants SSA rights only at the coordinates identified in the 1982 Confidential Report.[729] The Government of Colombia remains committed to respecting the 2007 Supreme Court Judgment.

521. Though unrelated to counsel for the Claimant in the current case, and yet unsurprising given SSA's lack of transparency in this arbitration in regards to the lawsuits against Colombia before the U.S. courts, it is notable that SSA's counsel in the U.S. courts was subsequently suspended

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726 Letter from Mariana Garcés Córdoba (Ministry of Culture) to Fernando Arteta (Sea Search Armada), 22 December 2014 (**Exhibit C-032**).

727 Witness Testimony of Juan Manuel Vargas, (**Exhibit RWS-5 [Vargas]**), ¶ 52.

728 Amended Statement of Claim, ¶ 223.

729 3rd Judge of the Circuit of Barranquilla, Judgement No, 1989-9134, 22 October 2024 (**Exhibit R-231**), p. 1.

and disbarred by three jurisdictions, after the U.S. courts found that SSA's counsel had practised law without authorization and had mishandled client funds.[730]

M. SSA'S UNWARRANTED AND UNSUCCESSFUL ATTEMPTS TO ENFORCE ITS PURPORTED RIGHTS OVER THE *GALEÓN SAN JOSÉ* BEFORE THE IACHR

522. SSA's attempts to enforce its non-existent rights over the *Galeón San José* did not stop with the lawsuits before the U.S. Courts. Rather, in SSA's characteristic fashion of using litigation to pressure the Colombian government into recognizing rights it does not possess, on 15 April 2013, SSA filed a petition before the Inter-American Court of Human Rights (the **"IACHR"**). The petition's stated purpose was to seek the protection of its so-called property rights over the *Galeón San José* and to obtain judicial protection.[731]

523. In the Amended Statement of Claim, SSA alleges that it filed the petition before the IACHR since "*Colombia's attitude towards SSA grew increasingly hostile*."[732] Further, SSA complains that Colombia was allegedly preventing it from accessing its property.[733]

524. In its Amended Statement of Claim, SSA omits two key aspects of the petition filed before the IACHR.

525. ***First***, SSA does not mention that SSA explicitly stated that Colombia had expropriated what SSA now defines in this arbitration as their "protected investment" in the petition. In fact, SSA stated in the petition that, after 13 January 1989, Colombia "*began the conspiracy* […] *aimed not only at denying its right of first refusal to contract the salvage but also at depriving it of its ownership of the treasures discovered*."[734]

526. ***Second***, SSA fails to mention that, in the petition before the IACHR, SSA explicitly stated that on 26 November 2012, Colombia notified SSA of its definitive decision not to comply with the 2007

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730 Virginia State Bar Disciplinary Board, VSB Docket No. 20-053-116380, Memorandum Order, 12 February 2021 (**Exhibit R-232**); Supreme Court of Pennsylvania, No. 2679, Order, 16 January 2020 (**Exhibit R-225**); United States Court of Appeals for the District of Columbia, No. 19-BG-473, Order, 15 April 2020 (**Exhibit R-227)**.

731 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p.1.

732 Amended Statement of Claim, ¶ 220.

733 Amended Statement of Claim, ¶ 221.

734 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 8, ¶ 17 (emphasis added).

Judgment and, therefore, did not recognize the rights supposedly affirmed by the SCJ.[735] According to the Claimant, this implied "*the notification of the definitive confiscation of its treasure, without payment of fair compensation*."[736]

527. Indeed, before the IACHR, SSA labelled and qualified Colombia's conduct regarding SSA's alleged rights over the *Galeón San José* as an expropriation, claiming that Colombia (***i***) confiscated SSA's private property and (***ii***) did not pay SSA a fair compensation for said confiscation.[737] The Claimant's petition before the IACHR reads as follows:[738]

> Naturally, that extreme resistance to the exercise of such powers by the owner implies the confiscation of private property without the payment of fair compensation. It implies the consequent violation of that other commitment acquired by the Colombian State through Article 21 of the American Convention on Human Rights, which states that "No person may be deprived of his property except upon payment of fair compensation, for a public purpose or social interest and in the situations and according to the forms established by law".[739]

528. The Claimant's claim before the IACHR is no different from the Claimant's claim in these proceedings.

529. ***Third***, and finally, it is worth noting that Article 21 of the American Convention on Human Rights, on the right to property – which was supposedly breached by Colombia, according to SSA's petition before the IACHR – has a similar wording and virtually exactly the same requirements as Article 10.7 of the TPA, which sets forth the expropriation standard.[740]

530. On one hand, Article 21 of the American Convention on Human Rights states that:

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735 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 10, ¶ 26.

736 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38.

737 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18, ¶ 36.

738 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18, ¶ 36.

739 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18, ¶ 36 (emphasis added).

740 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Art. 10.7 ("*No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose5 ; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5.*").

> [N]o 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.[741]

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

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law and Article 10.5.[742]

532. On their face, both Article 21 of the American Convention on Human Rights and Article 10.7 of the TPA set forth that property may be expropriated for reasons of public purpose or public utility, upon payment of just compensation and in accordance with the forms established by law (due process). It is clear that an unlawful expropriation may be claimed under the same basis both under the American Convention on Human Rights and the TPA.

N. SINCE 2007, COLOMBIA, THROUGH ITS HIGHEST AUTHORITIES, HAS CONSISTENTLY REJECTED SSA'S CLAIMS THAT IT HAS ANY RIGHTS OVER THE *GALEÓN SAN JOSÉ*

533. The Claimant's primary position in this case is that it – somehow – acquired rights over the *Galeón San José* despite having never found it.[743] This is despite Colombia's consistent

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741 American Convention on Human Rights (1978) (**Exhibit RLA-25**), Article 21.2 .

742 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.7.1.

743 *See* Claimant's Request for Arbitration, ¶ 18; *See also* Amended Statement of Claim, ¶¶ 5-8.

position over the years that SSA has never had any right whatsoever over the *Galeón San José*, reiterated by countless letters from Colombia's highest authorities to SSA.[744]

534. Not only has the Claimant argued that it has rights over the *Galeón San José*, it has also tried to impose its interpretation of the 2007 SCJ Decision. Indeed, in the Amended Statement of Claim, the Claimant argues that the 2007 SCJ Decision granted SSA rights to the *Galeón San José* Shipwreck situated in areas beyond the 1982 Coordinates.[745]

535. Not only did SSA commence proceedings against Colombia on the basis of a completely distorted interpretation of the 2007 SCJ Judgment before the U.S. Courts, but not content with the results of its unsuccessful litigation in the U.S., resorted to bringing a case before the IACHR, presenting, *inter alia*, a claim of expropriation against Colombia.

536. SSA later withdrew its claim before the IACHR. As a sign of good faith, the Colombian State offered SSA to conduct a verification of the 1982 Coordinates,[746] which was the area in which SSA has undetermined rights under Resolution No. 354.

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744 *See* Letter from the President of Colombia to SSA, 14 May 2015 (**Exhibit C-081)**; Letter sent by SSA to the Commission of Antique Shipwrecks, 24 August 2015 (**Exhibit R-025)**; Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082)**; Letter from the Ministry of Culture to SSA, 28 July 2015 (**Exhibit C-087)**; Letter sent by the Ministry of Culture to SSA, 9 July 2015 (**Exhibit R-200)**; Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28)**, p. 233; Letter from the Ministry of Culture to SSA, 16 December 2015 (**Exhibit C-206)**; Letter from the Ministry of Culture to SSA, 23 December 2015 (**Exhibit C-208)**; Letter from the Ministry of Culture to SSA, 12 January 2016 (**Exhibit C-209)**; Letter from the Ministry of Culture to SSA, 5 February 2016 (**Exhibit R-036)**; Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028)**; Letter from the Ministry of Culture to SSA, 20 September 2016 (**Exhibit C-214)**; Letter from the Ministry of Culture to SSA, 29 November 2016 (**Exhibit R-029)**; Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226)**; Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R-037)**; Letter from the Ministry of Culture to SSA, 17 June 2019 (**Exhibit C-040)**; Letter from SSA to the President of Colombia, 1 April 2016 (**Exhibit R-206)**; Letter from the Ministry of Culture to SSA, 30 November 2016 (**Exhibit R-029)**, p. 1; Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028)**; Letter from the Ministry of Culture to SSA, 20 September 2016 (**Exhibit C-214)**; Letter from the Ministry of Culture to SSA, 29 November 2016 (**Exhibit R-029)**; Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226)**; Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R-037)**; Letter from the Ministry of Culture to SSA, 17 June 2019 (**Exhibit C-040)**; Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226)**; Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082)**; Letter from the Ministry of Culture to SSA, 9 July 2015 (**Exhibit R-200)**; Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226)**.

745 Amended Statement of Claim, ¶¶ 212-213.

746 *See* Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**); Letter from the Ministry of Culture to SSA, 23 December 2015 (**Exhibit C-208**).

537. Despite Colombia's good faith and openness to discussing with SSA and show that there was nothing at the 1982 Coordinates, the Claimant tried to force Colombia into undertaking verification and salvage campaigns over areas that had not even been explored by SSA's Alleged Predecessors in 1982.[747] SSA's lack of knowledge of the actual location of the *Galeón San José* became even more evident in light of SSA's constant changes in position on what it considered to be the "margin of error" or "immediate vicinity" applicable to the 1982 Coordinates.[748]

538. In the sections below, Colombia shows that it has consistently rejected SSA's unfounded claims that it – somehow – acquired rights to the *Galeón San José*, and that the 2007 SCJ Judgment recognized SSA's Alleged Predecessors to possess rights to the *Galeón San José* (**1**); that despite SSA's efforts to force Colombia into unreasonable salvage and verification campaigns, Colombia has always remained willing to discuss the scope of SSA's rights and even repeatedly offered to verify the 1982 Coordinates with SSA (**2**); that Colombia approached SSA in good faith to find an end to SSA's unreasonable legal claims before foreign and international venues against Colombia (**3**); that Colombia consistently manifested its willingness to recognize SSA's rights granted under Resolution No. 354 by, for example, proposing several verification efforts of the 1982 Coordinates (**4)**; and Colombia systematically rejected SSA's ever-changing concept of the applicable "margin of error", which SSA had tried to impose on the Colombian authorities in clear disregard of the 2007 SCJ Decision (**5**).

1. Despite SSA's efforts to impose a distorted interpretation of the 2007 SCJ Decision, Colombia has always been clear on the correct interpretation of this Decision

539. In the Amended Statement of Claim, SSA argues that "[f]*ollowing its victory before the Supreme Court, SSA Cayman transferred its rights to SSA, which SSA then sought to enforce,*

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747 *See* Letter from Colombia to SSA, 24 March 2010 (**Exhibit R-017**); Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035**); Letter from SSA to the President of Colombia, 1 April 2016 (**Exhibit R-206)**; Letter from Jack Harbeston to the President of Colombia, 4 November 2016 (**Exhibit R-208**).

748 Letter from SSA to the Ministry of Culture, 9 June 2015 (**Exhibit C-084**); Letter from SSA to the Ministry of Culture, 17 February 2017 (**Exhibit C-218**); Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226**); Letter sent by SSA to the President of Colombia, 4 September 2017 (**Exhibit R-030**); Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 117; Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 51.

first through discussions with Colombia and then litigation before foreign courts."[749] The Claimant further states that the 2007 SCJ Decision allegedly granted SSA rights to the *Galeón San José* shipwreck, which apparently obliged Colombia to salvage the alleged treasure.[750]

540. SSA's claims are far from the truth. As established above, the 2007 SCJ Decision did not grant SSA's Alleged Predecessors any rights over the *Galeón San José*.[751] Despite the clear language in the 2007 SCJ Decision, for over a decade, and through more than 20 letters, SSA and its Alleged Predecessors continuously threatened Colombia's highest authorities and tried to impose their distorted interpretation of the 2007 SCJ Decision.[752]

541. In fact, by a letter dated 9 December 2010, SSA informed the President of Colombia that the SCJ had granted SSA rights over the *Galeón San José* (*quod non*) in the following terms:

> By decision of 5 July 2007 the Supreme Court of Justice definitively resolved the dispute between the Nation and Sea Search Armada regarding the property of the objects being transported by the Galeón *San José*, which sank within Colombia's continental shelf in 1708.[753]

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749 Amended Statement of Claim, ¶ 208.

750 Amended Statement of Claim, ¶¶ 212-213.

751 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28)**, p. 233.

752 Letter from SSA to the President of Colombia, 15 August 2008 (**Exhibit C-110)**; Letter from SSA to the President of Colombia, 14 April 2009 (**Exhibit C-112)**; Letter from SSA to the Ministry of Culture, 7 May 2010 (**Exhibit C-193)**; Letter from SSA to the President of Colombia, 9 December 2010 (**Exhibit C-194)**; Letter from SSA to the President of Colombia, 31 March 2011 (**Exhibit C-031)**; Letter from SSA to the President of Colombia, 15 July 2011 (**Exhibit C-113)**; Letter from SSA to the Legal Secretary to the President of Colombia, 8 March 2012 (**Exhibit C-114)**; Letter from SSA to the Ministry of Culture, 31 July 2013 (**Exhibit C-195)**; Letter from SSA's legal counsel to Colombia's legal counsel, 4 February 2015 (**Exhibit R-023)**; Letter from SSA to the Ministry of Culture, 20 May 2015 (**Exhibit C-035)**; Letter from SSA to Colombia's Shipwrecked Antiquities Commission, 8 October 2015 (**Exhibit R-026)**; Letter from SSA to the Ministry of Culture, 18 December 2015 (**Exhibit C-207)**; Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035)**; Letter from SSA to the Ministry of Culture, 18 January 2016 (**Exhibit C-210)**; Letter from SSA to the President of Colombia, 3 August 2016 (**Exhibit C-212)**; Letter from SSA to the President of Colombia, 12 September 2016 (**Exhibit C-213)**; Letter from SSA to the Ministry of Culture, 4 October 2016 (**Exhibit C-215)**; Letter from SSA to the President of Colombia, 17 April 2017 (**Exhibit C-220)**; Letter from SSA to Colombia, 4 September 2017 (**Exhibit R-030)**; Letter from SSA to the Vice President of Colombia, 12 March 2019 (**Exhibit R-033)**; Letter from SSA to the Vice President of Colombia, 12 July 2019 (**Exhibit C-41)**.

753 Letter from SSA to the President of Colombia, 9 December 2010 (**Exhibit C-194**), p. 1 (emphasis added).

542. Also, by letter dated 18 December 2015, SSA claimed the Ministry of Culture that SSA's rights were related to the *Galeón San José* since:

> In accordance with the applicable law, Glocca Morra Company, who assigned its rights to Sea Search Armada (SSA), reported the location of the [G]aleón *San José* on 18 March 1982 in the following manner: […]
>
> In turn, by decision of July 5, 2007, the Supreme Court of Justice ruled on the litigation on the ownership of the shipwreck, stating in the second paragraph of its decision that with the exclusion of spaces, zones, or diverse areas, it declared SSA the owner in common with the Nation, and in equal parts, of the treasures "that are found in the coordinates referred to in the Confidential Report on Underwater Exploration," which is the title of the report.[754]

543. Moreover, in an extraordinary and demonstrably false contention, on 4 January 2016, SSA contended that Colombia had found the *Galeón San José* on the basis of the 1982 Reported Coordinates stating:

> It was, and it is about, proving that starting from the coordinates included in said report, it was inevitable to (re)find the *Galeón San José* in its immediate vicinity, which is the place where its discoverer located it.
>
> That verification was declined again, even though SSA reiterated its offering of relinquishing the property over the treasures that was granted to it by the Supreme Court of Justice, and to desist from the seizure decreed over the objects to be extracted from the immediate vicinity of the referred coordinates, should it be proven that it is a different shipwreck, in a different area.[755]

544. The Claimant's contentions based on an unfounded interpretation of the 2007 SCJ Judgment, as well as its harassment of the Colombian authorities, are also evident from its letters dated 15 August 2007,[756] 14 April 2009,[757] 7 May 2010[758], 9 December 2010,[759] 31 March 2011,[760]

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754 Letter from SSA to the Ministry of Culture, 18 December 2015 (**Exhibit C-207)**, pp. 1-2 (emphasis added).

755 Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035)**, p. 1 (emphasis added).

756 Letter from SSA to the President of Colombia, 15 August 2008 (**Exhibit C-110**).

757 Letter from SSA to the President of Colombia, 14 April 2009 (**Exhibit C-112**).

758 Letter from SSA to the Ministry of Culture, 7 May 2010 (**Exhibit C-193**).

759 Letter from SSA to the President of Colombia, 9 December 2010 (**Exhibit C-194**).

760 Letter from SSA to the President of Colombia, 31 March 2011 (**Exhibit C-031**).

15 July 2011,[761] 8 March 2012,[762] 31 July 2013,[763] 4 February of 2015,[764] 20 May 2015,[765] 8 October 2015,[766] 18 December 2015,[767] 4 January 2016,[768] 18 January 2016,[769] 3 August 2016,[770] 12 September 2016,[771] 4 October 2016,[772] 17 April 2017,[773] 4 September 2017,[774] 12 March 2018,[775] 12 July 2019.[776]

545. In response to SSA's baseless and incessant claims, Colombia's highest authorities consistently reaffirmed the correct interpretation of 2007 SCJ Decision stating that (***i***) the 2007 SCJ Decision clearly and undoubtedly circumscribed any right SSA's Alleged Predecessors may have had at the specific coordinates reported in the 1982 Confidential Report, "*without including therefore, different spaces, zones or areas*";[777] (***ii***) that the 2007 SCJ Decision did not grant SSA, nor any of its Alleged Predecessors, any access whatsoever to the *Galeón San José*, much less did it order any recovery efforts to be conducted; and (***iii***)

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761 Letter from SSA to the President of Colombia, 15 July 2011 (**Exhibit C-113**).

762 Letter from SSA to the Legal Secretary to the President of Colombia, 8 March 2012 (**Exhibit C-114**).

763 Letter from SSA to the Ministry of Culture, 31 July de 2013 (**Exhibit C-195**).

764 Letter from SSA's legal counsel to Colombia's legal counsel, 4 February 2015 (**Exhibit R-023**).

765 Letter from SSA to the Ministry of Culture, 20 May 2015 (**Exhibit C-035**).

766 Letter from SSA to Colombia's Shipwrecked Antiquities Commission, 8 October 2015 (**Exhibit R-026**).

767 Letter from SSA to the Ministry of Culture, 18 December 2015 (**Exhibit C-207**).

768 Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035**).

769 Letter from SSA to the Ministry of Culture, 18 January 2016 (**Exhibit C-210**).

770 Letter from SSA to the President of Colombia, 3 August 2016 (**Exhibit C-212**).

771 Letter from SSA to the President of Colombia, 12 September 2016 (**Exhibit C-213**).

772 Letter from SSA to the Ministry of Culture, 4 October 2016 (**Exhibit C-215**).

773 Letter from SSA to the President of Colombia, 17 April 2017 (**Exhibit C-220**).

774 Letter from SSA to Colombia, 4 September 2017 (**Exhibit R-030**).

775 Letter from SSA to the Vice President of Colombia, 12 March 2019 (**Exhibit R-033**).

776 Letter from SSA to the Vice-President of Colombia, 12 July 2019 (**Exhibit C-41**).

777 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 233 (**Exhibit C-28**)

that, contrary to SSA's convenient allegations, it was untrue that no cultural heritage assets were located at the shipwreck.[778]

546. The letters below are but a handful of the numerous communications between the Claimant and the Colombian authorities, in which Colombia's highest authorities rejected the Claimant's baseless interpretation of the 2007 SCJ decision.

547. On 24 March 2010, the President of Colombia made clear to SSA that the 2007 SCJ Decision had not ordered any salvage or verification operation over any shipwreck:

> 1. The Judgment in question nowhere orders the plaintiff to have "access to the wreck" as the petitioner claims, but on the contrary, on page 21, the Supreme Court of Justice establishes with respect to the recovery of the denounced assets that this petition "has not yet had any concretion or definition of any kind, nor does it concern this controversy - neither directly nor indirectly", the judgment does not order any recovery as claimed.[779]

548. Later, on 27 May 2015, the Minister of Culture made clear dialogue with SSA in no way related to the *Galeón San José*, but rather sought to determine the existence of any shipwreck at the 1982 Coordinates:

> The first thing to point out is the erroneousness of the reference in your brief, and the multiple mentions to the "Galean San Jose", given that the Colombian Government has been emphatic and reiterative in stating that what is involved is to verify in situ the coordinates referred to in the aforementioned ruling, without being able to assert the existence of a specific shipwreck.[780]

549. It bears recalling in this regard that no shipwreck was found by the Columbus expedition in 1994 at the coordinates reported by GMC. Yet, given SSA's insistence, Colombia was open and repeatedly offered to take SSA to the site so that there would be no doubt.

550. Finally, having found the *Galeón San José* in 2015, by a letter dated 17 June 2016 the Ministry of Culture – once again –SSA's interpretation of the 2007 SCJ Decision and reiterated

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778 *See*, *for example*, Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028**); Letter from the Ministry of Culture to SSA, 30 November 2016 (**Exhibit R-029**); Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R-037**).

779 Letter from the Legal Secretary to the President of Colombia to SSA, 24 March 2010 (**Exhibit R-017**) (emphasis added).

780 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**) (emphasis added).

Colombia's willingness to jointly verify with SSA whether a shipwreck was located at the 1982 Coordinates:

> The assistance to Sea Search Armada that the Colombian Government is willing to provide is without prejudice to the position of the Colombian Government with respect to the eventual rights of Sea Search Armada, which would be exclusively limited to those referred to by the Supreme Court of Justice in the terms and conditions indicated by the latter**.**
>
> We have expressed this position in several communications, and we reiterate it now.
>
> The judgment of the Supreme Court of Justice is clear, it does not admit interpretations and it cannot be inferred from it, as you claim, alleged rights over the Galeón *San José*.[781]

551. Colombia's longstanding position that the 2007 SCJ Decision in no way recognized SSA's Alleged Predecessors a right over the *Galeón San José*, was repeatedly communicated by letters dated 24 March 2010,[782] 27 May 2015,[783] 14 December 2015,[784] 23 December 2015,[785] 12 January 2016,[786] 5 February 2016,[787] 17 June 2016,[788] 20 September 2016,[789] 30 November 2016,[790] 3 March 2017,[791] 5 January 2018,[792] and 17 June 2019.[793]

552. Therefore, SSA had full and direct knowledge of Colombia's position and asserting that Colombia recognized that they had any right over the *Galeón San José* by the time Resolution No. 85 was issued is disingenuous.

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781 Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028**), pp. 1-2 (emphasis added).

782 Letter from the Legal Secretary to the President of Colombia to SSA, 24 March 2010 (**Exhibit R-017**).

783 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**).

784 Letter from the Ministry of Culture to SSA, 14 December 2015 (**Exhibit C-206**).

785 Letter from the Ministry of Culture to SSA, 23 December 2015 (**Exhibit C-208**).

786 Letter from the Ministry of Culture to SSA, 12 January 2016 (**Exhibit C-209**).

787 Letter from the Ministry of Culture to SSA, 5 February 2016 (**Exhibit R-036**).

788 Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028**).

789 Letter from the Ministry of Culture to SSA, 20 September 2016 (**Exhibit C-214**).

790 Letter from the Ministry of Culture to SSA, 30 November 2016 (**Exhibit R-029**).

791 Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226**).

792 Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R-037**).

793 Letter from the Vice President to SSA, 17 June 2019 (**Exhibit C-040**).

2. Despite SSA's efforts to force Colombia into unreasonable salvage and verification campaigns, even by threatening to forcefully trespass upon Colombia's territory, Colombia remained willing to discuss the scope of SSA's rights and repeatedly offered to take SSA to jointly verify the 1982 Coordinates

553. In the Amended Statement of Claim, SSA argues that the SCJ had not only declared that it had alleged rights over the *Galeón San José* (*quod non*) but also ordered Colombia to salvage it.[794] Nevertheless, according to the Claimant, Colombia rejected its efforts to conduct a joint salvage operation,[795] which indicated that the Government "*would prefer the treasure to be lost to all rather than allow SSA to access the location.*"[796] The Claimant has the audacity to argue that Colombia threatened SSA with retaliation by the National Armed Forces if it attempted to salvage the shipwreck itself.[797] As shown below, SSA had put forward a series of theories to pressure Colombia into a joint salvage operation for the *Galeón San José*.

554. For instance, SSA has been crying wolf over the years, and been asserting that the *Galeón San José* is in danger of being ransacked, in an attempt to justify its threats to unilaterally conduct a salvage operation in the areas surrounding the 1982 Coordinates, without the proper authorization to enter Colombia's sovereign territory.[798]

555. Tellingly, SSA's assertions that the *Galeón San José* is at risk of being ransacked appeared right after the 2007 SCJ Decision – which defined the scope of SSA's rights to the specific 1982 Coordinates – to try and force the State into a salvage operation over areas different to those at the 1982 Coordinates that was recognized by Resolution No. 354.[799]

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794 Amended Statement of Claim, ¶ 212.

795 Amended Statement of Claim, ¶ 214.

796 Amended Statement of Claim, ¶ 213

797 Amended Statement of Claim, ¶ 214.

798 *See* Letter from SSA to the President of Colombia, 2 March 2009 (**Exhibit C-111**); Letter from SSA to the President of Colombia, 14 April 2009 (**Exhibit C-112**); Letter from Colombia to SSA, 24 March 2010 (**Exhibit R-017**); Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035**).

799 *See* Letter from SSA to the President of Colombia, 15 August 2007 (**Exhibit C-110**); Letter from SSA to the President of Colombia, 14 April 2009 (**Exhibit C-112**).

556. On 2 March 2007, SSA informed the President of Colombia that, in light of the "*ever-looming*" possibility of the *Galeón San José* being looted, the implementation of the 2007 SCJ Decision was necessary to impede such a loss:

> Nevertheless, in the face of the ever-looming possibility of the looting of the shipwreck by third parties, with consequent loss for everyone, with all due respect we request that you grant us an audience at your earliest convenience, in order to lay out for you our concerns, and present for your consideration plans which, within the guidelines indicated by the Supreme Court of Justice, would impede a loss of such magnitude.[800]

557. This allegation was reiterated in a letter dated 14 April 2009, in which SSA repeated its "*concern*" over the shipwreck being ransacked.[801]

558. The same motive was alleged by SSA to force the Colombian authorities into re-allowing SSA to explore Colombian waters under the premise of a "*verification*" or "*salvage*" operation that was not circumscribed to the 1982 Coordinates but over much more extended areas, including areas that were not even explored by SSA's Alleged Predecessors.[802]

559. For example, by a letter dated 16 March 2010, SSA requested Colombia to conduct the joint salvage operation to recover SSA's alleged property and informed it that if no response was given to SSA within 30 days, SSA would unilaterally initiate preparations to recover what the SCJ had supposedly declared to be its property.[803] In response, the Legal Secretary to the President of Colombia informed SSA that, contrary to SSA's view, no salvage had been ordered by the 2007 SCJ Decision.[804]

560. SSA's communications to the Colombian authorities, making unreasonable requests, were also – in not few instances – plainly disrespectful. On 14 May 2015, the Presidency of Colombia responded to SSA's letter of 13 May 2015, underscoring SSA's rude and disobliging tone when addressing Colombian public authorities, nonetheless reiterating the State's willingness to

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800 Letter from SSA to the President of Colombia, 2 March 2009 (**Exhibit C-111**), p. 1 (emphasis added).

801 Letter from SSA to the President of Colombia, 14 April 2009 (**Exhibit C-112**).

802 Letter from SSA to the Presidency of Colombia, 4 September 2017 (**Exhibit R-30**). *See also* Letter from SSA to the Ministry of Culture, 9 June 2015 (**Exhibit C-084**), pp. 2-3.

803 Letter from the Legal Secretary to the President of Colombia to SSA, 24 March 2010 (**Exhibit R-017**).

804 Letter from the Legal Secretary to the President of Colombia to SSA, 24 March 2010 (**Exhibit R-017**), p. 2.

reopen dialogue with SSA to verify the 1982 Coordinates in the terms set out in the 2007 SCJ Decision.[805]

561. Colombia's position was, again, reiterated in a letter dated 27 May 2015, when the Minister of Culture made clear to SSA that the dialogue being held between the Colombian Government and SSA was strictly related to the verification onsite of the coordinates referred to in the 2007 SCJ Decision, that is the 1982 Coordinates.[806] Once again, the Minister underscored the uncertainty of the existence of a shipwreck in said location.[807] For this purpose, and demonstrating the State's good faith to resolve the ongoing dispute with SSA, in said letter, the Minister of Culture requested SSA's representative to clarify what SSA deemed to be the applicable margin of error supposedly recognized by the 2007 SCJ Decision.[808] It bears mentioning that the 2007 SCJ Decision did not discuss the "margin of error".

562. As expected, SSA's response was both unreasonable and disrespectful of the Colombian authorities. By letter of 9 June 2015, the Claimant made the unreasonable and fanciful statement that the "margin of error" to be considered for the verification campaign amounted to the entirety of one of the exploration areas granted by Resolution 48 in 1982.[809]

563. Despite SSA's unreasonable requests for a salvage operation to be conducted, basically, in the entirety of the Cartagena Bay, on 28 July 2015, the Minister of Culture informed SSA, as a demonstration of good faith, that Colombia was still willing to carry out an initial verification campaign over the 1982 Coordinates[810]. In addition, the Ministry of Culture also informed the Claimant that SSA had to take "*the necessary steps to obtain the authorizations from DIMAR and the Ministry of Culture so that by October at the latest, this procedure [of verification] can be carried out.*"[811] By this point, it was been made clear to SSA that Colombia agreed to a verification expedition in the area expressly delineated by the 2007 SCJ Decision, that is, the area at the 1982 Coordinates.[812]

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805 Letter from the President of Colombia to SSA, 14 May 2015 (**Exhibit C-081**).

806 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**).

807 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**).

808 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**).

809 Letter from SSA to the Ministry of Culture, 9 June 2015 (**Exhibit C-084**), pp. 2-3.

810 Letter from the Ministry of Culture to SSA, 28 July 2015 (**Exhibit C-087**).

811 Letter from Ministry of Culture to SSA, 28 July 2015 (**Exhibit C-087**).

812 Letter from the Ministry of Culture to SSA, 28 July 2015 (**Exhibit C-087**).

564. The Ministry of Culture later, on 28 July 2015, reiterated this position in response to another letter filed by SSA,[813] where the Ministry informed SSA that the National Government was willing to allow SSA to access the area defined in the 1982 Confidential Report at its own expense and with the ongoing supervision of, and prior authorization from, the Ministry of Culture, ICANH, and DIMAR.[814] The same was also reiterated to SSA in a letter dated 28 July 2015.[815]

565. Despite the clear willingness of the Ministry of Culture to allow SSA to verify the area, where pursuant to Resolution 354 and in accordance with the 2007 SCJ Judgment, it had rights over property not comprised under the scope of Law 163 of 1959,[816] by letter dated 31 July 2015, SSA attempted to bypass the Ministry of Culture and – ironically, given its conduct and disobliging manner when corresponding with the Minister – complained to the President of Colombia that the Ministry of Culture was not conducting the conversations with SSA "*in a good manner*".[817] The Presidency, respectful of the State's institutions and regular conduits, redirected SSA to the Ministry of Culture, which was the competent authority to discuss these matters.[818]

566. After SSA had been redirected to the Ministry of Culture, SSA attempted to bypass the Ministry of Culture, once again, by sending several letters to the Colombian Shipwrecked Antiquities Commission, claiming that the Minister of Culture had conditioned any dialogue with SSA on the existence of the shipwreck in the 1982 Coordinates and that, since SSA knew no shipwreck was located therein, their alleged property rights also entailed the shipwrecked objects found within the "immediate vicinity" of said coordinates:

> But of those dialogues there was only a first and only meeting on 19 May, because on 28 July they were cancelled by the Minister of Culture, by conditioning its continuity to the verification of the existence of a fact whose non-existence is known to all since 18 March 1982, when, according to the then in force article 112 of decree law 2349 of 1971, which authorized margins of error in the indication of the coordinates, the discoverer denounced his finding, leaving it perfectly clear that the shipwreck was not in the coordinates indicated, but in its immediate vicinity. And it is precisely

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813 Letter from SSA to the Ministry of Culture, 26 June 2015 (**Exhibit C-085**).

814 Letter sent by the Ministry of Culture to SSA, 9 July 2015 (**Exhibit R-200**).

815 Letter from Ministry of Culture to SSA, 28 July 2015 (**Exhibit C-087**).

816 Law 163 of 1959 (**Exhibit R-77**).

817 Letter from SSA to the President of Colombia, 31 July 2015 (**Exhibit C-088**), p. 3.

818 Letter from the Presidency of Colombia to SSA, 3 August 2015 (**Exhibit C-89**).

> in those exact coordinates, where we all know that the reported shipwreck is not to be found, where its existence will be verified.[819]

567. On 19 November 2015, after the Colombian Shipwrecked Antiquities Commission did not agree to meet with SSA considering that it had no right whatsoever over objects that fell within the remit of its mandate,[820] SSA fundamentally changed its position, claiming that it had no interest in participating in any salvage operation or verification campaign at the coordinates reported in 1982 since SSA knew, from the start, that no shipwreck was located at the reported coordinates:

> In light of this reality, SSA reiterates what it stated in its communication of 19 October, regarding its non-participation in the verification of the shipwreck at the coordinates referred to in the report filed on 18 March 1982, because since that day the discoverer left perfectly and clearly established the location of his discovery in a place different from the coordinates where the announced verification will be carried out. Therefore, it does not make sense to propose to him that assuming his cost, he verifies the same thing that he has repeated for 33 years, that is, that his discovery is not in those coordinates but in his immediate vicinity.[821]

568. However, after the public announcement of the 2015 discovery of the *Galeón San José* by the Colombian State (the "**2015 Discovery**"),[822] SSA resumed its request to conduct a verification campaign, shamelessly demanding the State for it to be taken to the coordinates of the 2015 Discovery.[823] According to SSA, the 2015 Discovery was located within the "immediate vicinity" of the 1982 Coordinates.[824] Conveniently, SSA did not define what it deemed to be the "immediate vicinity" it was referring to.

569. In any case, the area of the 2015 Discovery is nowhere near the 1982 Coordinates.[825]

570. In response to SSA's disobliging letter of 10 December 2015, on 14 December 2015, the Ministry of Culture – once again – denied SSA any right whatsoever over the *Galeón San José* and rejected

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819 Letter from SSA to Colombia's Shipwrecked Antiquities Commission, 24 August 2015 (**Exhibit R-025**) (emphasis added), p. 3.

820 Letter from the Presidency of Colombia to SSA, 6 November 2015 (**Exhibit C-205**).

821 Letter SSA to the Ministry of Cultures, 19 November 2015 (**Exhibit R-027**), p. 2 (emphasis added).

822 Statement from President Santos on the discovery of the *San José Galeón*, 5 December 2015 (**Exhibit C-037**).

823 Letter from SSA to the President of Colombia, 10 December 2015 (**Exhibit C-38**).

824 Letter from SSA to the President of Colombia, 10 December 2015 (**Exhibit C-38**).

825 *See* Section II.A.

SSA's request to be taken to the place where the *San José Galeón* had been discovered.[826] In this letter, the Ministry reiterated the State's invitation to take SSA to the actual 1982 Coordinates and stated that if any shipwreck were to be found in such coordinates, Colombia would be willing to agree with SSA the conditions for its identification and possible salvage.[827]

571. Still, SSA insisted on being taken to the coordinates where the *Galeón* had been found, despite it being in a completely different area to the one that was reported in the 1982 Confidential Report.[828]

572. Nonetheless, and demonstrating yet again the State's good faith and respect for the rights granted to SSA's Alleged Predecessors, on 23 December 2015, the Minister of Culture reiterated the invitation for SSA to verify the 1982 Coordinates and identify if any shipwreck was located therein:

> For the same reasons already expressed, I would like to reiterate our invitation to you to promptly inform us of the date, the type of vessels that would be used and the technical procedures that will be carried out to go to the coordinates stated in the ruling of July 5, 2007 issued by the Supreme Court of Justice, in order to verify the existence or not of a shipwreck in said place.[829]

573. Ignoring Colombia's repeated invitations to conduct the verification, on 4 January 2016, SSA once again threatened Colombian authorities to forcefully and without sovereign authorization attempt to salvage the shipwreck allegedly discovered by its Alleged Predecessors.[830]

574. Faced with SSA's threats to openly ignore the State's territorial sovereignty, Colombia categorically expressed that any operation to be carried out within the Colombian territorial sea, the contiguous zone, the exclusive economic zone of the continental shelf, required

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826 Letter from the Ministry of Culture to SSA, 14 December 2015 (**Exhibit C-206**).

827 Letter from the Ministry of Culture to SSA, 14 December 2015 (**Exhibit C-206**).

828 Letter from SSA to the Ministry of Culture, 18 December 2015 (**Exhibit C-207**); Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035**); Letter from SSA to the Ministry of Culture, 18 January 2016 (**Exhibit C-210**); Letter from SSA to the President of Colombia, 3 August 2016 (**Exhibit C-212**).

829 Letter from the Ministry of Culture to SSA, 23 December 2015 (**Exhibit C-208**) (emphasis added).

830 Letter from SSA to the Ministry of Culture, 4 January 2016 (**Exhibit R-035**).

authorization from the local authorities. Colombia also stated that, in the event of a transgression into its territory, it would be forced to use its armed forces to protect its territorial sovereignty.[831]

575. Nonetheless, the Respondent continued to extend its invitation to take SSA to the 1982 Coordinates.[832]

576. Unsurprisingly, and in line with its bullying tactics, on 1 April 2016, SSA threatened the President of Colombia that it would trespass into Colombian territory – despite having no authorization to do so – to rescue the alleged "treasures" recognized by the 2007 SCJ Decision.[833]

577. Again, despite SSA's threats against the State, on 17 June 2016, the Ministry reaffirmed the State's willingness to take SSA to the 1982 Coordinates without prejudice to Colombia's position regarding SSA's supposed rights, which were in any case limited by the resolutive part of the 2007 SCJ Decision.[834] The exact same position was reiterated by the Ministry of Culture in its letters dated 20 September 2016[835] and 4 October 2016.[836]

578. However, on 12 September 2016, SSA demanded the Respondent to take it to the area of the 2015 Discovery.[837] In the same vein, on 4 October 2016, the Claimant insisted on conducting a verification campaign, but it now claimed – contrary to Colombia's interpretation – that it was SSA's prerogative to determine the "immediate vicinity" area for the verification to take place, which was the same area where the *Galeón San José* had supposedly been "re-discovered" in 2015.[838]

579. In a letter sent on the same day, the Ministry of Culture reminded SSA that, contrary to its assertions, Colombia was abiding by the clear and specific wording of the 2007 SCJ Decision, and

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831 Letter from the Ministry of Culture to SSA, 12 January 2016 (**Exhibit C-209**).

832 Letter from the Ministry of Culture to SSA, 12 January 2016 (**Exhibit C-209**).

833 Letter from SSA to the President of Colombia, 1 April 2016 (**Exhibit R-206**), pp. 23-24.

834 Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-028**).

835 Letter from the Ministry of Culture to SSA, 20 September 2016 (**Exhibit C-214**).

836 Letter from the Ministry of Culture to SSA, 4 October 2016 (**Exhibit R-207**).

837 Letter from SSA to the President of Colombia, 12 September 2016, p. 1 (**Exhibit C-213**).

838 Letter from SSA to the Ministry of Culture, 4 October 2016, pp. 1-4 (**Exhibit C-215**).

as such, requested SSA, once again, to provide the information required for the verification of the 1982 Coordinates.[839]

580. As if it had not received any communication from Colombia, on 4 November 2016, SSA's representative invited the President of Colombia to join SSA in an expedition, in which SSA would carry out to identify the alleged shipwreck reported by GMC in 1982.[840] In its letter, SSA went as far as to submit that it did not need to obtain the authorizations required by law to access the site to which its alleged discovery was located:

> I am writing to invite the Government of Colombia to accompany the Sea Search Armada (SSA) on an expedition to positively identify the wreck reported confidentially to that Government in February 1982, the ownership of which was declared by the Courts to be in common and pro indiviso, in equal shares, between the Nation and SSA.
>
> […]
>
> There is a point to be clarified regarding Minister Garces' invitation to visit the site described in the 1982 complaint. During President Uribe's administration, in a letter dated April 27, 2010, his Secretary of State, after warning to act "by precise instructions of the President of the Republic", communicated, among other things, that in the event that Sea Search Armada would attempt to access the property that was recognized by the Supreme Court, "the National Navy will avoid the development of unauthorized activities in maritime spaces that are not authorized by the Supreme Court, "The President was wrong to maintain that SSA is obliged to request permits imposed by laws and regulations subsequent to its discovery and denunciation, and he was also wrong in his application of the 1958 Geneva Convention on the Continental Shelf.[841]

581. SSA's allegations in the letter are perplexing. Indeed, according to SSA, Colombia's statement that in the face of unauthorized trespass into its sovereign territory, the Colombian Navy would be deployed had been inconvenient to it, hindering its ability to engage personnel and find vessels to carry out such efforts:

> This threat by the President of Colombia to use military force against SSA has made it much more difficult and costly to recruit expedition personnel, as

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839 Letter from the Ministry of Culture to SSA, 4 October 2016 (**Exhibit R-207**).

840 Letter from Jack Harbeston to the President of Colombia, 4 November 2016 (**Exhibit R-208**).

841 Letter from Jack Harbeston to the President of Colombia, 4 November 2016 (**Exhibit R-208**), p. 1 (emphasis added).

> well as to hire ships and technical equipment. And it has caused damage: it has increased the cost of insurance to prohibitive levels.[842]

582. Evidently, and fortunately, personnel and vessels willing to invade the sovereign territory of a State in violation of the most basic rules on international law, as SSA's intended, are still difficult to find.

583. As expected, on 30 November 2016, the Ministry of Culture, again, reaffirmed its longstanding position that no shipwreck was located around the 1982 Coordinates and categorically stated that the condition established in the 2007 SCJ Decision to acquire any property rights, that is the existence of a shipwreck in the reported coordinates, had not been met by SSA:

> For this reason, the Colombian Government has the scientific evidence that allows it to categorically state that the condition established by the Colombian Supreme Court of Justice in the July 5, 2007, ruling was not met. Therefore, there is no place for any alleged rights that would allow Sea Search Armada to claim 50% of what would not be considered the Nation's Cultural Heritage of the shipwreck that could eventually be found in the coordinates established in the confidential report.
>
> Moreover, although the Colombian Supreme Court of Justice was absolutely clear in affirming that the rights of Sea Search Armada were limited to the coordinates reported in the confidential report "without including, therefore, spaces, zones or diverse areas", we can affirm without any doubt that in the areas described in the graph provided in the confidential report, there is no vestige of any shipwreck either.[843]

584. At this point it remained clear that, by November 2016, Colombia had consistently expressed that (***i***) GMC did not discover the Galleon *San José*; (***ii***) the litigation that resulted in the 2007 SCJ Decision did not concern the *Galeón San José*; (***iii***) the 2007 SCJ Decision established that any right recognized by Resolution 0354 concerned only objects in the area reported in 1982 that were capable of qualifying as a treasure; and (***iv***) given that one of these conditions was not met – that is, no shipwreck was located within the area reported in 1982 – SSA had no property rights to claim.

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842 Letter from Jack Harbeston to the President of Colombia, 4 November 2016 (**Exhibit R-208**), p. 1.

843 Letter from Ministry of Culture to Sea Search Armada, 30 November 2016 (**Exhibit R-029**), p.1 (emphasis added).

585. Despite Colombia's clear and unequivocal position on the actual extent of its rights, SSA continued its attempts to claim the alleged rights over the *Galeón* that it was not entitled to.[844]

586. On 17 February 2017, SSA insisted that the verification campaign be carried out over an "immediate vicinity" area of 100nm^2.[845] This was rejected by the Ministry of Culture, who made clear to SSA that: (***i***) in neither the 1982 Confidential Report nor the lawsuit filed before Colombian courts was there a single reference to the Galleon *San José*; (***ii***) the 2007 SCJ Decision determined the rights that could correspond to SSA's Alleged Predecessors over a hypothetical shipwreck located within the reported coordinates, without referring to any specific shipwreck; (***iii***) SSA had no right over the Galleon *San José*;[846] and (***iv***) that the "immediate vicinity" of 100 nautical miles claimed by SSA was unacceptable since it was so vast that it even included areas that were never explored by SSA's Alleged Predecessors.[847]

587. Said understanding was later repeated by the Vice President of Colombia in a letter dated 17 July 2019. In that letter, the Vice President stated that SSA did not have a right over the Galleon *San José* and its contents, and the location at the coordinates from the 2015 Discovery was nowhere close to the location at the 1982 Coordinates:

> The ruling of 5 July 2007 issued by the Supreme Court of Justice written by Justice Carlos Ignacio Jaramillo within the file 08001-3103-010-1989-09134-01, limited the right of Sea Search Armada to those assets [1] that have the character of treasure in the terms of article 700 of the Civil Code and [2] that are located in the specific coordinates reported by Glocca Morra in 1982, without including rights over different spaces or areas, as stated in the second point of the resolutive part:
>
> "(…) the property there conferred, in equal parts, in favor of the Nation and the claimant, is referred only and exclusively to the assets that, on one side, by their characteristics and own features, in conformity with the circumstances and directions indicated in this decision, are still susceptible of being qualified juridically as a treasure, in the terms of Article 700 of the Civil Code and the restriction or limitation that placed upon it article 14 of Law 163 of 1959, among other applicable legal provisions and, on the other side, to the assets referred to by Resolution 0354 of 3 June 1982, issued by the General Maritime and Ports Directorate, namely, those, that are found in 'the coordinates referred to in the 'Confidential Report on Underwater

844 Letter from SSA to the Legal Secretary of the President of Colombia, 4 September 2017 (**Exhibit R-030**).

845 Letter from SSA to the Ministry of Culture, 17 February 2017 (**Exhibit C-218**).

846 Letter from SSA to the Legal Secretary of the President of Colombia, 4 September 2017 (**Exhibit R-030**); Letter from SSA to the Ministry of Culture, 28 February 2018 (**Exhibit R-038**).

847 Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226**).

> Exploration carried out by the Company' GLOCCA MORRA in the Caribbean Sea, Colombia 26 February 1982' Page 13 No. 49195 Berlitz Translation Service.', without including, therefore, different spaces, zones or areas.
>
> 2. Regarding the verification of the coordinates reported in 1982, such a task was already carried out within the framework of contract No. 544 of 1993, the results of which led to the conclusion that in the site of the coordinates reported by Glocca Morra Company (today Sea Search), there is NO shipwreck, much less any trace of the Galeón *San José*. Only a piece of wood was found at the site, which, after being examined, led to the conclusion that it did not belong to any shipwreck.
>
> In light of the above, Sea Search Armada (SSA) has no right over the Galeón *San José* or its content because it is not located at the coordinates reported by that company.
>
> […]
>
> 3. According to the Dimar certification attached to this document, the coordinates reported by Maritime Archaelogy Consultants Switzwerland (MACS) do not correspond to those reported by Glocca Morra Company and do not overlap with these coordinates.[848]

588. The above correspondence shows that ever since the 2007 SCJ Decision, Colombia has emphatically rejected SSA's fanciful claims regarding its alleged rights over the Galleon *San José*, and Colombia's alleged obligations to recover a shipwreck that, by 2007, had not been discovered.

589. Not only that, but the above correspondence also demonstrates SSA's lack of respect for Colombia's institutions and its authorities, even threatening, on several occasions, to trespass upon Colombia's territory with no authorization to do so.

3. Colombia, in good faith, approached SSA to put an end to its unreasonable legal claims before foreign and international courts

590. In the Amended Statement of Claim, SSA alleges that Colombia somehow forced it to withdraw its U.S. and IACHR claims for dialogue and negotiations to take place.[849] According

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848 Letter from Vice-President of Colombia to SSA, 17 June 2019 (**Exhibit C-40**) (emphasis added), p. 1-3.

849 Amended Statement of Claim, ¶¶ 222-224.

to SSA, after a letter sent by Colombia, it "*took Colombia by its word and withdrew both the U.S. Litigation and the IACHR petition*."[850]

591. The Claimant's position is misconstrued and seeks to transmit the false idea that Colombia promised some type of beneficial interpretation of the 2007 SCJ Decision or an apparent recognition of a non-existent right over the *Galeón San José* if all foreign and international claims were withdrawn by SSA.[851] This is clearly supported by the facts of this case, which show that: (***i***) Colombia never made any promises to SSA other than opening a dialogue to try and find a solution to a longstanding dispute; and (***ii***) SSA did not withdraw any of the U.S. litigation actions, which were defeated by Colombia.

592. In light of the lawsuits filed by SSA against Colombia in foreign courts, Colombia set a position that there would be no room for dialogue if SSA continued with those proceedings.[852]

593. As mentioned by SSA, on 22 December 2014, the Minister of Culture sent a letter replying to SSA's request to initiate dialogue to try and find a solution to the interpretation of the 2007 SCJ Decision.[853] In that letter, the Minister of Culture reaffirmed Colombia's position that there would be no room for dialogue between SSA and Colombia, unless all judicial actions initiated against Colombia were ended.[854]

594. This goes in line with Colombia's constant position over the years until results of the U.S. Courts' litigation proceedings were known.[855]

595. In adopting this position, the Colombian State did not force SSA into dropping the lawsuits filed in foreign courts as well as before the IACHR. SSA was, and has always been, at liberty to continue its legal efforts against Colombia, but Colombia is also at liberty to set its position before any dialogue is to take place.

596. In any case, contrary to SSA's false representation of the facts, SSA did not withdraw its lawsuits before the U.S. Courts. They were dismissed. Notably, on 30 January 2015, the U.S.

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850 Amended Statement of Claim, ¶ 223.

851 Amended Statement of Claim, ¶¶ 222-224.

852 Letter from the Ministry of Culture to SSA, 22 December 2014 (**Exhibit C-032**).

853 Letter from the Ministry of Culture to SSA, 22 December 2014 (**Exhibit C-032**).

854 Letter from the Ministry of Culture to SSA, 22 December 2014 (**Exhibit C-032**).

855 SSA, Petition before the IACHR, 15 April 2013 (**Exhibit R-021**).

District Court for DC granted Colombia's motion to dismiss SSA's lawsuit, stating that the 2007 SCJ Decision "*did not order that SSA be paid a sum of money*."[856]

597. Despite representing to Colombian authorities that SSA was committed "*to end the litigation in the District of Columbia*,"[857] SSA went ahead and filed a motion to alter or amend the Court's Judgment dismissing its claims.[858]

598. It is clear that SSA was not acting in good faith, much less expecting to find a "*mutually beneficial solution*" with Colombia on this matter.

599. Though the Colombian Government and the Colombian Courts have refused to recognize SSA's rights over the *Galeón San José*, Colombia nevertheless kept an open channel of communication with SSA to avoid further conflict, and manifested a willingness to verify the coordinates reported by SSA in 1982.[859]

4. Through the years, SSA has been purposefully vague on the proper meaning of the "margin of error", to serve the end of claiming areas that its Alleged Predecessors had never explored

600. To date, the Claimant has requested unreasonable verification and salvage operations to Colombian authorities, even threatening to do so unauthorized in Colombia waters, and has attempted to define "margin of error" very broadly, expanding the 1982 Coordinates to include as many areas as possible.

601. In its Amended Statement of Claim, the Claimant argues that the 1982 Coordinates *"include an inherent margin of error in light of the technology available and methods used to locate the target at that time"*,[860] which was apparently set forth under Colombian law.[861] However,

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856 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, SSA's Withdrawal of Its Motion to Alter or Amend Judgment, 9 February 2015 (**Exhibit R-024**).

857 Letter from Sea Search Armada's legal counsel to Colombia's legal counsel, 4 February 2015 (**Exhibit R-023**).

858 United States District Court for the District of Columbia, Civil Action No. 1:13-cv-00564-RBW, SSA's Withdrawal of Its Motion to Alter or Amend Judgment, 9 February 2015 (**Exhibit R-024**).

859 Letter from Ministry of Culture to SSA, 21 July 2015 (**Exhibit C-087**); Letter from the Ministry of Culture to SSA, 14 December 2015 (**Exhibit C-206**).

860 Amended Statement of Claim, ¶ 77.

861 Amended Statement of Claim, ¶ 206.

over the years, the Claimant has not hesitated in substantially changing the scope of the so-called "margin of error," also referred to by the Claimant as "surrounding areas" or "immediate vicinity", which according to SSA are the same thing.[862]

602. Below, the Respondent shows how the Claimant has conveniently changed its position over the years.

603. On 27 May 2015, in response to SSA's multiple letters, the Minister of Culture requested SSA to explain its understanding of the "margin of error".[863] On 9 June 2015, SSA informed Colombia that the coordinates that, in their view, constituted the "immediate vicinity" were the ones established in Article 1, Numeral 1 of Resolution No. 48 ("**Exploration Area 1**"), which corresponded to one of the areas authorized to GMC for exploration in 1980.[864] This area was much larger than the areas that were explored by GMC. The below map shows the entirety of Exploration Area 1 (corresponding to the yellow rectangle), along with the areas actually explored by GMC (corresponding to the black shapes):[865]

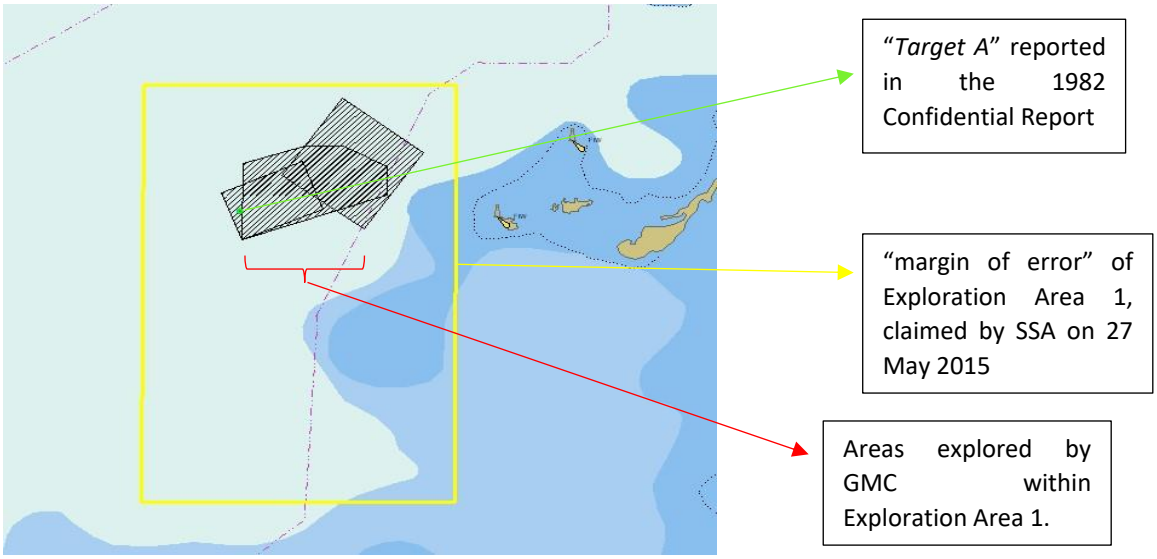

Image 29: Map of Exploration Area 1, with the areas that were ultimately explored by GMC.[866]

862 Letter from SSA to Ministry of Culture, 3 June 2015 (**Exhibit C-083**).

863 Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-082**).

864 Letter from SSA to the Ministry of Culture, 9 June 2015 (**Exhibit C-084**).

865 Map prepared by DIMAR for the immediate vicinity of Num. 1, Art. 1 of Resolution 48 (**Exhibit R-243**).

866 Map prepared by DIMAR for the immediate vicinity of Num. 1, Art. 1 of Resolution 48 (**Exhibit R-243**).

604. The Exploration Area 1 – which the Claimant contends corresponded to the "margin of error" applicable to the 1982 Coordinates, is not only very big – it amounts to 10.6 times the city of Paris or 159,520 times a football/soccer field – it also includes areas that SSA's Alleged Predecessors had not explored.

605. SSA's ever-changing definition of the "margin of error" or "immediate vicinity" conveniently equates the whole area authorized for Exploration Area 1 under Resolution No. 48 (Article 1, Num. 1),[867] and the area for which GMC was recognized as a reporter of an alleged discovery, pursuant to Article 1 of Resolution No. 354 and the 1982 Confidential Report.[868]

606. Clearly, an area of exploration that DIMAR granted under an exploration permit – i.e., Exploration Area 1 – and a specific area where a finding is reported – i.e., the 1982 Coordinates – are different. If these were to be the same, as SSA contends, there would have been no need for Resolution No. 354 to recognize GMC as a reporter of an alleged "discovery" within a specific set of coordinates as Resolution No. 048 already included the entire Exploration Area 1. This position is simply absurd and contrary to common sense.

607. Then, during a meeting held on 17 February 2017, SSA changed its own definition of the "margin of error" by arguing that it now covered 100 square nautical miles around the 1982 Coordinates.[869] This new and ever-expanding concept of "immediate vicinity" also covered

867 Resolution No. 48, Article 1, Numeral 1 (**Exhibit C-002**).

868 Resolution No. 354 (**Exhibit C-013**).

869 Letter from SSA to the Ministry of Culture, 17 February 2017 (**Exhibit C-218**).

areas that had never been explored by GMC, and some areas that had never been authorized for exploration under Resolution No. 048:[870]

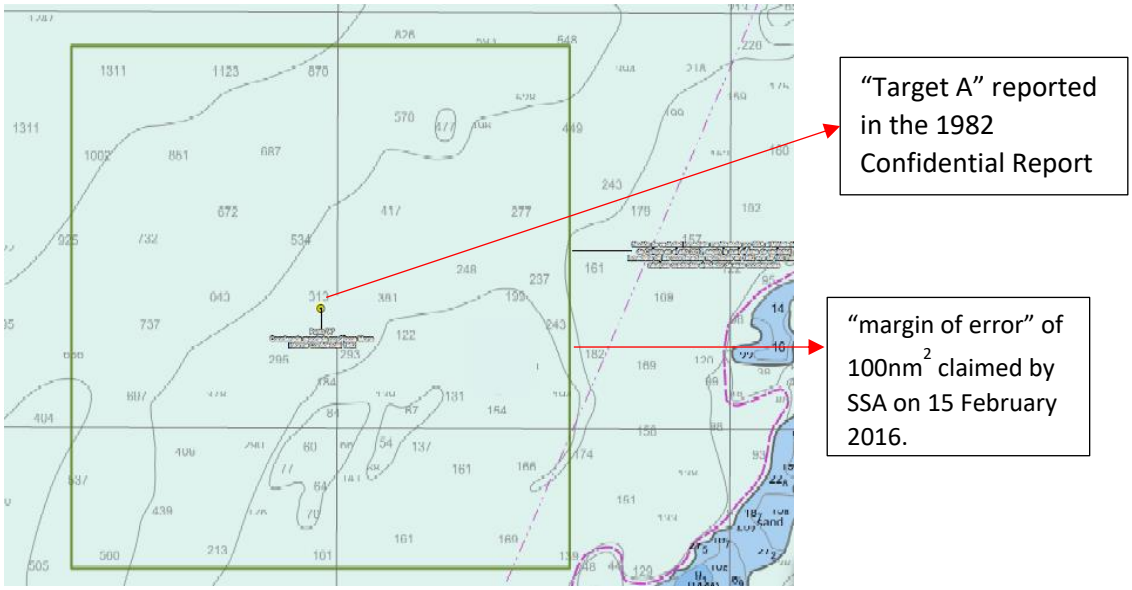

Image 30: Map of "margin of error" of 100nm^2 claimed by SSA on 15 February 2016.[871]

608. This area of 100nm^2 amounts to three times the city of Paris or 48,060 times a football/soccer field.

609. According to SSA, this new area being claimed as the "immediate vicinity" corresponded to *"the same area assigned by the GOC to the Swedes (100 square miles) in the MOU in 1988"*.[872] This allegation is disingenuous. The MoU between Colombia and Sweden did not determine an area of 100nm^2 as an immediate vicinity but as an area for underwater exploration.[873]

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870 Map prepared by DIMAR for the immediate vicinity of 100nm^2 (**Exhibit R-236**).

871 Map prepared by DIMAR for the immediate vicinity of 100nm^2 (**Exhibit R-236**).

872 Amended Statement of Claim, ¶ 251.

873 Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988 (**Exhibit C-059**), p. 2.

610. On 3 March 2017, the Ministry of Culture rejected SSA's newly minted concept of the "immediate vicinity" or "margin of error" by informing it that the 100nm^2 area was unacceptable, as it included areas that had never been explored by SSA's Alleged Predecessors.[874] This can be seen in the following illustration:[875]

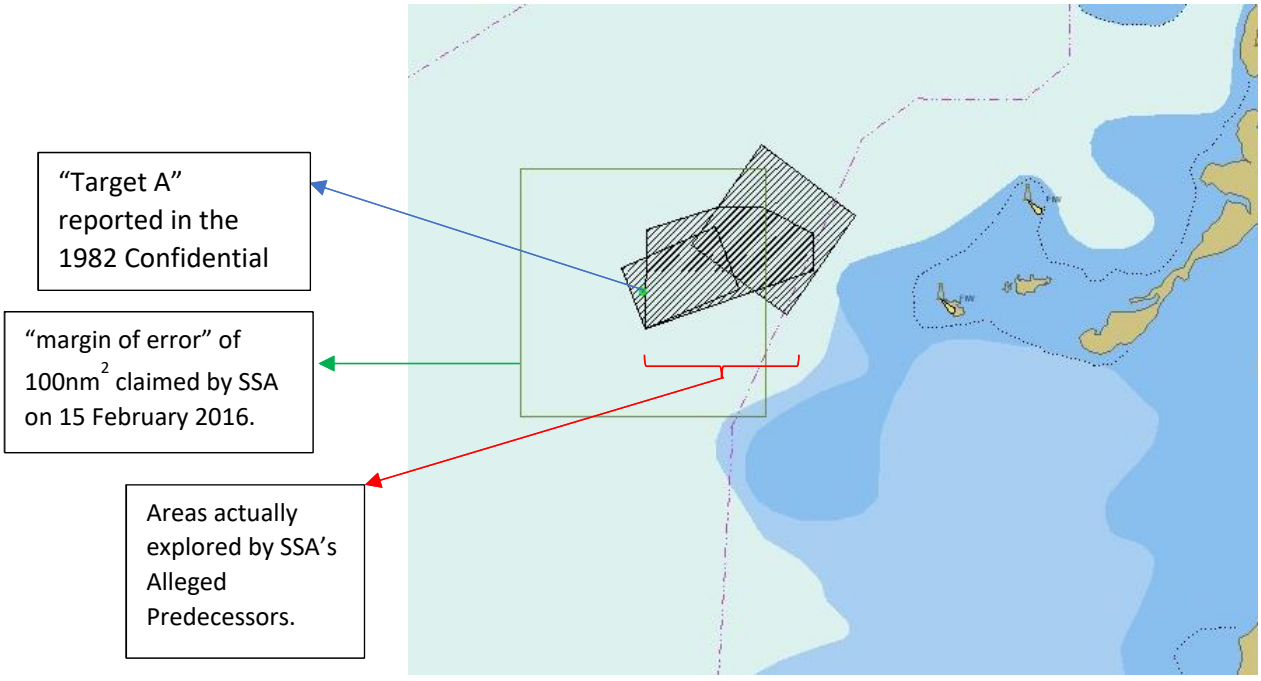

Image 31: Map of "margin of error" of 100nm^2 claimed by SSA on 15 February 2016 with the areas that were ultimately explored by GMC.[876]

611. On 24 July 2017, only four months after proposing the extraordinary idea of 100nm2 as the scope of the immediate vicinity, SSA inexplicably changed its position regarding the so-called "margin." Now, SSA claimed to the President of Colombia that the "immediate vicinity" or

874 Letter from the Ministry of Culture to SSA, 3 March 2017 (**Exhibit C-226**).

875 Map prepared by DIMAR for the immediate vicinity of 100nm^2 with SSA's explored areas (**Exhibit R-237**).

876 Map prepared by DIMAR for the immediate vicinity of 100nm^2 with SSA's explored areas (**Exhibit R-237**).

"margin of error" corresponds to an area of 36 square nautical miles.[877] This proposed area still amounted to an area larger than that explored by GMC:[878]

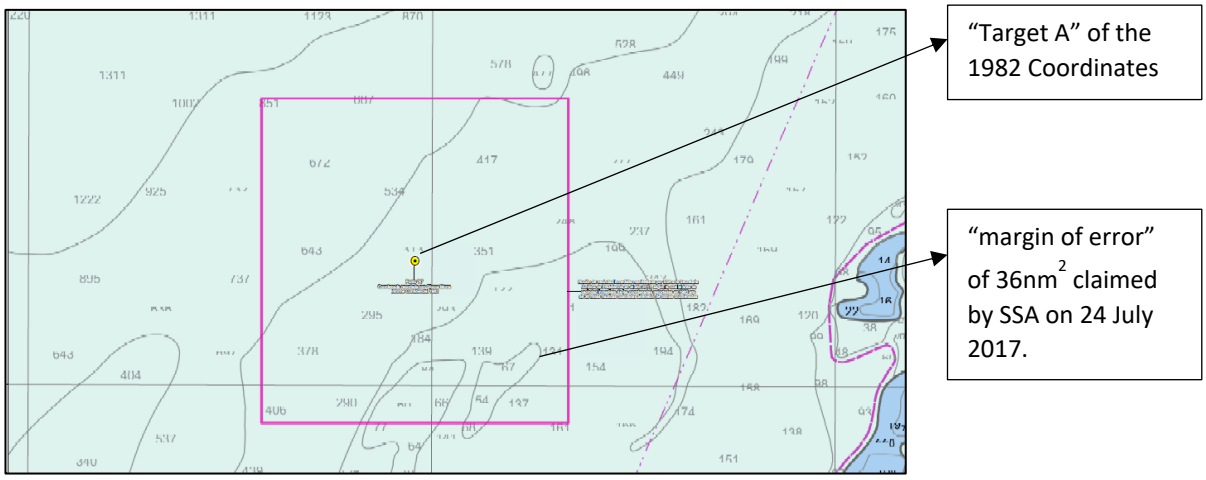

Image 32: Map of "margin of error" of 36nm^2 claimed by SSA on 24 July 2017.[879]

612. It bears underscoring that this area of 36nm^2 amounts to 1.18 times the city of Paris or 17,650 times a football/soccer field. Even though this area was significantly smaller than the two previous areas, it is still a huge area to be considered as the "margin of error" for a precise set of coordinates.

613. Claimant was not yet done changing its claims as regards the area comprised under its rubber-band approach to the immediate vicinity and with its Rejoinder to Respondent's Article 10.20.5 Objection, SSA again changed its position to claim an "immediate vicinity" of 3.24 miles from the 1982 Coordinates.[880] The newly claimed "margin" covered the following area:[881]

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877 Letter sent by SSA to the President of Colombia, 4 September 2017 (**Exhibit R-030**), p. 20.

878 Map prepared by DIMAR with the margin of error of 36nm claimed by SSA on 24 July 2017 (**Exhibit R-238**).

879 Map prepared by DIMAR with the margin of error of 36nm claimed by SSA on 24 July 2017 (**Exhibit R-238**).

880 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 117.

881 Map prepared by DIMAR with the margin of error claimed in SSA's 10.20.5 Rejoinder (**Exhibit R-239**).

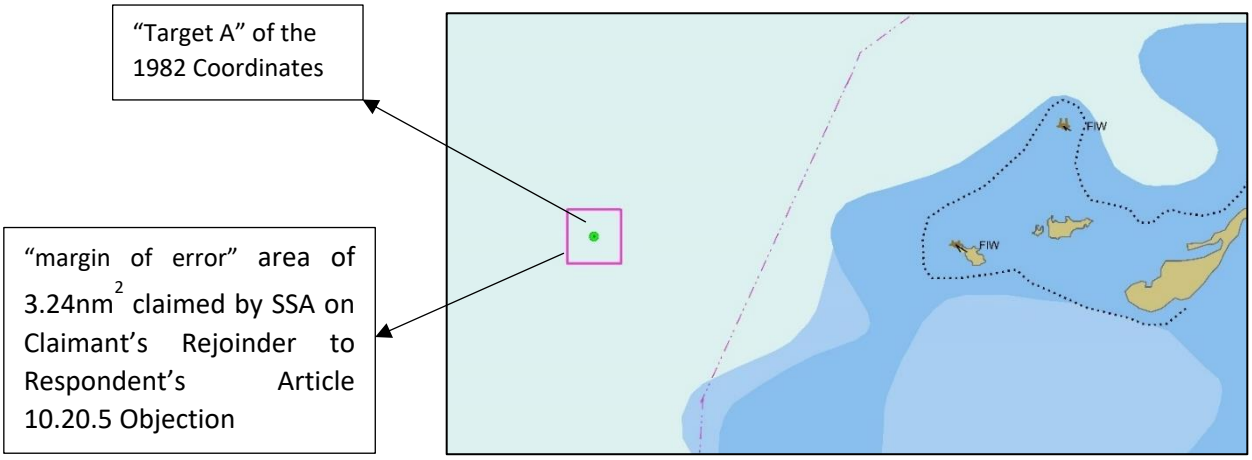

Image 33: Map of "margin of error" area of 3.24nm^2 claimed by SSA on Claimant's Rejoinder to Respondent's Article 10.20.5 Objection.[882]

614. By way of illustration, the area of 3.24 nm amounts to 1,592 times the size of a football/soccer field.

615. Once again, during the 14 and 15 December 2023 Hearing regarding Colombia's Article 10.20.5 Objection, SSA changed its position, going back to its previous definition for "immediate vicinity": the Exploration Area 1 established in Article 1, Numeral 1 of Resolution No. 48, (i.e., one of the areas GMC Inc. was authorized to explore in 1980.[883] The extent of this area can be seen above.[884]

616. Yet, in its Amended Statement of Claim, the Claimant seems to have abandoned its previous conceptions of "immediate vicinity" and "margin of error", and now claims that it should cover an area located about 1.57 nautical miles east of the 1982 Coordinates, at a bearing of 87.9°.[885] The figure below illustrates the newest "immediate vicinity" area:[886]

882 Map prepared by DIMAR with the margin of error claimed in SSA's 10.20.5 Rejoinder (**Exhibit R-239**).

883 Transcript on Hearing 10.20.5, Day 2, pp. 458:24-25, 459: 1-12.

884 Map prepared by DIMAR for the immediate vicinity of Num. 1, Art. 1 of Resolution 48 (**Exhibit R-243**).

885 Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 51.

886 Map prepared by DIMAR with the margin of error claimed in Expert Report of J.D. Morris (**Exhibit R-240).** *See also* **CER-1. [Morris]**), ¶ 51.

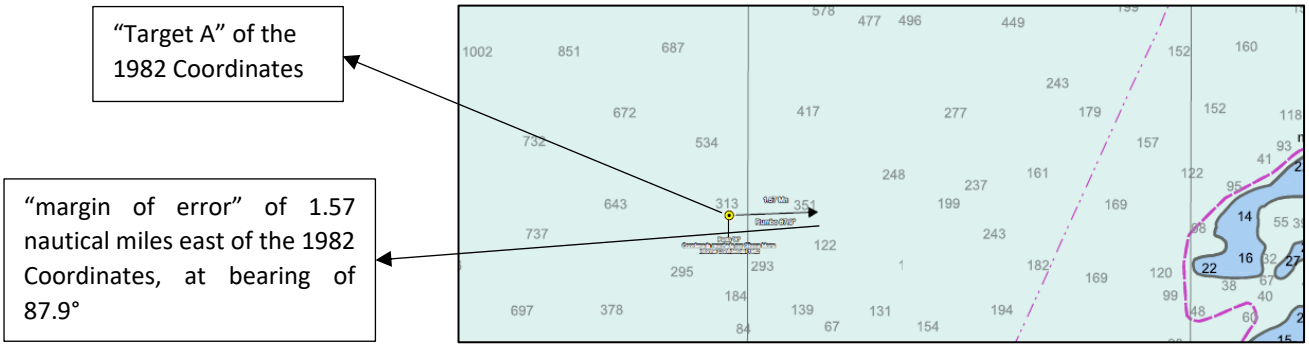

Image 34: Map of "margin of error" of 1.57 nautical miles east of the 1982 Coordinates, at bearing of 87.9° claimed by SSA on the Amended Statement of Claim.[887]

617. The letters and exchanges between SSA and the Colombian State, above, show that SSA does not know where the *Galeón San José* is located. In that respect, the Claimant's constant change in positions since 2015 speaks volumes. Indeed, as shown by Colombia, knowing perfectly well that its Alleged Predecessors did not find the *Galeón San José*, the Claimant has used the concept of "margin of error" or the "immediate vicinity" to gain information, access, and ultimately claim rights to the *Galeón San José*.

618. The Claimant's reluctance to fix its position as to what the margin of error was shows that, as long as the Claimant could equivocate, stretching literally the areas of the alleged vicinity or the "margin of error" – which it uses indistinctly – SSA could keep its false contentions regarding its supposed rights to the Galleon and unduly attempt to profit from Colombia's finding.

619. The Tribunal should see through the Claimant's tactics and refuse to condone them.

620. It is Colombia's position that the Claimant's Alleged Predecessors reported in 1982 the coordinates corresponding to its alleged finding, and hence cannot vary its position and extend the area beyond the reported coordinates. The Colombian Courts made it clear that it had no rights to areas in the vicinity.[888] In any event, even if, for the sake of argument, the Claimant was

887 Map prepared by DIMAR with the margin of error claimed in Expert Report of J.D. Morris (**Exhibit R-240**). *See also* **CER-1. [Morris],]**), ¶ 51.

888 *See* 10th Judge of the Barranquilla Circuit, Judgment, 6 July 1994 (**Exhibit C-25**); Superior Tribunal of Barranquilla, Decision, 21 June 1995 (**Exhibit C-76**); Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), p. 70, 233**.**

allowed to claim a "margin of error" or "immediate vicinity", which would never extend or be equal to any of the various proposed areas claimed, as shown above by the Claimant.

621. In any case, and for the Tribunal's ease of reference to SSA's constant changes in position with regards to the "margin of error" or "immediate vicinity" are shown in following chart:

"Margin of error" / "immediate vicinity" area claimed by SSA	Date of change in SSA's position	Exhibits where it was requested
Exploration Area 1 (Article 1, Numeral 1 of Resolution No. 48)	9 June 2015	Exhibit C-084
100 square nautical miles	15 February 2017	Exhibit C-218
36 square nautical miles	24 July 2017	Exhibit R-030
3.24 square nautical miles	19 November 2023	SSA's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA
Exploration Area 1 (Article 1, Numeral 1 of Resolution No. 48)	15 December 2023	Transcript on Hearing 10.20.5, Day 2, pp. 458:24-25, 459: 1-12.
about 1.57 nautical miles east of the 1982 Coordinates, at a bearing of 87.9°	14 June 2024	Amended Statement of Claim

622. These changes in position can also be evidenced in the following map:[889]

[889] Map prepared by DIMAR containing al the "margin of error" areas reported by SSA over the years (**Exhibit R-242**).

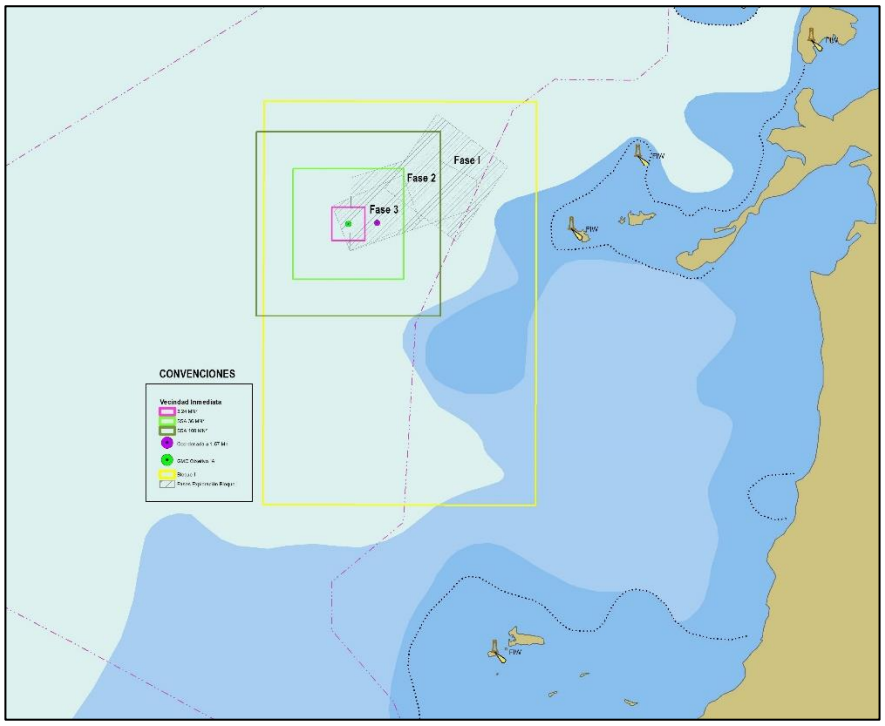

Image 35: Map containing all the "margin of error" areas reported by SSA over the years.[890]

623. Finally, as can be seen from the correspondence above, every time SSA has come with a new position for the applicable "margin of error", the Colombian State has clearly and unequivocally rejected it based on what was determined by the 2007 SCJ Judgment. All the correspondence in which Colombia unequivocally rejected SSA's everchanging concept of the applicable "margin of error" is included below.

5. In any event, the Ministry of Culture unequivocally rejected the margin of error claimed by SSA

624. The preceding section clearly shows Colombia's constant and unequivocal denial of SSA's concept of "margin of error". This is evident in letters dated 9 July 2015,[891] and 3 March 2017[892] sent by the Colombian State to SSA as well as in the minutes of the meeting held

890 Map prepared by DIMAR containing al the "margin of error" areas reported by SSA over the years (**Exhibit R-242**).

891 Letter sent by the Ministry of Culture to SSA, 9 July 2015 (**Exhibit R-200**).

892 Letter from the Ministry of Culture to SSA, 3 March 2017, (**Exhibit C-226**)

between representatives of Colombia (DIMAR, the Ministry of Culture, and the ICANH) and SSA's representatives on 15 February 2017.[893]

625. Also, and as stated above, Colombia has unequivocally rejected SSA's interpretation of the 2007 SCJ Decision, which in SSA's view recognized on behalf of SSA a larger area than the pinpoint coordinates included in the 1982 Confidential Report.

O. SINCE THE *GALEÓN SAN JOSÉ* HAD NOT BEEN DISCOVERED, COLOMBIA WAS ENTITLED TO CONDUCT OCEANOGRAPHIC SURVEYS IN SEARCH OF THE SHIPWRECK

626. In its Amended Statement of Claim, SSA makes grave and false allegations regarding Colombia's relationship with Maritime Archaeology Consultants Limited ("**MAC**").

627. First, the Claimant alleges that Colombia and MAC carried out secret negotiations to "*confirm the location of the Galeón*".[894] SSA also suggests that "*Colombia shared the location reported by SSA's Predecessors with MAC*",[895] Finally, SSA claims that, based on the remuneration scheme that Colombia negotiated with MAC, it was reasonable for SSA "*to expect that a significant portion of the San José shipwreck consisted of treasure*".[896]

628. In this section, the Respondent shows that during the Public-Private Partnership Project between Colombia and MAC all the information related to MAC's proposal to structure the Project was confidential as required by the applicable law (**1**); Colombia acted transparently towards SSA and did not share "*the location reported by SSA's Predecessors with MAC*" (**2**);[897] and Colombia never entered into a contract with MAC, [redacted]

893 Minutes of meeting held between Colombia and SSA, 15 February 2017 (**Exhibit R-209**)

894 Amended Statement of Claim, ¶¶ 9, 229.

895 Amended Statement of Claim, ¶¶ 9, 247.

896 Amended Statement of Claim, ¶¶ 330, 378.

897 Amended Statement of Claim, ¶¶ 9, 247.

1. The Public-Private Partnership Project between MAC and the Colombian State

629. The model of Public-Private Partnerships ("**PPPs**") was adopted by Colombia in 2012, for the construction of substantial infrastructure projects.[898] Colombia adopted Law 1508 of 2012 to establish the principles, rules, and general procedures applicable to the creation, development, and execution of PPPs.[899]

630. Article 1 of Law 1508 defines PPPs as "*an instrument for engaging private capital, formalized through a contract between a state entity and a natural or legal person under private law, for the provision of public goods and related services, involving the retention and transfer of risks between the parties and payment mechanisms linked to the availability and level of service of the infrastructure and/or service*".[900]

631. Law 1675 of 2013[901] on the protection of submerged cultural heritage explicitly allows the private sector to participate through the PPP regime in the activities of exploration, intervention, exploitation and preservation of Colombia's Submerged Cultural Heritage.[902]

632. More specifically, Article 17 of Law 1675 of 2013 allows a private party to submit an initiative to carry out the above activities, which initiative must be accompanied by historical research, a technical and financial feasibility study, an environmental impact assessment and evidence of experience in activities related to submerged cultural heritage.[903]

[redacted]

898 Studies on the Public-Private Partnerships Regime. Alexandra Baquero and others. Universidad Externado, 2024 (**Exhibit R-62**), p. 77.

899 Law 1508 of 2012 (**Exhibit R-185**), Article 1.

900 Law 1508 of 2012, 10 January 2012 (**Exhibit R-185**), Article 1.

901 Law 1675 of 2013, 30 July 2013 (**Exhibit R-191**).

902 Law 1675 of 2013, 30 July 2013 (**Exhibit R-191**), Article 17. ***See also*** Regulatory Decree No. 1082 of 2015 (**Exhibit R-198**).

903 Law 1675 of 2013, 30 July 2013 (**Exhibit R-191**), Article 17.

904 [redacted]

[redacted]

634. The Claimant alleges that Colombia "*secretly contracted with MAC to supposedly confirm the location of the Galeón*".[907] [redacted]

635. [redacted]

636. After an analysis of the information provided by MAC, the Ministry of Culture, through Resolution 1456 of 26 May 2015,[910] approved the pre-feasibility of the project and authorized exploration in Colombian territorial waters.

3. The exploration area granted to MAC

637. In the Amended Statement of Claim, SSA suggests that Colombia "*authorized MAC to search for the San José shipwreck in the Discovery Area identified by SSA*".[911] The Claimant also alleges that

[redacted]

907 Amended Statement of Claim, ¶¶ 9, 229.

908 Law 1508 of 2012, 10 January 2012, (**Exhibit R-185**) Article 14.

909 Amended Statement of Claim, ¶ 241.

910 Resolution 1456, 26 May 2015 **(Exhibit R-199)** ("*This Resolution approves the prefeasibility and authorizes MAC to explore Colombian maritime waters*.").

911 Amended Statement of Claim, ¶ 239.

"*MAC's rediscovery of the San José shipwreck appears to have been based on receiving the location reported by SSA's Predecessors*".[912] These allegations are misleading and false.

638. First, on 15 October 2015, MAC requested that the Ministry of Culture grant an extension of its exploration area.[913] This request was carefully considered by the Ministry of Culture and consulted with DIMAR before granting the authorization.

639. As a result, DIMAR rendered Legal Opinion No. 22201500402 on 19 October 2015,[914] outlining specific limitations and exclusions. Specifically, DIMAR's Legal Opinion defined an exclusion area and clarified that any information collected in that area shall be sent immediately to DIMAR under confidentiality and shall be for the exclusive use of the Colombian State.[915]

640. On the basis of DIMAR's Legal Opinion, the Ministry of Culture approved MAC's extension request through Resolution 3031 of 2015.[916] Article 2 of Resolution 3031, explicitly clarified that:

> [i]n the event that there are findings of sites likely to contain submerged cultural heritage within the restricted, excluded or limited areas as provided in *letter d* of paragraph 2 (d) of DIMAR legal opinion no. 22201500402 of 19 October 2015, no rights will be created on these findings nor will they be considered within the project process as a PPP.[917]

641. The image below illustrates the area where the Respondent authorized MAC to explore, and identifies the exclusion area corresponding to the 1982 Coordinates reported by GMC and contained in the 1982 Confidential Report:[918]

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912 Amended Statement of Claim, ¶ 290.

913 Request for extension of the exploration area submitted by Mac to the Ministry of Culture (MC-020171-ER), 15 October 2015 (**Exhibit R-201**).

914 DIMAR Concept No. 22201500402, 19 October 2015 (**Exhibit R-202**).

915 DIMAR Concept No. 22201500402, 19 October 2015 (**Exhibit R-202**), p. 3.

916 Resolution No. 3031, 20 October 2015 (**Exhibit R-203**), Article 2, p. 4.

917 Resolution No. 3031, 20 October 2015 (**Exhibit R-203**), Article 2, p. 4 (emphasis added).

918 Graphic comparing SSA's exploration area vs. MAC's exploration area.

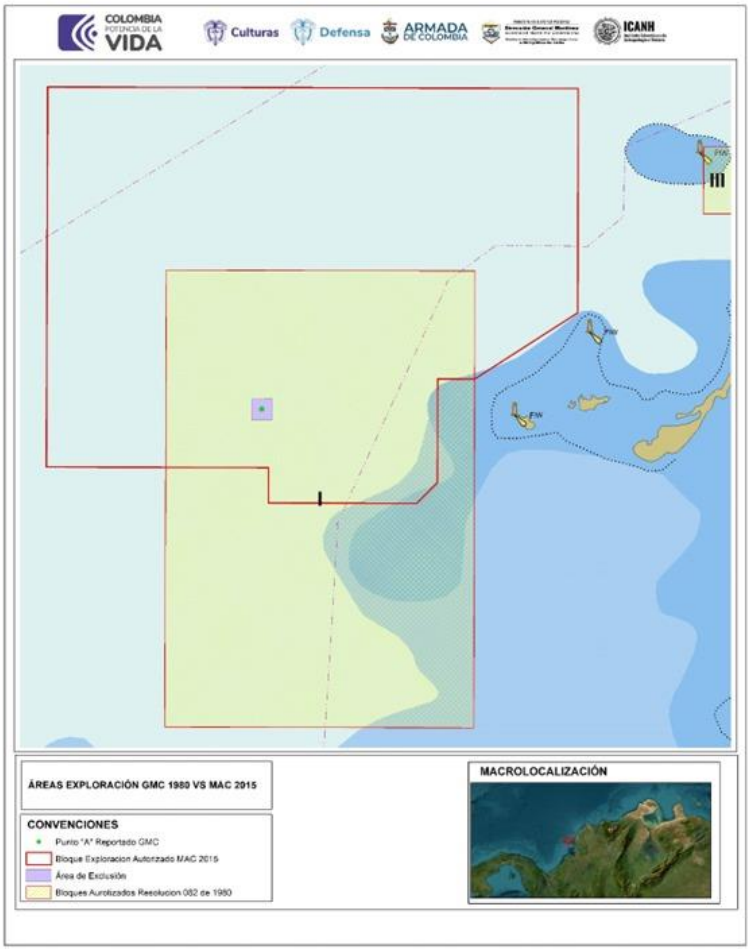

Image 36

642. Contrary to SSA's unsubstantiated claims,[919] Colombia did not share with MAC the coordinates of the 1982 Confidential Report. As can be seen in the image above, Colombia carved out an exclusion area around the coordinates reported by GMC in the 1982 Confidential Report.[920] The exploration area granted to MAC, including the exclusion area, evidences that Colombia, contrary to what the Claimant states, respected SSA's alleged rights recognized by Resolution 354.

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919 Amended Statement of Claim, ¶¶ 9, 239, 247, 290.

920 DIMAR Concept No. 22201500402, 19 October 2015 (**Exhibit R-202**).

643. SSA's assertion that "*MAC's rediscovery of the San José shipwreck appears to have been based on receiving the location reported by SSA's Predecessors*"[921] needs further clarification: there is no such "*rediscovery of the San José*." As Colombia has explained, there is no evidence in the record that demonstrates that SSA's Predecessors found the *Galeón*.

644. In fact, as shown above, the technical data proves that neither the 1982 Coordinates nor the Corrected 1982 Coordinates coincide with the area of the 2015 Discovery and thus would have been of no use in MAC's exploration efforts. Moreover, Colombia had already determined in 1994 that there was no shipwreck – or, in fact, any object or anomaly – at the reported 1982 Coordinates.[922] This was further confirmed by the 2022 Verification Campaign and WHOI's Survey.[923]

645. In addition, when SSA alleges that "*MAC has reported that it made its discovery after it ´returned to the search area determined by previous historical research*"[924] it mistakenly assumes that the "historical research" referred to by MAC was related to SSA's exploration. This assumption is baseless, since it is well known that the encounter between the Spanish and British forces which led to the sinking of the San José took place near the Barú Island and the Cartagena Bay – the area in which the remains of the *Galeón* were ultimately located.

646. Furthermore, SSA's assertion that "C*olombia was avoiding any sort of verification exercise in the Discovery Area because MAC's purported discovery of the San José shipwreck is within that Area*"[925] is belied by the simple fact that, as mentioned above, the *Galeón San José* was discovered nowhere near the 1982 Coordinates, nor the Corrected 1982 Coordinates. As demonstrated by the Respondent above, the so-called "Discovery Area" does not exist as a concept.

647. In line with the preceding misleading contention, SSA also alleges that "*leaked reports indicate that MAC found the shipwreck well within the debris field that would be associated with the San*

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921 Amended Statement of Claim, ¶ 290. *See also* ¶¶ 225, 246, 263, 321, 376.

922 Columbus Exploration, "Final report to the nation of Colombia on an oceanographic survey", 4 August 1994 (**Exhibit R-12**).

923 DIMAR, "Report Verification Campaign Complaint 1982", Glocca Morra - Sea Search Armada, 25 May 2022 (**Exhibit R-34**).

924 Amended Statement of Claim, ¶¶ 9, 321.

925 Amended Statement of Claim, ¶ 247.

José shipwreck, as reported by SSA's Predecessors".[926] This argument only evidences both SSA's and Mr. Morris' lack of technical knowledge and precision. As mentioned above, the current data on the debris field of the *Galeón San José* indicates that it is predominantly contained to the southwest-northwest area of the site, with a limited radius of 400 meters.[927]

648. Moreover, Mr. Morris' contention that the debris field of the *Galeón* could have been amplified by seasonal "*currents or other oceanographic factors*"[928] is also belied by the most fundamental principles of physical oceanography. As Captain Monroy explains in his Witness Statement, the area of the 1982 Coordinates, as well as the 2015 Discovery, is not subject to seasonal currents. Indeed, the currents are so weak that any object weighing more than 220 grams would sink in a straight trajectory from the surface to the bottom of the sea.[929] Captain Monroy also demonstrates that the other oceanographic factors referred to by Mr. Morris, such as the phenomenon known as upwelling, do not occur in that specific area. Thus, none of the alleged factors identified by Mr. Morris could have impacted the debris field of the *Galeón*. Therefore, it was simply not possible for the 2015 Discovery to be even remotely linked to the area of the 1982 Coordinates, nor the Corrected 1982 Coordinates.

649. In sum: Colombia acted transparently and respectful manner with regard to SSA's rights: Colombia carved out an exclusion area around the coordinates reported by SSA in the 1982 Confidential Report and clarified that MAC would not be entitled to any rights over the findings.

4. Colombia never entered into a contract with MAC, and, in any event, the *Galeón San José* was always susceptible of being considered submerged cultural heritage

650. The Claimant contends that "[a]*s result of 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.'*".[930]

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926 Amended Statement of Claim, ¶ 290.

927 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 221, 229, 230.

928 Expert Report of J. Morris (**CER-1 -[Morris]**), ¶ 61.

929 Witness Statement of Capitan C. Monroy (**RWS-2 [Monroy**]), ¶ 51.

930 Amended Statement of Claim, ¶ 269.

651. SSA also alleges that "*as late as 26 May 2015, Colombia entered into a contract with MAC where ´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*.´"[931] The Claimant intends to demonstrate that "[i]*t was* […] *reasonable to expect that a significant portion of the San José shipwreck consisted of treasure*".[932]

652. The Respondent corrects two inaccuracies in the prior allegations.

653. ***First***, it is false that Colombia entered into a contract with MAC on 26 May 2015. SSA intentionally conflates two different stages of the PPP Project: (***i***) the approval of the pre-feasibility of the project and the authorization to conduct explorations on the one hand, and (***ii***) the award of the contract as the final step of the selection process MC-APP-001 of 2018 on the other.

654. The approval of the pre-feasibility of the project took place on 26 May 2015. As mentioned before, the Ministry of Culture approved this through Resolution 1456,[933] which is not a contract, but an administrative act.[934] In fact, the contract was never awarded to MAC,[935] as will be explained.

655. The feasibility phase of the PPP Project was also analysed, and as part of this phase, the selection process identified as MC-APP-001 of 2018 was started.[936] Afterward, the contracting process was suspended and, finally, with the issuance of Resolution 085, declared void.[937]

656. As explained below, on 23 January 2020, by virtue of Resolution 085, the Ministry of Culture declared the *Galeón San José* as an Asset of Cultural Interest at the national level.[938] This declaration led to the termination of the selection process. Consequently, on 4 March 2022,

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931 Amended Statement of Claim, ¶ 378. *See also* ¶¶ 230, 330.

932 Amended Statement of Claim, ¶ 330.

933 Resolution No. 1456 of 2015, 26 May 2015 (**Exhibit R-199**). Article 1 (Resolution 1456 approved the pre-feasibility and authorized MAC to explore in Colombian maritime waters.)

934 Expert Report of A. Linares (**RER-3 [Linares**]), ¶ 24.

935 Resolution No. 0113, 4 March 2022 (**Exhibit R-229**).This Resolution declared void the selection process MC APP 001 of 2018.

936 SECOP Detail of the Process Number: MC APP 001 2018 **(Exhibit R-213)**.

937 Resolution No. 0113 of 2022, 4 March 2022 **(Exhibit R-229**). This Resolution declared void the selection process MC APP 001 of 2018.

938 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**).

through Resolution 0113, the Ministry of Culture declared the selection process MC APP 001 of 2018 void.[939] Consequently, no contract was entered into between Colombia and MAC.

657. ***Second***, SSA cannot allege that "*it was* […] *reasonable to expect that a significant portion of the San José shipwreck consisted of treasure*"[940] because in the negotiations between Colombia and MAC, "*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*.'"[941]

658. As the Respondent has previously demonstrated, the Claimant holds no rights whatsoever over the *Galeón San José*. In that regard, the negotiations conducted between Colombia and MAC, as well as the implications arising from the issuance of Resolution 085 – which expressly concerns the *Galeón San José* discovered by MAC – should, therefore, be deemed immaterial to the Claimant.

659. [redacted]

660. [redacted]

P. COLOMBIA'S 2015 EXPEDITION AND ACTUAL FINDING OF THE *SAN JOSÉ* CLEARLY SHOW THAT SSA'S RIGHTS ARE IN NO WAY RELATED TO THE *GALEÓN*

661. As mentioned above, in November 2015, the Colombian State, together with MAC and WHOI, conducted two underwater explorations between the months of June and November.[943] During

939 Resolution No. 0113, 4 March 2022 (**Exhibit R-229**). This Resolution declared void the selection process MC APP 001 of 2018.

940 Amended Statement of Claim, ¶ 330.

941 Amended Statement of Claim, ¶ 378. *See also* ¶¶ 230, 330.

942 [redacted]

943 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 18-29.

the second expedition, the Colombian State, together with MAC and WHOI, discovered the *Galeón San José*.[944] The discovery was made nowhere near the coordinates reported in the 1982 Confidential Report, nor in the newly claimed "corrected" coordinates stated by SSA in its Amended Statement of Claim.[945]

662. The below sections describe the campaigns conducted during 2015 that concluded with the discovery of the *Galeón San José* on 27 November 2015 (**1**); the clear differences between the area where the *Galeón* was discovered in 2015 and the areas reported by SSA in 1982 – now "corrected" by SSA in its Amended Statement of Claim (**2**); the evidence on the scattering patrons of the *Galeón San José* that show that SSA's Alleged Predecessors could not have found any piece of the shipwreck (**3**); the right of the Colombian State to search for and find the *Galeón San José*, since the Attachment Order in no way related to the shipwreck (**4**); and SSA's tactics to intimidate and threaten third parties that were working with the Colombian State in the protection of its submerged cultural heritage (**5**).

1. In November 2015, Colombia found the *Galeón San José*.

663. [redacted]

664. On 26 May 2015, through Resolution No. 1456 of 2015, the Ministry of Culture authorized MAC to conduct underwater exploration in specific areas of Colombian territorial waters in the search for a submerged cultural shipwreck but conditioned the authorization of exploration efforts to be conducted jointly with DIMAR and the Colombian Navy.[947]

665. MAC's efforts to conduct underwater exploration began with the engagement of WHOI to conduct survey studies on the seabed of specific areas within Colombian waters.[948]

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944 Statement by President Santos on the discovery of the *San José Galeón*, 5 December 2015 (**Exhibit C-37**).

945 Amended Statement of Claim, ¶ 102.

[redacted]

947 Ministry of Culture Resolution 1456 of 2015, 26 May 2015 (**Exhibit R-199**).

948 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 8.

666. Between the months of April and May 2015, MAC began the preparatory works and the installation of WHOI's equipment into the Malpelo vessel (owned by DIMAR) for the first expedition that was set to take place in June of that same year (the "**First Expedition**").[949]

667. The First Expedition began on 20 June 2015 and was conducted over specific, previously defined areas, using equipment for advanced high-resolution seafloor survey.[950] However, no findings were reported after an 8-day search.[951]

668. At the beginning of November 2015, a second expedition was set to take place at the end of the month (the "**Second Expedition**"). The Second Expedition began on 22 November 2015 and was also set to cover specific pre-determined areas within Colombian waters, using advanced technology for high-resolution seabed surveys.[952]

669. On 27 November 2015, on the fifth day of the Second Expedition, after reviewing the data gathered the day before, WHOI personnel informed the DIMAR officials on board the vessel of the possible discovery of a shipwreck that required further verification.[953] Days later, personnel from ICANH and MAC confirmed that the finding made on 27 November 2015 was the *Galeón San José* – given the engravings and shapes on the cannons, among other elements (the "**2015 Discovery**").[954]

670. On 5 December 2015, the President of Colombia publicly announced that an archaeological site corresponding to the *Galeón San José* had been found on 27 November of that same year.[955] The international media covered this important discovery. BBC News issued a press release that included information on the finding of the shipwreck and the dispute with SSA.[956] The Spanish newspaper *El País* published, "[a]t *dawn on Friday, 27 November, the sonar of the Colombian Navy ship Malpelo showed what experts in underwater archaeology call an anomaly. The disturbance on the Caribbean seabed, in an area never explored before, was the Galeón San*

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949 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 10.

950 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 18.

951 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 23.

952 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 24-25.

953 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 28.

954 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 30.

955 Statement by President Santos on the discovery of the *San José Galeón*, 5 December 2015 (**Exhibit C-37**).

956 BBC News, "*Colombia says treasure-laden San Jose Galeón found",* 5 December 2015 (**Exhibit C-17**).

José".[957] Further, on 4 December 2015, *Noticias Caracol*, an important news outlet in Colombia, reported the discovery of the *Galeón* on 27 November and mentioned that Colombia's President had reported the finding *"in a place never before mentioned in previous studies"*.[958]

671. The discovery of the *Galeón San José* on 27 November 2015, publicly announced on 5 December of the same year, marked a pivotal moment in Colombia's culture and history. The widespread media coverage, both nationally and internationally, underscores the significance of the find and highlights what archaeological and historical experts have identified as the intrinsic cultural value of such a finding. [959]

2. Contrary to the Claimant's allegations, MAC's discovery is not located at the coordinates reported by SSA's Predecessors in the 1982 Confidential Report or the Corrected Coordinates.

672. In the Amended Statement of Claim, SSA argues that Colombia "*authorized MAC to search for the San José shipwreck in the Discovery Area identified by SSA.*"[960] Then SSA claims that *"Colombia was avoiding any sort of verification exercise in the Discovery Area because MAC's purported discovery of the San José shipwreck is within that Area."*[961]

673. SSA's claims hold no water. In fact, SSA has not submitted a single piece of evidence in support of its allegations that the 2015 Discovery was made within what SSA has called the "Discovery Area", and its reliance on Mr. Morris' report does not advance its claim.

674. Indeed SSA bases its arguments on Mr. Morris' Report, which states that the presence of features – evidenced in the videos allegedly recorded by SSA's Alleged Predecessors and in the 1982 Confidential Report, such as what appeared to be *"piles of a ship's timbers"* and *"a significant magnetic signature suggesting large ferrous materials such as cannons, shots, and/or anchors"* – *"indicates that SSA had found a portion of a shipwreck from the time period they were looking*

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957 El Pais, "*El hallazgo del galeón San José se convierte en secreto de Estado* [The discovery of the *Galeón San José* becomes a State secret]", 9 December 2015 (**Exhibit R-205**).

958 Noticias Caracol, "*Hallazgo del Galeón San José, un tesoro rodeado de pleitos* [Discovery of the *Galeón San José*, a treasure surrounded by lawsuits]", 4 December 2015 (**Exhibit R-204**).

959 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), Section XII; Expert Report of Dr. K. Lane (**RER-2 [Lane]**), Section XIV.

960 Amended Statement of Claim, ¶ 239.

961 Amended Statement of Claim, ¶ 247.

for."[962] Yet, Mr. Morris provides no evidence – assuming GMC had actually found part of a shipwreck (*quod non*) – that very portion would belong to the *San José*.

675. As shown above, and contrary to the Claimant's contentions, the 2015 Discovery was not made in the 1982 Coordinates, nor in the Corrected 1982 Coordinates.[963]

676. ***First*,** as demonstrated above, the 2015 Discovery is not located within the 1982 Coordinates. In fact, there is no shipwreck, nor any object of interest located in the 1982 Coordinates, as demonstrated by the 1994 Columbus Report,[964] the 2022 Verification Campaign[965] and WHOI's Survey.[966]

677. ***Second***, the 2015 Discovery is not located within the newly claimed Corrected 1982 Coordinates. In fact, WHOI's Survey objectively and undeniably demonstrated that the area explored by SSA's Alleged Predecessors between 1981 and 1983 is actually located within the Corrected 1982 Coordinates. Thus, since the 1982 Coordinates are located closer to the mainland and at a shallower depth, it turns out SSA's Alleged Predecessors were even further away from the site of the 2015 Discovery.

678. In light of the above, it goes without saying that MAC's discovery is nowhere near the coordinates reported by SSA's Alleged Predecessors in the 1982 Confidential Report or the Corrected Coordinates.

3. The Claimant's attempt to assert a right on the *Galéon* by relying on the alleged extension of the debris field must fail

679. In the Amended Statement of Claim, the Claimant relies on Mr. Morris' report to argue that the Claimant's Alleged Predecessors had reported the *Galeón*'s debris field over an area, and "*not a pinpoint*."[967] According to the Claimant, the debris field of the *Galeón San José* covers "*a considerable area of the ocean floor*", allegedly amplified by "*the manner in which the San*

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962 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 52.

963 Amended Statement of Claim, ¶ 102.

964 Columbus Report, 1994 (**Exhibit R-12**).

965 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022 (**Exhibit R-34**).

966 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), p. 12.

967 Amended Statement of Claim, ¶ 316.

José sank", as well as "*ocean currents, significant water depth, and steeply sloped ocean floor*."[968]

680. Particularly, Mr. Morris states that, since the *Galeón San José* allegedly sank in a "*steeply sloped area with recorded water depths between 200' and 4500*'", the sinking of the *Galeón* "*would be subjected to drift from currents for a longer period*", as "*ocean currents and other oceanographic factors would increase the dispersion of the pieces of the shipwreck*."[969]

681. According to Mr. Morris, "*ocean currents and other oceanographic factors*" that "*scatter the remains of the vessel further*"[970] – which Mr. Morris later characterizes as "seasonal currents" – are "*especially true in an area along a steep slope on the edge of the continental shelf were upwelling is known to occur*."[971]

682. As a result of these aggregate alleged circumstances, according to Mr. Morris, when looking for the *Galeón San José*, "*the team would be looking for a large debris field containing articulated and disarticulated sections of a wooden ship, magnetic anomalies, and diagnostic artifacts over a large area*".[972]

683. Both the Claimant's and Mr. Morris' contentions are incorrect and denote a serious lack of knowledge. Mr. Morris' contentions, in particular, are fundamentally flawed. This is to be expected, as he does not possess the necessary expertise to conduct serious analyses on the issues in question.

684. As the expert opinions of Mr. Del Cairo, Mr. Santana and Captain Monroy show, Mr. Morris' conclusions lack technical precision. This is particularly evident in Mr. Morris' approach to the analysis of the alleged scattering pattern of the *Galeón* and in his description of fundamental oceanographic concepts.

685. In his Report, Mr. Del Cairo, one of the Respondent's archaeology experts explains that, despite having "chaotic" debris fields, shipwrecks caused by explosions do not tend to be

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968 Amended Statement of Claim, ¶ 316.

969 Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 23.

970 Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 61.

971 Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 60 (emphasis added).

972 Expert Report of J.D. Morris (**Exhibit CER-1. [Morris]**), ¶ 23.

scattered in vast areas extending for hundreds of kilometers, like Mr. Morris and SSA suggest.[973]

686. Mr. Del Cairo determined the scattering pattern of the *Galeón San José*'s shipwreck through a statistical analysis of its debris field, by employing the data gathered in WHOI's Survey. At the outset, Mr. Del Cairo identified a series of potential archaeological anomalies, as well as their density and direction, by reviewing sonar images provided by WHOI and other available images of the site.[974] Mr. Del Cairo then graphically represented each anomaly in dispersion maps, classified by their attributes:[975]

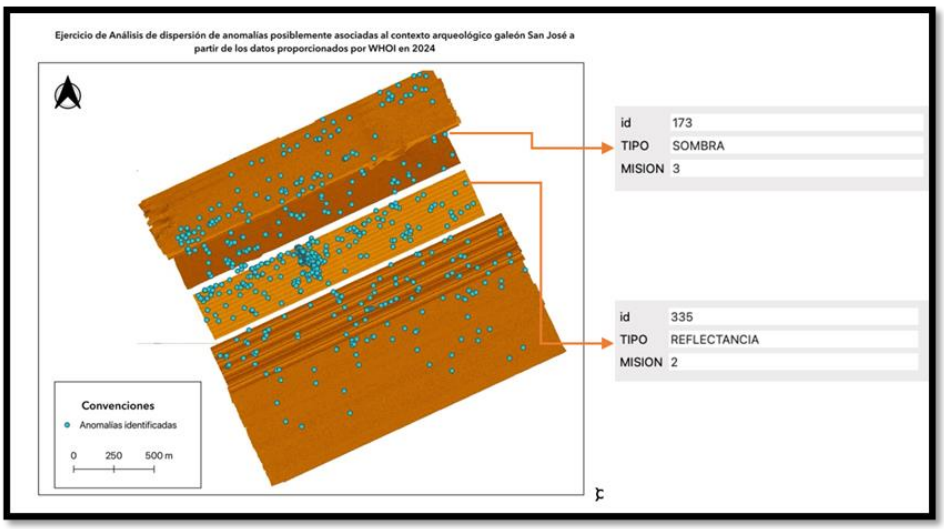

Image 37: Identification of anomalies through sonar images provided by WHOI, assigning to each the attribute that distinguishes them.

687. To statistically demonstrate that the concentration of the elements found in the site explored by Colombia in 2015 could not be attributable to a natural phenomenon, Mr. Del Cairo employed Kernel's method for density analyses to graphically represent the area with higher density of anomalies, obtaining a concentrated cluster.[976] Mr. Del Cairo then analyzed the

973 *See* Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 95-97. *See also* Witness Statement of J. Santana (**RWS-2 [Santana]**), ¶¶ 1.52-1.61; Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 38-56.

974 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 220-222.

975 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶ 223.

976 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 229-230.

pattern obtained by the location of each anomaly using the "*closest neighbor*" method.[977] This exercise confirmed that the probability that the observed clustering could be a random event is negligible.[978]

688. In light of these results, Mr. Del Cairo concluded that the debris field of the *Galeón* is contained and clearly aggregated[979] falling within a radius of 400 meters.[980]

689. Also, Mr. Del Cairo found the presence of completely preserved yet fragile objects like Chinese porcelain and ceramics to constitute further evidence that what caused the *Galeón* to sink was not an explosion, that being an assumption on which Mr. Morris relies to estimate the alleged dimensions of the debris field.[981] Based on these observations, Mr. Del Cairo concludes that the scattering pattern of the *Galeón San José* rules out any possibility that the coordinates reported by GMC Inc. in 1982, and the site discovered in 2015, are related in any way.[982]

690. In turn, Mr. Santana explains that Mr. Morris' views regarding the geomorphology of the ocean floor are simply incorrect. [983] In particular, Mr. Santana, an expert in the geomorphology of the ocean floor in Colombian waters, states that , contrary to Mr. Morris' view, there is no such "*relatively steep slope*" between the 1982 Coordinates and the deeper areas, as erroneously stated by Mr. Morris. Rather, according to Mr. Santana, the seabed relief contains a gradual slope that is far from steep.[984] This is shown in the figure below, which presents a transversal cut of the morphological characteristics of the area corresponding to the 1982 Coordinates:[985]

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977 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶ 231.

978 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶ 231.

979 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶ 233.

980 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 229-230, 234.

981 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 235-238.

982 Expert Report of C. del Cairo (RER-1 [del Cairo]), ¶¶ 238-239.

983 Witness Statement of J. Santana (**RWS-3 [Santana]**).

984 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.57.

985 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶¶ 1.57-1.58, Figure 22.

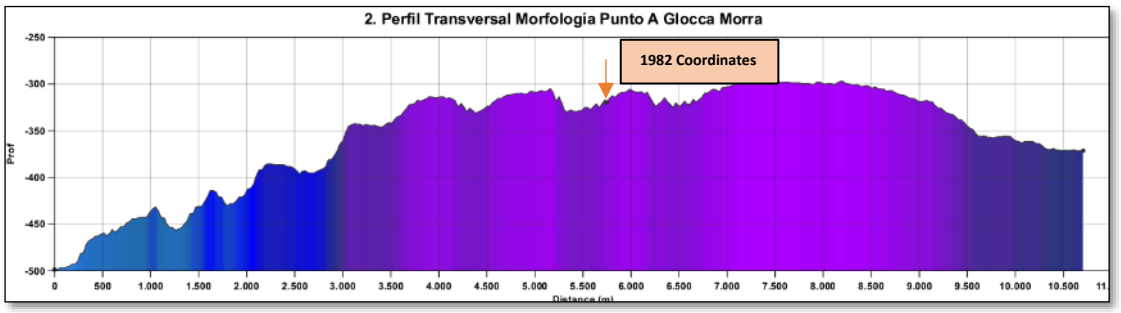

Image 38: Transversal Profile - Morphological characteristics of the point area reported by GMC Inc. [986]

691. Accordingly, Mr. Morris' theory that, after the sinking of the *Galeón San José*, its remains would have been dispersed over a wide area due to the slope and the existence of variations in depths ranging from 60 to 1,370 meters deep, is simply impossible.[987] Additionally, as Mr. Santana explains, the irregular surface of the area surrounding the 1982 Coordinates presents obstacles that make it difficult for objects to move significantly – particularly, if the objects in question are heavy items such as cannons or irregular objects, such as wooden planks.[988]

692. Finally, Captain Monroy explains why Mr. Morris' contention on the likely impact of currents in the spread of the debris field is flawed and telling as to his lack of knowledge of some of the basic principles of physical oceanography.[989] Mr. Del Cairo confirmed Mr. Monroy's conclusions, indicating that the data confirms that the debris field of the *Galeón San José* is not a wide area formed by the compounded effect of an explosion and the existence of allegedly strong currents.[990]

693. Indeed, contrary to Mr. Morris' unfounded statements, Captain Monroy's oceanographic analysis shows that there are no seasonal currents in GMC Inc.'s reported area nor in the 2015 Discovery area. Contrary to Mr. Morris' opinion, the existing currents around these areas have typical values of 0.5 meters per second at the surface and up to an approximate depth of 50m, and 0.2 to less than 0.1 meters per second between a depth of 50m and the ocean floor.[991] To have a better sense of what these values entail, Captain Monroy calculated

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986 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶¶ 1.57-1.58, Figure 22.

987 See Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶ 1.59.

988 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶¶ 1.59-1.62.

989 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 50.

990 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 104, 238-239.

991 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 51.

the minimum weight that an object must have to fall vertically towards the seabed in these conditions.[992] The result obtained by Captain Monroy is that any object heavier than 220 grams will have a vertical drop from the surface to the bottom of the sea, both in the 2015 Discovery area and at the point reported by GMC Inc. in 1982, with no horizontal drifts through the water-wall.[993]

694. Moreover, Captain Monroy also explains that Mr. Morris's errs when asserting that the presence of seasonal currents in the area surrounding the 1982 Coordinates and the 2015 Discovery, is because "*the entire area off the Rosario Islands is under the influence of an intraseasonal effect (a time scale of less than three months) on the seabed and not a seasonal one*."[994] Unlike Mr. Morris' views on this matter, Captain Monroy's opinion is based upon decades-long studies and observations of the data on currents off the coast of Cartagena and the Rosario Islands.[995] Captain Monroy's expert view is further grounded on the geographic representation of a year's worth of current data at the depths of 643 meters, which can be found in the annex to Captain Monroy's Witness Statement.[996]

695. Furthermore, Captain Monroy also corrects Mr. Morris' proposition that the debris pattern of the *Galeón San José* would also be impacted by the presence of upwelling systems, which are "*known to occur*" within this area.[997]

696. As a preliminary matter, upwelling is a coastal phenomenon where seawaters at deeper depths are being drawn to the surface (i.e., upwell) to replace surface waters that are being pushed offshore by parallel coastline winds ("alongshore wind").[998] Captain Monroy provides a visual illustration of this phenomenon:

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992 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 51.

993 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 52.

994 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 47.

995 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 42.

996 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 42-43, Image 3.

997 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 60.

998 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 53-54.

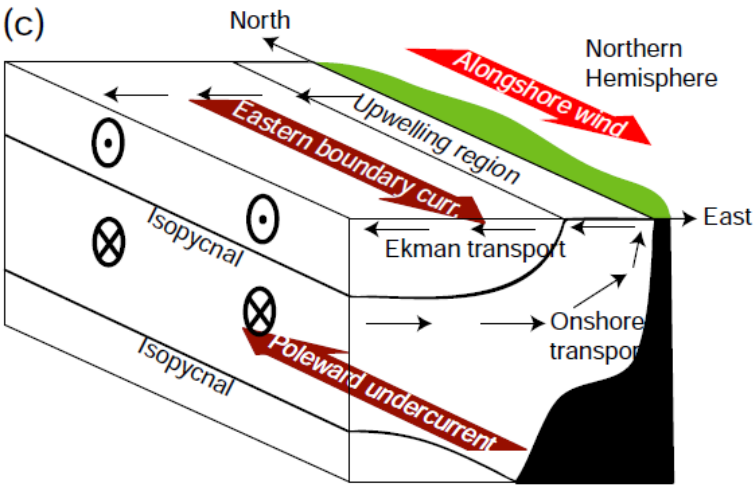

Image 39: Representation of the upwelling system in coastal areas of the northern hemisphere. [999]

697. The upwelling phenomenon is a phenomenon of the ocean surface, not of the seabed.[1000] Thus, as Captain Monroy concludes, the existence of upwelling "*has no impact on objects on the seabed and much less at such a considerable distance from the coast as the site where the Galeón San José was found in 2015 and even the point reported by GMC in 1982*".[1001]

698. In any case, the areas concerning the 1982 Coordinates and the 2015 Discovery are not prone to upwelling, which does not occur at these locations.[1002] Mr. Morris' patently erroneous remark on the alleged effects of "upwelling" in the area speaks volumes of his lack of knowledge of the dynamics of the Colombian Caribbean coast.

699. Importantly, as noted by Captain Monroy, the relevant area, which is near the city of Cartagena, is affected by the Panama-Colombia countercurrent, which moves against the wind in a south-north direction from Panama.[1003] This simply does not create the conditions for upwelling to occur in that area.[1004]

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999 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 53-54; Image 4.

1000 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 55.

1001 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 55.

1002 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 54-58.

1003 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶¶ 54-57, Image 5.

1004 Witness Statement of Captain J. Monroy (**RWS-2 [Monroy]**), ¶ 55-58.

700. In light of the above, it is clear that SSA's suggestion that the debris field generated by the explosion could have a radius of up to 5 nautical miles, given the alleged combination of the "explosion" of the *Galeón* and the "*ocean currents and other oceanographic factors*" in the area is meritless.[1005] There is simply no evidence, whether historical, archaeological, or physical, to support the view that the *Galeón San José* is linked to the 1982 Coordinates that were reported by SSA's Alleged Predecessors.

4. Since the Attachment Order is in no way related to the *Galeón San José*, when conducting the survey, Colombia did not infringe such an order

701. Introducing yet another falsity to cast doubt on Colombia's actions, SSA claims that the Attachment Order "*prohibits Colombia from taking any measures to recover goods from the shipwreck area reported by SSA's Predecessors"*[1006] and that Colombia, notwithstanding the Attachment Order, conducted the 2015 survey to verify the coordinates as indicated in the 2007 SCJ Decision.[1007] As stated above, the Attachment Order does not enjoin Colombia from accessing any area whatsoever, nor does it concern the recovery of the objects from the *Galeón San José* in any way.

702. In fact, the 10th Civil Judge of Barranquilla expressly stated that "*it is not possible to consider that* […] *operations necessary for the recovery of those assets* [*i.e.* any objects located at the coordinates reported by SSA in 1982] *from the seabed are an integral part of a simple attachment procedure.*".[1008] It is thus plain that Colombia did not infringe the Attachment Order in any manner when it conducted the survey. Still, it was on this untrue assertion that SSA threatened WHOI, as shown in this Memorial.

1005 Expert Report of J. Morris (**CER-1 [Morris]**), ¶ 23.

1006 Amended Statement of Claim, ¶ 7.

1007 Amended Statement of Claim, ¶ 236.

1008 10th Civil Judge of the Circuit of Barranquilla, Judgement of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 4.

5. Faithful to its bullying tactics, SSA unduly threatened third parties, including WHOI, with litigation should they participate in any exploration and salvage operations

703. In the Amended Statement of Claim, SSA avers that it approached Woods Hole Oceanographic Institution ("**WHOI**")")[1009] as a last resort measure, in light of *"Colombia's outright refusal to even engage in communications"* in relation to the discovery of the *San José* in 2015.[1010]

704. However, and in line with SSA's characteristic behavior over the past 30 years, SSA's letters were bullying and harassment tactics to dissuade any party willing to collaborate with Colombia's efforts to locate the *San José* and to sow confusion among third parties – such as WHOI – over the rights recognized to SSA under the 2007 SCJ Decision.[1011]

705. In fact, as stated by SSA in the Amended Statement of Claim, on 29 February 2016, SSA's legal counsel approached WHOI and threatened litigation against them *"if, despite 'the precautionary measure that guarantees this judgment, Woods Hole Oceanographic Institute insists to sign a contract for shipwreck rescue [with the Government of Colombia]'."*[1012]

706. The *letter* is both outrageous and uncalled for, filled with blatant lies regarding SSA's non-existent property rights over the *Galeón San José*.

707. In this letter, SSA misrepresented the facts by: (***i***) changing the facts on the 1982 expeditions and what was ultimately reported to Colombian authorities by GMC;[1013](***ii***) alleging that a salvage operation was being prepared for the *San José*; and (***iii***) presenting the 2007 SCJ Decision as the instrument that purportedly confirmed SSA's rights over the *San José*, while the SCJ expressly excluded the *Galeón San José* from the scope of its decision.[1014] Then, SSA represented to WHOI that the discovery of the *Galeón San José* by the Colombian Government was just another

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1009 WHOI is an independent non-profit organization that was engaged by MAC to provide seabed survey services in the Colombian Caribbean.

1010 Amended Statement of Claim, ¶ 244.

1011 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), p. 233.

1012 Letter from SSA to WHOI, 29 February 2016 (**Exhibit C-211**).

1013 Letter from SSA to WHOI, 29 February 2016 (**Exhibit C-211**).

1014 Letter from SSA to WHOI, 29 February 2016 (**Exhibit C-211**).

attempt to deprive them of their alleged property rights and afterward threatened WHOI with legal actions:

> Therefore, any "discovery" of the San Jose as announced by the GOC in November 2015 is specious and merely a further attempt by the GOC to obfuscate the issues and keep SSA from its property. While your involvement with the GOC concerning its alleged "discovery" may have merely been in a non-salvage role and without full knowledge of the facts concerning SSA's rights, please be aware that any attempts to interfere with SSA's property rights or interfere with SSA's own salvage operations will be aggressively fought by all legal means at my client's disposal.[1015]

708. As if it was not enough to threaten a third-party non-profit oceanographic research organization, on 20 January 2017, SSA sent another harassing letter to WHOI.[1016] In its 20 January letter, SSA attempted to rely on provisions under Colombian law to intimidate WHOI and referred to the 1994 Attachment Order, alleging that it covered all objects found within the archaeological context of the *San José*.[1017]

709. In this 20 January 2017 letter, SSA's representative warned WHOI that the assets found within the archaeological context of the *San José*, if salvaged by the Colombian State along with WHOI, would be deemed as smuggled objects under Colombian law, as the property of SSA over such goods had already been determined by the Colombian Supreme Court in 2007.[1018]

710. SSA also went on to, once again, present threats of legal action against WHOI, should WHOI decide to continue with any salvage efforts over the *San José*:

> If well-known all these facts, including the precautionary measure that guarantees this judgment, Woods Hole Oceanographic Institute insist to sign a contract for shipwreek [sic] rescue, will be responsible for the consequences and damages from any order that will result from their conduct.
>
> In addition, it should compensate SSA for being in possession of and using for its benefit, information that was reserved to the Colombian government. And also of legal information that the Colombian government supplied it

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1015 Letter from SSA to WHOI, 29 February 2016 (**Exhibit C-211**) (emphasis added).

1016 Letter from SSA to WHOI, 20 January 2017 (**Exhibit C-217**).

1017 Letter from SSA to WHOI, 20 January 2017 (**Exhibit C-217**).

1018 Letter from SSA to WHOI, 20 January 2017 (**Exhibit C-217**).

> with respect to the rights of SSA on the San Jose *Galeón*, and the scope of the precautionary measure to which it is submitted.[1019]

711. These were but just some of the several threats carried out by SSA against any third party that participated in anything related to the *San José*.

712. Indeed, on June 1988, through its legal counsel at the time, SSA sent letters to third parties who were in discussions with the Colombian Government for the search and – eventual – salvage of the *Galeón San José*, "warning" them that they were interfering with the rights to which SSA Cayman was allegedly entitled pursuant to Colombian law.[1020]

713. In a letter on 23 June 1988, SSA Cayman's representative attempted to intimidate the Swedish Investment Bank by stating that, knowing that the Government of Colombia may have invited the company to enter into a salvage contract for the *Galeón San José*, SSA Cayman took strong exception to what it considered to be an *"attempt to interfere with the rights to which it is entitled under the Colombian Civil Code"*.[1021] Then, as if such a plain lie was not enough, SSA Cayman's representative went on to threaten the Swedish Investment Bank with legal action:

> It intends to seek full enforcement of its rights in whatever courts are available to it, including Swedish courts if necessary. A contract between your company and the Colombian Government for the salvage of the cargo to which Sea Search Armada has ownership claims may be a serious encroachment of Sea Search Armada's rights. Furthermore, Sea Search Armada has not authorized the Colombian Government to reach agreements on its behalf for the salvage of such cargo. Sea Search Armada wishes to make it clear that it intends to hold any entity which salvages or receives any part of its property strictly accountable for the damages that it suffers as a result of such actions. [1022]

1019 Letter from SSA to WHOI, 20 January 2017 (**Exhibit C-217**).

1020 Letter from Baker & McKenzie in representation of SSA Cayman to the Swedish Investment Bank, 23 June 1988 (**Exhibit R-125**). *See also* Letter from Baker & McKenzie in representation of SSA Cayman to Micoperi S.p.A., 23 June 1988 (**Exhibit R-126**).

1021 Letter from Baker & McKenzie in representation of SSA Cayman to the Swedish Investment Bank, 23 June 1988 (**Exhibit R-125**).

1022 Letter from Baker & McKenzie in representation of SSA Cayman to the Swedish Investment Bank, 23 June 1988 (**Exhibit R-125**) (emphasis added).

714. SSA Cayman used the exact same language in a letter sent to Micoperi S.p.A.,[1023] another company that was in discussions with the Colombian Government for the search and – eventual – salvage of the *Galeón San José*.

715. Additionally, between 1989 and 1990, SSA sent threatening letters to Mr. Richard Cassin, Director of the OSRI.[1024] In particular, on 23 May 1989, Mr. Jack Harbeston, SSA's president, sent a letter to Richard Cassin, claiming an alleged property right of 50% over the *Galeón San José* on behalf of SSA and threatening Mr. Cassin with litigation strategies that would impede the execution of any project regarding the supposed salvage of the *San José* – even threatening the economic security of those who chose to engage with Colombia for these purposes.[1025] In the words of Mr. Harbeston:

> Our present and future litigation will affect the timing of the project, and, with billions of dollars at stake, the economic security of those who choose to participate with Colombia in violation of our rights. [1026]

716. On 8 November 1990, Mr. Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA Cayman, sent another letter to the Ocean Science Research Institute, warning about the alleged expropriation being conducted by the Colombian State against SSA's alleged rights over the *Galeón* and even requesting evidence that they held no relationship with Colombia.[1027] SSA's counsel then issued a final warning to the Ocean Science Research Institute if they did have a relationship with the Government of Colombia:

> Finally, if such a relationship exists, you may want to know that SSA intends to protect its interests in Colombia. [1028]

1023 Letter from Baker & McKenzie in representation of SSA Cayman to Micoperi S.p.A., 23 June 1988 (**Exhibit R-126**).

1024 Letter from Jack Harbestonto the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**). *See also* Letter from Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA, 8 November 1990 (**Exhibit R-143**).

1025 Letter from Jack Harbeston to the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**).

1026 Letter from Jack Harbeston to the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**), pp. 4-5 (emphasis added).

1027 Letter from Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA, 8 November 1990 (**Exhibit R-143**), p. 2.

1028 Letter from Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA, 8 November 1990 (**Exhibit R-143**), p. 2 (emphasis added).

717. These letters show that SSA's bullying tactics were not only aimed at the Colombian State but also at any other party that got involved with the *San José*, which would get harassed into withdrawing from this matter to avoid legal actions. It defeats logic for SSA to attempt to intimidate anyone who came close to being involved with the *Galeón San José*, while knowingly lacking any rights over it.

718. In addition to threatening third parties approached by Colombia to conduct surveys or wishing to contract with the State, SSA and its Alleged Predecessors incessantly lobbied with U.S. politicians and did not shy away from flaunting in multiples letters their alleged connections to figures in the United States' Legislative and Executive Branches to pressure Colombia and third parties into acceding to their demands.

719. This was the case of the letters sent by SSA to Mr. Richard Cassin, Director of OSRI.[1029] In a letter dated 23 May 1989, SSA claimed to have the alleged support of the U.S. Department of State, prior to threatening Mr. Cassin with severe economic consequences if the ORI chose to work with the Colombian State.[1030]

720. Not content with the above, in a letter dated 8 November 1990, SSA's representative cautioned Mr. Richard Cassin of SSA's relationship with representatives of the U.S. Senate and Congress, referring to some letters sent by U.S. senators and congressmen to the President of Colombia, allegedly intervening on behalf of SSA's alleged rights over the *San José*.[1031]

721. Not only did SSA attempt to scare off third parties working with the Colombian State by referring to its alleged connections to the U.S. Senate, Congress, and even the Department of State, SSA also instrumentalized U.S. Senate and Congress' high authorities to push the false narrative of its alleged rights over the *San José* – even threatening Colombia with adverse effects if SSA was not recognized as having any rights over the *San José*. It is worth noting that five of these senators

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1029 Letter from Jack Harbeston to the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**). *See also* Letter from SSA's representative to the Ocean Science Research Institute, 8 November 1990 (**Exhibit R-153**).

1030 Letter from Jack Harbeston to the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**).

1031 Letter from SSA's representative to the Ocean Science Research Institute, 8 November 1990 (**Exhibit R-153**).

and congressmen had economic interests in SSA Cayman and were the ones orchestrating this extorsive scheme against the Colombian State.[1032]

722. Indeed, in a letter dated 5 June 1989, U.S. Senator James McClure addressed the then President of Colombia, Mr. Virgilio Barco, referring to *"disturbing reports that the Government of Colombia"* had signed *"secret Memoranda of Agreement with Swedish interests"* distributing among them "*the properties which U.S. investors have located*".[1033] Then, as if addressing the President of a sovereign Nation to spread falsehoods was not enough, Senator McClure warned Colombia that if no successful arrangement was reached in favor of SSA Cayman, Colombia's relations with the U.S. could be adversely affected.[1034]

723. In a letter dated 6 June 1989, U.S. Senator Peter Flory addressed President Virgilio Barco, manifesting his alleged concern over the negotiations taking place between Colombia and Sweden in relation to the *San José*, which, in his view, discriminated against SSA Cayman.[1035]

724. Very similar language was included in Senator Guy Vander Jagt's letter to the President of Colombia, who went so far as to instruct the Colombian State to *"refrain from involving a third party or from taking any actions which tend to usurp the function of* [Colombia's] *own judicial system."*[1036] Senator Vander Jagt also warned Colombia of a serious "*erosion of both States' trading relationship*".[1037]

725. Senator Vander Jagt even visited the then Ambassador for Colombia in Washington D.C., Mr. Carlos Lleras, to threaten Colombia into settling the situation with SSA before "*the genie came out of the lamp*" and Colombia's preference to the NAFTA was removed.[1038]

726. In fact, in a manner reminiscent of gunboat "diplomacy," the Claimant and Alleged Predecessors went as far as to unduly represent that they could enlist the help of the United States Navy,

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1032 Letter from Colombia's Ambassador in Washington D.C., U.S., to the Colombian Minister of Foreign Affairs, Mr. Rodrigo Pardo, 28 November 1994 (**Exhibit R-171**).

1033 Letter from U.S. Senator James McClure to the President of Colombia, 5 June 1989 (**Exhibit R-133**).

1034 Letter from U.S. Senator James McClure to the President of Colombia, 5 June 1989 (**Exhibit R-133**).

1035 Letter from U.S. Senator Peter Flory to the President of Colombia, 6 June 1989 (**Exhibit R-134**).

1036 Letter from U.S. Senator Guy Vander Jagt to the President of Colombia, 7 June 1989 (**Exhibit R-135**).

1037 Letter from U.S. Senator Guy Vander Jagt to the President of Colombia, 7 June 1989 (**Exhibit R-135**).

1038 Letter from Colombia's Ambassador in Washington D.C., U.S., to the Colombian Minister of Foreign Affairs, Mr. Rodrigo Pardo, 28 November 1994 (**Exhibit R-171**).

threatening Colombia with its intervention in Colombian waters to salvage their alleged rights over the *San José* should Colombia refuse to allow them to salvage the alleged treasure.

727. Not content with the foregoing, on 25 September 2012, SSA warned President Virgilio Barco that it would unilaterally conduct all salvage efforts for the *San José* – despite not having found it – which would be informed to the U.S. Department of State.[1039]

728. Paradoxically, the Claimant has portrayed itself in these proceedings as a party unduly threatened and harassed by Colombia,[1040]yet the opposite is true. The Claimant and its Alleged Predecessors have used every possible means to interfere with Colombia's right to verify the information reported by GMC, threatened third parties into not collaborating or contracting with the State, commenced litigation against Colombia in every available avenue and even threatened U.S. Army intervention, entering Colombian waters.

729. The impact of the Claimant's and its Alleged Predecessors' threats cannot be understated. As a result of these threats and extreme litigious behavior, potential witnesses and experts contacted by Colombia refused to appear in these proceedings for fear of retaliation. This situation has gravely impaired Colombia's ability to defend itself. The Claimant's and its Alleged Predecessors' harassing and threatening behavior is reprehensible, and the Tribunal should not condone it. The Respondent is compelled to apprise the Tribunal of the Claimant's inadmissible behavior and reserves the right to request measures to ensure that no retaliatory action is taken against Colombia's witnesses or experts in these proceedings.

1039 Letter from the Presidency of Colombia to Jack Harbeston, 25 September 2012 (**Exhibit R-188**).

1040 Letter from Baker & McKenzie in representation of SSA Cayman to the Swedish Investment Bank, 23 June 1988 (**Exhibit R-125**). *See also* Letter from Baker & McKenzie in representation of SSA Cayman to Micoperi S.p.A., 23 June 1988 (**Exhibit R-126**); Letter from Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA, 8 November 1990 (**Exhibit R-143**); Letter from Lauane C. Addis, legal counsel for IOTA Partners Limited Partnership and SSA, 8 November 1990 (**Exhibit R-143**), p. 2; Letter from Jack Harbeston to the Ocean Science Research Institute, 23 May 1989 (**Exhibit R-131**); Letter from SSA's representative to the Ocean Science Research Institute, 8 November 1990 (**Exhibit R-153**); Letter from Colombia's Ambassador in Washington D.C., U.S., to the Colombian Minister of Foreign Affairs, Mr. Rodrigo Pardo, 28 November 1994 (**Exhibit R-171**); Letter from U.S. Senator James McClure to the President of Colombia, 5 June 1989 (**Exhibit R-133**); Letter from U.S. Senator Peter Flory to the President of Colombia, 6 June 1989 (**Exhibit R-134**); Letter from U.S. Senator Guy Vander Jagt to the President of Colombia, 7 June 1989 (**Exhibit R-135**); Letter from the Presidency of Colombia to Jack Harbeston, 25 September 2012 (**Exhibit R-188**); Letter from SSA to WHOI, 29 February 2016 (**Exhibit C-211**); Letter from SSA to WHOI, 20 January 2017 (**Exhibit C-217**).

Q. THE COUNCIL OF STATE, THE HIGHEST AUTHORITY IN ADMINISTRATIVE MATTERS, BACKED COLOMBIA'S INTERPRETATION OF THE 2007 SCJ DECISION

730. The Claimant devotes 126 pages to its recount of the facts in its Amended Statement of Claim,[1041] yet it fails to mention the decision rendered in 2018 by Colombia's Council of State. This decision concerned a class action lawsuit brought against Resolution No. 354 on the basis that the Resolution was contrary to Colombia's legislation and obligation to protect the Nation's cultural heritage.[1042] Unsurprisingly, the decision rendered by the Council of State confirms Colombia's longstanding position on the correct interpretation of the 2007 SCJ Decision.

731. In this section, Colombia briefly summarizes the facts regarding the class action brought against Resolution No. 354 (**1**); thereafter, it will highlight the main findings of the decision of the Council of State, which clearly confirm that the Respondent's interpretation of the 2007 SCJ Decision is correct (**2**).

1. The class action brought against Resolution No. 354

732. Class actions are set forth in Article 88 of Colombia's Political Constitution and regulated by Law 472 of 1998 ("**Law 472 of 1998**"). They allow any citizen to take action to prevent or eliminate threats to collective rights and interests.[1043]

733. On 8 November 2002, citizen Antonio José Rengifo (the "**Petitioner**") filed a class action against DIMAR, the Nation, and the Ministry of National Defense to protect the collective rights and interests related to administrative morality and the defense of the Nation's cultural and public heritage (the "**Class Action**").[1044] In the Class Action, the Petitioner claimed that DIMAR's issuance of Resolution No. 354, whereby it recognized GMC as the reporter, was contrary to the aforementioned collective rights and interests and sought the annulment of Resolution No. 354.[1045]

1041 Amended Statement of Claim, Section II.

1042 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit RL-212)**.

1043 Congress of Colombia, Law 472 of 1998, Article 1 (**Exhibit R-174)**.

1044 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 2.

1045 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 2.

734. The Petitioner's main argument was that Resolution No. 354 failed to take into consideration the application of Article 14 of Law 163 of 1959, which excluded cultural, historical, and artistic heritage, including submerged heritage, from the definition of treasure contained in Article 700 of the Colombian Civil Code.[1046]

735. SSA, the Ministry of Culture, and other entities became parties to the Class Action and filed memorials in response to it.[1047]

736. The Class Action was assigned to the Sixteenth Administrative Judge of Bogotá (the "**Sixteenth Administrative Judge**"), whom as court of first instance, found on 1 June 2009 that Resolution No. 354 threatened the collective rights related to the Nation's cultural heritage by failing to apply Article 14 of Law 163 of 1959.[1048]

737. On appeal, the Administrative Tribunal of Cundinamarca (the "**Administrative Tribunal of Cundinamarca**") revoked the decision of the Sixteenth Administrative Judge and denied the Petitioner's requests in their entirety.[1049] The Administrative Tribunal of Cundinamarca considered that the 2007 SCJ Decision had circumscribed the effects of Resolution 354 and, therefore, a class action was not admissible, as the question was *res judicata*.[1050]

738. The Administrative Tribunal of Cundinamarca further emphasized that the Class Action, aimed at obtaining the annulment of Resolution No. 354, was inadmissible since class actions were created under the 1991 constitution and Resolution No 0354 was issued in 1982.[1051]

739. Following the decision of the Administrative Tribunal, the Petitioner requested the highest court in Colombia in administrative matters, the Council of State, to review the Administrative Tribunal of Cundinamarca's decision, arguing that the 2007 SCJ Decision did not protect the

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1046 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 5.

1047 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 4.

1048 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 9.

1049 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 11.

1050 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 11.

1051 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 11.

collective right to cultural heritage given that the effects of Resolution No. 354 remained fully in force and would only cease with its annulment.[1052]

2. The Council of State's 2018 Decision further shows that the Respondent's interpretation of the 2007 SCJ Decision is correct

740. The Council of State selected the matter for review due to "*the legal importance, social and economic significance of the case*" and to unify the jurisprudence on (***i***) the admissibility of a public interest action to protect collective rights allegedly infringed prior to the 1991 Constitution; and (***ii***) the annulment via class action of any administrative acts that directly violate or threaten a collective right.[1053]

741. On 13 February 2018, the Council of State rendered its final ruling. In its decision, the Council of State unified the jurisprudence for the two questions discussed, by establishing two key principles.

742. ***First***, the collective right to defend cultural, historical, archaeological, or submerged cultural heritage requires enhanced protection, and can be invoked even if the events threatening this right predate Law 472 of 1998 and the Constitution. The reason being Articles 63 and 72 of the Constitution establish that said heritage belongs to the Nation, is inalienable, imprescriptible, and is placed under the permanent protection of the State.[1054]

743. ***Second***, a judge hearing a class action cannot annul administrative acts that harm or threaten collective rights since this would require a full legal review of all related administrative acts beyond the judge's authority. However, the judge can take steps to safeguard the collective rights affected by these decisions.[1055]

744. After establishing these two unifying criteria, the full chamber of the Council of State then confirmed the decision of the Administrative Tribunal of Cundinamarca, finding that:

1052 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212),** p. 11.

1053 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 22.

1054 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 22.

1055 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 22.

745. ***First***, Resolution No. 354 posed a significant threat to collective rights and interests, particularly as regards public and national cultural heritage, and especially submerged cultural heritage. However, this threat ceased with the 2007 SCJ Decision, which corrected the errors of the civil judges of the first and second instance, who had granted rights to SSA without properly considering the provisions regarding the protection of cultural heritage in Law 163 of 1959.[1056]

746. ***Second***, the 2007 SCJ Decision explicitly stated that assets, which constitute historical, cultural, and archaeological heritage, including submerged cultural heritage, cannot be classified as treasure. The reason being, and as outlined in Article 14 of Law 163 of 1959, such assets cannot be the object of commercial transactions and cannot be acquired pursuant to Article 700 of the Civil Code.[1057]

747. ***Third***, regardless of the classification assigned to objects recovered from the depth of the sea, these objects cannot be legally considered "treasures". In accordance with public law, the classification, destination, and rights of those contractually involved in their recovery or extraction are governed by a special regime designed to protect the submerged public, cultural, and historical heritage.[1058]

748. ***Four***, the institution of treasure must evolve in tandem with the development of property law, enhancing its flexibility to serve paramount public and social interests better.[1059]

749. Importantly, the Council of State concluded that, as shipwrecks and their artifacts are considered the property of the Nation, civil law provisions regarding the acquisition of ownership, via occupation, over found objects or treasures (i.e., unclaimed property), as established in Article 685 of the Civil Code, cannot be applied to shipwrecks, as they are national heritage.[1060]

1056 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 23-40 (emphasis added).

1057 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 53.

1058 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 **Exhibit R-212)**, p. 79.

1059 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 67.

1060 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 57.

750. The Council of State further emphasized that shipwrecked antiquities are deemed to be of unquantifiable value by the National Council of Cultural Heritage, the competent authority in these matters, and shall be considered historical heritage for all the effects of Law 163 of 1959.[1061] According to the Council of State, the classification of such property as historical and archaeological heritage must be determined exclusively by the objective criteria of representativeness, uniqueness, repetition, conservation state, and scientific and cultural relevance, as established by the Constitutional Court in the ruling C-264 of 2014.[1062]

751. Moreover, as regards the rights of SSA as a reporter, the Council of State explained that Resolution No. 354 granted the reporting party, in this case, GMC, an economic interest contingent upon the successful recovery of the find at the exact coordinates provided.[1063] However, this recovery has not yet materialized.[1064]

752. The Council of State explained that, before the issuance of Resolution No. 354 by the DIMAR, GMC reported a "discovery" to DIMAR.[1065] According to the Council of State, GMC provided this information in the 1982 Confidential Report, which indicated that the primary objective was located at the coordinates marked with the letter "A". However, in 1983, DIMAR inspectors accompanied GMC's crew in further exploration efforts and presented two technical reports, none of which *"corroborates or denies the existence of any type of shipwreck in the coordinates indicated in the confidential report."*[1066] Further, the Council of State found that the coordinates reported by the inspectors did not match the "objective A" specified in the "confidential report".[1067]

1061 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 77.

1062 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 77.

1063 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 82.

1064 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 82.

1065 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 46.

1066 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 46.

1067 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 46.

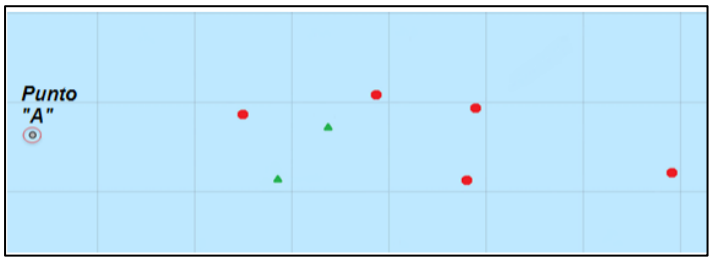

Image 40: Location of the points covered by the Heather Express and the Seaway Eagle.

753. As explained by the Council of State, the graphic above was prepared to illustrate the routes taken by SSA vessels: Heather Express (red circles) and Seaway Eagle (green triangles). These points correspond to the coordinates informed by DIMAR inspectors aboard SSA's vessels in the 1983 reports and definitively do not align with the reported point "A"[1068], further corroborating the claim that GMC reported incorrect coordinates to the Colombian authorities back in 1982.

754. As can be seen, the decision of the Council of State is key since it: (***i***) leaves no doubt that Law 163 of 1959, which protects movable monuments and cultural patrimony, fully applied to Resolution No. 354 of 1982, as expressly recognized by the SCJ in the 2007 SCJ Decision; and (***ii***) further confirms the Colombian authorities' long-standing interpretation of the 2007 SCJ Decision, which has been consistently communicated to SSA, namely that the rights granted to SSA's Alleged Predecessors by Resolution No. 354 of 1982 were rights of an economic interest contingent upon the successful recovery of the find at the exact coordinates provided by GMC in the 1982 Confidential Report.[1069]

1068 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 82.

1069 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212)**, p. 82.

T. THE MINISTRY OF CULTURE ISSUED RESOLUTION 085 DECLARING THE ENTIRETY OF THE *GALEÓN SAN JOSÉ* ARCHAEOLOGICAL HERITAGE PURSUANT TO ITS REGULATORY POWERS TO PROTECT COLOMBIA'S CULTURAL HERITAGE AND DID NOT VIOLATE THE CLAIMANT´S RIGHTS UNDER RESOLUTION 0354

755. In the Amended Statement of Claim, the Claimant argues that, by operation of Resolution 085, SSA "*lost its rights to the San José irretrievably*",[1070] and insists that Resolution 085 is the expropriation measure, despite earlier claims of prior expropriation and unfair treatment.[1071]

756. In this section, the Respondent demonstrates that Resolution 085 does not concern SSA's Alleged Predecessors' rights under Resolution 354 (**1**) and that, in any event, Resolution 085 was issued in compliance with the Colombian constitutional and legal framework (**2**).

1. Resolution 085 did not impact SSA's alleged rights since SSA's Alleged Predecessors did not find the *Galeón San José*

757. Resolution 085 declared the *Galeón San José* an "*Asset of Cultural Interest at the National Level*".[1072] In that regard, the first critical aspect of Resolution 085 is that it specifically concerns the *Galeón San José* and, therefore, it does not concern any rights recognized pursuant to Resolution 0354 to the Claimant's Alleged Predecessors Claimant.

758. Since 1994, and consistently throughout this Statement of Defense, the Respondent has demonstrated that SSA's Alleged Predecessors did not find the *Galeón San José*. In fact, as also shown by the Respondent, they were not even remotely close to finding it. There is sufficient evidence that supports this conclusion, collected by the Colombian State in 1994, 2022 and, yet again, in 2024.

759. In light of the technical evidence submitted with this Statement of Defense, it is patent that GMC never found the *Galeón San José* and thus was never in a position to acquire any property rights over the alleged treasure that SSA is now claiming.[1073]

1070 Amended Statement of Claim, ¶ 270.

1071 Amended Statement of Claim, ¶¶ 217-221. *See also*, Claimant's Response to Respondent's Preliminary Objections pursuant to Article10.20.5 of the TPA, ¶ 107.

1072 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**).

1073 Witness Statement of J. Santana (**RWS-3 [Santana]**), ¶¶ 1.35-1.44; Expert Report of WHOI (**RER-9 [WHOI]**) pp. 13-15.

760. Moreover, no Colombian authority – from the executive, legislative, or judicial branch – ever recognized any rights to SSA's Alleged Predecessors or to SSA itself over the *Galeón*. Despite the Claimant's conveniently ignoring the documentary evidence, it is undeniable that GMC did not request DIMAR's authorization specifically to search for the *Galeón San José* and that neither Resolution 48 nor Resolution 354 granted GMC either exploration rights or the status of reporter of treasures with respect to the *Galeón San José*.

761. Similarly, no judicial authority ever recognized any rights to GMC, SSA Cayman or the Claimant over the *Galeón*. in fact, the 2007 Judgment clarified that the dispute was unrelated to the *Galeón San José*. As referred to above, the SCJ only mentioned the *Galeón* once, stating that:

> There is no evidence in the record to prove that the report submitted by Glocca Morra Company to DIMAR [...] corresponds to a specific or precise shipwreck and, even less, that it is inexorably or undeniably the '*Galeón San José*'. [1074]

762. Against this backdrop, there can be no doubt that Resolution 085, which expressly concerns the *Galeón San José*, has no impact whatsoever over the Claimant's alleged investment. No expropriation could have resulted from a legitimate declaration, made for a public purpose, that a property that has never belonged to the Claimant is an Asset of Cultural Interest of the Colombian Nation. SSA's claim that Resolution 085 transferred movable property is unfounded,[1075] for the simple reason that SSA never acquired rights over the *Galeón San José* that could be subsequently transferred.

763. In other words, and contrary to Justice Ortíz' conclusion,[1076] SSA's rights to 50% of the objects that "*are still susceptible of being legally qualified as treasure and which are located 'in the coordinates referred to in the 1982 Confidential Report, without including, therefore, spaces, zones or diverse areas'*"[1077] were not affected by Resolution 085.

1074 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), p. 226 (emphasis added).

1075 Expert Report of Justice Ortíz (**CER-5 [Ortíz]**), pp. 49-54.

1076 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), pp. 59-60.

1077 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), pp. 234-235.

764. Nonetheless, and for the sake of completeness, the Respondent will demonstrate that Resolution 085 was enacted in compliance with all the legal requirements established under Colombian Law.

2. Resolution 085 was enacted in compliance with the Political Constitution of Colombia and the domestic legal framework

765. The Claimant makes various unwarranted arguments questioning its legality and constitutionality against Resolution 085, namely: (**a**) Resolution 085 was not adequately motivated; (**b**) Resolution 085 did not comply with publicity requirements; (**c**) Resolution 085 implied a retroactive application of rules; (**d**) that Resolution 085 disregarded the *res judicata* effect of the 2007 SCJ Decision; and (**e**) its issuance was unforeseen.

766. The Respondent rebuts each one in turn.

a. Resolution 085 was adequately motivated in accordance with Law 1675 of 2013

767. The Claimant and its expert, former Justice Ortiz, contend that Resolution 085 is inconsistent with Laws 1675 of 2013 and Law 1185 of 2008,[1078] which provided the legal basis to issue the Resolution. In particular, the Claimant argues that the debate leading to the issuance of Resolution 085 lacked an in-depth discussion as to why it was necessary to protect the entirety of the *Galeón San José*, stating that "*Resolution No. 0085 does not furnish any evidentiary or legal basis for designating the entirety of the San José as cultural patrimony*".[1079]

768. Those allegations are misleading, since Resolution 085 was issued in compliance with the procedure established under Law 1675 of 2013, and was duly motivated.

769. ***First*,** the enactment of Resolution 085 was preceded by a judicious and technical analysis by the National Council of Cultural Heritage, who carefully evaluated each of the five criteria established under Law 1675, as well as the principle of unity, recognized by the Colombian Constitutional Court.

770. As stated in Resolution 085, before proceeding with the declaration of the *Galeón San José* as an Asset of Cultural Interest, the National Council of Cultural Heritage evaluated the criteria

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1078 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 148.

1079 Amended Statement of Claim, ¶ 267.

established in Article 3 of Law 1675 of 2013, analyzing, *inter alia*, MAC's exploration reports relating to the 2015 expedition during which the *Galeón* was found.[1080]

771. The information provided by the final exploration report was the substantial basis for the analysis since it allowed the Council to directly observe the characteristics of every item and to conclusively determine that:

> The entire find identified as the *Galeón San José* consists of assets considered cultural heritage of the nation. Consequently, the wreck in its entirety is a National Asset of Cultural Interest, and the preservation of its unity must be ensured for future generations. The recovery of this find will allow us to reconstruct and understand a chapter of the history of our country and that of all the other Spanish-American nations with which we have been united since then by inseparable ties. [1081]

772. When determining whether the *Galeón San José* should be considered an Asset of Cultural Interest in its entirety, the National Council of Cultural Heritage analyzed the criteria set forth in Article 3 of Law 1675 of 2013,[1082] namely (***i***) representativeness, (***ii***) uniqueness, (***iii***) state of conservation, (***iv***) repetition, and (***v***) scientific and cultural importance. [1083] All these elements were considered when issuing Resolution 085. The Respondent addresses them in turn.

i. Representativeness

773. The criteria of "representativeness" in the context of cultural heritage is defined in Article 3 of Law 1675 of 2013 as:

> Quality of a good or set of goods, which makes them meaningful for understanding and valuing specific sociocultural trajectories and practices that are part of the process of shaping Colombian nationality within a global context.

1080 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 2.

1081 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1082 Note that, according to Article 5(a) of Law 1185 of 2008 (which amended Article 8 of Law 397 of 1997), the Ministry of Culture is responsible for declaring and managing assets of cultural interest at the national level, subject to the prior favourable opinion of the National Council of Cultural Heritage. *See* Law 1185 of 2008, 12 March 2008 (**Exhibit R-244**), Article 1.

1083 Law 1675 of 2013, 30 July 2013 (**Exhibit R-191**), Article 3.

774. In this sense, the National Council of Cultural Heritage concluded that "*undoubtedly, the archaeological work to be carried out on the wreck of the Galeón San José will make it possible to recreate its era and understand the historical and socioeconomic context at the time of its sinking, thereby adhering to the principle of representativeness*".[1084]

ii. Uniqueness

775. Law 1675 of 2013 sets forth that, to determine whether the protection of an item as cultural heritage is warranted, "uniqueness" means:

> The quality of a good or set of goods that makes them unique or rare compared to other known goods, as they are representative of particular sociocultural trajectories and practices.

776. Concerning uniqueness, the National Council of Cultural Heritage held that "*there was no doubt that the Galeón San José is the Galeón of Galeóns, and its discovery is unique*".[1085] The same Council stated that "*its importance is unparalleled, and the recovery of its contents will provide information on the commercial life between America and the Indies in the early 18th century, as well as on the seafaring life of the same period*".[1086]

iii. Repetition

777. Article 3 of Law 1675 of 2013 set forth the definition of "repetition", as it is relevant to the determination of what constitutes cultural heritage. In this regard:

> [Repetition refers to the] [q]uality of a good or group of movable goods that makes them similar, taking into account their characteristics, their serial condition, and for having an exchange or fiscal value, such as coins, gold and silver ingots, or uncut precious stones.

778. Regarding the *Galeón San José*, the Council identified some objects as unique and unrepeatable.[1087] However, objects such as gold and silver coins, ingots, and jewelry were

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1084 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 2-3.

1085 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1086 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1087 The National Council of Cultural Heritage identified as unique, *inter alia*, 22 cannons, the iron anchor, ceramic pieces, the armor, and other objects belonging to the ship.

analyzed in accordance with the principle of unity, following the jurisprudence of the Constitutional Court in this regard.[1088]

779. The Constitutional Court, through its Decision C-264 of 2014, established the standard for the harmonic application of the criterion of repetition and the principle of unity:

> [R]epetition is one of five criteria that must be reasonably weighed by the National Council of Cultural Heritage. [1089]
>
> […]
>
> Clarifying that the criterion of repetition applies exclusively to goods that possess both the fiscal and cultural value, determining which of these two aspects of the good must prevail is a task that will correspond to the National Council of the Cultural Patrimony, which must take into account, integrally, the five criteria applicable to the Submerged Cultural Patrimony.
>
> When a discovery involves serialized goods, a multiple number of ingots, coins, gold and/or silver pieces, or rough precious stones are found, the Council shall complement the application of the criterion of repetition with the principle of unity, which although it is not one of the criteria of Article 3 of Law 1675 of 2013, it is enshrined in paragraph 3 of literal b of Article 4 of Law 397 of 1997, modified by Article 1 of Law 1185 of 2008, which reads:
>
> "*The declaration of cultural interest may fall on a particular tangible property, or on a particular collection or set, in which case the declaration shall contain the relevant measures to preserve them as an indivisible unit*".
>
> This implies that if a group of goods, whose main characteristic is their similarity, forms a cultural unit that would lose its meaning if one of the goods is separated from the group, then the total group of goods is indivisible and all of them must be included in the cultural heritage of the Nation.[1090]

780. When issuing Resolution 085, the National Council of Cultural Heritage followed the criteria established by the Constitutional Court. The Council concluded that the principle of unity was especially relevant in the case of the *Galeón San José,* since the value of this shipwreck lies

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1088 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1089 Constitutional Court of Colombia, Judgment C-264, 29 April 2014 (**Exhibit R-193**) p. 1.

1090 Constitutional Court of Colombia, Judgment C-264, 29 April 2014 (**Exhibit R-193**) p. 86 (emphasis added).

precisely in the pieces that form part of it, as a whole. Given the state of preservation in which the pieces were found, the *Galeón* is of undeniable cultural importance.[1091]

781. Legal expert Ortíz challenges this conclusion, arguing that:

(i.) Decision C-264 of 2014 of the Constitutional Court "*referred exclusively to serial assets or collections of the same asset and not to the entire content of a shipwreck*" and, thus, the decision does not apply in the case of the *Galeón San José* .[1092]

(ii.) "*The principle of unity is not in the special law for the preservation of underwater heritage (Article 3 of Law 1675 of 2013), but rather in the general law for heritage protection (Article 4 (b), para. 3, of Law 397 of 1997, amended by Article 1 of Law 1185 of 2008), which makes its application in this matter questionable, by virtue of the principle for interpretation of the law on prevalence of the special law over the general one (Civil Code Article 10 (1))*".[1093]

782. Colombia's legal expert Dr. Linares disagrees with Ortíz's critiques:

> I respectfully disagree with the reproach contained in paragraph 148 of the GO Report, according to which the concept of unity of the judgment C-264 of 2014 is not applicable to this case, inasmuch as that pronouncement is limited to *"serial goods or collections of the same good and not to all the contents of a shipwreck"*. In my opinion, the application of the general considerations of the ruling, to a specific rule, does not preclude that such general considerations may be applied to another situation that also involves the defense of the Cultural Heritage of the Nation. Specifically, I believe that the following general considerations made by the CC should be taken into account before resolving the specific case:
>
> "[T]he *Court emphasizes that the legislator recognized that cultural interest may apply to an individual asset or a set of assets or a collection, in which case the declaration of cultural interest will render the set of assets indivisible, codifying the so-called principle of unity.*"
>
> Indeed, it is important to point out that Law 397 provided in its Article 4 that "[t]*he declaration of cultural interest may apply to a particular tangible*

1091 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1092 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 148.

1093 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 148.

> *property, or to a particular collection or set, in which case the declaration shall contain the relevant measures to preserve them as an indivisible unit"*, without the Legislator having established any restriction such as the one argued by former Judge Ortiz. Furthermore, interpretation such as the one proposed in said report implies disregarding the autonomy and margin of free appreciation of the National Council of Cultural Heritage. Likewise, I consider that the statement according to which *"the application of the principle of unity to submerged heritage is doubtful"* should be carefully considered. This insofar as, for the [Constitutional Court], the highest interpreter of the Constitution, [the principle of unity] is applicable.[1094]

783. Therefore, Justice Ortíz´ allegations regarding the alleged inapplicability of the principle of unity should be dismissed.

iv. State of conservation

784. The state of conservation for purposes of assessing whether an asset qualifies as cultural heritage is defined by Law 1675 of 2013 as follows:

> [The state of conservation refers to the d]egree of integrity of the physical conditions of the original materials, forms, and contents that characterize a property or group of movable and immovable properties, including the spatial contexts in which they are located.

785. As reflected in Resolution 085 itself, MAC's final exploration report of the site containing the *Galeón* showed a surprising state of preservation of its contents. The items identified as part of the shipwreck included objects made of bronze, copper, pewter, and ceramics. Additionally, the Council confirmed, without a doubt, that "*on the seabed, the ship retained a good proportion of its shape, which is easily distinguishable in the photographic images*".[1095]

v. Scientific and cultural importance

786. Pursuant to Law 1675 of 2013, the concept of "scientific and cultural importance" in relation to the assessment of cultural heritage is as follows:

> The potential offered by a good, or group of movable or immovable goods, to contribute to a better understanding of historical, scientific, and cultural

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1094 Expert Report of A. Linares (**RER-3 [Linares]**), ¶¶ 217-221 (emphasis added).

1095 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

> aspects of particular trajectories and sociocultural practices that are part of the process of shaping the Colombian nationality within a global context.

787. The National Council of Cultural Heritage also recognized the scientific and cultural importance of the *Galeón,* noting that the information preserved in its interior "*will allow our country and the world to understand, as never before, this period of our history*."[1096]In this sense, the Council catalogued the archaeological discovery of the *San José* as "*the most important in the history of archaeology*" in Colombia. [1097]

b. Lack of compliance with administrative due process

788. Due process is a fundamental constitutional right enshrined in Article 29 of the 1991 Political Constitution of Colombia,[1098] which has been defined as a "*set of guarantees aimed at the observance of the forms previously established in the Law and Regulations*".[1099]

789. Justice Ortíz argues that "*the adoption of Resolution No. 0085, as I can infer from the document file available to the public, did not satisfy basic and necessary due process in accordance with the regulations in effect*".[1100] In her view, Resolution 085: (***i***) should have been notified to the parties, and (***ii***) lacked evidence to be enacted.[1101]

790. Colombia addresses, in turn, these allegations.

i. Resolution 085 complied with the publicity requirements

791. According to the Claimant, the "*Colombian State should have notified all interested parties, including SSA, prior to the issuance of Resolution No. 0085*".[1102]

1096 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1097 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1098 Political Constitution of Colombia, (1991) (**Exhibit R-245**), Article 29.

1099 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 195.

1100 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 150.

1101 *See* Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 150.

1102 Amended Statement of Claim, ¶ 259; *See* Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**),

792. Contrary to the Claimant's baseless assertions,[1103] Resolution 085 was issued in compliance with the constitutional principle of due process, including the publicity requirements established under Colombian law.

793. Under Colombian domestic law, administrative acts create, modify, or extinguish legal situations.[1104] They can have general effects (addressing abstract and impersonal legal situations) or specific character (concerning individual and concrete legal situations).[1105] This distinction is crucial since specific acts must be formally notified to interested parties, while general acts only require publication.[1106]

794. Resolution 085 is an administrative act of general character,[1107] which regulates a general, impersonal, and abstract legal situation by declaring the *Galeón San José* a National Asset of Cultural Interest.[1108]

795. Justice Linares explains that Resolution 085 regulates a legal situation aimed at safeguarding a shipwreck of unquantifiable historical and archaeological value:

> *In the first place*, […] Resolution No. 0085 [regulates] a legal situation in an impersonal, general and abstract manner by declaring the wreck of the *Galeón San José* as an Asset of Cultural Interest at the national level and, in doing so, it regulates equally for all those affected, without exception, that specific legal situation.
>
> *Secondly*, […] even abstracting from its addressees, by its material content, it is evident that Resolution No. 0085 regulates a matter that is related to the general interest of the Colombian State and all its citizens. Indeed, Resolution 85 of 2020 refers to the protection of the cultural heritage of the Nation, which is a constitutionally and legally protected right.[1109]

1103 *See* Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 150.

1104 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 20.

1105 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 20.

1106 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 185.

1107 Expert Report of A. Linares (**RER-3 [Linares]**), ¶¶ 186-187.

1108 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 187.

1109 Expert Report of A. Linares (**RER-3 [Linares]**), ¶¶ 187-188.

796. Given the above, Resolution 085 did not require personal notification of specific individuals. Instead, the only requirement was to make it publicly available,[1110] which was done by the Respondent: Resolution 085 was published in *Official Journal No. 51.223*.[1111]

797. Therefore, Ms. Ortíz's assertion that Resolution 085 requires to notify "*individuals who may be directly affected*", [1112] is incorrect. Resolution 085 fully complied with the publicity requirements provided by Colombian law.

798. Colombia has already demonstrated that the Claimant has no rights over the *Galeón*. To that extent, any legitimate decision adopted by the Colombian government concerning the *Galeón San José* did not require consultation with, or notification to, SSA under Articles 35 and 36 of the Code of Administrative Procedure and Contentious-Administrative Matters.

ii. The decision to issue Resolution 085 to protect the entirety of the *Galeón San José* was adequately motivated and did not lack an evidentiary basis

799. The Claimant argues that "*Resolution No. 0085 does not furnish any evidentiary or legal basis for designating the entirety of the San José as cultural patrimony*".[1113] Furthermore, Ms. Ortíz criticizes that "*Resolution No. 0085 does not provide technical support for the decisions. It is adopted solely on the basis of a private document (the MAC report). As I have not seen anything in the text of Resolution No. 0085 to suggest that the normal administrative process was carried out with a reasoned and substantiated record, this leads me to believe that Resolution No. 0085 could violate administrative due process and the principle prohibiting arbitrariness*".[1114]

800. These claims are baseless.

801. ***First***, as previously explained, the National Council of Cultural Heritage conducted a comprehensive technical evaluation of the five elements set forth in Law 1675 of 2013 before the enactment of Resolution 085.

1110 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 189.

1111 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 189.

1112 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 150.

1113 Amended Statement of Claim, ¶ 267; Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶148.

1114 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 151.

802. ***Second***, Ortíz' assertion that the lack of public access to a document could render the administrative act "arbitrary" is misplaced. If that was the case, the State would not be permitted to protect highly sensitive and confidential information concerning its own national security, such as that contained in the MAC Report.

803. ***Finally***, and precisely because of the confidential nature of the MAC Report, Ms. Ortíz was not privy to the report and its contents, making unclear on what grounds she could question it.

c. SSA erroneously contends Resolution 085 had a retroactive effect

804. Legal Expert Ms. Ortíz also contends that "*the retroactive application of rules at a later time is a serious flaw in Resolution No. 0085. In fact, the legal basis and regulatory support for Resolution No. 0085 are based on rules that were not in force in 2007, much less in 1982, in spite of which it affects consolidated legal situations and rights acquired prior to its issuance*".[1115]

805. The Respondent reiterates that SSA never consolidated a legal situation nor acquired any right over the *Galeón San José*. However, even assuming, *quod non*, that the Claimant did acquire the alleged rights, it is worth noting that Resolution 085 would not have had retroactive effects even under this hypothetical scenario.

806. ***First,*** one of Resolution's 085 legal basis is Law 163 of 1959, which was enacted before 1982. Law 163 is a foundational instrument that established strong safeguards for movable historical and archaeological monuments, explicitly excluding them from the treasure regime.[1116]

807. ***Second***, as Justice Linares explains, the 2007 SCJ Decision determined that SSA had rights to 50% of the objects that were susceptible of being classified as treasure,[1117]a classification entrusted to the Ministry of Culture by Law 1675 of 2013. Precisely, it was in exercise of the authority granted by Law 1675 of 2013 that the Ministry of Culture issued Resolution 085. It is therefore clear that Resolution 085 complied with the directives outlined in the 2007 SCJ Decision.[1118] Even considering, *quod non*, that the 2007 SCJ Decision referred to SSA's rights

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1115 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 146 (emphasis in the original).

1116 Law 163 of 1959 (**Exhibit R-77**), Article 14.

1117 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), pp. 234-235.

1118 Expert Report of A. Linares (**RER-3 [Linares]**), ¶ 223.

over the *Galeón*, Resolution 085 would not entail a retroactive application but rather complied with criteria and guidelines defined by the SCJ.

808. In any event, SSA must accept the implications arising from the 2007 SCJ Decision, which set forth the scope of its rights: that the objects eventually found at the reported location shall be classified as cultural heritage of the Nation and not as treasures. This would apply, even if SSA had discovered the *Galeón* (*quod non*).

d. Resolution 085 did not disregard the *res judicata* effect of the 2007 SCJ Decision

809. Justice Ortíz also opines that Resolution 085 "*disregarded the res judicata contained in the 5 July 2007 Supreme Court of Justice judgment*".[1119] According to SSA's legal Expert:

> It bears recalling that this Supreme Court Decision maintained the validity of SSA Cayman's right to the treasure, as it concluded that there could be goods that are recovered from shipwrecks, such as the *San José Galeón*, that may be classified as treasure. The Supreme Court of Justice admitted the possibility that goods that may be classified as treasure, after directly verifying their content, may be found in this discovery. By abstractly excluding that possibility, Resolution No. 0085 effectively disregarded the res judicata of a judgment by the highest court of the ordinary court system. In other words, this administrative act removed from private ownership goods of financial value that had been recognized by judicial and administrative actions.[1120]

810. This is untrue. Even if it were true that the 2007 SCJ Decision pertained to the *Galeón* and that the Claimant had rights over it – which it did not – Resolution 085 did not disregard the *res judicata* principle. In fact, the 2007 SCJ Decision, aligning with the position of the Constitutional Court, explicitly recognized:

> Not all submerged property becomes part of the national patrimony, since it is necessary that it has a historical or archaeological value, which justifies its incorporation to such patrimony. According to this article, the Ministry of Culture is responsible for the corresponding evaluation of the archaeological or historical value of the corresponding property, in order to determine

1119 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 158.

1120 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 140 (emphasis added).

> whether or not it is incorporated into the archaeological and cultural heritage of the Nation. [1121]

811. Concerning the technical evaluation required to establish whether the found objects belong to the heritage of the Nation, the 2007 SCJ Decision set forth that:

> Therefore, in view of the preceding considerations, as soon as the technical evaluation of the discovered goods is made or becomes necessary, which will only be pertinent with respect to those that do not appear expressly listed as "movable monuments" or as part of the "national historical or artistic heritage" in the law, it is necessary to observe that, on the one hand, it must be subject to the criteria established in Article 1° of Law 163 of 1959, as well as article 1° of the "Treaty concluded between the American Republics, on the defense and conservation of the historical heritage" -by express normative reference-, guidelines to establish whether the objects found belong to such heritage and, on the other hand, that such examination must be carried out by the corresponding authority, at the time of its realization, according to the prevailing regime or that for the effect prevails.[1122]

812. In light of the above, it is clear that the enactment process of Resolution 085 fully complied with the standard established by the 2007 Judgment, namely, the examination (***i***) was conducted by the competent authority, the Ministry of Culture, and (***ii***) aligned to the applicable and prevailing regime: Law 1675 of 2013.

813. Justice Linares provides a helpful explanation on this matter:

> [I]t is important to note in the first place, that Law 1675, which currently regulates the activities on submerged cultural heritage, does not impose in any part that the classification by the Ministry of Culture can only be done with the physical apprehension of the property. In this sense, article 14 of said ordinance contemplates the scenario in which the classification is given after the extraction, but this does not imply a prohibition that, if there are sufficient elements of judgment, such classification may be given in an earlier scenario, in defense of the general interest and the right of Colombians to access to culture. Therefore, what the Law requires is that the classification of the good takes place, but it does not restrict the stages in which this may take place.

1121 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), pp. 230-231.

1122 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**), p. 215 (emphasis added).

> Secondly, it must be considered that the factual context analyzed by the CSJ in 2007 is significantly different from the one analyzed in Resolution No. 0085. Between the 1980s and 2020, there were scientific and technological developments that allowed the Ministry of Culture to make the controversial declaration. Specifically, what the CSJ pointed out in its 2007 ruling was that it did not have sufficient elements of judgment, nor technical knowledge, to qualify by itself the nature of the property found. This does not imply a prohibition for elements of judgment provided in a subsequent exploration, as evidenced in Act No. 9 of December 2019 cited in Resolution No. 0085, to qualify a property as of cultural interest.[1123]

814. In other words, Law 1675 of 2013, does not state when the examination must take place. Furthermore, advanced technology enabled a precise and thorough evaluation of the findings, allowing for direct verification of its content.

815. In fact, the declaration of a shipwreck as submerged cultural heritage in its entirety before the shipwreck is excavated is consistent with the practices in underwater archaeology. As Mr. Monteiro points out in his Expert Report "*many countries are avoiding fully excavating their shipwrecks unless they are threatened*".[1124]

816. In sum, Resolution 085 did not violate the principle of *res judicata*, and the technical evaluation of the discovered site and objects was performed in accordance with the terms established in the 2007 Judgment.

e. Resolution 085 was not "unforeseen"

817. The Claimant also questions the timing of the enactment of Resolution 085, alleging that "*the Resolution provides no evidence as to why this determination was being made now, more than 4 years after MAC's supposed discovery (and more than 40 years after SSA's)*".[1125]

818. The Claimant suggests that the enactment of Resolution 085 was somehow linked to the Tribunal of Barranquilla's confirmation of the Attachment Order.[1126] However, as previously explained, the Attachment Order concerns undetermined objects and does not specifically include the *Galeón San José*, as it clearly arises from the Judgment of the Court of Barranquilla:

1123 Expert Report of A. Linares (**RER-3 [Linares]**), ¶¶ 214-215 (emphasis added).

1124 Expert Report of V. Monteiro (**RER-4 [Monteiro]**), ¶¶ 130.

1125 Amended Statement of Claim, ¶ 264.

1126 Amended Statement of Claim, ¶ 258.

> For the purposes of these proceedings, it is immaterial whether the remains claimed to be located at that site correspond to that vessel or to any other that may have sunk in that location during the colonial era […].[1127]

819. Resolution 085 is, by no means, an isolated measure. Rather, it is in line with Colombia's policy to protect its historical and archaeological heritage, and it strengthens the legal framework designed to ensure the protection of the Nation's cultural heritage. The Council of State, in a 2018 ruling concerning a collective action (class action), held that "[r]*egardless of the classification assigned to objects recovered from the depths of the sea, these cannot be legally considered treasures*".[1128] The Council of State concluded that:

> As shipwrecks and their artifacts are considered the Nation's property; civil law provisions regarding found objects or treasures cannot be applied. These civil provisions stipulate that ownership of unclaimed property is acquired through occupation, as stated in Article 685 of the Civil Code. However, this principle does not extend to national heritage.[1129]

820. Finally, Ms. Ortíz states that "ANDJE's participation in this process suggests that the Government was aware of the possibility of litigation on the part of affected private parties such as SSA and, despite this, did not consider it appropriate to notify and involve such parties".[1130] This assertion is ludicrous since no government agency believed Resolution 085 affected SSA given that, for over 20 years, Colombia consistently maintained that SSA held no rights over the *Galeón San José*.[1131] It is evident that Colombia was not concerned with SSA's groundless claims at the time

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1127 10th Civil Judge of the Circuit of Barranquilla, Judgment of 12 October 1994, 12 October 1994 (**Exhibit R-13**), p. 2.

1128 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), p. 53, ¶ 132.

1129 Council of State, Full Chamber, Judgment No. 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), p. 57.

1130 Expert Report of Justice G. Ortíz (**CER-5 [Ortíz]**), ¶ 152.

1131 Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-28**); Letter from the Ministry of Culture to SSA, 29 November 2016 (**Exhibit R-29**); Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R-37**); Letter from Colombia to SSA, 24 March 2010 (**Exhibit R-17**); Letter from the Ministry of Culture to SSA, 27 May 2015 (**Exhibit C-82**); Letter from the Ministry of Culture to SSA, 16 December 2015 (**Exhibit C-206**); Letter from the Ministry of Culture to SSA, 23 December 2015 (**Exhibit C-208**); Letter from the Ministry of Culture to SSA, 12 January 2016 (**Exhibit C-209**); Letter from the Ministry of Culture to SSA, 5 February 2016 (**Exhibit R-36**); Letter from the Ministry of Culture to SSA, 20 September 2016 (**Exhibit C-214**); Letter from the Ministry of Culture to SSA, 3 March 2017, (**Exhibit C-226**); Letter from the Ministry of Culture to SSA, 5 January 2018 (**Exhibit R37**); Letter from the Ministry of Culture to SSA, 17 June 2019 (**Exhibit C-40**).

Resolution 085 was issued. Furthermore, ANDJE's participation was in accordance with its mandate to prevent anti-juridical damage and to provide legal assistance to centralized governmental agencies.[1132]

f. SSA's baseless attempts to portray Colombia's position regarding the status of the *Galeón San José* as inconsistent

821. The Claimant argues that Resolution 085 represents "*a complete reversal of Colombia's decades-long position that a substantial portion of the San José consisted of treasure*".[1133] This assertion is incorrect.

822. ***First,*** Colombia has never recognized any rights in favor of SSA over the *Galeón San José*. This has been and remains Colombia's primary position.

823. ***Second***, SSA ignores the entire legal framework applicable to the protection of the Nation's cultural heritage, which Colombia has developed and upheld for decades. As shown by the Claimant, since 1936 Colombia has issued numerous legal instruments to safeguard Colombia's archeological and historical heritage.[1134] This protection has been enshrined in the Political Constitution of Colombia, making it a fundamental part of Colombia's legal system.[1135] One of these protections is the exclusion of some categories of property from private ownership. This regime was also in place at the time SSA's Alleged Predecessors applied for and obtained their authorization to explore Colombian waters; in fact, Law 14 of 1936 and Law 163 of 1959 set forth ample exclusions of property from private ownership.

824. As Dr. Linares states in his Expert Report:[1136]

> Since the issuance of Law 163, read in conjunction with Law 14; individuals could not have aspirations of dominion over assets that, by operation of law, have been excluded from the treasury regime regulated by Article 700 of the Colombian Civil Code, are owned by the State and are subject to the special regime established in that law.

1132 Decree 4085 of 2011, 1 November 2011 (**Exhibit R-223**).

1133 Amended Statement of Claim, ¶ 269.

1134 Law 14 of 1936, 22 January 1936 (**Exhibit R-69**).

1135 Expert Report of A. Linares (**RER-3 [Linares]**), ¶31.

1136 Expert Report of A. Linares (**RER-3 [Linares]**), ¶63.

825. Clearly, most of the objects, if not the totality of the items that may be found at the site where the *Galeón San José* is located fall within the scope of paragraph b) of Article 1 of Law 14 of 1936, since it provides that all items with historical or artistic value should be considered as movable monuments from the Colonial Era and, as such, be excluded from the treasury regime. Consequently, the assertion that Colombia's long-standing position was *"that a substantial portion of the San José consisted of treasure"*[1137] is both legally and factually incorrect. This claim openly contradicts the existing legal framework under which GMC applied for its exploration authorizations, and SSA allegedly acquired its investment. The Claimant cannot feign ignorance of the existing laws and regulations.

826. Furthermore, as thoroughly explained above, after the 2007 SCJ Decision, Colombia clearly and consistently communicated its position to SSA that the rights recognized to SSA's Alleged Predecessor were clearly delineated in the 2007 SCJ Decision, which clearly limited any rights to a finding in the Reported 1982 Coordinates and excluded any property that fell under the scope of Laws 14 of 1936 and 163 of 1959. Therefore, claiming, as SSA does, that Colombia misrepresented the *Galeón San José*'s legal status to SSA is farcical.

827. The Claimant further argues that Colombia's supposed "*reversal of its position*" [1138] is evidenced by its decision to rescind "*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.´*" [1139] [redacted]

828. [redacted]

[1137] Amended Statement of Claim, ¶ 269.

[1138] Amended Statement of Claim, ¶ 269.

[1139] Amended Statement of Claim, ¶ 269.

U. COLOMBIA HAD NO OBLIGATION WHATSOEVER TO CONSULT OR INVOLVE SSA IN ANY MEASURE OR DECISION RELATED TO THE *GALEÓN SAN JOSÉ*

829. As the Respondent shows, Colombia had no obligation to consult or involve SSA in any decision related to the *Galeón San José*. In fact there was no obligation whatsoever to include SSA in the 2022 verification Campaign (**1**); and Colombia was not obligated to involve SSA in the issuance of Resolution No. 712 of 2014 (**2**)

1. Colombia had no obligation to include SSA in the 2022 verification campaign

830. In the Amended Statement of Claim, SSA claims that on 2022 the Colombian State "*without informing or otherwise consulting with SSA, the Colombian Navy unilaterally went to the coordinates listed in the 1982 Report and declared that there was no shipwreck there*."[1140]

831. In fact, in May 2022 Colombia conducted a verification campaign to the 1982 Coordinates (the "2022 Verification Campaign"), with the purpose of "*recharacterizing the area through the recollection and interpretation of photographic and video information thereof*."[1141]

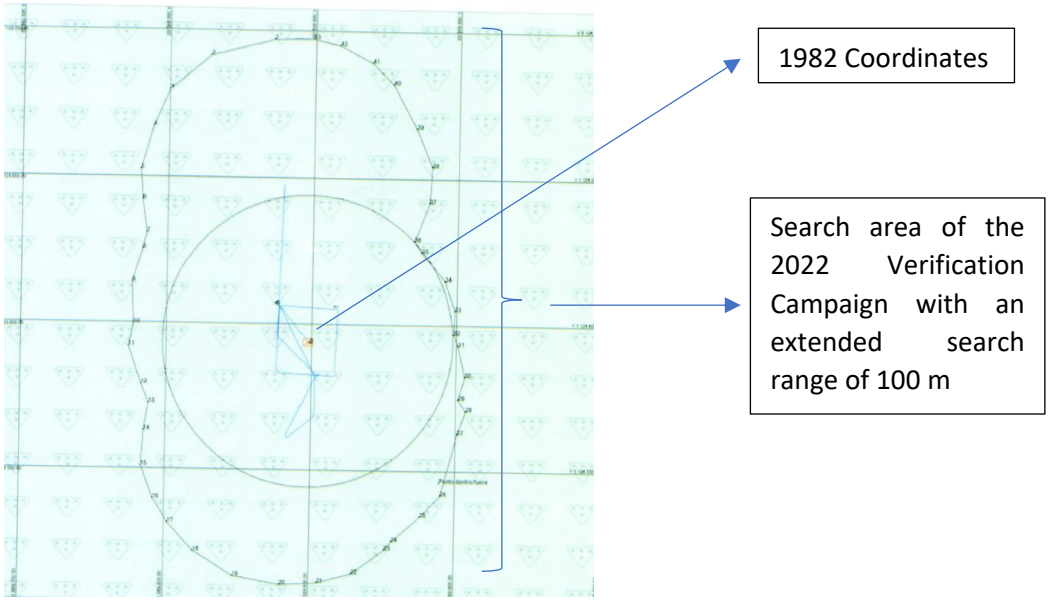
832. The 2022 Verification Campaign was planned by analysing the legal background of the exploration activities conducted by GMC that led to the submission of the 1982 Confidential Report.[1142]

1140 Amended Statement of Claim, ¶271.

1141 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022 (**Exhibit R-034**)**.**

1142 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022, (**Exhibit R-034**), p. 4.

833. The 2022 Verification Campaign concluded with the finding of three anomalies of natural origin associated to scour marks on the seabed, possible rock formations and possible wood branches, within the adjacent area of the 1982 Coordinates, and even within an amplified radio around the coordinates of approximately 100m.[1143] The search area of the 2022 Verification Campaign can be seen in the following image:[1144]



834. While the 1982 Coordinates correspond to the area upon which SSA Cayman was declared as a reporter under Resolution No. 0354, this in no way signifies that SSA, nor any of its predecessors were declared as owners of such an area. The area lies within Colombian territory and therefore belongs to the Colombian State.

835. In that sense, Colombia is – and has always been – at liberty of visiting and researching any area that lies within its territory, which, -off course-, includes the area corresponding to the 1982 Coordinates. Therefore, the Colombian State was not under any legal obligation to informing or otherwise consult SSA about the execution of activities within the 1982 Coordinates, such as the 2022 Verification Campaign.

1143 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022 (**Exhibit R-034**), p. 4.

1144 Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022 (**Exhibit R-034**), p. 5.

2. Colombia was not obligated to involve SSA in issuing Resolution No. 712 of 2024

836. In the Amended Statement of Claim, the Claimant alleges that, by issuing ICANH Resolution No. 712 of 2024, by which the site where the *Galeón San José* was found was declared an Archaeological Protected Area, the Respondent "*solidif*[ied] *its possession over the San José shipwreck*."[1145]

837. To be clear, Colombia's possession over the *San José* needs no further "solidification", as the Claimant conveys. The *Galeón San José* is an Asset of Cultural Interest, belonging to the Nation's submerged cultural heritage. As such, it represents Colombia's historical and cultural patrimony.[1146]

838. Contrary to the Claimant's allegations, the issuance of Resolution 712 of 2024 had no relation whatsoever to SSA, nor did it intend to "*solidify*" the State's possession of the *Galeón*. Resolution No. 712 was adopted fully within the legal framework for the protection of Colombia's submerged cultural heritage under Colombian law.[1147] In this regard, Resolution No. 712 established the Archaeological Management Plan for the archaeological site surrounding the *Galeón San José*, which sets forth the guidelines for the proper management of the *San José* to ensure its integrity and conservation at all times.[1148] Indeed, the Archaeological Management Plan was adopted by the Tribunal as an integral part of the Evidence Preservation Protocol issued on 28 June 2024, pursuant to the Tribunal's Supplementary Decision and Order for an Evidence Preservation Protocol.[1149]

839. Following the above, and contrary to the Claimant's insinuations that the Respondent was somehow limited in the exercise of its regulatory powers in light of SSA's non-existent alleged rights over the *San José*, Colombia has, and has always had, the right to implement whatever measures necessary for the protection and preservation of the public interest, such as the protection of submerged cultural heritage.

1145 Amended Statement of Claim, ¶ 275.

1146 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), pp. 2-4.

1147 Colombian Institute of Anthropology and History (ICANH) Resolution No. 0712, 22 May 2024 (**Exhibit C-224**).

1148 Colombian Institute of Anthropology and History (ICANH) Resolution No. 0712, 22 May 2024 (**Exhibit C-224**), p. 4.

1149 *See* Evidence Protocol, ¶ 21.

840. Moreover, as explained, as Resolution 085, Resolution 172 is a general act that does not require notification. In any event, Resolution 172 did not affect the Claimant's rights because, as has been cogently demonstrated by the Respondent in this Statement of Defense, SSA's Alleged Predecessors never found, nor were they ever close to finding, the *Galeón San José*.[1150] As a result, neither SSA nor any of its alleged Predecessors have any right whatsoever that concerns the *Galeón San José*.

III. THE TRIBUNAL LACKS JURISDICTION OVER THE PRESENT DISPUTE

841. The Respondent respectfully submits its objections to the Tribunal's jurisdiction over the present dispute, in line with Article 10.20.4(d) of the TPA and the Tribunal's decision on the Respondent's Preliminary Objections.

842. To recall, pursuant to Article 10.20.4 (d), the "*respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph* [10. 20.5]."[1151] In line with Article 10.20.4(d) of the TPA, and as expressly confirmed by the Tribunal in its Decision on the Respondent's Preliminary Objections on Jurisdiction

> (i) this Decision does not constitute an "award" made pursuant to Article 34 of the UNCITRAL Arbitration Rules; (ii) this Decision is not intended to give rise to any issue estoppel or any form of res judicata; and (iii) any issue addressed in this Decision may be revisited in further orders, decisions or awards in this arbitration.[1152]

843. The Respondent's Objections on Jurisdiction are set out in the next sections. The Respondent trusts that the Tribunal will analyze and determine these Objections, free of any bias and in line with its findings in the Decision, pursuant to which its prior views as expressed in the Decision are merely *pro tem*[1153] and do not entail a prejudgment of the Respondent's Objections on Jurisdiction.[1154]

1150 *See* Section A above.

1151 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.20.4.

1152 Tribunal's Decision on the Respondent's Preliminary Objections, ¶ 287.

1153 Tribunal's Decision on the Respondent's Preliminary Objections, ¶ 119.

1154 Tribunal's Decision on the Respondent's Preliminary Objections, ¶¶ 118, 119.

A. THE TRIBUNAL'S DECISION HAS A PRIMA FACIE NATURE PURSUANT TO ARTICLE 10.20(5) OF THE TPA

844. Colombia understands that in its Decision on Respondent's Preliminary Objections under Article 10.20.5 of the TPA (the "**Preliminary Decision**") the Tribunal reached a series of conclusions regarding whether there is a covered investment and whether SSA qualifies as an investor under Article 10.28 of the TPA. Respondent also understands that these conclusions were based on a *prima facie* assessment[1155] at the time of the Preliminary Decision.

845. In its Preliminary Decision, the Tribunal held that it would address the *ratione materiae* and *the ratione personae* objections jointly, as both are inextricably linked under Article 10.28 of the TPA,[1156] and reached a *prima facie* conclusion in these regards, which the Respondent summarises below.

846. **First**, the Tribunal concluded that Claimant's alleged investment included a commitment of capital since "[u]*nder Article 10.28 of the TPA, it is the 'investment' that must reflect a 'commitment of capital' rather than the 'investor'*."[1157] On this basis, the Tribunal considered that it was allowed to consider capital invested by SSA's predecessors as part of the investment.

847. The Tribunal further stated that, "*at this juncture*"[1158] it could not conclude that the TPA requires an "active" and "personal" investment by the investor. Since the Tribunal found no basis to doubt that SSA's predecessors poured significant resources into their exploration activities,[1159] nor any reason to doubt that Claimant committed capital and other resources by way of the APA, it concluded that the commitment of capital requisite was met.

848. The Tribunal was not persuaded by Colombia's argument that Article 10.28 of the TPA requires the alleged investor to make a meaningful transfer of resources into the economy of the host State, as no such requirement is explicitly stated in the TPA.[1160]

1155 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 115.

1156 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 131.

1157 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 169.

1158 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 178.

1159 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 179.

1160 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 182.

849. ***Second***, the Tribunal concluded that Claimant's alleged investment included the expectation of gain or profit, noting that "[w]*hen Claimant's Predecessors embarked upon this venture in the 1970's, they must have expected to make a profit."*[1161] Furthermore, the Tribunal noted that "*based on the record as it currently stands*", it was "*impossible to ignore that the CSJ appears at least to have recognized that SSA's predecessors possessed or were entitled to certain rights* […]."[1162]

850. Additionally, the Tribunal considered that SSA must have expected some gain or profit in 2008 when it entered into the APA.

851. ***Third***, that Claimant's alleged investment did include an assumption of risk, given that there is a degree of risk inherent in the treasure searching business,[1163] and because a degree of risk was also inherent in SSA's assumption of liabilities under the APA.[1164]

852. ***Fourth,*** on the question of whether Claimant owns or controls a protected investment under Article 10.28 of the TPA, the Tribunal concluded that it does, (***i***) as Colombia had not demonstrated that SSA Cayman Islands' rights were not successfully transferred by way of the APA, and (***ii***) because Colombia "*failed to establish that Decree No. 2349 required SSA Cayman to obtain prior authorization from DIMAR validly to transfer the rights derived from Resolutions Nos. 0048 and 0352 to Claimant*."[1165]

853. Finally, the Tribunal concluded that Claimant owns or controls a protected investment, as there is nothing in the TPA mandating (as suggested by Claimant) that SSAs rights be *in rem* rights. The Tribunal added that the nature and content of SSA's rights is a matter for the merits phase of the proceedings.

854. ***Fifth***, considering the above, the Tribunal concluded that "*based on the record as it currently stands*"[1166] it was unable to conclude at such stage that SSA was not an investor of a party.

1161 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 184.

1162 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 185.

1163 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 190.

1164 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 191.

1165 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 207.

1166 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 216.

855. Based on the Tribunal's acknowledgment that its conclusions were reached *prima facie* at the time of its Preliminary Decision,[1167] Colombia submits that the Claimant has not satisfied its burden of proof regarding either its condition as investor under the TPA or that it has made an investment under the TPA. It is uncontested that investors bear such burden.[1168] In its Amended Statement of Claim—and despite the Respondent's pointing at the lack of documentation—the Claimant did not provide any additional elements demonstrating that it satisfies the requirements under Article 10.28 of the TPA. At this stage of the Arbitration, the lack of evidence from SSA is simply unacceptable. To recall, the Claimant filed an Amended Statement of Claim, and made much noise about it having a right to do so and differentiating the different levels of depth and extent in a Notice of Arbitration vs. a Statement of Claim[1169] and yet, in its Amended Statement of Claim, took no step to complete the record.

856. As the Respondent demonstrates below, there are several questions regarding SSA's condition as investor and whether it indeed qualifies as an investor. In fact, the opacity of SSA's structure, the lack of any documentations on the nationality of the various stakeholders in the various companies, several of them incorporated in a safe haven jurisdiction, namely the Cayman Islands, as well as SSA's unwillingness to produce proper and complete supporting documentation regarding the acquisition of its purported investment, raise several questions, which severely call into question the Claimant's allegations as regards its alleged investment and its qualification as investor.

857. It is undisputable that it is the Claimant who must prove that it meets the requirements under Article 10.28 to establish the Tribunal's jurisdiction — and it has not done so. Additionally, Section 4.1 of Procedural Order No. 1 requires that the Parties: (***i***) submit all the facts and legal arguments on which they intend to rely; and (***ii***) produce all evidence upon

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1167 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 119.

1168 *See Apotex Holdings Inc. and Apotex Inc. v. United States* (UNCITRAL Case), Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RLA-151**), ¶¶ 149-150 (holding that "[t]*his issue obviously turns upon the precise (i) and (ii) nature of each of the activities / property relied upon by Apotex as an "investment" for the purposes of NAFTA Article 1139. Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction in this regard*."). *See also Caratube International Oil Company LLP v. Republic of* Kazakhstan, Award, 5 June 2012 (**Exhibit RLA-148**), ¶ 401 (holding that "[a]*gain, the starting point for the Tribunal's examination is that Claimant has the burden of proof.*")

1169 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 159:7-11 (stating that "[b]*ecause that is what--how the rules are. But as is common in these cases, that is--there is still an opportunity to file a more robust Statement of Claim. It is typically the case in these UNCITRAL proceedings.*").

which it wishes to rely, including documentary evidence, written witness statements and expert reports. Despite this clear and explicit requirement, Claimant has failed to provide any additional documents, along with its Amended Statement of Claim to establish the two key elements necessary to establish this Tribunal's jurisdiction.

858. What is worst, by failing to provide documentation in response to the Respondent's Submission Pursuant to Article 10.20.5 of the TPA, the Claimant has sought effectively to reverse the burden of proof. That cannot be accepted. In view of the Claimant's lack of transparency, the Respondent fully reserves its right to further supplement, amend, and add to its jurisdiction objections following, *inter alia*, the document production phase, and to request adverse inferences if required. Moreover, the Respondent fully reserves its right to deny benefits to the Claimant pursuant to Article 10.12.2 of the TPA if the conditions are met either on the basis of the information provided or as a result of adverse inferences.

B. THE TRIBUNAL LACKS JURISDICTION BECAUSE SSA'S ALLEGED INVESTMENT DOES NOT QUALIFY AS AN INVESTMENT UNDER ARTICLE 10.28 OF THE TPA

859. 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. […][1170]

860. A literal reading of Article 10.28, it is clear that the "investment" consists of two components – both of which must be met for an asset to qualify as an investment. *First*, it requires that assets be "owned or controlled" by an investor. *Second*, these assets must exhibit key characteristics of investment, such as commitment of capital, expectation of gain or profit, or the assumption of risk.

861. Additionally, in its Non-Disputing Party Submission, the United States noted as follows:

> The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or

[1170] United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28.

> other resources, the expectation of gain or profit, or the assumption of risk.[1171]

862. Colombia submits that SSA's alleged investment does not satisfy the characteristics of an investment, namely (*i*) the expectation of gain or profit, (*ii*) the assumption of risk nor (*iii*) commitment of capital.

1. SSA's alleged investment lacks the characteristics of an investment

a. SSA did not commit capital

863. In its Preliminary Decision, the Tribunal held that the term "commitment", not "contribution", was the controlling term for purposes of establishing whether an investment took place under the TPA.[1172] For the Tribunal, a commitment did take place in this case because: (*i*) under Article 10.28 of the TPA "*it is the* '*investment*' *that must reflect a commitment of capital rather than the ´investor*'" and thus (*ii*) SSA predecessors' commitment of capital in their exploration efforts may be considered by the Tribunal for purposes of this requirement.[1173]

864. The Tribunal further held that it would assume Claimant's statements as to the commitment of resources by SSA's predecessors as correct.[1174] Subsequently, the Tribunal added that it had "*no reason to doubt at this stage Claimant's submission that it committed capital and other resources itself in the context of its acquisition, by way of the 2008 APA, of SSA Cayman's purported rights to 50% of the treasure in the Discovery Area*."[1175] Thus, it found that the commitment of capital requisite was met.

865. However, such findings of the Tribunal were made *prime facie*, based on the record of the arbitration "*as it currently stands*."[1176]These preliminary findings are still subject to verification. The Claimant should have provided convincing evidence to demonstrate that it made an investment within the meaning of Article 10.28. of the TPA. Yet, the Claimant has failed in this

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1171 Non-disputing party submission of the United States of America,¶ 7. (emphasis added).

1172 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 166.

1173 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶¶ 169, 180.

1174 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 179.

1175 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 180.

1176 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 216.

regard. The following paragraphs show that Claimant failed to prove the existence of a protected investment within the meaning of Article 10.28 of the TPA.

866. SSA has claimed that it has committed capital based on two primary arguments:

(i.) SSA relies on the expenditures made by its predecessors, particularly SSA Cayman Islands, to support its claim of committing capital in relation to the alleged exploration, discovery, and verification of the Galeón San José. SSA asserts that these expenditures, adjusted for today's value, amount to over USD 40 million.[1177] SSA contends that these past investments, coupled with its acquisition of rights and liabilities under the APA, constitute a "*meaningful transfer of value" and meet the TPA's standards for an investment*;[1178] and

(ii.) SSA claims that it acquired significant liabilities under the APA, which it argues qualify as a "commitment of capital" and meet the TPA's definition of an investment. These liabilities allegedly assumed are tied to "Acquired Permits" and "Acquired Contracts" under the APA. However, the only concrete contract SSA mentions is the 1988 Limited Partnership Venture Management Agreement with IOTA Partners ("**IOTA Agreement**"), which covered leadership services and exploration costs.[1179] SSA also claims it allegedly acquired liabilities towards "Economic Interest Holders", and vendor debts owed to Chicago Maritime for submarine services.[1180] As further explained below, these alleged liabilities are remote, lack specificity and there is no certainty that they currently exist.

867. This is plainly insufficient to prove that the requirements of Article 10.28 of the TPA are met. With regards to the alleged expenditures incurred by SSA´s Alleged Predecessors, Colombia will demonstrate that these liabilities do not satisfy the required standard under the TPA, which

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1177 Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 183. Amended Statement of Claim, ¶ 286.

1178 Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶¶ 183, 188, 189. Amended Statement of Claim, ¶¶ 228, 286.

1179 Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 190.

1180 Response to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶¶ 189–190; Rejoinder, ¶¶ 183, 188–191; Amended Statement of Claim, ¶¶ 282, 286.

mandates that the investor must take concrete steps to attempt to make the investment, be in the process of making it, or have already made the investment.

868. As to the alleged liabilities that SSA supposedly acquired under the APA, Colombia will show that these do not amount to commitment of capital because these liabilities are not certain, as SSA has not demonstrated that the APA effectively gave or has given rise to them.

869. It is Colombia' submission that SSA did not conduct an investment under Article 10.28 of the TPA in absence of actual commitment of capital because: (**i**) the TPA requires a substantial commitment of capital; (**ii**) the TPA requires that investors at least attempt through concrete action to make an investment, or that investors make an investment; (**iii**) the mere indication of potential liabilities in the APA does not amount to having committed capital.

i. The TPA requires that the investor conduct a substantial commitment of capital

870. To recall, pursuant to Article 10.28, for an "*asset that an investor owns or controls, directly or indirectly*" to qualify as an investment pursuant to Article 10.28 of the TPA, it must have "*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*".[1181] Article 10.28, contains the basic elements of an investment in an economic sense.

871. The commitment of capital or other resources is central to the concept of an investment and logically requires that said commitment be made by a person or entity, the investor.

872. The requirement "*commitment of capital or other resources*" has been recently analyzed in three cases — namely Kaloti Metals & Logistics, LLC v. Republic of Peru, Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru, and The Lopez-Goyne Family Trust and others v. Republic of Nicaragua. In each case, the tribunal assessed the definition of "investment" under provisions identical to the definition of investment provided in Article 10.28 of the TPA.[1182] These tribunals concluded that the commitment requirement entails, at least, a substantial commitment of

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1181 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28 (emphasis added).

1182 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 **(Exhibit RLA-226**), ¶ 354; *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28) (**Exhibit RLA-222**), ¶ 496. *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, (ICSID Case NO. ARB/17/44), Final Award, 1 March 2023, (**Exhibit RLA-218**), ¶¶ 276, 308.

capital or other resources by the investors. Moreover, the tribunals that upheld their jurisdiction, assessed whether the investor had made actual contributions,[1183] as explained below.

873. The *Kaloti Metals* tribunal held that "*in order to establish an investment it must be shown that there is a* ***commitment of capital that is substantial***."[1184] In interpreting this requirement, the tribunal referred to Article 10.28 of the United States-Peru Trade Promotion Agreement, deriving its conclusion from a functional interpretation of "investment" under treaties like the underlying treaty. It drew on the reasoning of the *Apotex* tribunal, which, under the NAFTA, assessed a functionally equivalent provision to Article 10.28.[1185] The *Apotex* tribunal found that the claimant was required to commit significant capital in the United States but did not find this requirement met, as the capital was invested in manufacturing products in Canada for export to the United States.[1186] The *Kaloti Metals* tribunal also referenced the *Bayindir* tribunal, which required a "substantial commitment" from the investor,[1187] and the *Poštová* tribunal which required that "*in an economic sense*" an investment be "*linked with a process of creation of value*." [1188] The

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1183 *See The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID CASE NO. ARB/17/44), Final Award, 1 March 2023 (**Exhibit RLA-218**), ¶ 331-337. *See also Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28), Final Award, 20 December 2023. *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Final Award, 20 December 2023 (**Exhibit RLA-226),** ¶ 366.

1184 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 354. (emphasis added)

1185 *See Apotex Holdings Inc. and Apotex Inc. v. United States* (UNCITRAL Case), Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RLA-151**), ¶ 141.

1186 *See Apotex Holdings Inc. and Apotex Inc. v. United States* (UNCITRAL Case), Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RLA-151**), ¶¶ 235-239 (concluding that "[t]*he Tribunal has no reason to doubt that Apotex has committed significant capital in the United States towards the purchase of raw materials and ingredients used in its sertraline and pravastatin ANDA products. But this activity was evidently undertaken for the purposes of manufacturing in Canada products intended for export to the United States (and subsequent sale by others)"*).

1187 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009 (**Exhibit CLA-135**), ¶ 131 (noting that "*to qualify as an investment, the project in question must constitute a* ***substantial commitment*** *on the side of the investor. 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*") (emphasis added).

1188 *Poštová banka, a.s. and Istrokapital Se v. Hellenic Republic* (ICSID Case No. ARB/13/8), Award, 9 April 2015 (**Exhibit RLA-160**), ¶¶ 360-361, 371 (noting that "[i]*f an "objective" test is applied, in the absence of a contribution to an economic venture, there could be no investment. An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which is also a process of exchange of values i.e. a process of providing money for a given amount of money in return* […]") (emphasis added).

tribunal concluded that whether the claimant made a commitment of capital to an investment in Peru turned on "*whether it had **sufficient elements of a business operation in Peru** to which it committed capital.*"[1189]

874. In requiring that the commitment of capital be substantial, the *Kaloti Metals* tribunal reached the conclusion that the purchase and selling of gold did not amount to a substantial investment.[1190] Other associated activities for the shipping of gold were merely commercial transactions that did not themselves create value. For the tribunal, the claimant should have demonstrated the existence of *"contribution of money to an economic venture that creates value and can constitute an investment."*[1191]

875. In *Latam Hydro* the tribunal – also addressing an identical definition of investment as the one contained in the TPA –[1192] found that the requisite of commitment of capital was met because the claimant had:

> [C]ommitted cash, expected gain or profit, and assumed risk in relation to the Mamacocha Project on the territory of Peru, by making loans and equity contributions to Second Claimant to finance its operations.[1193]

876. Similarly, in *Lopez-Goyne*, a case brought under the DR-CAFTA, which contains the same definition of investment included in Article 10.28 of the TPA, the tribunal concluded that the investment met that requirement because an affiliate company had made "substantial disbursements"—approximately US$ 74 million—towards the exploration of a concession agreement. This was done on behalf of Industria Oklahoma Nicaragua S.A., the entity that entered into the concession agreement with the host State and was therefore considered an

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1189 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 358.

1190 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 356.

1191 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 356.

1192 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28) (**Exhibit RLA-222**), ¶ 496.

1193 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28). *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Final Award, 20 December 2023 (**Exhibit RLA-226**), ¶ 366.

investor under the CAFTA-DR.[1194] Acting as its subcontractor, the affiliate company also undertook to recover compensation for the works it performed on the investor's behalf, as well as certain expenses following the affiliate's bankruptcy.[1195]

877. Importantly, that tribunal also held that some of the claimants in that case made "*substantial disbursements and personal non-monetary contributions*" related to the company that entered into the concession agreement with the host-State.[1196]

878. In these three cases, the tribunals found that the requirement of *commitment of capital* entailed a substantial contribution by the investors or the companies in which they had shares to an economic venture. To recall, in *Kaloti Metals,* the tribunal required the claimant to show a "*contribution of funds to an economic venture that creates value*."[1197] It found that buying and selling gold alone did not meet this standard, as it lacked sufficient economic impact.[1198] Moreover, in *Latam Hydro* and *Lopez-Goyne*, the tribunals determined the "commitment of capital" requirement was satisfied through substantial financial contributions, such as investing cash, assuming risk, making loans and equity contributions.[1199]

1194 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID CASE No. ARB/17/44) Final Award, 1 March 2023 (**Exhibit RLA-218**), ¶ 335 (holding that "*it is noteworthy that Norwood was not acting as assignee of the Concession Contract, but was acting on ION's behalf as a subcontractor, as permitted by the Concession Contract and Article 28 of Law 286, subject to ION maintaining "control and full responsibility over them vis-a vis the State*" (unofficial translation).

1195 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID CASE No. ARB/17/44) Final Award, 1 March 2023 (**Exhibit RLA-218**), ¶¶ 331-337 (holding that "[a]*s to contribution It is true and undisputed that the most substantial disbursements for the exploration of the Concession (approximately US$ 74 million) were made by Norwood"*).

1196 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID CASE No. ARB/17/44) Final Award, 1 March 2023 (**Exhibit RLA-218**), ¶ 321 (holding that "*some of the Claimants made substantial disbursements and personal non-monetary contributions related to ION. Since ION's only asset is the Concession, such disbursements and contributions may be presumed to be related to the Concession.").*

1197 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 356.

1198 *Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Award, 14 May 2024 (**Exhibit RLA-226**), ¶ 356.

1199 *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua,* (ICSID CASE No. ARB/17/44), Final Award, 1 March 2023 (**Exhibit RLA-218**), ¶¶ 334-339. *See also Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28), Final Award, 20 December 2023 (**Exhibit RLA-218**), ¶ 366. *See also Kaloti Metals & Logistics, LLC v. Republic of Peru* (ICSID Case No. ARB/21/29), Final Award, 20 December 2023 (**Exhibit RLA-226**), ¶¶ 354-360.

879. In contrast, SSA's situation differs fundamentally: SSA has failed to prove that it made any commitment, let alone that it is substantial. In fact, there is no evidence of any commitment of capital under the APA, that would allow for the Tribunal to make an assessment on whether their alleged capital commitment was substantial or not.

880. SSA has conveniently overlooked a crucial factor: It refers to liabilities the APA and its related agreements clearly stipulate that the liabilities that SSA has allegedly acquired *vis-à-vis* third parties would arise only upon its successful recovery and monetization of treasure from its targets. Since no such liability has materialized, the obligations of SSA claims to have assumed do not exist. Consequently, SSA has not undertaken any risk under the APA, as further explained below.

881. ***First***, there are no liabilities allegedly assumed by SSA towards third parties that could constitute a commitment of capital or other resources.

882. As detailed later in this section, the only liability towards third parties that SSA has purportedly identified stems from the IOTA Agreement.[1200] It is impossible for SSA to rely on that contract to sustain that it has committed capital, as the creation of any liability under it depends entirely on conditions that have not yet occurred. Without the fulfillment of these conditions, no liability has arisen, which means that no capital has been committed—and as a corollary, no risk has been undertaken.

883. Section 2 of the IOTA Agreement specifies that SSA's obligation of payment is dependent on the proceeds derived from the treasure salvaged from SSA's targets. Such section provides as follows:

> Compensation and "Distribution of Proceeds: As compensation to IP for providing the leadership and management services described above, it is understood and agreed that IP will receive a portion of the proceeds derived from the treasure salvaged from SSA's Targets ("Proceeds"), whether in cash or in kind, as set forth below. As manager of the venture, IF shall collect all Proceeds and pay or reimburse all expenses and provide for contingent liabilities. […]. Distribution shall be made when assets or cash are available for distribution after provision has been made for all expenses and contingencies, and it is determined by IP that marketing of the treasure will

1200 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.1.(c).

> not be adversely affected. Income shall be deemed recognized and received in the same proportion and manner as proceeds are distributed.[1201]

884. Notably, from the time that the APA was executed to the time right before the objects of the Galleon San José are retrieved and monetized, no liability of SSA exists to pay them a dime. There is no language in the APA or in the IOTA Agreement that supports that SSA has already effectively acquired any liability or committed any capital. No financial obligation, or liabilities has yet arisen for SSA and therefore, it cannot be said that it has committed any of its capital towards third parties.

885. ***Second*,** the alleged obligation for SSA to distribute proceeds among the Economic Interest Holders neither amounts to a commitment of capital. The APA and its Exhibit B — the "Amended Limited Partnership Agreement of Sea Search–Armada" ("**LLC Agreement**") — make clear that SSA's liability to distribute profits is entirely dependent on conditions that have not yet occurred, as Colombia will further explain.

886. The APA provides that pursuant to various agreements between SSA and its members, "profits and proceeds from Seller's Business were to be allocated and distributed in specified amounts and or percentages."[1202] In turn, the APA defines the term "Seller's Business as 'the business of searching for, salvaging and marketing shipwrecks and sunken treasure'".[1203] Moreover, Article 1.3 of the APA establishes that SSA as purchaser shall "*assume and thereafter will pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities (as defined herein)*". It further provides that the term "Assumed Liabilities" means the following:

> (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; (iii) distribution and

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1201 Sea Search-Armada and IOTA Partners Venture Management Agreement (**Exhibit C-58**), Article 2.

1202 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Recitals.

1203 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Recitals.

> allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement (defined below). [1204]

887. From this follows that the only possible liabilities that SSA could have acquired towards the Economic Interest Holders are governed by exclusively one specific contract, namely the "Limited Liability Company Agreement of [Sea Search - Armada, LLC]". Section 1.5 (b) of the APA defines that contract as "the Purchaser LLC Agreement"[1205] and is included in the APA as its Exhibit B ("the Purchaser LLC Agreement")[1206]. Importantly, no liability that could arise under the Purchaser LLC Agreement could amount to a substantial commitment of capital as Article 10.28 of the TPA requires. This is because the Purchaser LLC Agreement and the APA place the risk of loss of profits squarely on the Economic Interest Holders rather than SSA, as explicitly outlined in the following provisions of these contracts:

888. Section 1.3.(iii) establishes that SSA as purchaser would pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities which comprise distribution and allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement.[1207]

889. Article 13.1 of the Purchaser LLC Agreement provides that the company will not distribute money or return investments to its members or other stakeholders if the company owes money to creditors.[1208]

1204 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.3.

1205 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.5(b).

1206 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Exhibit B.

1207 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Section 1.3 (iii) (establishing the following: "*Assumption of Specified Liabilities. On the terms and subject to the conditions set forth herein, effective as of the Closing Date, Purchaser shall assume and thereafter will pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities (as defined herein). As used herein, the term "Assumed Liabilities" shall mean only:*[…] (iii) *distribution and allocation of profits and losses to the Economic Interest Holders pursuant to the Purchaser LLC Agreement (defined below).*"). (emphasis added).

1208 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Exhibit B, Article 13.1 (establishing that "[t]*he Company may make distributions or return contributions to Members or Economic Interest Holders, as the case may be, upon direction by the Manager and subject to any restriction in the Certificate, provided that, if the Company has creditors, no distribution or return of contribution may be made, if after giving it effect, either of the following occur (a) (b) the Company would be insolvent; or the net assets of the Company would be less than zero.*").

890. Article 13.2 of the Purchaser LLC Agreement establishes that "*Profits and Losses shall be allocated to the Economic Interest Holders*".[1209] Similarly, Article 13.3 of that same contract establishes that "*Gain or Loss on Capital Transactions shall be allocated in the same order and in the same manner as set forth in Section 13.2 for Profits and Losses.*"[1210]

891. These provisions clearly establish that, under the APA and the Purchaser LLC Agreement, losses are allocated to the Economic Interest Holders. The contracts do not include any provision indicating that SSA would be responsible for covering such losses.

892. Logically, it must be concluded that the distribution of such profits and losses to the Economic Interest Holders in turn currently depends, in its entirety, on the successful recovery and monetization of the treasure.

893. In light of the above, it is evident that SSA's obligations under the APA and the Purchaser LLC Agreement are limited to the allocation and distribution of profits and losses to the Economic Interest Holders. SSA has not committed any of its capital towards the Economic Interest Holders yet. This is because SSA's obligations are entirely contingent upon the successful recovery and monetization of treasure, and the risk of no profits is explicitly allocated to the Economic Interest Holders. Therefore, it is clear that SSA has not committed substantial capital as required by Article 10.28 of the TPA.

894. Unlike the claimants in *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru,* and *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, SSA has failed to demonstrate any substantial commitment of capital or contribution of resources creating value under the APA.

1209 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Exhibit B, Article 13.2 (establishing that "*13.2 Allocation of Profits and Losses. After giving effect to the special allocations set forth in Section 13.4 below, Profits and Losses shall be allocated to the Economic Interest Holders, each with the same relative priority and in an amount or percentage of such Profits or Losses that is consistent with and equal to the relative priority, amount and/or percentage of the "net profits" and "net losses" (as such terms are defined in the Profit Allocation Agreement to which the Economic Interest Holder in question or its predecessor in interest is a party) to which such Economic Interest Holder is entitled in accordance with the terms of the Profit Allocation Agreement applicable to such Economic Interest Holder*"). (emphasis added).

1210 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Exhibit B, Article 13.3.

ii. Article 10.28 of the TPA requires that investors at least attempt through concrete action to make an investment, or that investors make an investment

895. In its Preliminary Decision, the Tribunal held that, under Article 10.28 of the TPA "it is the 'investment' that must reflect a 'commitment of capital' rather than the 'investor´ which must 'commit' capital, which in turn 'allows the Tribunal to consider capital that was invested as part of the investment whether by this specific investor or its predecessors'".[1211] The Tribunal based this conclusion on the reasoning held in Renée Rose Levy de Levi v. Peru.[1212]

896. Colombia respectfully submits that this finding should be reconsidered in light of the definition of investor of Article 10.28 of the TPA, which informs the definition of investment, in terms of Article 31 of the Vienna Convention on the Law of Treaties ("**Vienna Convention"** or "**VCLT**"), as part of its "context". Where relevant, Article 10.28 of the TPA provides as follows:

> 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[1213]

897. Crucially, the Tribunal has acknowledged that "the notion of 'investor of a Party' in Art. 10.28 of the TPA is inextricably linked to the notion of 'investment' […]".[1214]

898. By considering the above-cited provision of Article 10.28 and reading the term "investment" within its "context" as mandated by the international customary rules of interpretation reflected in Article 31(1) of the Vienna Convention on the Law of Treaties,[1215] the Tribunal should find that the TPA requires commitment of capital by the investor. For the following reasons, it is simply not sufficient for the investor to rely on investments allegedly incurred by a predecessor:

899. ***First***, as submitted, the definition of "investment" under the TPA must be interpreted in conjunction with the definition of "investor" in Article 10.28, which stipulates that an investor must either: (*i*) attempt through concrete action to make; (*ii*) be in the process of making; or (*iii*)

1211 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 169.

1212 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 169.

1213 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28.

1214 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 131.

1215 Vienna Convention on the Law of Treaties (1969) (**Exhibit RLA- 002**), Article 31(1).

have already made an investment in the territory of another Party.[1216] All three options require active conduct by the investor. When these provisions are read in conjunction with the definition of "investment" in the TPA, they establish a clear standard: an investor must take active steps to bring about the investment.

900. This interpretation reinforces that the mere ownership or holding of rights, without concrete actions demonstrating a commitment of capital, does not meet the requisite criteria for an investment to qualify under the TPA. The language of the TPA makes it evident that the investment must be linked to the investor's active conduct with the purpose of creating value or contributing to the economic activity in the host State.[1217] Thus, it is simply not sufficient for an investor to "own" or "hold" an investment.

901. SSA has not satisfied the TPA's standard. It has not provided any evidence that it has taken concrete steps or performed an active conduct that demonstrates a substantial commitment of capital or resources to qualify as "having made" an investment. What has SSA done? It has passively received a transfer of rights, which can hardly qualify as performing concrete action to attempt to make, or as making an investment.

902. Further, SSA's assertion that it made a commitment of capital because SSA Cayman Islands invested significant resources to support the enforcement of its rights (*i.e.* to initiate litigation before Colombian courts)[1218] is baseless. Certainly, initiating judicial proceedings to claim undetermined rights over undetermined goods and threatening a sovereign State, as well as third parties—as SSA did with WHOI by misrepresenting the contents of the Attachment Order issued by the domestic courts[1219]—does not qualify as a commitment of capital for purposes of the TPA.

903. The tribunal in *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* recently confirmed the point. It first recalled that for purposes of jurisdiction *ratione personae*, claimant must have

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1216 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28 (providing that "*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*").

1217 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 165.

1218 Response to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA, ¶ 190.

1219 Amended Statement of Claim, ¶¶ 244, 250.

attempted to make, be making or have made an investment.[1220] It then proceeded to determine whether the claimant had been the company which made commitments of cash for the affected project.[1221]

904. Considering these two requirements jointly, as the *Latam Hydro* tribunal did, the Tribunal in this case should find that the TPA does indeed require that the commitment of capital be carried out by the investor itself. Although the definition of "investment" does not expressly require that an asset be "invested by investors" as noted by the Tribunal,[1222] the requirement of active investment is clearly embodied in the TPA under the definition of "investor." Therefore, the express wording of the TPA does not allow SSA to get protection under the treaty, without having made an actual investment. The TPA requires Claimant, not any predecessor, to have made the investment. SSA, having performed no active steps to bring about the investment, does not qualify as an investor that has made an investment.

905. ***Second***, SSA's position also lacks relevant supporting case law. The only case cited by SSA is *Renée Rose Levy de Levi v. Peru*,[1223] which was brought under the Peru-France BIT.[1224] This treaty is not a NAFTA-like treaty and is not even comparable to the TPA. *Renée Rose Levy* can be distinguished from the facts of this case, as it was brought under a BIT that did not stipulate the requirements provided in the TPA.[1225] Respondent respectfully requests that the Tribunal reconsider its *prima*

1220 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28) (**Exhibit RLA-222**) ¶ 359 (holding that "[f]*or the purposes of its jurisdiction ratione personae under the TPA, the Tribunal must therefore be satisfied that First Claimant: (i) is an enterprise of a TPA Party (in this case, the United States); that (ii) has attempted to make, is making or has made an investment in the territory of Peru.*").

1221 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28), Final Award, 20 December 2023 (**Exhibit RLA-222**) ¶ 366 (stating that "*that First Claimant committed cash, expected gain or profit, and assumed risk in relation to the Mamacocha Project on the territory of Peru, by making loans and equity contributions to Second Claimant to finance its operations, specifically in relation to the performance of the RER Contract*").

1222 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶¶ 176-178.

1223 *See Renée Rose Levy de Levi v. Peru* (ICSID Case No. ARB/10/17), Final Award, 26 February 2014 (**Exhibit CLA-069**), ¶ 138.

1224 Claimant's Rejoinder to Respondent's Article 10.20.5 Objection, ¶ 186.

1225 *See Renée Rose Levy de Levi v. Peru* (ICSID Case No. ARB/10/17), Final Award, 26 February 2014 (**Exhibit CLA-069**), ¶ 138.

facie conclusion on the relevance of *Renée Rose Levy* as a supplementary source of international law,[1226] for the reasons set below.

906. Case law cannot supersede the actual language of the TPA, which is a primary source of international law, [1227] and the actual applicable law. As such, the reasoning and conclusions by that tribunal are not applicable to the present case.

907. Furthermore, *Renée Rose Levy* is distinct from the present case because the underlying treaty (Peru-France BIT) provided a less detailed definition of investment compared to the TPA. [1228] Under the Peru-France BIT, "investment" was defined broadly as "*all assets such as goods, rights, and interests of any nature*", requiring only that the assets be invested in accordance with domestic law. [1229] This broad formulation lacks any specific requirements for a concrete commitment of capital or the inherent characteristics of an investment, such as contribution, risk, and duration.

908. Also, the Peru-France BIT did not include a definition of "investor," let alone one requiring the investor to "attempt through concrete action to make," "be in the process of making," or "have already made an investment in the territory of another Party", as expressly required by Article 10.28 of the TPA. These key differences underscore why SSA's situation is distinct. The TPA imposes a more stringent threshold for what constitutes an investment — requiring active steps and a substantial commitment of capital.

909. Unlike the broader BIT applicable in *Renée Rose Levy*, under the TPA, merely holding or owning rights—absent any demonstrated contribution or active investment—does not satisfy the requisite criteria. SSA's failure to provide evidence of concrete actions or substantial contributions reinforces that its claims fall short of the TPA's stricter requirements.

910. Moreover, the distinction drawn between SSA's case and *Renée Rose Levy* demonstrates the incompatibility of SSA's claims with the requirements of the TPA. In *Renée Rose Levy*, both the transferring party and the transferee were French nationals. This meant that the original owner of the assets could have directly brought the claim under the treaty, as the investor and

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1226 Statute of the International Court of Justice (1945), Article 38(1)(d).

1227 Statute of the International Court of Justice (1945), Article 38(1)(d).

1228 *Renée Rose Levy de Levi v. Peru* (ICSID Case No. ARB/10/17), Final Award, 26 February 2014 (**Exhibit CLA-069**), ¶ 138

1229 *Renée Rose Levy de Levi v. Peru* (ICSID Case No. ARB/10/17), Final Award, 26 February 2014 (**Exhibit CLA-069**), ¶ 138.

investment aligned with the treaty's scope.[1230] By contrast, in this case, the transfer under the APA occurred between parties of different nationalities—namely, SSA's predecessor, a company incorporated in the Cayman Islands, and SSA itself.

911. This distinction is crucial under Article 10.28 of the TPA, which strictly defines an investor as "*a national or an enterprise of a Party*". Since SSA's predecessor was not incorporated in the United States, but in the Cayman Islands, it could not have qualified as an investor under the treaty. Consequently, any rights derived from the predecessor's transfer to SSA lack the necessary connection to a qualifying investor, as required under the TPA.

912. Permitting a claim based on rights originating from a non-qualifying entity would undermine the *effet utile* of Article 10.28 of the TPA. Specifically, it would render meaningless the carefully constructed definition of "investor" provided in that article. Such an interpretation would enable nationals or enterprises of a Party to bring claims based on alleged rights without having taken the required active steps to attempt to make, be in the process of making, or have already made an investment in the territory of another Party. This would effectively bypass the TPA's clear requirement for investors to demonstrate concrete actions and economic engagement, contrary to the intent of Article 10.28 of the TPA.

913. Moreover, it would be contrary to the purpose of the TPA. The treaty's purpose, as stated in its preamble construed in accordance with Article 31(2) of the Vienna Convention,[1231] is to protect investments made by companies incorporated in the United States or in Colombia,[1232] provided

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1230 *Renée Rose Levy de Levi v. Peru* (ICSID Case No. ARB/10/17), Final Award, 26 February 2014 (**Exhibit CLA-069**) ¶ 124 (rejecting Perú's allegation according to which "[t]*he only logical explanation for the endorsement of Holding XXI shares from her father is that it was a transaction designed to manufacture ICSID jurisdiction for this dispute by keeping the indirect ownership of BNM in the hands of a French national*."); ¶ 154 (finding that "[w]*ith regard to the intention behind Mr. Levy Pesso's assignment of his shares to his daughter, the Claimant, the Tribunal considers that the fact that this transfer took place without charge does not demonstrate that it was an attempt 'to manufacture jurisdiction,' as the Respondent states. Firstly, because this is a transfer between very close family members and, secondly, because the transfer occurred in July 2005*.").

1231 Vienna Convention on the Law of Treaties (1969) (**Exhibit RLA- 002**), Article 31(2).

1232 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Preamble ("[t]*he Government of the United States of America and the Government of the Republic of Colombia, resolved to: […] ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable legal and commercial framework for business and investment […] AVOID distortions to their reciprocal trade*").

they meet the explicit requirements of Article 10.28. To allow otherwise would expand the protection of the treaty beyond its intended scope.

iii. The mere indication of potential liabilities in the APA does not amount to commit capital

914. In the absence of actual evidence that could prove commitment of capital by SSA, SSA had no other alternative than to vaguely rely on the same provisions of the APA it had mentioned in its previous submissions, without satisfying the requirements of the TPA.

915. SSA submits that, after the execution of the APA, it undoubtedly made a commitment of capital, by assuming the obligation to pay "as and when due" SSA Cayman's "Assumed Liabilities."[1233] SSA merely refers to Article 1.3 of the APA, which deals with the alleged Assumption of Specified Liabilities. SSA has been incapable of identifying the substantial commitment that it allegedly made – even less how such alleged commitment has materialized since 2008 (in the last 14 years). The referred terms of the APA are nothing more than vague references to contracts and liabilities that SSA fails to duly identify, and whose current existence is unsupported by any evidence.

916. Notably, under Article 2 of the APA, SSA as an assignee assumes and agrees to pay all amounts due and payable under the "Assigned Contracts". This article also provides that SSA shall make all payments to the other party to the Acquired Contracts when due. Thus, the defined term "Assigned Contracts" is necessary for understanding the liabilities that SSA may have actually assumed, which is key to determine whether SSA actually incurred in commitment of capital, as addressed by the Tribunal in its Preliminary Decision.[1234]

917. Section 1.1. (d) of the APA contains such definition, providing that "Acquired Contracts" shall mean:

> Each contract, agreement, understanding, lease, license, commitment, undertaking, arrangement or understanding, written or oral, including any document or instrument evidencing any purchase order, customer order, distributorship or similar agreement to which or by which Seller is a party or

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1233 Amended Statement of Claim, ¶ 282.

1234 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 180.

> otherwise subject or bound and described on Schedule 1.1(c) (sic). [apparently meaning Schedule 1.1(d)][1235]

918. However, Schedule 1.1.(c) lists only one "Acquired Contract", *i.e.* the IOTA Agreement:[1236]

> **SCHEDULE 1.1(c)**
>
> **Acquired Contracts**
>
> 1. Sea Search Armada – IOTA Partners Limited Partnership Venture Management Agreement, dated _____, 1988.
> 2.
> 3.

919. If the IOTA Agreement contained actual proof of any form of commitment of capital incurred by SSA, SSA would have provided further information in this regard in this Arbitration. It did not. Importantly, Colombia has timely warned about this empty box and SSA's lack of transparency, since the very early stages of this Arbitration.[1237] Yet, SSA has remained silent – completely ignoring this issue in its Amended Statement of Claim. With no transparency, SSA has failed to address how a contract dated 1988 could serve as a basis to meet the requirement of commitment of capital that it has the burden of proving under Article 10.28 of the TPA.

920. SSA has failed to show whether the IOTA Partners Limited Partnership has fulfilled its obligations under the IOTA Agreement and whether any resulting liabilities for SSA Cayman Islands could be transferred to SSA. Moreover, the current status of the IOTA agreement is unknown. The lack of evidence concerning the performance of the IOTA Agreement is concerning. SSA has failed to provide any correspondence between SSA's predecessor and the IOTA Agreement, demonstrating that the parties to this contract have conducted any activities towards its performance. The burden of proof remains in SSA's court.

1235 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.1.(d).

1236 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.1.(c)

1237 Colombia's Submission Pursuant to Article 10.20.5 of the TPA, ¶ 251.

921. SSA has also failed to substantiate how it remains liable for future commitments under the IOTA Agreements, bearing in mind that this contract was allegedly executed in 1988, while the APA under which SSA supposedly committed capital was executed in 2008, *i.e.* 20 years later.

922. Blatantly, SSA ignores a crucial fact: it has not proved whether SSA Cayman Islands duly assigned the IOTA Agreement pursuant to the requirements of such contract. It did not even address the issue in its Amended Statement of Claim. Indeed, Article 12 of the IOTA agreement establishes that the contract can be assigned with prior written consent of the other party. Such provision reads as follows:

> 12. Assignment: Neither this Agreement nor any interest of either of the parties herein may be assigned, pledged, transferred, or hypothecated, without the prior written consent of the other party hereto, provided, either party may sell, transfer, pledge or otherwise dispose of this interest in proceeds to be distributed under Section 2.[1238]

923. The lack of evidence regarding the transfer of the IOTA Agreement renders any allegation by SSA on commitment of capital void and baseless. Since SSA has not substantiated that SSA Cayman validly transferred the IOTA Agreement in accordance with the requirements of that contract, SSA cannot rely on it to assert that the commitment of capital requirement has been met. Lack of transfer of the IOTA Agreement is evidence of the fact that such commitment did not take place. Furthermore, SSA has not provided any evidence that the IOTA Agreement performed any of its obligations that could give rise to liability for SSA. Moreover, SSA has not explained how such alleged commitments concerning the IOTA Agreement were registered in the company's accounting records.

924. SSA's silence regarding this matter confirms that the content of the APA and its annexes, concerning any possible liability to be incurred by SSA that could amount to commitment of capital, is a mere illusion. Thus, SSA has failed to provide evidence of concrete contracts or commitments that would meet for its alleged rights under the APA to qualify as a protected investment under the TPA.

925. Neither do other articles of the APA nor its annexes provide any evidence that SSA's predecessor has made a substantial commitment of capital. The only additional provision of the APA governing the issue of liabilities allegedly acquired by SSA is Section 1.3. As explained above, that section provides that SSA, as the purchaser, will assume and fulfill the "Assumed Liabilities," which include payment and performance obligations of the seller arising before the closing date

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1238 Sea Search-Armada and IOTA Partners Venture Management Agreement (**Exhibit C-58**), Article 12.

under the Acquired Permits and Acquired Contracts to the extent these had not been paid or performed by the time of execution of the APA.[1239]

926. It follows that the existence of any "Assumed Liabilities" was subject to the existence of specific Acquired Contracts. SSA has provided no additional contracts apart from the IOTA Agreement. Absent those contracts, the Tribunal should not approve SSA's lack of transparency by concluding that the APA sufficiently proves SSA's or any of its predecessors' commitment of capital. As such specific Acquired Contracts do not exist, SSA has not demonstrated that it has committed any capital.

927. In its Rejoinder, SSA claimed that an additional liability would have been transferred under the APA, referring to a debt allegedly owed to Chicago Maritime. This debt was allegedly accrued in 1982 by the SSA Cayman Partners for the charter of the submarine Auguste Piccard as mentioned in Article 4 of the LLC Agreement.[1240] The reference to the alleged liability in the Amended Limited Partnership Agreement Of Sea Search – Armada cannot be deemed a liability for the purpose of determining whether SSA has met the requirement of risk because: (i) it is not listed as an Acquired Contract under Article 1.3 of the APA;[1241] and (ii) the only mention to a liability appears in Article 4 of LLC Agreement, with no supporting documentation to verify the existence of such debt[1242]. Consequently, there is no certainty that SSA's predecessors incurred this liability. Consequently, there is no certainty regarding the extent or scope of the liability incurred by SSA's predecessor, and even less certainty about the extent or scope of any liability that SSA itself allegedly acquired.

928. A similar case can be seen concerning Assumed Liabilities under "Acquired Permits." The APA defines this term as "[a]*ll governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals, consents and franchises used or useful in connection with the*

1239 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.3.

1240 Rejoinder to Colombia's Preliminary Objections pursuant to Article 10.20.5 of the TPA, ¶ 189.

1241 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30bis**), Section 1.3.

1242 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, (**Exhibit C-30**), Exhibit A, Article IV (providing that "*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.*")

operation of Seller's Business and any and all pending applications relating to any of the foregoing."[1243] Again, SSA has failed to demonstrate how it could have incurred any commitment of capital with regards to any Acquired Permit under the APA.

929. Notably, what the lack of specific "Assumed Liabilities" under the APA in fact shows is that SSA and SSA Cayman Islands agreed that SSA would not assume any liability, and therefore SSA Cayman Islands remains liable under Section 1.4 of the APA. As provided by that section:

> SSA as purchaser "will not assume or perform, and Seller shall retain, pay, perform and discharge all liabilities of Seller of whatever kind or nature that are not Assumed Liabilities (collectively, the "Retained Liabilities"), including, without limitation: (a) Any liability, of whatever kind or nature, associated with, relating to or arising from the operation of Seller's Business or the Acquired Assets that is not an Assumed Liability. [1244]

930. Thus, SSA did not agree to be held liable for any contracts other than the "Derived Contracts", *i.e.* the IOTA Agreement, which is the only "Derived Contract" that the APA identifies. And, as substantiated above, such contract is an empty box.

931. Clearly, the terms of the APA are insufficient to satisfy the requirement of commitment of capital under Article 10.28 of the TPA.

932. To support its arguments, SSA has relied upon the findings in *Malicorp Limited v. The Arab Republic of Egypt* and *RSM Production Corporation v. Grenada*. SSA used these cases to submit that "commitment" of capital or other resources includes promises to provide them in the future, and accordingly these promises can be made through contractual obligations.[1245] Such is not the case here, concerning the IOTA Agreement. The reasoning in those two awards would not render the IOTA Agreement sufficient for purposes of satisfying the requirement of commitment of capital under the TPA.

933. SSA omits several key facts of *Malicorp* and *RSM* that distinguished those cases from this arbitration and make them irrelevant for this case. In *Malicorp,* as well as in *RSM*, the investors

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1243 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30bis**), Section 1.3.

1244 Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC (**Exhibit C-30**), Section 1.4.

1245 Claimant's Rejoinder to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA, ¶ 192.

had entered into specific contracts with the respective host-States.[1246] The specific commitments of capital from the investors and their scope and amount were sufficiently determined following the terms of the contracts.[1247]

934. In *Malicorp*, the investor was obliged under the contract to furnish a series of guarantees. Furthermore, the investor was specifically obliged to future commitments, including establishing a subsidiary and providing a 2 million Egyptian pounds guarantee.[1248] Based on these commitments, the tribunal held that an investor being bound by the contract created an obligation to make significant future contributions, which constituted the investment:

> 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. In other words, 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.[1249]

935. The circumstances in *Malicorp* are significantly different to this case. The investor in *Malicorp* did commit specific contributions, pursuant to two contracts entered into with the government of the host-State.[1250] Here, in *SSA v. Colombi*a, SSA has not revealed any commitment to specific contributions. As explained above in this Section, the liabilities SSA alleges under the APA have not arisen yet, and therefore do not constitute any substantial or specific commitment by SSA.

1246 *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011, (**Exhibit CLA-65**), ¶ 93. *See also RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009, (**Exhibit CLA-21**), ¶ 5

1247 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011 (**CLA-65**), ¶ 93 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009 (**Exhibit CLA-21**), ¶ 5

1248 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011 (**CLA-65**), ¶ 15.

1249 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011 (**CLA-65**), ¶ 113.

1250 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011 (**CLA-65**), ¶¶ 15,113 (holding that "*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. In other words*").

936. In *RSM,* the dispute concerned an exploration license application and exploration activities that were future obligations under a contract entered into by the investor and the host-State.[1251] The tribunal held that a binding agreement involving exploration rights and an investor's commitment to allocate resources constituted an investment.[1252] This binding agreement was entered directly between the claimant and the host State.[1253] Consequently, the tribunal's finding hinged on the private party's obligation to commit resources as an integral part of the agreement's performance. In essence, the tribunal emphasized that the commitment of capital must be directly tied to the investor's undertaking to fulfil specific obligations necessary for the exploration agreement with the host State.

937. The rationale in *RSM* is inapplicable here. Unlike the circumstances in *RSM,* SSA has failed to demonstrate any equivalent commitments tied to its alleged acquisition of rights under the APA. Moreover, SSA has not substantiated how its conduct satisfies the TPA's requirements for "concrete actions" or a "commitment of capital" under Article 10.28.

938. Another distinction between *RSM* and SSA's case is that the tribunal's finding in *RSM* was based on contractual and reciprocal obligations. The lack of direct, binding commitments or obligations equivalent to those in *RSM* highlights the inapplicability of that tribunal's reasoning to the present case.

939. In sum, the specific commitments incurred by the investors in those two cases drastically differ from the alleged liabilities that could eventually bind SSA under the IOTA Agreement, and pertain to drastically different industries. As a consequence, SSA cannot rely on the findings by the tribunals in those cases to wrongfully conclude that the terms of the APA and the IOTA Agreement meet the requirement of commitment of capital.

1251 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009 (**CLA-21**), ¶ 5.

1252 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009 (**CLA-21**), ¶ 242 (holding that "***an agreement*** *whereby, on the one hand, a state confers upon a private party the right to search for natural resources while, on the other, the private party undertakes to commit the necessary means to that end, is undoubtedly an investment.*") (emphasis added).

1253 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009 (**CLA-21**), ¶ 242.

b. SSA's alleged investment did not involve an assumption of risk

940. Respondent submits that Tribunal's reasoning regarding the alleged assumption of liabilities under the APA, specifically the alleged obligations to pay SSA Partners and third parties,[1254] equally merits further review. In this case, SSA's case concerning the alleged assumption of risk falls short. The reason is that since it has not committed any capital, it has not assumed any risk. In addition, SSA relinquished any such assumption by seeking to modify and enlarge the coordinates of the *Galeón* San José's location.

941. In *KT Asia v. Kazakhstan*, the tribunal stated that, if there is no contribution of an economic value, there can be no risk. Thus, if the characteristic of commitment of capital is not fulfilled, neither will the characteristic of assumption of risk.[1255] SSA has proposed that the reasoning of the tribunal is not applicable because: (*i*) that tribunal was interpreting the definition of "investment" under Article 25(1) of the ICSID Convention, which does not apply to the TPA;[1256] and (*ii*) the facts of that case differ from those in this Arbitration.[1257] That is not correct. First, Article 10.28 itself provides the minimum element of an investment in an economic sense. Hence the Respondent does not need to rely on Article 25 of the ICSID Convention, the TPA itself provides the elements, contained in Article 25. In this sense, and with that clarification, the reference findings in *KT Asia* are illustrative:

942. First,[1258] the *KT Asia* tribunal emphasized that the meaning of the "investment" based on the investment treaty must derive from the term's ordinary meaning in line with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). It is trite to say that this is a basic rule of interpretation. The tribunal added that the ordinary meaning is objective, as confirmed in

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1254 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶¶ 188-193.

1255 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (stating that "*To qualify as an investment, an allocation of resources must finally involve a level of risk* […] *The difficulty here is that KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution. As was discussed above, KT Asia was not capitalized; had no resources; financed the acquisition through a loan; and had no means of repaying such loan unless it received the proceeds of the resale of the shares. The Tribunal agrees with the Respondent's argument that in the absence of any contribution of some economic value it is difficult to identify an investment risk*") (**Exhibit RLA-041),** ¶¶ 217, 219 (emphasis added).

1256 Rejoinder to Colombia's Preliminary Objections pursuant to Article 10.20.5 of the TPA, ¶¶ 205-206.

1257 Rejoinder to Colombia's Preliminary Objections pursuant to Article 10.20.5 of the TPA, ¶ 207.

1258 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (**Exhibit RLA-041**), ¶ 165.

previous cases like *Saba Saba Fakes v. Republic of Turkey* [1259] and *Quiborax S.A., Non Metallic Minerals S.A v. Plurinational State of Bolivia*.[1260]

943. *Second*, the *KT Asia* tribunal further clarified that risk is a central component of the inherent definition of an investment. This equally applies to the case at hand. According to the tribunal, risk entails not just the possibility of contractual breach but the uncertainty of a venture's success or failure, including the unpredictability of returns. It rejected the idea that a separate "expectation of profit" is required, noting instead that this expectation is already implicit within the concept of risk[1261]. This led the tribunal to conclude that without contribution of resources by an investor the requirement of assumption of risk is not met.[1262]

944. *Third*, by establishing that risk is inherent within the act of investing, the tribunal highlighted that the assumption of risk necessarily comes from the fact that an investor has committed resources.[1263]

945. *Lastly,* irrespective of the specific factual circumstances of that case, the key point is that the *KT Asia* tribunal concluded that the investor had failed to demonstrate any contribution. Consequently, it held that *"having made no contribution,* [the claimant] *incurred no risk of losing such (inexistent) contribution."*.[1264] This reasoning makes SSA's position even further removed from satisfying the requirement of assuming risk. If the requirement of risk cannot

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1259 *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010 (**Exhibit CLA-63**), ¶ 108 (holding that "[t]he Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention [...]").

1260 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Final Award, 16 September 2015, (**Exhibit RLA-31**) ¶ 212.

1261 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (**Exhibit RLA-041**), ¶ 170. (noting that "[…] *contribution of money or assets (that is, a commitment of resources), duration and risk form part of the objective definition of the term "investment". The expectation of a commercial return is sometimes viewed as a separate component. This Tribunal is rather of the opinion that such expectation is part of the risk element. Be this as it may, an investor commits resources with a view to generating profits, which necessarily implies a risk*." (emphasis added).

1262 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (**Exhibit RLA-041),** ¶ 219 (holding that "[…] *The difficulty here is that KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution.*") (emphasis added).

1263 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (**Exhibit RLA-041),** ¶ 170.

1264 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 (**Exhibit RLA-041),** ¶¶ 217-219.

be met in the absence of a contribution, it follows that the requirement is even less likely to be satisfied when, as in the present case, there has been no commitment of capital whatsoever.

946. In this case, as explained above, SSA has not substantiated that it incurred a substantial commitment of capital. The liabilities in question have not effectively arisen and would only arise if, of all things, objects from a treasure are retrieved and monetized. This contingency of the materialization of a payment, *i.e.* an actual commitment of capital, underscores the absence of inherent risk. Consequently, the requirement of assumption of risk is not met, as these liabilities are speculative and conditional rather than concrete, immediate or with a certain date. Regarding liabilities toward third parties, SSA has not demonstrated that these were validly transferred under the IOTA Agreement, failing to prove a commitment of capital in that context. Therefore, SSA has not assumed any risk in this regard.

947. Furthermore, it bears mentioning that in *KT Asia v. Kazakhstan*, the tribunal clarified that risk is a central component of the inherent definition of an investment. According to the tribunal, risk entails not just the possibility of contractual breach but the uncertainty of a venture's success or failure, including the unpredictability of returns.[1265]

948. Finally, with regard to the Tribunal's reasoning concerning the inherent risk in the treasure-searching business and its analogy to the findings in *RSM Production Corporation v. Government of Grenada*,[1266] Colombia respectfully reiterates its position on the lack of applicability of that case to the present matter. A particularly important consideration in assessing whether SSA has incurred any risk is that, in this case, SSA has neither assumed any outstanding liability nor paid any consideration or made substantial capital commitments, as substantiated in this Section. By contrast, in *RSM*, the assumption of risk was closely tied to the investor's industry expertise and know-how, which were "ostensibly dedicated to the project as soon as the Agreement was signed by the Parties, and both could have been put to use had the Exploration License been issued by Grenada."[1267]

1265 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, (ICSID Case No. ARB/09/8), Award, 17 October 2013, (**Exhibit RLA-041)**, ¶ 170 (noting that "*an investor commits resources with a view to generating profits, which necessarily implies a risk.*").

1266 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 194.

1267 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, 13 March 2009 (**CLA-21**), ¶ 249.

c. SSA did not have an expectation of gain or profit

949. Article 10.28 of the TPA provides that an investment must possess *"characteristics of an investment, including such characteristics as* […] *expectation of gain or profit*."[1268] Investment tribunals have interpreted this concept as requiring that the investor seek "*to make a profit as a consequence of the investment.*[1269]

950. According to the Tribunal, the expectation of profit relies on the 2007 SCJ Decision. In that regard, the Tribunal explained that "*based on the record as it currently stands, it is impossible to ignore that the CSJ appears at least to have recognized that SSA's Predecessors possessed or were entitled to certain rights, which seem to relate to the rights claimed by SSA in this arbitration.*"[1270]

951. Further, in its Preliminary Decision, the Tribunal concluded that the "*CSJ appears to have recognized some form of rights or entitlement to such assets or goods that 'may legally qualify as treasure'*" in particular *"to* those [assets or goods] *that are in 'the coordinates referred to in the 'Confidential Report on Underwater Exploration […]' which does not include other spaces, zones, or areas,' whatever those expressions may be found to mean."*[1271] The Tribunal also found that the Claimant must have expected some gain or profit when it entered into the APA.[1272]

952. In its Amended Statement of Claim, SSA asserts that its alleged investment reflects an expectation of gain or profit because "*Article 701 of the Civil Code, on its face, would provide an expectation to rights to discovered treasure which the Colombian Supreme Court 'appears at least to have recognized*'."[1273] According to SSA, those rights were "*acquired by SSA under the APA*."[1274]

953. Colombia further submits that the SCJ 2007 Decision could not serve as a basis for SSA's expectation of gain of profit in this case since, in its judgement, the SCJ expressly limited any rights of SSA to objects—that could potentially be classified as treasure—within the exact coordinates of the 1982 Confidential Report "*without including, therefore, diverse spaces, zones*

1268 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28.

1269 *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 (**Exhibit CLA-57**), ¶ 225.

1270 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 185 (emphasis added).

1271 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 186.

1272 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 187.

1273 Amended Statement of Claim, ¶ 286.

1274 Amended Statement of Claim, ¶ 287.

or areas."[1275] Thus, if SSA knew as early as 1982 that there was nothing to be found in the coordinates of the 1982 Confidential Report, how could it have any good faith expectation of profit by 2008 when it passively received the rights from SSA Cayman pursuant to the APA? SSA could not have any good faith expectation of profit by 2008 because by that date it fully knew that the GSJ was not at the coordinates its predecessor provided to the Republic of Colombia in 1982.

C. THE TRIBUNAL LACKS JURISDICTION BECAUSE SSA DOES NOT QUALIFY AS AN INVESTOR UNDER ARTICLE 10.28 OF THE TPA

954. Article 10.28 of the TPA defines "investor of a Party" as follows:

> 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.[1276]

955. According to the definition of investor as set out above, to qualify as an investor, the national or the enterprise of a Party must attempt through concrete action to make, be making or have made an investment in the territory of another Party. As the Tribunal recognized in its Preliminary Decision, "*the notion of 'investor of a Party' in Art. 10.28 of the TPA is inextricably linked to the notion of 'investment'* […]".[1277] In essence, this means that where there is no investment, there is no investor.

956. It is Colombia's submission that SSA does not qualify as an investor because:

957. ***First,*** SSA did not even attempt, through concrete action, to make an investment.

958. The mere execution of the APA does not constitute a concrete action towards making an investment as required by the TPA. In fact, as noted above, SSA's alleged compliance with the definition of "investment" under the TPA relies exclusively on unproven expenditures and liabilities incurred by its predecessors. Thus, if SSA did not take any concrete action to attempt to invest—in fact, it did not take any action at all, other than receiving a transfer of rights under

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1275 Supreme Court of Justice, Civil Chamber, Judgement No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 235.

1276 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.28.

1277 Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the TPA, ¶ 131.

the APA—SSA's conduct does not qualify under the lower threshold of "attempting through concrete action" to make an investment.

959. Logically, if SSA does not even qualify as an "investor" because SSA has not shown that it attempted through concrete actions to make an investment, even less can it be concluded that SSA made an investment, which entails a higher standard of performance – all consistent with the active participation standard established by the TPA under the definition of investor of a Party.[1278]

960. **And *second***, as explained in the previous sections, SSA did not make an investment pursuant to Article 10.28 of the TPA.

D. COLOMBIA FULLY RESERVES ITS RIGHT TO DENY SSA THE BENEFITS UNDER THE TPA AND FURTHER OBJECT TO THE TRIBUNAL'S JURISDICTION ON THE BASIS OF ARTICLE 10.12.2 OF THE TPA.

1. Article 10.12.2 of the TPA on Denial of Benefits

961. Article 10.12.2 of the TPA provides as follows:

> A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.[1279]

962. Pursuant to Article 10.12, Colombia may deny benefits to an investor of the United States that is an enterprise of the United States and to investments of that investor if:

1278 *See Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru* (ICSID Case No. ARB/19/28) (**Exhibit RLA-222**) ¶ 359 (holding that: "[f]*or the purposes of its jurisdiction ratione personae under the TPA, the Tribunal must therefore be satisfied that First Claimant: (i) is an enterprise of a TPA Party (in this case, the United States); that (ii) has attempted to make, is making or has made an investment in the territory of Peru.*").

1279 United States – Colombia Trade Promotion Agreement (excerpts) (2012) (**Exhibit CLA-1**), Article 10.12.2.

(i.) The enterprise has no substantial business activities in the United States, and

(ii.) Persons of a State non-Party to the TPA, or persons of Colombia, own or control the enterprise.

a. It is unknown whether SSA has substantial business activities in the United States

963. Other than alleging that it performed a reorganization from the safe haven Cayman Islands to Delaware in the United States,[1280] SSA has also failed to explain the business activities that it conducts in the United States. Less so has SSA attempted to demonstrate that any of the business activities that it has in the United are substantial. SSA's submissions in this arbitration, and publicly available records do not shed any light.

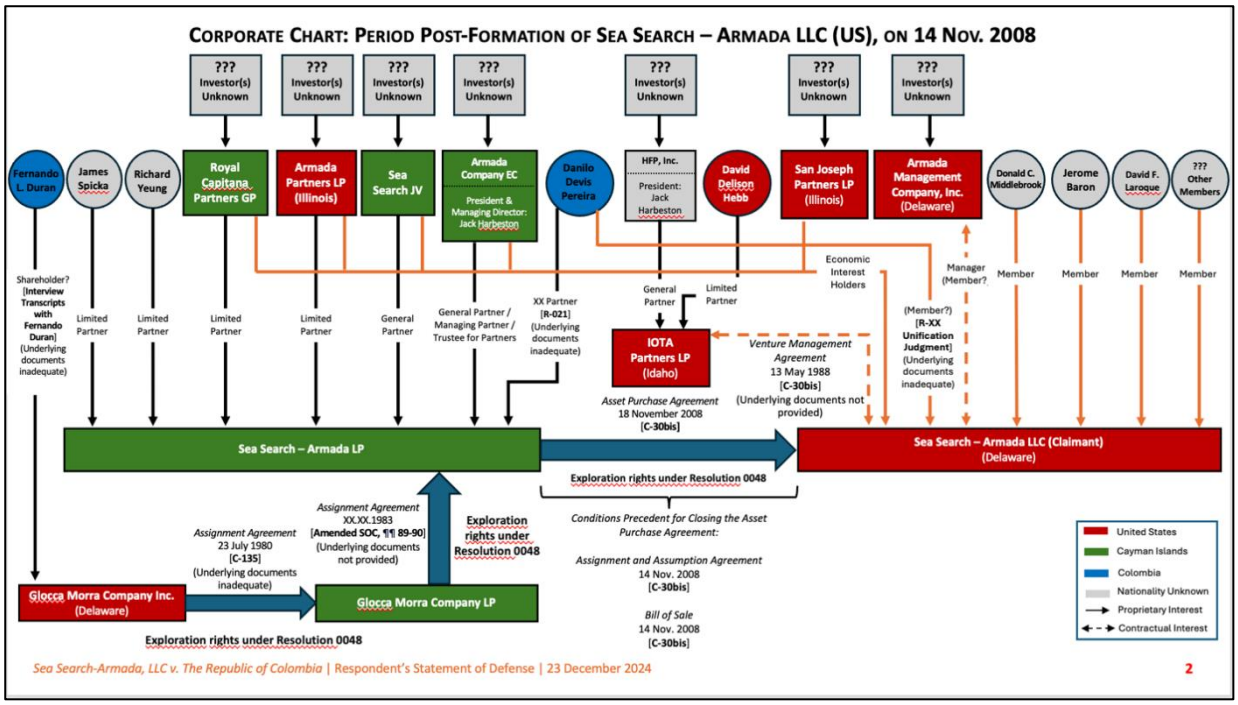
964. As SSA has opted not to be forthcoming in its submissions as regards the business activities, if any, that it has in the United States, and even less if they are substantial, there is no proof that SSA has any presence in the United States beyond mere form.

965. Therefore, Colombia fully reserves the right to deny benefits to SSA based on the lack of substantial activities of SSA in the United States, after Respondent has the opportunity to review documents related to SSA's dealings and economic activities in the United States, following the document production phase in this arbitration.

b. The ownership and control of SSA is unknown

966. The Respondent has reviewed the submissions of Claimant, which fail to disclose the corporate structure of SSA, its owners, members or stakeholders, the percentages each owns in SSA, and their nationality. The opacity of the structure, nationalities of the stakeholders and lack of clarity on the percentages owned etc., made it impossible for Colombia to determine who owns or controls SSA. The chart below, prepared by the Respondent, makes this plain.

[1280] Response to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 203.



967. Based on this information, a pivotal question remains: who truly owns or controls this alleged investment? It is uncertain whether SSA fulfils the ownership or control requirement, as there is no conclusive evidence that its members are U.S. nationals. What we do know, although limited, suggests that SSA has members of Colombian nationality. For example, Mr. Danilo Devis, a Colombian national, appears to be entitled to a 20% of the rights of Claimant.[1281] Mr. Fernando Leyva Durán also appears to be Colombian.[1282] What is certain is SSA's lack of transparency concerning its corporate structure and who owns and controls such entity.

968. As for the remaining entities, such as Royal Capitana Partners GP, Armada Partners LP, Sea Search JV, Armada Company EC, HFP, Inc., San Joseph Partners LP, Armada Management Company, Inc.,

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1281 Sea Search Armada, Petition to the IACHR, 15 April 2013 (**Exhibit R-21**), p. 26 (where Mr. Danilo Devis requested the ICHR to recognize him as petitioner in the proceedings, together with SSA, in his condition as "*assignee of 20% of the rights recognized to Sea Search Armada through Judgment of 5 July 5 2007.*"; *See also* 10th Judge of the Barranquilla Circuit, Judgement, 6 July 1994 (**Exhibit C-25**), p. 33 (deciding to "*3°) Recognize Mr. Danilo Devis Pereira as the holder of 10% of the rights declared in this ruling in favor of the company Sea Search Armada*").

1282 Memorandum containing transcriptions of interviews to Fernando Leyva Durán, 9 August 1988 (**Exhibit R-115**), p. 1 (stating that "[i]*n 1979 some American friends and I first thought of San Jose and founded a company called Glocca Morra* […]"; p. 1 (stating that "*I do not have access to what Sea Search is going to do. I am simply a shareholder* […]".) (emphasis added).

SSA has failed to provide the information on their members, and publicly available information is insufficient. Even for those companies or partnerships whose legal names are known, their stakeholder composition remains undisclosed.

969. In conclusion, while Colombia has demonstrated due diligence and made its best efforts, this appears to be the extent of the uncovered information. There is absolutely no transparency regarding (i) whether SSA has substantial business activities in the US, and (ii) who owns or controls the alleged investment. Instead, there is sufficient evidence to suggest that SSA has stakeholders of other nationalities, including Colombian. Accordingly, Colombia reserves its right to deny benefits to SSA following the document production phase, on the basis that SSA does not have substantial business activities in the US and is owned or controlled by stakeholders of Colombia or of a State non-Party to the TPA.

IV. THE TRIBUNAL LACKS JURISDICTION *RATIONE TEMPORIS*

970. As demonstrated above, the Tribunal lacks jurisdiction *ratione materiae* since the Claimant has no investment rights capable of being protected under the TPA.

971. Nonetheless, even if the Tribunal were to consider – contrary to the overwhelming evidence presented by the Respondent – that the Claimant somehow has some rights as regards the Galleon *San José* or, for that matter, over anything at the coordinates that SSA has wrongly reported, the Tribunal still lacks jurisdiction *ratione temporis*, as the Respondent demonstrates below.

972. To recall, the Claimant alleges that by issuing Resolution 085 of 23 January 2020, Colombia eviscerated SSA's alleged rights over the Galleon San José.[1283] The allegation, however, is nothing but a poor attempt to artificially gain access to this Tribunal by repackaging, as a purported new measure, alleged facts and claims that occurred before the TPA entered into force and that, in any event, are time barred under the TPA. The Tribunal should not condone the Claimant's abusive behaviour, which openly contravenes both the TPA's clear language and the Contracting Parties' intention when consenting to arbitration under the TPA.

973. ***First***, any alleged "acts and facts" which, according to the Claimant's 2010 submission before the United States District Court for the District of Columbia ("**U.S. District Court for DC**"),

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1283 Amended Statement of Claim, ¶ 258 (stating that "*Resolution No. 0085 completely eviscerated SSA's rights*.").

"*eliminat*[ed] *all of SSA's property rights in the treasure*"[1284] and purportedly constituted unfair treatment, fall outside the temporal scope of the TPA, pursuant to Article 10.1.13. Simply put, the alleged "acts and facts" that SSA first characterized as expropriatory and unfair took place in 1984, well before the Treaty came into force on 15 May 2012.

974. ***Second***, and in the alternative, were the Tribunal to disregard that the Claimant expressly claimed in 2010 that its alleged expropriation had occurred in 1984 and, notwithstanding that statement, consider alleged "acts or facts" that took place after the TPA entered into force, the Respondent submits that the Tribunal lacks jurisdiction *ratione temporis* given that the Claimant's claims for alleged breaches of expropriation and unfair treatment are barred pursuant to Article 10.18 of the TPA.

975. ***Third***, and finally, even if the Tribunal were to (i) ignore the multiple and repeated claims made by the Claimant and the Claimant's Alleged Predecessors throughout the decades and the fact that, pursuant to the terms of the TPA, the Claimant is not allowed to claim for the same alleged breach multiples times – in particular as regards to the alleged breach of expropriation – and (ii) somehow consider that, notwithstanding the Claimant's claim before the Inter-American Commission of Human Rights ("**IACHR**"),that Colombia had allegedly "*confiscated its property*" and treated its investment arbitrarily by 26 November 2012 at the latest, the Tribunal must still decline its jurisdiction *ratione temporis* since: (***i***) the Claimant did not bring any claims for expropriation under the TPA despite the reiterated and unequivocal communications by Colombia that it did not recognize that the Claimant has any rights over the remains of the Galeon San José, and (***ii***) as the Respondent demonstrates below, the reinstatement of the Attachment Order by the Superior Tribunal of Barranquilla did not, and could not, revive the Claimant's alleged rights.

1284 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-18**), p. 15, ¶ 12 (emphasis added).

A. IN 2010, SSA CLAIMED THAT, BY 1984, COLOMBIA HAD ADOPTED THE ALLEGED ACTS "ELIMINATING ALL OF SSA'S PROPERTY RIGHTS IN THE TREASURE", INCLUDING BY THE ENACTMENT OF THE "SEIZURE LAW"

1. The Tribunal has no jurisdiction given that the alleged expropriatory acts and alleged unfair treatment first complained of by SSA's Alleged Predecessors took place prior to the TPA's entry into force

976. To recall, Article 10.1.3 of the Treaty provides that, "[f]*or greater certainty, this Chapter does not bind any Party in relation to* <u>*any act or fact that took place or any situation*</u> *that ceased to exist before the date of entry into force of this Agreement*."[1285] This provision is consistent with, and effectively replicates, the general rule of international law on the "non-retroactivity of treaties", as codified in Article 28 of the VCLT, which provides as follows:

> 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.[1286]

977. Article 10.1.3 of the TPA, the United States and Colombia are not bound in relation to any acts or facts that took place prior to the Treaty's entry into force, and there can be no internationally wrongful act as no international obligation exists in the first place. Since the TPA entered into force on 15 May 2012, Colombia owes no international obligations to SSA under the Treaty for any acts or facts that allegedly took place before that date, or for any situations that ceased to exist before that date.

978. This is further consistent with Article 13 of the International Law Commission's ("**ILC**") Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), which provide that "[a]*n act of 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*."[1287]

1285 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-01bis**), Article 10.1.3 (emphasis added).

1286 Vienna Convention on the Law of Treaties (1969) (**Exhibit RLA-2**), Article 28.

1287 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibit RLA-120**), Article 13.

979. Numerous awards rendered under Free Trade Agreements ("**FTAs**") with provisions identical to Article 10.1.3 of the TPA (such as the NAFTA and the DR-CAFTA) have confirmed that a State cannot be held liable for acts that took place before the entry into force of the treaty.

980. In interpreting Article 10.1.3 of the TPA, the tribunal in *Carrizosa v. Colombia* observed that, "*unless the post-treaty conduct* […] *is itself capable of constituting a breach of the* [treaty]*, independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would fall outside the Tribunal's jurisdiction*".[1288]

981. The principle was reiterated in *Spence v. Costa Rica*. In *Spence*, in a dispute brought under the DR-CAFTA, the tribunal refused to exercise jurisdiction over an expropriation claim, as the expropriatory acts had taken place prior to the entry into force of the treaty on 1 January 2009. The claimants in *Spence* argued that the respondent had directly expropriated some of their investments by taking possession of their land between 12 March 2008 and 9 December 2008.[1289] The claimants further argued that the respondent's actions effectively expropriated their investments, starting with the Constitutional Court decision dated 23 May 2008, which crystallized by a directive from the Ministry of Environment, Energy, Mining and Tourism dated 19 March 2010.[1290] That directive instructed staff to terminate all pending environmental permits and reject future applications for properties within the 125-meter restricted zone of the national park.[1291] Finding that it lacked jurisdiction *ratione temporis*, the *Spence* tribunal held:

> An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time. The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above. Such acts and facts cannot, however, form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach. To be justiciable, a breach that is alleged to have

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1288 *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5), Award, 19 April 2021 (**Exhibit RLA-23**), ¶ 153.

1289 *Aaron C. Berkowitz, Brett E. Berkowitz, and others (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No UNCT/13/2), Interim Award (Corrected), 30 May 2017 (**Exhibit CLA-41**), ¶ 70.

1290 *Aaron C. Berkowitz, Brett E. Berkowitz, and others (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No UNCT/13/2), Interim Award (Corrected), 30 May 2017 (**Exhibit CLA-41**), ¶ 41(t).

1291 *Aaron C. Berkowitz, Brett E. Berkowitz, and others (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No UNCT/13/2), Interim Award (Corrected), 30 May 2017(**Exhibit CLA-41**), ¶ 41(l).

> taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be independently actionable.[1292]

982. The *Spence* tribunal further held that Article 10.1.3 merely restated the general rule of customary international law as reflected in Article 28 of the VCLT. As opined by the *Spence* tribunal, "[t]*he general principle of non-retroactivity is not controversial.*"[1293]

983. The principle of non-retroactivity, which mandates that facts or acts that occurred prior to the entry into force of the applicable treaty are not covered under its scope, is further confirmed by the United States in this matter, in its Non-Disputing Party Submission in these proceedings dated 8 December 2023.[1294] In its submission, the United States explained that, "[w]*hereas a host State's conduct prior to the entry into force of an obligation may be relevant in considering whether the State subsequently breached that obligation, under the rule against retroactivity, there must exist 'conduct of the State after that date which is itself a breach*.'"[1295] Therefore, conduct that predates the entry into force of the TPA cannot be actionable under the TPA.

984. Importantly, unlike other treaties that define their temporal scope by reference to the time when the "dispute" first arose,[1296] Article 10.1.3 of the TPA defines its temporal scope by reference to the time at which facts, acts, or a situation occurred. The operative words are "act", "fact", and "situation", not "dispute". As a result, where an alleged conduct took place prior to the entry into force of the Treaty, it does not fall within the Treaty's temporal scope.

985. Crucially, with regard to claims of expropriation, several tribunals have confirmed that expropriation, by its nature, cannot be a continuing breach, given that it happens at the moment when there is a taking of the property. In particular, the tribunal in *Pey Casado v. Chile* found

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1292 *Aaron C. Berkowitz, Brett E. Berkowitz, and others (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No UNCT/13/2), Interim Award (Corrected), 30 May 2017 (**Exhibit CLA-41**), ¶ 222 (emphasis added).

1293 *Aaron C. Berkowitz, Brett E. Berkowitz, and others (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No UNCT/13/2), Interim Award (Corrected), 30 May 2017 (**Exhibit CLA-41**), ¶ 215.

1294 *See* Submission of the United States of America of 8 December 2023.

1295 Submission of the United States of America of 8 December 2023, ¶ 9.

1296 *See* Colombia-Switzerland Bilateral Investment Treaty (2006) (**Exhibit RLA-93**), Article 2 (providing on the Scope of Application of the treaty that "*it shall not apply to claims or disputes arising from events occurring prior to its entry into force*"). *See also* Colombia-China Bilateral Investment Treaty (2008) (**Exhibit RLA-94**), Article 11 (providing on the Scope of Application of the treaty that "*this Agreement only applies to disputes arisen after the Agreement enters into force*.").

"*expropriation to be an instantaneous act and which does not create a continuous situation of 'deprivation of a right'*".[1297]

986. The *Mondev v. USA* tribunal followed the same rationale. In that case, a Canadian real estate development company claimed that its option to purchase land had been expropriated without compensation through a contractual breach and judicial actions by the United States, in violation of NAFTA's expropriation provisions. While the contractual breaches occurred before 1991, before NAFTA came into force in 1994, the court rulings were issued after the treaty had entered into force. In rejecting the idea of "continuous expropriation", the *Mondev* tribunal found as follows:

> As to the loss of LPA's and Mondev's rights in the project as a whole, this occurred on the date of foreclosure and was final. Any expropriation, if there was one, must have occurred no later than 1991. In the circumstances it is difficult to accept that there was a continuing expropriation of the project as a whole after that date.[1298]

987. In the present case, and as further detailed below, the Claimant considered and claimed that, by 1984, Colombia had already expropriated and unfairly treated its investment (alleged to be property rights over the remains of the Galleon San José). Under the Claimant's own theory, once the investment was taken in 1984, it could not be taken again, nor be the subject of alleged unfair treatment.

988. Indeed, in SSA's own words, the alleged expropriatory act took place in 1984, when Colombia *"eliminat[ed] all of SSA's property rights in the treasure*."[1299] Since expropriation is an immediate act, any rights SSA would have had were terminated in 1984, namely 28 years before the entry into force of the TPA.

989. That all of SSA's property rights – assuming they existed in the first place – were eliminated in 1984 was recognized by the U.S. District Court for DC, which was not deceived by SSA's attempts to circumvent the applicable statute of limitations by arguing that the 2007 Judgment of the Colombian Supreme Court (the "**2007 Judgment**") and the alleged subsequent actions of the

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1297 *Victor Pey Casado & President Allende Foundation v. Republic of Chile (I)* (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA-133**), ¶ 608 (unofficial translation).

1298 *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (**Exhibit RLA-24**), ¶ 61 (emphasis added).

1299 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, 7 December 2010, Complaint (**Exhibit R-18**), ¶ 12 (emphasis added).

Colombian State could affect the timing of SSA' claim and bring it within the applicable statute of limitations.[1300] This Tribunal should read into SSA's maneuvers just as the U.S. District Court for DC did, and not entertain SSA's improper attempts to skirt around the temporal scope of the Treaty.

2. SSA claimed in 2010 before the U.S. District Court for DC that by 1984 Colombia's acts, including the enacting the so-called Seizure Law, expropriated "all of SSA's property rights in the treasure"

990. To recall, SSA commenced a lawsuit against Colombia for alleged breach of contract and, in the alternative, conversion, before the U.S. District Court for DC on 7 December 2010 (the "**First Lawsuit of SSA before U.S. Courts**"), arguing that Colombia had expropriated SSA's alleged rights over the *Galleon* San José in 1984 and treated its alleged investment unfairly.[1301] In its complaint, SSA stated:

> Subsequently [to Colombia's refusal to permit SSA to perform salvage operations at the alleged San Jose site] in 1984 the Colombian Parliament enacted a law giving Colombia all rights to treasure salvaged from the San Jose site eliminating all of SSA's property rights in the treasure (the "Seizure Law").[1302]

991. SSA's aforementioned claim is of significance since it was made in the course of legal proceedings and makes plain that SSA itself took the position that Colombia, through alleged actions that took place before 1984, had expropriated its alleged rights over the Galleon San José. Therefore, by SSA's own judicial admission, it had no alleged rights after 1984, a full 28 years before the TPA entered into force.

1300 United States District Court for the District of Columbia. Civil Action No. 1:10-cv-02083 (JEB), Memorandum Opinion, 24 October 2011 (**Exhibit R-19**), p. 8 (finding that "[w]*hile it is true that Count II of the Complaint refers to the 2007 Supreme Court ruling and mentions actions taken thereafter* […] *Plaintiff cannot skirt around the fact that the allegations throughout the rest of the Complaint show that the conversion, if it occurred, began in 1984*.") (emphasis added).

1301 US District Court for the District of Columbia, Civil Action No. 10-2083 (JEB), Plaintiff's Opposition to Defendant's Motion to Dismiss, 27 June 2011 (**Exhibit R-184**), pp. 9, 11 (arguing that the "*Court must find that Colombia expropriated and taken SSA's 'rights in property taken in violation of international law*'.").

1302 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-18**), ¶ 12 (emphasis added).

992. For this reason, SSA cannot, in the same breath, claim that by 1984 "all" of its alleged rights to the San José were eliminated due to Colombia's alleged actions, and now come to this Tribunal to pretend that its alleged rights to the San José were expropriated after 2012, through Colombia's issuance of Resolution 085. Nor can SSA allege that Resolution 085 "crystallized" an alleged expropriation, given that Colombia is supposed to have expropriated all of its rights by 1984, after which there was by definition nothing left to expropriate in 2012

993. As noted by the Carrizosa tribunal in relation to Article 10.1.13 of the TPA "*unless the post-treaty conduct* […] *is itself capable of constituting a breach of the [treaty], independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would fall outside the Tribunal's jurisdiction*".[1303]

994. In the present case, the alleged post-treaty conduct, *i.e.*, the issuance of Resolution 085, is not capable in itself of constituting an expropriation, as per SSA's own claim in the U.S., by 1984 there was nothing left to expropriate.

995. To conclude, this Tribunal should find that it lacks *ratione temporis* jurisdiction over the Claimant's claim for expropriation since SSA's claim is based on alleged acts, facts and situations that predate the entry into force of the TPA.

B. EVEN IF THE TRIBUNAL WERE TO IGNORE THE CLAIMANT'S CLAIM THAT, BY 1984, COLOMBIA HAD ALLEGEDLY EXPROPRIATED ALL OF ITS PURPORTED RIGHTS TO THE GALLEON SAN JOSÉ, THE TRIBUNAL LACKS JURISDICTION *RATIONE TEMPORIS* OVER THE CLAIMANT'S CLAIMS RELATING TO COLOMBIA'S ALLEGED BREACHES OF ITS OBLIGATIONS UNDER ARTICLE 10.18.1 OF THE TPA

1. The Claimant's distorts the interpretation of Article 10.18.1 of the TPA and improperly attempts to circumvent the temporal limitation of the Treaty

996. Even if the Tribunal were to disregard SSA's claim that it was expropriated of "all" its alleged rights to the Galleon San José by 1984 and that its investment was treated unfairly, the Tribunal should still find that it lacks jurisdiction, given that SSA's allegations are time-barred under Article 10.18.1 of the TPA.

1303 *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5), Award, 19 April 2021 (**Exhibit RLA-23**), ¶ 153.

997. To recall, Article 10.18.1 of the TPA, titled "*Conditions and Limitations on Consent of Each Party*", provides that:

> No claim may be submitted to arbitration under this Section [Section B: Investor-State Dispute Settlement] 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.[1304]

998. Article 10.18 provides the conditions under which the Contracting Parties consent to arbitrate a dispute regarding an alleged breach under the Treaty. Article 10.18.1 expressly provides that there must be an alleged breach under the Treaty, and the claim must be submitted before three years have elapsed from the date on which the Claimant first acquired, or should have first acquired, knowledge of the breach alleged.

999. Not only does SSA confuse "alleged breach" with "measure", thus manifestly misinterpreting Article 10.18.1 of the TPA (***a***), but it abusively attempts to extend the limitation period under Article 10.18 (***b***).

a. SSA purposefully confuses "alleged breach" with "measure", manifestly misinterpreting Article 10.18.1

1000. Fully aware that its claims fall outside the three-year limitation period set forth in Article 10.18.1, SSA is seeking to rewrite the provision, conflating the terms "alleged breach" and "measure", stating that:

> [[T]he "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.[1305]

1001. During the Hearing on Preliminary Objections, the Claimant submitted that:

1304 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.18.1.

1305 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, 19 November 2023, ¶ 255.

> What is the impugned measure? And I will answer that for you. You could probably guess what my answer is. The impugned measure is Resolution 85. Did Resolution 85 occur after the TPA came into effect? Yes, it did. It happened in 2020.[1306]

1002. To then add:

> What is the alleged breach? It's the same. It's the passage of Resolution No. 85.[1307]

1003. Magnanimously, SSA further stated that "*Only SSA Is Entitled To Define The 'Breach Alleged'*".[1308]

1004. Given SSA's distortion of Article 10.18.1, Colombia is compelled to set the record straight.

1005. The concept of *"breach alleged"* (of an international obligation) under Article 10.18.1 of the TPA is distinct and different from that of *"measure"* (namely, an act or omission of a State concerning an international obligation). Understanding this distinction is critical for the interpretation of the time limitations under the Treaty.

1006. As set forth in Article 31 of the VCLT, "[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*".[1309] This Tribunal must therefore analyze the ordinary meaning of the terms (i) *"breach alleged"* and (ii) *"measure".*

1007. ***First***, as far as the term "breach" is concerned, the ILC has specified in Article 12 of its Articles that "[t]*here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or*

1306 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 124:16-20.

1307 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 125:6-7.

1308 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, 19 November 2023, Section IV(D)(b), p. 122.

1309 Vienna Convention on the Law of Treaties (1969) (**Exhibit RLA-2**), Article 31.

character".[1310] Under Article 13 of the ILC Articles, for there to be a "breach", the State must be "*bound by the obligation in question at the time the act occurs*".[1311]

1008. Article 10.18.1 refers to "*the breach alleged under Article 10.16.1*", which outlines the procedure for submitting a claim to arbitration. Article 10.16.1 provides in the relevant part:

> Article 10.16: Submission of a Claim to Arbitration
>
> In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A
>
> […]
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A […].[1312]

1009. To state the obvious, Section A – entitled "Investment" – sets out the international obligations assumed by the Contracting Parties. Clearly, therefore, an "alleged breach" is a breach of an international obligation in Section A, such as the obligation to not expropriate without compensation or the obligation to treat a foreign investor in accordance with the minimum standard of treatment – not a measure.

1010. ***Second***, as regards the concept of "measure", Article 1.3 (Definitions of General Application) of Chapter One (Initial Provisions and Definitions) of the TPA defines the term "measure" as "*includ*[ing] *any law, regulation, procedure, requirement, or practice*".[1313] Under this very clear definition, which is in line with the ILC Articles, a measure can clearly not be a "breach" of an international obligation – it is the action or omission (by way of a law, regulation, procedure,

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1310 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibit RLA-120**), Article 12 (emphasis added).

1311 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibit RLA-120**), Article 13.

1312 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.16 (emphasis added).

1313 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 1.3 (emphasis in the original).

requirement or practice) through which a State breaches one of its international obligations under the Treaty".

1011. The Claimant's misinterpretation of Article 10.18.1 – and its ordinary meaning – is all the more staggering in that the term "measure" does not even appear anywhere in Article 10.18.1. The words used in Article 10.18.1 are "alleged breached", not "measure".

1012. While the Claimant is at liberty to argue which obligation under the Treaty it alleges was breached (*i.e.*, the "alleged breach"), it cannot alter the plain meaning of – in fact, rewrite – Article 10.18.1 of the Treaty by simply replacing "alleged breach" or equating it with "measure". To be clear, Article 10.18 refers to "breach alleged", which is the mandatory language that this Tribunal must apply. In the Claimant's case, the "breach alleged" refers to SSA's assertion that Colombia violated its obligation not to expropriate SSA's investment; the alleged "measure" is Resolution 085.

1013. Accepting that the Claimant rewrites, as it pleases, provisions of the Treaty would have serious consequences, as the Tribunal would effectively rewrite the terms agreed between the Contracting Parties for purposes of the conditions to their mutual consent to arbitrate and replace those terms with terms that are contained nowhere in Article 10.18.1 of the TPA.

1014. ***Third***, to invoke Article 10.18.1 of the TPA, an actual "breach" is not necessary. "Breach alleged" is sufficient to trigger the three-year temporal limitation.

1015. Indeed, Article 10.18.1 refers to a "breach alleged", the term breach being qualified by the adjective "alleged". The Oxford English Dictionary defines "alleged" as something that is "claimed or asserted without proof, or pending proof".[1314] This distinction underscores that the breach need not be established or proven; it is enough that a claimant alleges such a breach, even if no finding is yet made as to an international obligation having in effect been violated.

1016. In line with Article 31 of the VCLT, the term "alleged" must be given meaning, as it differentiates what is "alleged" from what is actual. This distinction, too, is critical: in determining the Tribunal's jurisdiction, the question is not whether an expropriation or an unfair treatment of SSA's alleged investment has actually occurred (which is a question for the merits), but rather whether SSA has submitted a claim for an "alleged breach" within the three – year time limit set forth in the Treaty.

[1314] Oxford English Dictionary, "alleged" (2024) (**Exhibit R-228**).

1017. The question regarding the Respondent's consent to arbitrate a dispute under the TPA hinges on whether the Claimant, who has alleged a breach, has brought a claim for such "alleged breach" within the timeframe set forth in Article 10.18.1 of the TPA. This is the question that determines the Tribunal's temporal jurisdiction to adjudicate the present dispute.

1018. When determining whether the conditions for the State's consent to arbitrate are met under Article 10.18.1, the key question is not whether the Claimant filed the claim within three years of having actual or constructive knowledge of an "actual" violation of an international obligation contained in the TPA, *i.e.*, a breach of the TPA. Instead, the standard is whether the Claimant filed a claim, or could have filed a claim, within three years of having actual or constructive knowledge of the "alleged breach". In other words, what is important is that the breach was either alleged or could have been alleged.[1315]

1019. For the avoidance of doubt, Colombia has made abundantly clear, both during the Hearing on Preliminary Objections and in this Memorial, that any reference to the Claimant's alleged expropriation or unfair treatment of its investment are not an admission of liability. These references are made solely for the purpose of contesting the Tribunal's jurisdiction on the basis of Articles 10.1.13 and 10.18 of the TPA**.** It is a well-established principle of international law that for purposes of jurisdictional objections, the facts claimed by the Claimant are considered on a *pro tem* basis only, as explained by Lady Higgins in the ICJ case *Oil Platforms* (Iran v. United States).[1316]

1315 Non-Disputing Party Submission of the United States of America of 8 December 2023, ¶ 14 (arguing that "*a claimant has actual or constructive knowledge of the 'alleged breach' once it has (or should have had) knowledge of all elements required to make a claim under Article 10.7.* […] *That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant's investment. For example, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.*").

1316 *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgement on Preliminary Objection, Separate Opinion of Judge Rosalyn Higgins, 12 December 1996 (**Exhibit RLA-115**), ¶ 32 ("*The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles 1, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them*") (emphasis added).

b. SSA's attempt to extend the limitations period in Article 10.18 is unsupported by international law

1020. The Claimant's attempt to artificially extend the limitations period in Article 10.18 should be rejected.

1021. ***First,*** pursuant to Article 10.18.1, knowledge can be actual knowledge (first acquired) or constructive knowledge (should have first acquired) of the breach alleged. Indeed, the limitations period in Article 10.18.1 is triggered once the Claimant "*first acquired, or should have first acquired, knowledge of the breach alleged*".

1022. In this regard, the tribunal in *Grand River v. USA* held that "*constructive knowledge of a fact is imputed to the person if by exercise of reasonable care or diligence, the person would have known of the fact*."[1317] The tribunal went on to state that constructive knowledge was closely associated to the concept of constructive notice, which entails:

> [N]otice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge.[1318]

1023. In *Grand River*, the claimants contended that various actions taken by states of the United States to implement the 1998 Master Settlement Agreement (the "**MSA**"), which were concluded to settle litigation by several U.S. states against certain U.S. cigarette manufacturers, breached the claimants' rights under Chapter 11 of NAFTA. The claimants additionally contended that it was unreasonable to impute to them constructive knowledge of any NAFTA violations concerning the MSA and its implementation since (i) the MSA was a private agreement resolving U.S. court litigation in which they were not involved; (ii) they were not a party to the MSA and had no role in its negotiation; and (iii) they had never been sued for any alleged health-related consequences linked to their activities.

1024. The *Grand River* tribunal found that the claimants had constructive knowledge for various reasons. First, given their long-standing involvement in the tobacco business, they could not have been unaware of the extensive regulation and taxation of cigarette trade by U.S. states. Second, correspondence between the claimants and various state taxing and regulatory

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1317 *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, (UNCITRAL), Decisions on Objections to Jurisdiction, 20 July 2006 (**Exhibit RLA-37**), ¶ 59.

1318 *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America* (UNCITRAL), Decisions on Objections to Jurisdiction, 20 July 2006 (**Exhibit RLA-37**), ¶ 59.

authorities further demonstrated their awareness of the issues related to the distribution of Grand River's products in off-reservation U.S. markets. Lastly, the record showed that information about the MSA and its associated regulation was widely available between 1998 and 2001, and that even minimal inquiries by the claimants would have revealed the existence of new legal requirements affecting their business.

1025. Whereas in *Grand River* the question before the tribunal was whether the claimants had constructive knowledge, the Claimant in the present case has explicitly claimed, at several points in time, that it has allegedly been expropriated by Colombia by 1984. This alone takes care of any knowledge by the Claimant, acquired or constructive, of an alleged breach by Colombia of any international obligation that came to life 28 years later.

1026. ***Second***, limitation periods such as the one in the TPA are strictly enforced in international law. As stated by the tribunal in *Marvin Roy Feldman Karpa v. United Mexico*, when interpreting Article 1116(2) of the NAFTA, which is identical to Article 10.8.1 of the TPA:

> The Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification. Thus, the NAFTA legal system limits availability of arbitration within the clear-cut period of three years […].[1319]

1027. In the same vein, the tribunal in *Grand River v. USA* followed the analysis in Feldman and acknowledged that "[…] *Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence—not subject to any suspension, prolongation or other qualification* […]".[1320]

1028. The United States, in its Article 10.20.2 Non-Disputing Party Submissions, agreed that the limitations period is a "*clear and rigid*" requirement.[1321] As explained by the United States:

> An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and be contrary to the State Party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed

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1319 *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 *December* 2002 (**Exhibit RLA-38**), ¶ 63.

1320 *Grand River Enterprises Six Nations, Ltd., and others v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006 (**Exhibit RLA-37**), ¶ 29.

1321 Non-Disputing Party Submission of the United States of America, 8 December 2023, ¶ 12.

> from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.[1322]

1029. ***Third***, and finally, with regards to continuing courses of conduct, arbitral tribunals have consistently ruled that transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred.[1323]

1030. As further underscored by the United States in its Non-Disputing Party Submission pursuant to Article 10.20.2 of the TPA:

> An investor first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot first be acquired at multiple points in time or on a recurring basis. [1324]

1031. In the same line, the tribunal in the *Corona Materials LLC v. Dominican Republic*, a case submitted under the DR-CAFTA which contains an identical provision to Art. 10.18 of the TPA, found that:[1325]

> [W]here a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series'.[1326]

1322 Non-Disputing Party Submission of the United States of America, 8 December 2023, ¶ 13 (emphasis added).

1323 *See Grand River Enterprises Six Nations, Ltd., and others v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006 (**Exhibit RLA-37**), ¶ 81; *See also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018 (**Exhibit CLA-37**), ¶ 158.

1324 Non-Disputing Party Submission of the United States of America, 8 December 2023, ¶ 12 (emphasis added).

1325 Dominican Republic-Central America FTA (CAFTA -DR) (1 January 2009) (**Exhibit RLA-134**), Art. 10.18 ("*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage*.") (emphasis added).

1326 *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (**Exhibit RLA-17**), ¶ 215.

1032. Indeed, a finding to the contrary would enable an investor to simply bypass the limitations period by relying on the most recent act in the series, thereby undermining the very purpose of time-limitations provisions.[1327]

1033. The United States, in its Non-Disputing Party Submission in these proceedings, aptly stated, regarding expropriation claims, that:

> [W]ith respect to an expropriation claim, a claimant has actual or constructive knowledge for the "alleged breach" once it has (or should have had) knowledge of all elements requirement to make a claim under Article 10.7 – including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking.[1328]

1034. Thus, the United States' Non-Disputing Party's submission underscores that the expropriation is an instant breach – occurring when all the elements required for a taking are present – and that the relevant moment to determine time bar is the first time the Claimant had knowledge of the alleged breach.

1035. In the present case, the critical date for the determination of the three-year limitations period, under Article 10.18, is 18 December 2019, that is, three years prior to the date on which the Claimant submitted its Notice of Arbitration, *i.e.*, 18 December 2022. Therefore, if the Claimant first acquired, or should have acquired, knowledge of the "breach alleged" and knowledge that it allegedly incurred loss or damage at any time before 18 December 2019, then the Claimant's claims simply fall outside the temporal scope of the Treaty and the Tribunal's jurisdiction *ratione temporis*.

2. SSA claimed that Colombia purportedly committed the alleged breaches on 26 November 2012

1036. Having demonstrated that Article 10.18.1 has a very clear and definite meaning, the Respondent now addresses why, even if the Tribunal were inclined to consider the Claimant's alleged breaches of the expropriation and fair treatment standards on the basis of alleged acts occurring after the Treaty entered into force, the Tribunal still lacks jurisdiction over the Claimant's claims.

1327 *Grand River Enterprises Six Nations, Ltd., and others v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006 (**Exhibit CLA-37**), ¶ 81.

1328 Non-Disputing Party Submission of the United States of America, 8 December 2023, ¶ 14.

1037. To recall, after SSA has argued, in the U.S. proceedings, that Colombia allegedly deprived it of its rights over the Galleon San José due to its purported actions before 1984 and again between 1984 and 1986[1329], SSA had no hesitation alleging, in yet another venue, that Colombia somehow expropriated – again – the same purported rights to the San José on 26 November 2012, and treated SSA's alleged investment unfairly and unjustly.[1330]

1038. Indeed, on 15 April 2013, SSA filed a claim before the IACHR, alleging that Colombia had breached its right to private property and judicial protection.[1331] In its claim, SSA argued that Colombia, through a notification dated 26 November 2012, deprived it of the use of its property by denying it access to the shipwreck on the grounds that Colombia was awaiting the decision of the DC Court of Appeals before making any decisions regarding the *Galleon* San José.[1332]

1039. Specifically, SSA claimed that "[o]*n November 26, 2012 the Republic of Colombia definitively rejected its access to the wreck, in any form*",[1333] that "[t]*he bad faith of this last and definitive manifestation of rebellion against the judgment of the Supreme Court is evident if we take into account that such judgment was issued on 5 July 2007*",[1334] and that Colombia's notification on 26 November 2012 "*was the definitive intention of the Republic of Colombia not to abide by the judgment of its Supreme Court. This necessarily implies, in addition, the notification of the definitive confiscation of its treasures, without payment of fair compensation*."[1335]

1040. Thus, as per SSA's own assertion, by 26 November 2012 – just four months after the Treaty entered into force – Colombia had allegedly expropriated SSA's alleged rights to the *Galleon* San José. Yet, SSA chose not to bring a claim under the TPA within the three-year limitations period; it did so 8 years later, in 2020.

1041. Now faced with the consequences of its own decision not to commence arbitration proceedings under the TPA, when it could and should have done so within three years if it believed in its own

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1329 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-18**),¶¶ 12, 26.

1330 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18.

1331 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 1.

1332 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18, ¶ 38.

1333 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 18, ¶ 38 (emphasis added).

1334 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38.

1335 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38 (emphasis added).

alleged claims, SSA seeks to ignore the Treaty's time bar by artificially using Resolution 085 as a proxy to reinterpret the required "breach alleged" under Article 10.18.1 of the TPA.

1042. SSA's problem is that it constantly shifts and moves its target. However, words are words, and SSA cannot continuously reinterpret a "breach alleged" by recasting it in relation to yet another alleged measure, in an attempt to move the critical date forward, as it did in the past and continues to do in this arbitration. The Tribunal's answer to SSA's attempts should be simple: enough is enough.

3. After submitting that, on 26 November 2012, Colombia had definitively expropriated SSA's rights over the Galleon San José, SSA had no qualms alleging that Colombia repeatedly expropriated its rights and unfairly treated it in 2013, 2015 and 2016

1043. SSA's claim that on 26 November 2012 Colombia notified SSA of the "*definitive confiscation of its treasures*"[1336] is evidence that, if SSA's claims were founded, it had actual knowledge of the breach alleged by then. Clearly, the alleged breach of 26 November 2012 is outside the three-year limitation period in Article 10.18.

1044. It is worth noting that, in the very same petition to the IACHR on 29 March 2013, SSA also alleged that Colombia showed contempt for the Supreme Court's ruling and refused to comply with it – which yet again shows that SSA had knowledge of alleged facts on the basis of which it could allege a breach of the TPA. Yet it did not commence arbitration under the TPA then.

1045. In this context, it is astonishing, to say the least, that SSA now submits that Resolution 085 constitutes the definitive act of its alleged expropriation, after it alleged before another international forum, the IACHR, that the "*definitive confiscation of* [SSA's] *treasures without payment of fair compensation"* took place on 26 November 2012.[1337]

1046. Worse even, as summarized in Appendix C,[1338] SSA claimed again that Colombia completely expropriated SSA's rights over the Galleon San José and treated SSA unfairly – as it now alleges

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1336 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38.

1337 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38 (emphasis added).

1338 *See* Appendix C, Timeline of Alleged Breaches and Claims.

in this arbitration – at least five additional times prior to 18 December 2019: on 29 March 2013, on 23 April 2013, on 31 July 2013, on 15 November 2015, and on February 29, 2016.

1047. Under the applicable law in this arbitration – and notably Article 10.18.1, which is the controlling and applicable provision concerning the question of when SSA had actual knowledge of the breach alleged – the Tribunal must draw consequences from SSA's repeated submissions and statements. Clearly, by setting out the conditions for their consent to arbitration, the Contracting Parties established strict requirements under which a tribunal constituted pursuant to the TPA can entertain a claim. If a claimant alleges that a breach had been committed at a given time and fails to submit it within the time limits set forth in Article 10.18.1, that claimant is precluded from bringing a claim for the said alleged breach later on. This is particularly so in the case of expropriation for the reasons already explained. Importantly, the Contracting Parties made clear that Article 10.18.1's time bar was not just a question of admissibility of a claim but a condition for their consent to arbitrate, that is, a jurisdictional question.[1339]

1048. Not only has SSA alleged a breach by Colombia consisting of the "*definitive confiscatio*n" without compensation on 26 November 2012, but it has claimed in unequivocal terms, no less than five additional times before the time bar of 18 December 2019, that it was definitively expropriated of all of its alleged rights over the Galleon San José and that its alleged investment had been treated unfairly. The Tribunal cannot ignore this. To the contrary, it must draw all of the consequences from this abusive approach to international arbitration

4. Even if the Claimant, despite SSA's explicit and repeated allegations of Colombia's breaches, believed it had some rights over the San José, Colombia made it abundantly clear in correspondence from 2016 to 2019 that it did not recognize any rights of the Claimant over the San José

1049. Throughout the years, Colombia repeatedly informed SSA that it did not recognize any of the rights it alleges over the Galleon San José. In other words, given Colombia's repeated expressed view, SSA had direct and actual knowledge of Colombia's position and yet did nothing to commence arbitration under the TPA.

1050. Indeed, on 17 June 2016 – namely after Colombia made public statements regarding its discovery of the Galleon San José in December 2015 – the Colombian Minister of Culture

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1339 Submission of the United States of America of 8 December 2023, ¶ 10 ("[A] *tribunal must find that a claim satisfies the requirements of, inter alia, Article 10.18.1, in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim*.").

restated to SSA, in response to its continued assertions and purported claims that is allegedly had rights over the Galleon San José, that the 2007 Judgment did not grant it any rights over the Galleon San José. The Minister's letter emphatically denied SSA's assertions of rights over the San José as follows:

> The judgment of the Supreme Court of Justice is clear, it does not admit interpretations and it cannot be inferred from it, as you claim, alleged rights over the Galleon San José. It refers to possible rights over the possible shipwreck that may exist at the coordinates denounced by you and which are consigned in the confidential report of 1982, without being related to a specific shipwreck.[1340]

1051. On 30 November 2016, the Minister of Culture reiterated – once again – to SSA that SSA had no rights over the Galleon San José because the condition set by the Colombian Supreme Court in its 2007 Judgement – regarding the existence of a shipwreck at the provided coordinates – had not been met. The Minister's letter emphasized that SSA could not claim rights over the San José or any associated cultural heritage. The Minister stated:

> [T]he Colombian Government has the scientific evidence that allows it to categorically state that the condition established by the Colombian Supreme Court of Justice in the 5 July 2007 ruling was not met. There is no place, therefore, to alleged rights that would assist Sea Search Armada to claim 50% of what is not considered Cultural Patrimony of the Nation of the shipwreck that will be found at the coordinates established in the confidential report.[1341]

1052. Once again, on 5 January 2018, Colombia reiterated to SSA that it had no rights over the *Galleon* San José, as no shipwreck had been found at the coordinates provided by SSA, emphasizing that SSA had "*no right whatsoever over the San Jose*".[1342]

1053. In a letter dated 17 June 2019 – that is, over three months after the Superior Tribunal of Barranquilla reinstated the Attachment Order on 29 May 2019 – the Vice-President of Colombia – yet again – communicated in categorical terms to SSA that it had no rights over the San José

1340 Letter from the Ministry of Culture to SSA, 17 June 2016 (**Exhibit R-28**), p. 2.

1341 Letter from the Ministry of Culture to SSA, 30 November 2016 (**Exhibit R-29**), p. 1.

1342 Letter from the Ministry of Culture, 5 January 2018 (**Exhibit R-37**), p. 4.

or its contents, as no shipwreck had been located at the coordinates provided by SSA.[1343] The letter explicitly stated:

> Regarding the verification of the coordinates reported in 1982, this task was already carried out under contract No. 544 of 1993. The results of that investigation concluded that there is NO shipwreck at the site of the coordinates provided by Glocca Morra Company (now Sea Search). Only a piece of wood was found, which, after examination, was determined not to belong to any shipwreck. Therefore, the Sea Search Armada (SSA) has no rights over the San José Galleon or its contents, as it is not located at the reported coordinates.[1344]

1054. Evidently not in a position to explain in rational terms or justify its permanent moving targets, SSA asserted, in its Rejoinder to Colombia's 10.20.5 Objections, that Colombia had allegedly not offered any evidence to show that Resolution No. 085 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.[1345] SSA's assertions are, simply, disingenuous.

1055. ***First***, the multiple communications quoted above demonstrate that Colombia consistently and unequivocally communicated to SSA that Colombia did not recognize any rights of SSA over the Galleon San José. Yet, at no point in time did SSA commence arbitration under the TPA following those clear and unequivocal expressions of positions by Colombia. Framing now, as SSA does, its allegation as a "*change in the law*" affecting it is deceitful. Whether or not Colombia changed the law – which, as explained further, was not the case – is entirely irrelevant for purposes of the Tribunal's temporal jurisdiction: Colombia had denied for years that SSA had any alleged rights over the "treasure" of the San José. Given the fatal bar of Article 18.10.1 of the TPA, each of those points of time after 2012 (when the TPA entered into force) were times at which SSA could and should have brought an arbitration if it truly believed that it had a case (which it does not.

1343 Letter from the Vice President to SSA, 17 June 2019 (**Exhibit C-40**).

1344 Letter from the Vice President to SSA, 17 June 2019 (**Exhibit C-40**) (emphasis added).

1345 Claimant's Rejoinder to Colombia's 10.20.5 Objection, 19 November 2023, ¶ 255.

1056. ***Second***, and relatedly, Resolution 085 did not materialize out of thin air as the Claimant wrongly pretends.[1346] Much to the contrary, Resolution 085 and the protection it provides to the Galleon San José are perfectly in line and compliance with Colombia's domestic norms and international obligations. The Claimant's alleged predecessors were aware or should have been aware of the existing legal framework and, in particular, of Law 163 of 1959 regarding Colombia's protection of its historical and archaeological heritage, as well as its international commitments as regards the protection of cultural heritage, as the Respondent shows in this Statement of Defense. What is more, the 2007 Judgement expressly excluded from the concept of "treasure" any objects that constitute archaeological or historical heritage, as the Respondent has shown and as Colombia's experts, Justice Solarte[1347] explains.

1057. SSA claims to have acquired its investment in 2008.[1348] As the Respondent has shown in this memorial, Colombia's legal framework for the protection of its historical and archaeological heritage, and in general its cultural patrimony, was even more robust at that point. Accordingly, SSA acquired its alleged investment with knowledge of the strong protectionist legal environment regarding cultural patrimony, as the Respondent also underscores in this memorial.

1058. ***Third***, the Council of State in its 2018 decision – in which the Claimant was an active participant but tellingly yet chose not to mention in these proceedings – made plain that the 2007 Judgment had correctly provided the required protection to the archaeological and historical objects, making it clear that submerged cultural patrimony can never be considered a treasure.[1349]

1059. ***Finally***, not only is Resolution 085 inextricably related to Colombia's legal framework for the protection of its cultural patrimony, but SSA's misleading assertion that it could not possibly have known about the Colombia's decision to declare the Galleon San José as part of the Colombian cultural patrimony is belied by the facts.

1060. Indeed, on 9 October 2019 (which was, once again, more than 6 months after the reinstatement of the Attachment Order by the Superior Tribunal of Barranquilla), the Colombian Vice-President

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1346 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 125:8-10.

1347 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶¶ 205-206

1348 Claimant's Response to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 4.

1349 Council of State, Full Administrative Litigation Chamber, Unification Judgment CE-SU 25000231500020020270401, 13 February 2018 (**Exhibit R-212**), ¶ 237.

stated publicly that Colombia would not pay the MAC company – for the proposed rescue and creation of a Museum centered on the Galleon San José – with items recovered from the shipwreck. This decision was based on the stance that entirety of the Galleon San José was part of the cultural patrimony of Colombia. The Vice-President stated that:

> [G]iven the public interest and the heightened constitutional protection, and based on the law on submerged cultural heritage and current jurisprudence, we have decided to present the final report of the exploration to the National Council of Cultural Heritage in the coming days. This report will include a request to recognize the San José and all elements of the shipwreck as a unique and indivisible collection, whose testimony will provide insights into our historical and cultural trajectory. Therefore, if the Council deems it appropriate after reviewing the exploration report, we request that it declare the San José as Cultural Heritage in its entirety. [1350]

1061. As the Respondent demonstrates in this Statement of Defense, [redacted] As a result, and contrary to the Claimant's contention that Colombia signed a contract with MAC for it to rescue the Galleon and agreed to pay MAC with pieces of it,[1351] Colombia never did so. Indeed, payment to MAC with pieces of the Galeon was finally not agreed in order to protect the integrity of the Galleon San José and all the objects it contains as well as its remains. In other words, the Galleon San José is part and parcel of a whole that needs to be preserved as such. This is the rationale for Colombia's Government to request the Ministry of Culture to analyze under the applicable criteria its request to place the entirety of the Galleon under the protected regime of a cultural heritage, which everyone – SSA included – was perfectly aware of.

1062. In sum, the development and declaration of the entirety of the San José as a unity as cultural heritage was not only foreseeable, but also to be expected, in line with Colombia's Law 163 of 1959, Colombia's ratification on several international treaties prior to GMC's expeditions, and thereafter, as well as the reinforcement of Colombia's protection of its archaeological and historical heritage in the 1991 Constitution[1352] and the 2007 Judgement.[1353] Therefore, the

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1350 Declaration by the Vice-President of Colombia regarding the San Jose and the steps to preserve the patrimony of the Colombian people, 9 October 2019 (**Exhibit R-222**), p. 2.

1351 Amended Statement of Claim, ¶ 229.

1352 Political Constitution of Colombia, (1991) (**Exhibit RLA-054**), Articles 58 and 72.

1353 Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**Exhibit C-28**).

possibility of Colombia declaring the entire San José remains as cultural heritage was highly likely in 2008, when SSA acquired its alleged investment. For this reason, too, SSA is now estopped from arguing by issuing Resolution 085, Colombia deprived of its rights ever acquired any rights over the San José, even assuming it discovered it (which it did not).

C. SSA'S CLAIM THAT THE 2019 ATTACHMENT ORDER RESURRECTED ITS ALREADY EXPROPRIATED RIGHTS IN THE SAN JOSÉ LACKS ANY FACTUAL AND LEGAL BASIS

1063. Faced with the fact that it had claimed expropriation a myriad of times over the last 20 years, and that the Colombian Government had made it abundantly clear that it did not recognize that SSA had any rights over the San José, SSA latches on to a new, spurious argument, pursuant to which, for a couple of decades, it had merely believed that Colombia had expropriated its alleged rights to the San José; however, the story goes, SSA discovered, to its immense surprise, that its rights had not been expropriated at all, after the Superior Tribunal of Barranquilla decided against the lifting of the Attachment Order.

1064. To recall, in a complete reversal of its reiterated allegations and its prior statements on Colombia's "*definitive confiscation of* [SSA's] *treasures*",[1354] SSA changed gears again in this arbitration, making the following extraordinary claims and misrepresentations during the preliminary objections stage:

> Colombia's Columbus Press Release and subsequent letters to SSA denying the existence of the San Jose at specific coordinates cannot be taken at face value […] Colombia's letters did not, and indeed could not, impact SSA's rights […] [e]ven 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. [1355]

1065. During the Preliminary Objections Hearing, SSA – once again, contrary to its declarations throughout nearly two decades – stated that "*we did not believe that we had been permanently deprived of our rights*" to the San José.[1356] The Claimant then proceeded to present a

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1354 Sea Search Armada, Petition before the IACHR, 15 April 2013 (**Exhibit R-21**), p. 19, ¶ 38.

1355 Claimant's Rejoinder to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 238.

1356 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 136:20-21.

multilayered and convoluted explanation as to why, supposedly, it had not been deprived of its alleged rights over the San José, stating:

> So let's then turn to the three-year statute of limitations. The question here -- and there are two questions -- is about when we acquired knowledge and when we knew we suffered loss, to paraphrase the requirements of the Treaty.
>
> And at the end of the day, even if there are--even if it was being challenged, it's totally irrelevant,
>
> And in my submission--and you heard this yesterday, but just to confirm--this can be completely--our submission is you can decide this now because you know, as a result of the 2019 Colombian Court decision, that everybody understood that we had valid rights. We had--we continued to have rights just before the 2020 Resolution was adopted. So in my submission, that is the end of the matter.
>
> You need not go into various statements that may or may not have been made. And to the extent you want to go into those statements, it--I encourage the Tribunal to read, for example, if it's at all of interest or relevant to their decision-making--I don't think it is--but some of the decisions from the D.C. Courts.
>
> What was at issue there? We never argued that we didn't have any legal rights to the treasure. What we were arguing is we were being deprived of the ability to salvage the treasure itself.
>
> We're not making those submissions to you. We're not saying to this Tribunal that we have any rights to salvage the treasure. We're just saying that we have legal rights to the treasure itself.
>
> That was not being challenged in the other proceedings. And at the end of the day, even if there are--even if it was being challenged, it's totally irrelevant, because we did not believe that we had been permanently deprived of our rights. Because ultimately we withdraw--we were not, as a factual matter, permanently deprived of our rights.
>
> We withdraw those proceedings. We reengage in discussions.[1357]

[1357] Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, pp. 135-136:15-25.

1066. SSA then continued its submission by arguing that the crucial date was 2019, when the Superior Tribunal of Barranquilla reinstated the Attachment Order first obtained by SSA, before proceeding to make an improper and distasteful analogy with a thief stilling a car and then returning in back to the owner:

> And ultimately, in 2019--and that's the critical point--our rights are confirmed.
>
> Now, let's just say--let's just say that there was an expropriation beforehand. Okay? Let's just say that someone stole my car and they took it away. And that's basically what they're saying. We took it already. Right?
>
> Even if that were true, 2019 confirms that we have it back. If you get your car back, is what they're saying that because I expropriated your investment at some point in the past, and then some--and then I give it back or some court where I recognize that you have those rights, any future expropriation I'm in the clear because I expropriated it once?[1358]

1067. Besides the offensive character of the analogy when dealing with a sovereign State, the analogy is farcical, as the Respondent shows below.

1068. Still during its oral argument on Colombia's preliminary objections to jurisdiction, SSA posed a self-serving question to answer a strawman argument, according to which the relevant question was whether SSA "believed" whether it had rights before 2020, as follows:

> And so the question, I think, the Tribunal needs to answer and can easily answer as a result of 2019 Decision is: Did we believe before the 2020 measure was adopted that we had rights, that we had--did we believe that we had been deprived of our rights, our investment?
>
> And the answer is unequivocally no. After this 2019 Decision, we write to the Vice-President and we say: We are now going to enforce the injunction that has been reinstated, and we are going to have this ship salvaged--not the ship --the treasure salvaged and distributed pursuant to our rights.
>
> So did we think we had suffered a loss or that we had lost all of our rights on the eve of this expropriation? And the answer --and our submission--well, Resolution 85? The answer is absolutely not. We thought we had those legal rights. And in our submission, those legal rights were eviscerated as a result

[1358] Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, pp. 136-137:25-13 (emphasis added).

> of Resolution 85, which we are asking this Tribunal to make a determination of.[1359]

1069. The Respondent takes each of their contorted arguments in turn.

1070. ***First***, SSA argues that its allegation before the U.S. Courts concerned its right to salvage a treasure, not that it had allegedly been deprived of rights to a treasure. This is simply not true: as demonstrated, SSA claimed before the DC District Court that Colombia, through its acts, had allegedly "*eliminat*[ed] *all of SSA's property rights in the treasure*".[1360]

1071. Besides, it is irrelevant whether SSA's claim for expropriation before the US Courts was based on Colombia's actions in allegedly preventing it from salvaging an alleged treasure (and hence resulting in the elimination of <u>all</u> of SSA's alleged property rights over said treasure), or on Colombia's enactment of a resolution declaring the totality of the San José as cultural heritage. The relevant question, once again, is not the measure – or its nature – but the "alleged breach": in this case, the alleged expropriation of its claimed rights over the San José, which, as further confirmed by the U.S. Non-Disputing Party Submission, cannot occur and be claimed multiple times.

1072. ***Second,*** it is false for SSA to assert that, because *"ultimately we* withdr[ew] [the claims before the U.S. and IACHR] *we were not, as a factual matter, permanently deprived of our rights"*.[1361]

1073. The half-baked argument on withdrawal merits three comments: (*i*) to be clear, the Claimant did not withdraw the claim before the DC District Court – which was commenced in 2010, decided against the Claimant and reaffirmed on appeal – as detailed in this Statement of Defense;[1362] (*ii*) in any event, Colombia did not agree to negotiate with the Claimant, as shown

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1359 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, pp. 137-138:18-11.

1360 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083, Complaint, 7 December 2010 (**Exhibit R-18**), p. 15, ¶ 12 (emphasis added).

1361 Transcript of Hearing on Respondent's Objections to Jurisdiction pursuant to Article 10.20.5, Day 2, 15 December 2023, p. 136:21-23.

1362 United States District Court for the District of Columbia, Judgment, 30 January 2015 (**Exhibit R-197**), pp. 10, 12. It bears mentioning that on the Second Lawsuit of SSA before the US courts, commenced in 2013 the court remarked that, although it did not impose sanctions on SSA's counsel, it noted, "[t]*his case presents a closer case for sanctions than usual*." The court summarily decided that SSA's submissions in the Second Lawsuit were based on the "same nucleus of facts" as those in the First Lawsuit and were barred the doctrine of res judicata.

by Colombia and confirmed by its witness, Mr. Juan Manuel Vargas, former Legal Director of the Ministry of Culture ;[1363] and (*iii*) Colombia never recognized SSA's alleged rights to the San José.

1074. ***Third***, SSA's contention about an alleged agreement between the Parties that the reinstatement of the Attachment Order was a recognition of SSA's alleged rights over the San José is a gross misrepresentation and purely disingenuous[1364]. The protection provided by the Attachment Order was limited to SSA's right to any objects that could qualify as treasure and that could be found at the coordinates which SSA reported in 1982. The Attachment Order said nothing of the San José. Furthermore, as the Columbus report evidenced in 1994[1365] and as WHOI's recent survey confirms,[1366] SSA has a right to nothing, as nothing can be found in the 1982 coordinates.

1075. ***Fourth***, and relatedly, following the reinstatement of the Attachment Order on 29 March 2019, SSA filed a request before the 3rd Judge of the Circuit of Barranquilla, requesting that he compel the Colombian Ministry of Culture to authorize SSA's entry into what SSA refers to as the "immediate vicinity" of the 1982 coordinates, in order to proceed with the execution of the Attachment Order:

> [T]he initiation of the action established by the Superior Tribunal requiring the Ministry of Culture to comply with the burden of authorizing access to the immediate vicinity of such coordinates, so that the other stages of the attachment can be carried out, prior to the practice of the attachment of the galleon San José raised by the plaintiff SEA SEARCH ARMADA through its counsel, and which must be materialized with the prior authorization of the Nation as provided by the Superior Court of Barranquilla provided the second instance sentence.[1367]

1076. On 22 October 2024 the 3rd Judge of the Circuit of Barranquilla denied SSA's request, finding:

> [T]he Supreme Court of Justice modified the aforementioned second point of the first degree judgement, in the understanding that the property therein recognized in equal parts for the Nation and the plaintiff, is referred only and exclusively to the assets that, on the one hand, due to their own characteristics and features in accordance with the circumstances and guidelines indicated in the judgement of the Court, are still susceptible to be

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1363 *See* Witness Report JM. Vargas (**RWS-5 [Vargas]**), ¶ 28.

1364 Amended Statement of Claim, ¶¶ 254, 256.

1365 Columbus Report, 10 July 1994 (**Exhibit R-12**).

1366 Expert Report of Woods Hole Oceanographic Institution (**RER-9 [WHOI]**), pp. 12-14.

1367 3rd Judge of the Circuit of Barranquilla, Judgement No, 1989-9134, 22 October 2024 (**Exhibit R-231**), p. 1 (emphasis in the original).

> legally qualified as treasure, in the terms of article 700 of the Civil Code and the restriction or limitation imposed thereon by article 14 of Law 163 of 1959, among other applicable provisions, and on the other hand, referred to in resolution 0354 of 1982, that is to say, that are located at the coordinates referred to in the confidential report, without including spaces, zones or different areas.[1368]

1077. The Judge added that the 2007 Judgment was consistent with DIMAR's Resolution 354, through which DIMAR recognized SSA as the reporter of the find in the coordinates referred to in the 1982 Report. Therefore, as ruled by the Judge, "*the place of salvage cannot be varied by a broader or more lax interpretation, since this would imply ignoring the section on the location of the objects that may have the quality of treasures determined in the referenced report*."[1369]

1078. Consequently, the 3rd Judge of the Circuit of Barranquilla resolved the dispute, as stated by SSA, "*in a manner that is binding for all*", [1370] making it clear that the Attachment Order covers only those assets that qualify as "treasure" that would be located in the exact coordinates contained in the 1982 Confidential Report, without including what SSA labels the "immediate vicinity". No other objects were included, much less those that constitute historical, cultural, or archaeological heritage.

1079. ***Fifth***, and in any event, even if the Tribunal were to given any credence to SSA's argument that the Attachment Order concerned SSA's alleged rights over the San José (which it did not), the judgment of the Superior Tribunal of Barranquilla reinstating the Attachment Order did not resurrect any rights.[1371] In other words, the very same Attachment Order was in place when SSA claimed to have been expropriated by Colombia on 26 November 2012. Yet, at the time, that did not prevent SSA from claiming that it was expropriated, despite the Attachment Order supposedly protecting its alleged rights from expropriation. Clearly, SSA claimed (and not only considered) that its rights had allegedly been expropriated, regardless of the existence of the Attachment Order – the scenario in 2019 is no different.

1080. ***Sixth,*** for decades and up to the present, Colombia has made it clear that it does not recognize any rights held by SSA to the Galleon San José, even in light of the Attachment Order being in

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1368 3rd Judge of the Circuit of Barranquilla, Judgement No, 1989-9134, 22 October 2024 (**Exhibit R-231**), p. 1.

1369 3rd Judge of the Circuit of Barranquilla, Judgement No, 1989-9134, 22 October 2024 (**Exhibit R-231**), p. 1.

1370 Claimant's Amended Statement of Claim, ¶ 257.

1371 Superior Court of the Judicial District of Barranquilla, Judgement, 29 March 2019 (**Exhibit C-39**).

place. Clearly, the existence of the Attachment Order had no impact on Colombia's views as regards SSA's alleged rights to the San José. Colombia has made this plainly clear.

1081. Indeed, on 17 June 2019 – less than three months after the Superior Tribunal of Barranquilla reinstated the Attachment Order on 29 March 2019 – Colombia once again communicated to SSA that it did not recognize that SSA had any rights over the San José, regardless of the Attachment Order.[1372]

1082. Between Colombia's communication of 17 June 2019 and the issuance of Resolution 085, nothing changed as regards to the Attachment Order. Even if one were to accept SSA's contention that its alleged rights – so adamantly claimed to have been expropriated by Colombia – were resurrected by the reinstatement of the Attachment Order, the fact remains that by 17 June 2019, despite having full knowledge that Colombia denied it any rights over the San José, SSA did nothing – including commencing arbitration proceedings prior to 18 December 2019.

1083. ***Seventh***, SSA's allegation that, for purposes of Article 10.18.1 of the TPA, what matters is the date on which it "believed" that it had been expropriated, does not hold any more water. At the Hearing on Preliminary Objections, the Claimant stated:

> And the reason for that is because--it comes back to what I was saying earlier. Let's say that we believe that our expropriation--that our rights have been expropriated. Okay?
>
> PRESIDENT DRYMER: Right. Five years ago.
>
> MR. MOLOO: Five years ago. If the next day the State comes back to me and says, "No. You're wrong. You have your rights," is the fact that I thought mistakenly that I had been expropriated--if that were true, then if I mistakenly understood that I had been expropriated or I had been expropriated and the State gave it back to me --any--any--pick either one of those fact patterns—then the State now is free and clear to expropriate me in the future forever? […]
>
> And even more than that, <u>even if we were expropriated, that in and of itself does not preclude a potential or future claim of expropriation if you have a valid investment and belief, using their test, subjectively understood to have</u>

1372 Letter from the Vice-President of Colombia to SSA, 17 June 2019 (**Exhibit C-40**).

> rights that you continue to possess prior to the expropriation. That is being alleged to be the breach before this Tribunal.[1373]

1084. Adding that, for purposes of the calculation of the time bar, what matters was what the Claimant believed:

> [I]f you go and say: "Hey, I've been permanently deprived," and later on the court said--which is an organ of the state--says: "No, no, no, you haven't been." Then you go: "Oh, okay. Good. I haven't been. Vice-President, I'm going to now enforce my rights".[1374]

1085. It is quite a stretch for SSA to assert that the determination of whether or not an expropriation has taken place and that the date of the alleged breach for purposes of calculating the three-year limitations period under Article 10.18 of the TPA hinges on the Claimant's "subjective belief", *i.e.*, "*the moment* [they] *believe* [they] *have been permanently deprived*"[1375]. To recall, as a matter of law, it does not matter whether SSA changed its belief or whether expropriation took place or not, or its belief of when such expropriation took place. Under Article 10.18.1 of the TPA, what matters is when the Claimant first acquired, or should have acquired, knowledge of the "breach alleged", *i.e.*, expropriation and breach of the fair and equitable treatment. As further explained above, Article 10.18.1 of the TPA requires actual knowledge or constructive knowledge of the breach alleged:

> 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 […].[1376]

1086. The Respondent has also shown that the Attachment Order did not – and could not – resurrect any alleged rights of the Claimant to the San José. Colombia has further demonstrated that it directly and repeatedly communicated to SSA that it did not recognize it or its Alleged Predecessors any rights to the so-called treasure of the San José, including after the Attachment

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1373 Transcript of the Hearing on Respondent's objections pursuant to article 10.20.5 of the TPA, 15 December 2023, pp. 140-141:18-6, 142:18-24 (emphasis added).

1374 Transcript of the Hearing on Respondent's objections pursuant to article 10.20.5 of the TPA, 14 December 2023, p. 287:2-7.

1375 Transcript of the Hearing on Respondent's objections pursuant to article 10.20.5 of the TPA, Day 1, 14 December 2023, p. 286:17-18 (President Drymer). *See also* Transcript of the Hearing on Respondent's objections pursuant to article 10.20.5 of the TPA, Day 1, 14 December 2023, p. 287:1-15 (Mr. Moloo).

1376 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.18.1 (emphasis added).

Order was reinstated. To put it simply, there is no universe in which SSA can seriously contend that, by 18 December 2019, it did not have actual knowledge that the San José was nowhere to be found in the coordinates it had provided in the Confidential report – quite the contrary, since SSA purposefully concealed from Colombia the exact coordinates of its find.

1087. For these reasons, no matter which angle it adopts, SSA is barred from bringing claims under the TPA before this Tribunal, which lacks *ratione temporis* jurisdiction over the dispute.

1088. As a final comment, Colombia notes that SSA adopts a peculiar approach to the concept of expropriation, which it uses as an accordion: the player can expand the bellows once, and then it can expand the bellows again – twice, three, or multiple times – and continue to expand the bellows as many times as needed; SSA uses facts and the notion of expropriation as its accordion, which its expands as often as it needs, so that it may, on a happy misunderstanding, qualify within the three-year limitations period under Article 10.18.1 of the TPA. This approach is seemingly incompatible with that of a claimant as sophisticated as SSA – and accustomed to sophisticated counsel – which commences multiple legal proceedings before multiple fora to claim for the compensation of alleged expropriation and mistreatment, to then assert that it was mistaken in its "belief" of an expropriation. There is a name for this type of behavior: total disregard for the judicial function and abuse of process.

1089. In this respect, Colombia notes that, in SSA's its Rejoinder to Colombia's Objections under Article 10.20.5, SSA conceded that, where a "[c]*laimant has frivolously attached its claim to the most recent measure*", just to obtain jurisdiction, the respondent is then justified to raise abuse of process.[1377] Colombia agrees. This is exactly what the Claimant has done in this arbitration.

1090. In the circumstances, Colombia respectfully asks the Tribunal to decline is jurisdiction *ratione temporis* for all the reasons set out above. It also respectfully asks the Tribunal to draw all of the consequences of SSA's abusive behavior, consisting in (*i*) approaching this Tribunal after having approached the Colombian courts, the U.S. Courts (on two different occasions)[119] and the IACHR[120] regarding the same claims, (*ii*) asking this Tribunal to adopt its brazen rewriting of the TPA's limitations period provision, thereby, (*iii*) in the words of the *Orascom v. Algeria*

1377 Claimant's Rejoinder to Colombia's 10.20.5 Objection, November 2023, ¶ 236.

119 United States District Court for the District of Columbia. Civil Action No. 1:10-cv-02083 (JEB), Memorandum Opinion, 24 October 2011 (**Exhibit R-19**), p. 8; *See also* United States District Court for the District of Columbia. Civil Action No. 1:13-cv-00564-RBW, Order, 30 January 2015, (**Exhibit R-197**).

120 United States District Court for the District of Columbia. Civil Action No. 1:13-cv-00564-RBW, Order, 30 January 2015 (**Exhibit R-197**), p. 10.

tribunal, seeking to achieve "*consequences unforeseen by* [the Contracting Parties to the TPA] *and at odds with the very purposes underlying the conclusion of* [the TPA]". The position of the United States, the other Contracting Party to the TPA, is very clear in this respect:

> An ineffective limitations period would also undermine and be contrary to the State Party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute 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 and knowledge that the claimant has incurred loss or damage.[1378]

1091. It is precisely those unforeseen consequences that this Tribunal must avoid. It is precisely this type of abuse of process by SSA that the Tribunal is empowered to recognize and sanction.

V. IN ANY EVENT, COLOMBIA'S ACTIONS AS REGARDS THE *GALEÓN SAN JOSÉ* ARE LEGITIMATE REGULATORY MEASURES WHICH ARE NEITHER EXPROPRIATORY NOR CONTRARY TO THE MINIMUM STANDARD OF TREATMENT

1092. Contrary to the Claimant's allegations,[1379] Colombia did not expropriate the Claimant's alleged investment in Colombia, nor breach its obligation under the TPA to provide treatment in accordance with the Minimum Standard of Treatment. In the sections below, Colombia addresses the Claimant's claims and rectifies its mischaracterization of the applicable standards under the TPA for Expropriation (**A**) and Minimum Standard of Treatment (**B**).

A. CONTRARY TO THE CLAIMANT'S BASELESS ASSERTIONS, RESOLUTION 085 DOES NOT CONSTITUTE AN EXPROPRIATION OF THE CLAIMANT'S RIGHTS OVER THE PURPORTED FINDING

1093. In its Amended Statement of Claim, the Claimant alleges that Colombia "*has denied SSA its rights to the San José treasure*", which in the Claimant's view "*amounts to an expropriation of SSA's investment.*"[1380] The Claimant's allegation holds no water, as the Respondent demonstrates below.

1378 Non-Disputing Party Submission of the United States of America, 8 December 2023, ¶ 13 (emphasis added).

1379 *See* Amended Statement of Claim, Section IV.

1380 Amended Statement of Claim, ¶ 295.

1094. In this section, Colombia first sets forth the applicable standard to expropriation claims under the TPA, correcting the Claimant's erroneous portrayal and reliance on inapposite case law (**1**). Colombia then applies the correct standard to the relevant facts, demonstrating that, even if the Claimant had found the *Galeón* (*quod non*), the issuance of Resolution 085 of 2020 would not constitute a direct or indirect expropriation (**2**).

1. The legal standard for an expropriation under the TPA

1095. In its submission, the Claimant inaccurately describes the relevant standard for a claim for expropriation to succeed under the TPA,[1381] which is the starting point to evaluate its unfounded claims.

1096. Article 10.7(1) of the TPA, the substantive protection standard against wrongful expropriation, provides in relevant part:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law and Article 10.5.[1382]

1097. In addition, in Annex 10-B, the Contracting Parties "*confirm*[ed] *their shared understanding*" that Article 10(7)(1) applies to two situations: (***i***) direct expropriation, which occurs "*where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure*" and (***ii***) indirect expropriation, which occurs "*where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*."[1383]

1098. The Claimant argues that, by adopting Resolution 085, Colombia expropriated the Claimant's alleged investment both directly and indirectly. The Claimant's argument is predicated on either

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1381 *See* Amended Statement of Claim, Section IV(A)(a).

1382 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.7(1).

1383 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶¶ 2-3.

a mischaracterization or, at best, a selective portrayal of the relevant standards under the TPA. In the following sub-sections, the Respondent first addresses a key element that the Claimant omitted to refer to in its submission: any claim for expropriation necessarily presupposed the existence of a right capable of being expropriated (**a**). The Respondent then rectifies the standard applicable to direct (**b**) and indirect expropriation (**c**) under the TPA.

a. A claim for the alleged expropriation of rights over the *Galeón San José* presupposes that the Claimant has vested property rights or interests over the *San José* shipwreck

1099. It is axiomatic that, in order to determine whether an expropriation has occurred, the Claimant must have rights or interests capable of being expropriated. Indeed, in accordance with Annex 10-B(1), for an action or series of actions to constitute an expropriation under the FTA, it has to "*interfere*[] *with a tangible or intangible property right or property interest in an investment*".[1384] In other words, the existence of a property right or property interest is a condition *sine qua non* for an expropriation.

1100. Investment tribunals have consistently recognized that, even in the absence of express treaty language, expropriation claims are only cognizable in "*respect of rights that* [have] *the characteristics of property rights*" under domestic law.[1385] As Professor Douglas cogently explains:

> There are compelling reasons of justice that demand that only property rights be considered as the potential objects of indirect or de facto expropriations. It is widely accepted that a state can be liable for an indirect or de facto expropriation regardless of whether the state intended to expropriate the rights in question or whether it even had actual knowledge of the existence of the rights. This is defensible because everyone, including the state and its organs and officials, has constructive notice of property rights. Property rights are good against the whole world. […]

1384 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 1.

1385 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Award, 17 April 2015 (**Exhibit RLA-161**), ¶ 158. *See also Emmis International Holding, B.V., Emmis Radio Operating, B.V., and others v. Hungary* (ICSID Case No. ARB/12/2), Award, 16 April 2014 (**Exhibit RLA-154**), ¶¶ 159, 169; Andrew Newcombe and Lluís Paradell Trius, "Expropriation", *in Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009) (**Exhibit RLA-96**), p. 351.

> [Therefore], a business activity or the activity of making a profit cannot be characterized as property interests and thus be the object of an expropriation.[1386]

1101. For instance, in *Emmis v. Hungary*, the tribunal rejected the claimants' expropriation claims, explaining that "[i]*t* [] f*ollows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress.*"[1387] There are numerous additional examples in investment case law and practice to the same effect.[1388]

1386 Zachary Douglas, "Property, Investment and the Scope of Investment Protection Obligations", in Z. Douglas, J. Pauwelyn, and J.E. Viñuales (eds) *The Foundation of International Investment Law: Bringing Theory into Practice* (OUP, 2014) (**Exhibit RLA-97**), pp. 376-377. *See also Red Eagle Exploration Ltd v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 28 February 2024 (**Exhibit RLA-223**), ¶ 399.

1387 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and others v. Hungary* (ICSID Case No. ARB/12/2), Award, 16 April 2014 (**Exhibit RLA-154**), ¶ 168 (emphasis added).

1388 *See*, e.g., *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), Award, 4 September 2020 (**Exhibit RLA-206**), ¶ 472 *("The difficulty for an expropriation analysis is that Eskosol cannot show that it had a recognized property right to obtain this enhanced value of its assets, through participation in the Conto Energia III tariff regime*. […] *At best, Eskosol might argue that it was well positioned to eventually secure a legal right, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such. And absent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.")* (emphasis added); *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (**Exhibit RLA-112**), ¶ 22.1 ("*There cannot be an expropriation of something to which the Claimant never had a legitimate claim. The Tribunal concludes that the failure of the Kyiv City State Administration to secure the Claimant's use of the adjoining property cannot amount to an expropriation.*" (emphasis added)); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 (**Exhibit RLA-038**), ¶ 118 (The tribunal dismissed the claimant's expropriation claim under Article 1110 of NAFTA, *inter alia*, on the basis that "*the Claimant never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes*"); *Merrill & Ring Forestry L.P. v. The Government of Canada* (ICSID Case No. UNCT/07/1), Award, 31 March 2010 (**Exhibit RLA-140**), ¶ 140 (The tribunal dismissed the claimant's expropriation claim, on the basis that the claimant lacked a protected investment under Article 1110 of the NAFTA, stating that "*a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers*" was insufficient to this effect.); *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Non-Disputing Party Submission of Canada, 27 February 2020 (**Exhibit RLA-199**), ¶ 5 (stating that "[a]*ny expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated.*"); *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America, 16 August 2017 (**Exhibit RLA-179**), ¶¶ 9-10.

1102. Clearly, the lack of a demonstrated vested right or interest under domestic law over an asset that was allegedly expropriated is fatal for a claim of expropriation. As explained above, the Respondent has no rights over the *Galeón San José*, which should be the end of the matter.

b. Even assuming, *quod non*, that the Claimant had a vested right in the *Galeón San José*, the Claimant's portrayal of the standard applicable to direct expropriation under the Treaty is wrong

1103. In its Amended Statement of Claim, the Claimant purports to describe the legal standard for direct expropriation under Annex 10-B of the TPA.[1389]

1104. Colombia agrees with the Claimant that Annex 10-B of the TPA provides the criteria that the Tribunal should consider when determining whether there is a direct or indirect expropriation.

1105. As regards direct expropriation, the Parties also agree that, in accordance with Annex 10-B to the TPA, direct expropriations involve measures that entail a "*formal transfer of title or outright seizure*."[1390] However, the Claimant glosses over the operative term of the definition of direct expropriation in the TPA: namely, that for a direct expropriation to exist, the transfer of title must be "formal". In this regard, as explained by the tribunal in *Metalclad v. Mexico*, "*expropriation under NAFTA includes* […] *open, deliberate and acknowledged takings of property*".[1391]

1106. As noted by Professors Reinisch and Schreuer in the same commentary on which the Claimant relies, cases of direct expropriation have become increasingly rare.[1392] There are, however, instances where direct expropriations occasionally occur. One such case is *Santa Elena v. Costa Rica*, where the claimant alleged that Costa Rica had directly expropriated its investment by issuing a governmental decree which expressly stated in its Article 1 that "*the property owned by the Compañia de Desarrollo Santa Elena S.A. described in the third whereas clause of this decree,*

1389 *See* Amended Statement of Claim, ¶¶ 303-307.

1390 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 2. *See also* Amended Statement of Claim, ¶ 303.

1391 *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000 (**Exhibit CLA-106**), ¶ 103 (emphasis added).

1392 A. Reinisch and C. Schreuer, "Expropriation", *in International Protection of Investments: The Substantive Standards* (CUP, 2020) (**Exhibit CLA-174**), ¶ 168. *See also* UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), p. 7.

is hereby expropriated."[1393] Against this backdrop, the existence of a direct expropriation was not even disputed by the parties.

1107. The case law on which the Claimant relies concerns expropriations that were as direct and manifest as in the case of *Santa Elena v. Costa Rica*, and that do not support the Claimant's case.

1108. For instance, in *Kardassopoulos v. Georgia*,[1394] the tribunal first analyzed at length the question of whether the joint-venture company held by the claimants, GTI, was entitled to any rights under the Joint Venture Agreement and the Deed of Concession.[1395] Having satisfied itself that the claimants held rights in the oil pipeline facilities in Georgia, the tribunal further analyzed the effects that Decree No. 178 of 1996 by the Georgian Cabinet of Ministers had had on the claimants' investment.[1396] The tribunal concluded that the government of Georgia had directly expropriated the claimant's investment in the joint-venture company, GTI, which held rights to develop a pipeline and build other energy infrastructure. The impugned measure, Decree No. 178, had resolved "[t]*o assign a shareholder partnership to* [State-owned company Georgian International Oil Corporation] *[GIOC] in order to manage the government-owned state property*", further cancelling "*all rights (given earlier by the Georgian government to any of the parties) contradicting the present Decree*".[1397] As a result, according to the tribunal, "[w]ith the passage of Decree No. 178, [the President of GIOC,] *Mr. Chanturia, in effect, inherited control of the early oil pipeline project, formerly in the hands of GTI*".[1398]

1109. The Claimant also cited to the *Stans v. The Kyrgyz Republic* case.[1399] However, in doing so, the Claimant omits that the provision on expropriation applicable to that case was substantially

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1393 *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award, 17 February 2000 (**Exhibit CLA-105**), ¶ 18.

1394 *See* Amended Statement of Claim, ¶ 304.

1395 *See Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 (**Exhibit CLA-141**), ¶¶ 317-349.

1396 *See Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 (**Exhibit CLA-141**), ¶ 349.

1397 *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 (**Exhibit CLA-141**), ¶¶ 155, 157.

1398 *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 (**Exhibit CLA-141**), ¶ 158.

1399 *See* Amended Statement of Claim, ¶ 305 and fn. 702-704.

different from Article 10.7 of the TPA.[1400] Specifically, the relevant provision in *Stans* is broader than Article 10.7 and Annex 10-B, absent any specific definitions and elements for direct and indirect expropriation. In fact, the tribunal in *Stans* addressed claims for indirect expropriation – not direct expropriation, as the Claimant implies. Furthermore, the Claimant refers to the summary of the claimant's arguments, purporting this to be the tribunal's reasoning.[1401] The Claimant also fails to adequately describe the impugned measure. Said measure was a decision adopted by the Subsoil Use Licensing Commission of the Kyrgyz State Agency of Geology and Mineral Resources to terminate the licenses held by Kutisay Mining LLC, one of the claimants in the arbitration, in the following terms:

> Having exchanged opinions, the Committee DECIDES: […]
>
> to deliver to Kutisay Mining LLC a relevant notice of termination of subsoil use rights under:
>
> - Subsoil License No 2488 ME issued to Kutisay Mining LLC on 20 September 2010 for a term until 21 December 2029 for the right of subsoil use at the Kutessay II deposit for the purpose of development of rare earth elements, bismuth, molybdenum and silver. *Decision is carried unanimously. U.D. Ryskulov and K.K. Zhumabekov were absent.*
>
> - Subsoil License No 2489 ME issued on 20 September 2010 for a term until 21 December 2029 for the right of subsoil use at the Kalesay deposit for the purpose of development of beryllium and lead. *Decision is carried unanimously. U.D. Ryskulov and K.K. Zhumabekov were absent*.[1402]

1110. The tribunal thus concluded that the respondent's measures, and in particular the SAGMR's decision by which it "*formally decided the* [] *termination*" of the claimant's licenses, "*was indeed*

1400 Kyrgyz Republic Law No.66 (2003), Article 6 ("[i]*nvestments shall not be subject to expropriation (nationalization, requisition, or other equivalent measures, including actions or omissions by the government bodies of the Kyrgyz Republic resulting in forced withdrawal of investor's funds or in depriving investor of an opportunity to gain on the investments' results)* […]"), referred by *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic* (PCA Case No. 2015-32), Award, 20 August 2019 (**Exhibit CLA-172**), ¶ 552.

1401 *See* Amended Statement of Claim, fn. 703, citing to *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic* (PCA Case No. 2015-32), Award, 20 August 2019 (**Exhibit CLA-172**), ¶ 555. The tribunal's ruling may be found at ¶¶ 580-581.

1402 *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic* (PCA Case No. 2015-32), Award, 20 August 2019 (**Exhibit CLA-172**), ¶ 334.

a dispossession by the Respondent".[1403] Additionally, and contrary to the Claimant's allegations, the *Stans Energy* tribunal did not characterize this dispossession as a direct expropriation.[1404]

1111. Finally, in the case of *Southern Pacific v. Egypt*,[1405] the tribunal found that Egypt had expropriated the claimant's investment by withdrawing its approval of the project to build a tourism complex at the pyramids of Giza, which project had been originally granted to the claimant. Moreover, the measure challenged by Southern Pacific in the arbitration, Resolution No. 1/51-78 of the Egyptian Antiquities Authority, provided:

> As a result of the Decree of the Minister of Culture and Information dated 28/5/78, considering the Pyramids Plateau one of the monumental areas, and accordingly the nature of the land had changed to be a public domain owned by the State as public property, it is impossible legally to implement this project on this land.
>
> The Board of Directors of the General Investment Authority decided to drop its former issued agreement No 50/19-75, dated 20th July 1975, concerning the Pyramids Plateau, for the impossibility of executing this project on the Plateau, thus, according to the decree of the Minister of Culture and Information.[1406]

1112. A closer look at the case law on which the Claimant relies shows that, in all cases, the measure found to have directly expropriated the claimant's investment formally and explicitly targeted the claimant's investment. Indeed, the standard applicable to direct expropriation requires a measure that expressly and specifically dispossesses the investor of any rights that it demonstrably had over its alleged investment. As the Respondent shows below, this is not the case of Resolution 085 of 2022, given that (***i***) the Claimant lacks a vested right or interest over the *Galeón* and (***ii***) even if the Claimant had any vested interest in the *Galeón*, *quod non*, Resolution 085 did not "*openly and deliberately*" dispossess the Claimant thereof.

1403 *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic* (PCA Case No. 2015-32), Award, 20 August 2019 (**Exhibit CLA-172**), ¶¶ 580-581 (emphasis added).

1404 *See* Amended Statement of Claim, ¶ 305, fn. 704.

1405 *See* Amended Statement of Claim, ¶ 306; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits, 20 May 1992 (**Exhibit CLA-102**).

1406 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits, 20 May 1992 (**Exhibit CLA-102**), ¶ 64 (emphasis added).

c. The Claimant's alternative claim for indirect expropriation ignores the elements and key limits for finding an indirect expropriation under the TPA

1113. In the alternative to its flawed direct expropriation claim, the Claimant argues that Colombia indirectly expropriated the Claimant's alleged investment. As the Respondent demonstrates, the Claimant provides little to no authorities in support of its indirect expropriation claims.[1407] Rather, the Claimant simply regurgitates its flawed account of its alleged technical evidence and baseless accusations against Colombia.

1114. According to paragraph 3 of Annex 10-B of the TPA, an indirect expropriation occurs when "an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[1408]

1115. Pursuant to sub-section (a) of paragraph 3, the existence of an indirect expropriation is to be determined following a "*case-by-case, fact-based inquiry*" that must consider, among others, three cumulative non-exhaustive factors: (***i***) the economic impact of the measure; (***ii***) the investor's reasonable investment-backed expectations and (***iii***) the character of the government action.[1409]

1116. Moreover, according to paragraph 3(b) of Annex 10-B of the TPA, non-discriminatory regulatory actions will not ordinarily constitute an expropriation.[1410]

1117. The Respondent sets out below the appropriate standard for each of these tests.

1407 *See* Amended Statement of Claim, ¶¶ 309, 327.

1408 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3.

1409 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3. *See also Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Final Award, 6 December 2022 (**Exhibit CLA-57**), ¶ 1206; the Claimant seems to agree with this interpretation (*See* Amended Statement of Claim, ¶ 309).

1410 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, paragraph 3(b).

i. An indirect expropriation requires an economic impact that interferes with distinct, reasonable investment-backed expectations

1118. The Claimant acknowledges that, to determine whether an indirect expropriation occurred, the Tribunal must consider the factors set out in paragraph 3(a) of Annex 10-B: (***i***) the economic impact of the measure; (***ii***) the existence of reasonable investment-backed expectations and (***iii***) the character of the action.[1411] However, the Claimant's interpretation and application of each of these elements is wrong. The Respondent first addresses the relevant authorities to illustrate the correct approach to interpreting these elements.

1119. ***First***, the effect or impact of a measure on the alleged investment is a key element in determining the existence of an expropriation. That is: the impact of the measure should be of such magnitude "*that the government measure at issue destroyed all, or virtually all, of the economic value of its investment.*"[1412] In other words, for there to be an expropriation, a taking must be a "*substantially complete deprivation of the economic use and enjoyment of the rights to the property* […] *(i.e., it approaches total impairment*",[1413] or "*as if the rights related thereto* […] *had ceased to exist*."[1414]

1120. This tenet is reflected in paragraph 3(a)(i) of Annex 10-B of the TPA, which requires consideration of "*the economic impact of the government action*".[1415] As noted by the tribunal in *Gramercy v. Peru*, this standard for a substantial deprivation of the investment was incorporated into Annex

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1411 *See* Amended Statement of Claim, ¶ 327.

1412 *Angel Samuel Seda and others v. The Republic of Colombia* (ICSID Case No. ARB/19/6), Submission of the United States of America, 26 February 2021 (**Exhibit RLA-209**), ¶ 25, citing to *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Interim Award, 26 June 2000 (**Exhibit RLA-116**), ¶ 102. *See also Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 24; *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 (**Exhibit CLA-57**), ¶¶ 1193-1194 (citing to the Non-Disputing Submission of the United States as "*confirm*[ing]" the tribunal's view); *Kaloti Metals & Logistics, LLC, v. Republic of Peru* (ICSID Case No. ARB/21/29), Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), ¶ 49.

1413 *Cargill, Incorporated v. The United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 360.

1414 *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 (**Exhibit CLA-111**), ¶ 115. *See also Glamis Gold Ltd. v. United States of America*, (UNCITRAL), Award, 8 June 2009 (**Exhibit RLA-135**), ¶ 357.

1415 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3(a).

10-B of the TPA, which provides that the fact that a government action "*has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred*".[1416]

1121. Moreover, and critically in the present case, to assess the economic impact of an allegedly expropriatory measure, *"the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events."*[1417] In this regard, again according to the *Gramercy v. Peru* tribunal, the value of the investment must be assessed *"based on the facts and circumstances known to exist at the time"*.[1418]

1122. ***Second***, paragraph 3(a) of Annex 10-B requires the evaluation of "*the extent to which the government action interfere with* [(i)] *distinct*, [(ii)] *reasonable* [(iii)] *investment-backed expectations*".[1419] As stated by the United States in its Non-Disputing Party Submission in *Gramercy v. Peru*, this element requires an objective inquiry of "*the reasonableness of the claimant's expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made*".[1420]

1123. Similarly, in *Kaloti Metals v. Peru*, when addressing a provision identical to paragraph 3(a) of Annex 10-B , the United States as Non-Disputing Party stated that this "*objective inquiry of the reasonableness of the claimant's expectations* […] *depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the*

1416 *See Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Final Award, 6 December 2022 (**Exhibit CLA-57**), ¶ 1192. United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3(a)(i).

1417 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 25. As pointed out by the United States, this principle also applies in the determination of damages (*See* fn. 41). *See also Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company and others* (IUSCT Case No. 56), Partial award, 14 July 1987 (**Exhibit RLA-113**), ¶ 238 (stating that *"*[o]*ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.*").

1418 *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 (**Exhibit CLA-57**), ¶ 1194.

1419 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3(a)(ii).

1420 *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 26.

relevant sector." [1421] In this regard, where a sector is already highly regulated, it is easily foreseeable that these regulations might be extended.[1422]

1124. This is because *"an investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation".*[1423] The rationale was expressed by the tribunal in *Grand River v. United States of America*, which concluded that one of the claimants, a shareholder of a tobacco distribution business, *"could not reasonably have developed and relied on an expectation, the non-fulfilment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business […] without encountering state regulation."*[1424]

1125. As expressed in a report by the United Nations Conference on Trade and Development: *"[i]nvestors – be they foreign or domestic, remain exposed to the variety of risks in the country that they operate, including the risk of changes in the regulatory environment."*[1425] In this regard, investment treaties and the international law of expropriation in general are not intended to act as an insurance policy against normal commercial risks, such as the risk of reasonable bona fide regulations.[1426] As the Respondent shows, in light of the regulatory framework at the time of the alleged investment, the Claimant and its Alleged Predecessors could not and should not have had a reasonable expectation that Colombia would not adopt regulations to protect the *Galeón San José*, which is an important part of Colombia's cultural heritage. The Claimant and its Alleged Predecessors were aware or should have been aware of the existing legal framework, in

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1421 *Kaloti Metals & Logistics, LLC, v. Republic of Peru* (ICSID Case No. ARB/21/29), Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), ¶ 50.

1422 *Spence International Investments, LLC, Berkowitz et al v. The Republic of Costa Rica*, Submission of the United States of America, 17 April 2015 (**Exhibit RLA-162**), ¶ 29.

1423 *Kaloti Metals & Logistics, LLC, v. Republic of Peru* (ICSID Case No. ARB/21/29), Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), fn. 89. *See also Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America, 16 August 2017 (**Exhibit RLA-179**), ¶ 14 and fn. 21.

1424 *Grand River Enterprises Six Nations, Ltd., and others v. United States of America* (UNCITRAL), Award, 12 January 2011 (**Exhibit RLA-143**), ¶¶ 144-145.

1425 UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), p. 75.

1426 *Waste Management v. United Mexican States (II*) (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (**Exhibit RLA-123**), ¶ 114. *See e.g., Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**Exhibit RLA-125**), Part IV, Chapter D, ¶ 9 ("*Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level* […] *continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.*").

particular Law 163 of 1959, on movable cultural heritage, and Colombia's constitutional and legislative mandates providing for the protection of archaeological and historical heritage.

1126. ***Third***, paragraph 3(a)(iii) of Annex 10-B of the TPA mandates that the "*character of the government action*" be taken into account. This element considers the nature and character of the government action, including whether such action involves a physical invasion by the government or "*whether 'it arises from some public program adjusting the benefits and burdens of economic life to promote the common good'*".[1427] Thus, "*where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory*".[1428] Notably, "[w]*here a State proclaims that it is enacting a non-discriminatory statute or regulation for a bona fide public purpose, courts and tribunals rarely question that characterization*".[1429] As a result, claimants have a "*higher burden to prove the illegality*" in cases concerning "*bona fide regulatory measures seeking to promote the common good*".[1430]

1127. ***Finally,*** it is well-established that an expropriation requires the total and permanent deprivation of property rights. Absent a total and permanent deprivation, it would hardly make sense for the TPA to mandate that an expropriation must be compensated according "*to the fair market value of the expropriated investment immediately before the expropriation took place*".[1431] This has been confirmed by investment tribunals. For example, in *Busta v. Czech Republic* the tribunal held that for an expropriation to occur, "*there must be a permanent and irreversible deprivation*".[1432]

1427 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 27; *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America, 16 August 2017 (**Exhibit RLA-179**), ¶ 15.

1428 *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America, 16 August 2017 (**Exhibit RLA-179**), ¶ 16.

1429 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 27.

1430 *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 (**Exhibit CLA-57**), ¶ 1198. *See also Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 27.

1431 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.7.2(b).

1432 *Ivan Peter Busta and James Peter Busta v. Czech Republic* (SCC Case No. V 2015/014), Award, 10 March 2017 (**Exhibit RLA-224**), ¶ 389.

1128. Given the cumulative nature of the elements listed in paragraph 3(a) of Annex 10-B of the TPA, a claimant's failure to demonstrate that any one of the elements indicates a measure compatible with an expropriation leads to the "*necessary consequence*" that the impugned measure was "*incapable of producing effects equivalent to a direct expropriation*."[1433]

1129. As the Respondent addresses further below, by reference to the relevant facts, the Claimant failed to prove that any of the elements set out in paragraph 3(a) of Annex 10-B supports its claim that Colombia indirectly expropriated the Claimant's investment.

ii. Non-discriminatory regulatory actions designed to protect legitimate public welfare objectives, as is the protection of Colombia's cultural heritage, are not expropriatory in nature

1130. In its submission, the Claimant conveniently glosses over a key element of the standard of expropriation under the TPA: namely, paragraph 3(b) of Annex 10-B of the TPA, which provides:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[1434]

1131. This language enshrines the fundamental principle of the international law of expropriation that States are not liable for any loss of property that results from *bona fide* regulation, within the legitimate exercise of the police powers of the State.

1132. In the words of the *Glamis Gold* tribunal, citing to the Restatement (Third) of Foreign Relations of the United States:

> Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that "unreasonably interferes with, or unduly delays, effective enjoyment" of the property. A State is not responsible, however, "for loss of property or

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1433 *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 (**Exhibit CLA-57**), ¶ 1213 (rejecting Gramercy's indirect expropriation claim given that it had failed to demonstrate the economic impact of the measure on its investment).

1434 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3(b).

> for other economic disadvantage resulting from bona fide … regulation … if it is not discriminatory".[1435]

1133. The principle excluding the expropriatory nature of measures adopted in the exercise of the host State's right to regulate in the public interest is customary international law. According to the tribunal in *Saluka v. Czech Republic*:

> [T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today.[1436]

1134. Indeed, this principle, which applies most notably to measures of general application which are not abusive, unreasonable or discriminatory, has been widely recognized and applied in international investment case law and practice.[1437] The rationale is evident: for States to adequately safeguard the wellbeing of their populations, it is vital to ensure that investment

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1435 *Glamis Gold Ltd. v. United States of* America (UNCITRAL), Award, 8 June 2009 (**Exhibit RLA-135**), ¶ 354. *See also* Restatement (Third) of Foreign Relations (1987) (**Exhibit RLA-86**), § 712, Comment (g).

1436 *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 262; *Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016 (**Exhibit RLA-174**), ¶¶ 292-301. *See also Methanex Corporation v. United States* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**Exhibit RLA-125**), Part II, Chapter D, ¶ 7 ("[A]*s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios* [sic]*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.*").

1437 *See*, *e.g.*, Louis B. Sohn and Richard R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, (1961) 55 AM. J. INT'L L. (**Exhibit RLA-85**), p. 554, Article 10(5) ("*5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided: (a) it is not a clear and discriminatory violation of the law of the State concerned; (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention; (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property*"); UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), pp. 12-13; *Kaloti Metals & Logistics, LLC, v. Republic of Peru* (ICSID Case No. ARB/21/29), Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), ¶ 47; *Latam Hydro LLC, Ch Mamacocha S.R.L., v. Republic of Peru* (ICSID Case No. ARB/19/28), Submission of the United States of America, 19 November 2021 (**Exhibit RLA-213**), ¶ 37.

protections do not deter reasonable and necessary government action. As explained by Canada in its Non-Disputing Part Submission in *Eco Oro v. Colombia*:

> This principle allows governments the necessary flexibility to regulate without having to pay compensation for every effect of regulation. Otherwise, governments would be unable to tax, set standards, take important health or environmental measures or carry on the functions that citizens expect from governments.[1438]

1135. Therefore, when assessing an expropriation claim, a tribunal should clearly distinguish between measures adopted by a State in exercise of its police powers on the one hand and expropriatory measures on the other. In the words of the *Suez v. Argentina* tribunal:

> As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.[1439]

1136. As noted by the tribunal in *LG&E v. Argentina*, a measure adopted in pursuance of a social or general welfare purpose, even if it interferes with an investor's ownership rights, will generally not give rise to liability:

> In order to establish whether State measures constitute expropriation under Article IV(1) of the Bilateral Treaty, the Tribunal must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies. […]
>
> With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted

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1438 *Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41), Submission of Canada, 27 February 2020 (**Exhibit RLA-199**), ¶ 8.

1439 *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010 (**Exhibit CLA-143**), ¶¶ 128, 148 ("*The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights. In effect, the doctrine seeks to strike a balance between a State's right to regulate and the property rights of foreign investors in their territory*").

> without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.[1440]

1137. In fact, the tribunal in *CME v. Czech Republic*, on which the Claimant relies, the tribunal noted that *"deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law".*[1441] The tribunal further explained that regulatory measures *"are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State".*[1442] In other words, a government's regulatory actions to ensure that private property does not collide with the general welfare of the host State is deemed not to constitute an indirect expropriation.

1138. In regards to what constitutes a "*legitimate public purpose objective*", this concept must also be construed in accordance with customary international law.[1443] It is generally accepted that the concept of public purpose under customary international law is deliberately broad, in the understanding that it is for each State to decide what measures it considers to be useful or

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1440 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 (**Exhibit CLA-119**), ¶¶ 189, 195. *See also*, *e.g.*, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010 (**Exhibit CLA-144**), fn. 232 ("*When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors.*").

1441 *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (**Exhibit CLA-109**), ¶ 603.

1442 *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (**Exhibit CLA-109**), ¶ 603.

1443 *See Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (**Exhibit CLA-78**), ¶ 626 (interpreting a provision substantially similar to paragraph 3(b) of Annex 10-B of the TPA, stating that "*Annex 811(2) does not expressly exclude the application of general international law when seeking to understand and apply it. Indeed, parties to a Treaty cannot contract out of the system of international law. When States contract with each other it is inherent that they do so within the system of international law. Therefore, in interpreting and applying the provisions of Annex 811(2), awards on the police powers doctrine under customary international law may provide some guidance (by analogy*"*). See also Philip Morris and others v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Final Award, 8 July 2016 (**Exhibit RLA-174**), ¶ 289 (stating that the provisions of an investment agreement "*must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of '[a]ny relevant rules of international law applicable to the relations between the parties*'", including customary international law.)

necessary for the public interest.[1444] In this respect, international tribunals generally defer to the judgment of national authorities when assessing the existence of a public interest that may justify a taking. As stated by the Plenary of the European Court of Human Rights in the case of *James and others v. United Kingdom*:

> [T]he notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation.[1445]

1139. Accordingly, the specific motives alleged by the State when adopting a contested measure have generally not been considered relevant by international adjudicators.[1446] Indeed, the lack of a defined standard of public purpose under international law arises from the understanding that it is not for an international tribunal to second-guess the determination by a State of what is most convenient for the public needs of its population.[1447] As summarized by the United Nations Conference on Trade and Development: "[c]*ountries are the best judges of their own needs, values and circumstances, and tribunals should defer to their judgement unless there is evidence that the expropriation is manifestly without public purpose*."[1448]

1140. This wide discretion and general deference to national authorities has been mirrored by investment case law. An example of this is the Iran-U.S. Claims Tribunal's understanding in the *Amoco* case:

1444 UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), pp. 31-32.

1445 European Court of Human Rights, Case of *James and others v. The United Kingdom*, Judgment (Merits), 21 February 1986 (**Exhibit RLA-112**), ¶ 46 (emphasis added).

1446 *See* UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), p. 32.

1447 Louis B. Sohn and Richard R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, (1961) 55 AM. J. INT'L L. (**Exhibit RLA-85**), pp. 555-556 ("*This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied.*").

1448 UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), p. 34.

> A precise definition of the "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion.[1449]

1141. In *Amoco*, the tribunal also found that the existence of a potential economic interest of the Iranian State behind the nationalization of the claimant's company – which the claimant failed to prove – would, in the tribunal's view, "*not be sufficient* […] t*o prove that this decision was not taken for a public purpose*."[1450] On a similar basis, the tribunal in *Vestey v. Venezuela concluded that* "[i]*nternational tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies*".[1451] Indeed, the phrase "*except in rare circumstances*" in the TPA is consistent with this high degree of deference generally accorded to States when it comes to adopting legitimate regulatory action.[1452]

1142. In the same vein, the tribunal in *Muszynianka v. Slovak Republic* – citing to the awards previously rendered by the tribunals in *Guaracachi America v. Bolivia*, *LIAMCO v. Libya* and *Vestey v. Venezuela* – reasoned that there exists a "*presumption that State conduct seeks to attain a legitimate common good*."[1453] Moreover, given the deference owed to States, it is primarily for domestic law to establish the specific scope of the concept of public purpose:

> Investment treaty arbitration tribunals owe deference to States in determining what serves as a legitimate public purpose. Indeed, the "precise contours of public purpose […] lie within the internal constitutional and legal order of the State in question". As recognized by the *LIAMCO* tribunal, under

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1449 *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited* (IUSCT Case No. 56), Partial award (No. 310-56-3), 14 July 1987 (**Exhibit RLA-113**), ¶ 145.

1450 *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited* (IUSCT Case No. 56), Partial award (No. 310-56-3), 14 July 1987 (**Exhibit RLA-113**), ¶ 146.

1451 *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016 (**Exhibit RLA-172**), ¶ 294.

1452 *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Non-Disputing Party Submission of Canada, 27 February 2020 (**Exhibit RLA-199**), ¶ 11.

1453 *Spółdzielnia Pracy Muszynianka v. Slovak Republic* (PCA Case No. 2017-08/AA629), Award, 7 October 2020 (**Exhibit RLA-207**), ¶ 546.

> international law, States are free to judge for themselves what they consider "useful or necessary for the public good".[1454]

1143. As the language of the TPA unambiguously indicates ("*such as*"), the examples of public welfare objectives provided in paragraph 3(b) of Annex 10-B are not exhaustive. In practice, investment tribunals have considered that issues as varied as the preservation of health, security, morality, the enforcement of private property laws or bankruptcy laws, the preservation of the environment and the protection of the health of the financial system constitute, among others, legitimate public welfare objectives.[1455] In light of the crucial importance that Colombian law accords to cultural heritage, as the Respondent further explains below, there is no room for doubt that this must also be considered a legitimate public purpose objective within the scope of Colombia's right to regulate – the Claimant's allegations that "[a] *State cannot simply purport to act with a public purpose*" are entirely baseless, particularly given Colombia's sustained policy to protect cultural heritage, which existed well before the Claimant decided to invest.

d. Elements of the substantive protection against unlawful expropriation under the TPA

1144. Even if the Claimant succeeded in proving that an expropriation with the characteristics outlined above existed (*quod non*), Article 10.7(1) of the TPA provides certain circumstances in which an expropriation may be considered lawful – this would be precisely the case.

1454 *Spółdzielnia Pracy Muszynianka v. Slovak Republic* (PCA Case No. 2017-08/AA629), Award, 7 October 2020 (**Exhibit RLA-207**), ¶ 546. *See also Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17), Award, 31 January 2014 (**Exhibit CLA-68**), ¶ 437; *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Award, 12 April 1977 (**Exhibit RLA-109**), ¶ 241; *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016 (**Exhibit RLA-172**), ¶ 294.

1455 *See*, *e.g.*, *Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016 (**Exhibit RLA-174**), ¶¶ 418, 429 (understanding that the protection of public health is a legitimate public purpose objective); *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015 (**Exhibit RLA-166**), ¶ 445 (understanding that the enforcement of the State's private property laws are a legitimate public purpose objective); *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic* (PCA Case No. 2017-15), Final Award, 11 May 2020 (**Exhibit RLA-204**), ¶¶ 622-624 (understanding that bankruptcy proceedings "*in general*" are within the State's lawful regulatory power); *Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (**Exhibit CLA-78**), ¶ 642; *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, Final Award, 26 July 2018 (**Exhibit RLA-184**), ¶ 830.

1145. Article 10.7(1) of the TPA prohibits measures that are either directly or indirectly expropriatory, except if these measures are: (***i***) adopted for a public purpose; (***ii***) in a non-discriminatory manner; (***iii***) adequately, promptly and effectively compensated, and (***iv***) adopted in accordance with due process of law and the Minimum Standard of Treatment set forth in the TPA.[1456] If these requirements are met, an expropriation must be considered lawful under the TPA.

1146. ***First***, as regards the requirement that a measure must be adopted "*for a public purpose*", the Contracting States to the TPA clarified that the concept should be construed in accordance with customary international law. The Contracting States further specified that this concept may also be expressed in domestic law, either using a similar term or as various concepts such as "*public necessity*", "*public interest*" or "*public use*".[1457]

1147. It is generally accepted that the States' power to expropriate for reasons of public purpose exists as a matter of customary international law.[1458] As explained above, the concept of public purpose has been interpreted deliberately broadly, in the understanding that States should have ample discretion to determine general welfare objectives. As a result, international adjudicators generally defer to the regulatory acts of national authorities, and are reluctant to second-guess or even analyze the motives of *bona fide* regulations.

1148. Accordingly, the boundaries of what is considered "public purpose" are generally determined by reference to domestic law. This principle has been expressly enshrined by the Contracting States in the TPA, by providing:

> For greater certainty, for purposes of this article, the term "public purpose" refers to a concept in customary international law. Domestic law may

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1456 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 3(b).

1457 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.7(1)(a).

1458 *See e.g.* Louis B. Sohn and Richard R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, (1961) 55 AM. J. INT'L L. (**Exhibit RLA-85**), p. 553 (explaining that Article 10(1) of the Draft Convention on the International Responsibility of States for Injuries to Aliens (also known as the "Harvard Convention"), which sought to codify the existing customary international law regarding the responsibility of States for injuries to aliens at the time, provided that: "[t]*he taking* [by the State] *of any property of an alien, or of the use thereof, is wrongful: (a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking*"); Restatement (Third) of Foreign Relations (1987) (**Exhibit RLA-86**), § 712 (providing that "[a] *state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose*").

> express this or a similar concept using different terms, such as "public necessity", "public interest", or "public use".[1459]

1149. Indeed, in line with customary international law, Colombian law also provides that reasons of public utility or social interest may warrant lawful expropriation by the State, which may or may not be compensable for reasons of equity. In this regard, the relevant analysis must consider the various provisions in the Colombian legal order that are relevant to the protection of cultural and historical heritage, as described in detail above. These rules include, *inter alia*, Article 58 of the Political Constitution of Colombia, which expressly provides that "[p]*roperty has a social utility that entails obligations*" and Article 72, which states that "[t]*he cultural heritage of the Nation is under the protection of the State*."[1460]

1150. ***Second***, the TPA requires that a lawful expropriation be non-discriminatory. Investment tribunals have held that discrimination "*requires more than different treatment*".[1461] Rather, in line with the established case law, a three-pronged test must be applied to determine whether a State measure is discriminatory. According to this test, originally formulated by the tribunal in *Saluka v. Czech Republic*, State conduct is discriminatory if: "*(i) similar cases are (ii) treated differently (iii) and without reasonable justification*".[1462] In the words of the tribunal in *Quiborax v. Bolivia*, the third element entails that "*there are situations that may justify differentiated treatment, a matter to be assessed under the specific circumstances of each case*."[1463] The Respondent notes that the Claimant does not allege that the Respondent expropriated the Claimant's investment in a discriminatory manner – hence, this element is undisputed.

1459 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Chapter 10, fn. 5.

1460 Political Constitution of Colombia, (1991) (**Exhibit R-245**), Articles 58 and 72. The language establishing the "social utility" of private property dates back to the 1886 Political Constitution of Colombia.

1461 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶ 261.

1462 *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL, PCA Case No. 2001-04), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 313. *See also Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015 (**Exhibit CLA-156**), ¶ 247; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶ 261.

1463 *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015 (**Exhibit CLA-156**), ¶ 247.

1151. ***Third***, Article 10.7(1) of the TPA refers to the payment of "*adequate*[], *prompt*[] *and effective*[]" compensation.[1464]In the words of the United Nations Conference on Trade and Development, an "*adequate*" compensation must have "*a reasonable relationship with the market value of the investment concerned*".[1465] As further explained below, it is also axiomatic that speculative claims cannot be compensated – which is precisely the case of the Claimant's claims.

1152. ***Fourth***, and finally, Article 10.7(1) of the TPA establishes that, for an expropriation to be lawful, it must be conducted in accordance with due process of law. The Respondent agrees with the Claimant that the standard for "*due process of law*" in the context of claims for expropriation has been duly formulated by the tribunal in *ADC v. Hungary*. However, it does not advance the Claimant's case.[1466] According to the *ADC v. Hungary* tribunal, due process of law "*demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it*".[1467] That is, according to the *ADC v. Hungary* standard on which the Claimant relies, the possibility of challenging a measure after it was taken complies with the required due process. As the Respondent shows, the possibility of challenging Resolution 085 before the Colombian courts was widely available to the Claimant, who opted not to pursue this course of action. Moreover, the investor should be afforded "*a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard*".[1468] As the Respondent explains below, the Claimant's claim that Colombia did not accord it due process of law in relation to Resolution 085 is based on a false portrayal of the facts and guarantees available to the Claimant under Colombian law.

1464 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.7(1).

1465 UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), p. 40. *See also Angel Samuel Seda and others v. Republic of Colombia* (ICSID Case No. ARB/19/6), Submission of the United States of America, 26 February 2021 (**Exhibit RLA-209**), ¶ 22 (defining "adequate" as "*that it must be made at the fair market value as of the date of expropriation*").

1466 Amended Statement of Claim, ¶ 335.

1467 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of the Tribunal, 2 October 2006 (**Exhibit CLA-118**), ¶ 435 (emphasis added).

1468 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of the Tribunal, 2 October 2006 (**Exhibit CLA-118**), ¶ 435.

2. As a matter of fact, Resolution 085 does not impinge on or relate to the Claimant's rights

1153. As explained above, a tenable claim of expropriation requires the demonstration that an investor had property rights or interests capable of being expropriated. It is undisputable that this determination must be conducted pursuant to municipal law.

1154. The Claimant argues that *"SSA Had Rights Capable of Expropriation"*[1469] and states in this regard that *"[b]efore Colombia issued Resolution No. 0085, SSA had rights to 50% of the San José shipwreck that constituted treasure."*[1470] This is a blatant misrepresentation. As the Respondent shows, the Claimant did not and could not have any rights over the *San José* shipwreck, given the plain fact that Glocca Morra did not "discover" the *Galeón San José*, which was located by Colombian authorities at a wholly different site over thirty years after Glocca Morra's alleged "discovery". Moreover, despite the Claimant's allegations to the contrary, neither the DIMAR nor the Colombian courts ever conferred on Glocca Morra any rights over the *Galeón San José*.

1155. ***First***, the Claimant repeats its *leitmotiv* according to which "*the treasure to which SSA had rights comes from the San José*", allegedly relying on "[a]*ll available contemporaneous evidence*" collected by Glocca Morra, which "*indicated*" that Glocca Morra had *"found a ship of the same period as the San José, at the location historical records indicated the shipwreck would be."*[1471] As explained above, this is simply not true. As repeatedly shown in various expeditions from 1994 to the present day, the coordinates reported by Glocca Morra in 1982 do not lead to a shipwreck, let alone the *San José*.

1156. ***Second***, and contrary to the Claimant's assertions, at no point did the DIMAR and the Colombian courts grant Glocca Morra any rights over the *San José* shipwreck. In fact, the very DIMAR Resolution on which the Claimant relies clearly identifies Glocca Morra as claimant not of the *San José* but, rather, of the specific coordinates reported in the 1982 Confidential Report. Indeed, in its Resolution No. 0354, the DIMAR:

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

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1469 Amended Statement of Claim, Section IV(a)(b)(1).

1470 Amended Statement of Claim, ¶ 313.

1471 Amended Statement of Claim, ¶ 319.

> treasures or shipwrecked goods at the coordinates referred to in the [1982 Confidential Report].[1472]

1157. As is self-evident, and contrary to the Claimant's assertions, the DIMAR Resolution No. 0354 does not refer to the *Galeón San José*, let alone confers any rights over the *Galéon* on the Claimant. To the contrary, at best, the DIMAR Resolution No. 0354 would merely grant the Claimant an interest over any "*treasures or shipwrecked goods*" at the specific location reported by Glocca Morra which, as shown, are non-existent.[1473]

1158. Confronted with this reality, the Claimant argues that Glocca Morra reported "*an area, not a pinpoint*", which would include the "*surrounding areas located in the immediate vicinity*" of target "A", given that "*GMC INC. described its findings as* […] *not a pinpoint, but an area*".[1474] According to the Claimant, the fact that the DIMAR Resolution No. 0354 referred to the 1982 Confidential Report suffices to conclude that the Claimant is entitled to rights over said area, rather than over the specific coordinates included in the 1982 Confidential Report.[1475]

1159. The Claimant's interpretation is disproven by the very language of the DIMAR Resolution No. 0354, which specifically refers to "*the coordinates*" reported by Glocca Morra in the 1982 Confidential Report – not, as the Claimant would have it, the "*immediate vicinity*" of these coordinates, nor the so-called "*Discovery Area*".[1476]

1160. Equally misplaced are the Claimant's allegations that "[t]*he Colombian courts agreed that SSA's Predecessors had a right to the area covering the shipwreck, not just a pinpoint.*"[1477]

1161. Furthermore, the Claimant avers that Glocca Morra's alleged rights "*were assignable*", and that "*they were indeed validly assigned by GMC Inc. to SSA Cayman, and then from SSA Cayman to* [the Claimant]".[1478]

1162. In any event, even considering, *quod non*, that the DIMAR Resolution No. 0354 had indeed recognized Glocca Morra as "*claimant*" over an area, not the specific coordinates reported in the

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1472 DIMAR Resolution No. 0354, 3 June 1982 (**Exhibit C-14**), Article 1 (emphasis added).

1473 Amended Statement of Claim, ¶ 316.

1474 Amended Statement of Claim, ¶¶ 313, 316.

1475 Amended Statement of Claim, ¶ 316.

1476 DIMAR Resolution No. 0354, 3 June 1982 (**Exhibit C-13**).

1477 Amended Statement of Claim, ¶ 317.

1478 Amended Statement of Claim, ¶ 318.

1982 Confidential Report, as explained above,[1479] the "i*mmediate vicinity*" could not be reasonably construed to comprise an area with a radius of three nautical miles, as the Claimant purports. As Dr. Mora explains, the margin of error of the Decca Trisponder used by GMC was only 100 meters. In fact, if other elements that may affect the margin of error are considered, it cannot be greater than 400 meters. Thus, three nautical miles cannot be explained as an "error" within the acceptable margin of error for a geodetic measurement.[1480]

1163. As explained, the Claimant never had any vested rights or interests over the *Galéon San José*. This should be the end of the query as regards the Claimant's claim for an alleged expropriation under the TPA.

3. Assuming, *quod non*, that SSA had found the *Galeón San José*, Resolution 085 does not constitute either a direct or an indirect expropriation

1164. As explained above, the Tribunal need not analyze the Claimant's expropriation claim given that the Claimant lacks vested property rights or interests capable of being expropriated, which should be the end of the query. This notwithstanding, even if the Tribunal were to find that the Claimant holds a property right protected under the TPA, which the Respondent denies, the Claimant has failed to prove the occurrence of an expropriation, either direct or indirect, in accordance with the criteria set forth in Annex 10-B.

a. SSA cannot have been expropriated multiple times

1165. Preliminarily, the Respondent draws the Tribunal's attention to a fatal flaw in the Claimant's Expropriation claim: by definition, the same alleged right cannot have been expropriated multiple times.[1481] The Claimant, however, seems to ignore this simple tenet. Indeed, according to the Claimant, Colombia expropriated its alleged rights over the *Galeón San José* (which, as explained, are inexistent) at least four times: (***i***) in 1984, when Presidential Decree No. 12 was

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1480 Expert Report of Dr. H. Mora (**RER-5 [Mora]**), ¶ ¶ 7(h), 79

1481 *Victor Pey Casado & President Allende Foundation v. Republic of Chile (I)* (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA-133**), ¶ 622 ("*Decision No. 43 of April 28, 2000, on the other hand, is of a different nature. The Claimants described it as a "new dispossession", mainly in order to support the thesis of a composite event comprising a series of identical and analogous breaches. However, it is impossible to expropriate the same assets twice in a row. The assets of the companies CPP S.A. and EPC Ltda. were subject to a definitive expropriation in 1975.*") (emphasis added).

enacted; (***ii***) at an unspecified date following the Supreme Court's Decision of 2007, by allegedly "[taking] *several actions to avoid or ignore the effect of the Colombia Ruling*", (***iii***) on 26 November 2012, when Colombia allegedly notified its intention not to comply with the Supreme Court's decision, and (***iv***) by adopting Resolution 085 of 2020, as pleaded in this arbitration.

1166. According to the Claimant, therefore, the same rights that had already been expropriated by Colombia on three previous occasions, starting in 1984, were expropriated once again in 2020. The Claimant's position is simply untenable. The Claimant cannot have it both ways: if the Claimant's alleged rights were expropriated, *quod non*, the Claimant should be held to its own allegations that the expropriatory measure was adopted in 1984, resulting in the Claimant's claim being time-barred.[1482]

1167. The Claimant's ever-evolving Expropriation claim is nothing but a transparent and abusive attempt to perpetuate a claim concerning facts that are outside the temporal application of the FTA and alleging breaches that are time-barred. The Respondent rejects in the strongest terms the Claimant's tactical refurbishment and repetition of its Expropriation claim, which has dragged and continues to drag the Respondent through countless proceedings to defend itself from the Claimant's baseless claims.

b. Resolution 085 did not directly expropriate the Claimant's alleged investment

1168. To recall, Annex 10-B of the TPA provides that a direct investment requires "*a formal transfer of title or outright seizure*",[1483] which has been characterized by tribunals as an "*open, deliberate and acknowledged taking*[] *of property.*"[1484]

1169. The Claimant argues that, with the issuance of Resolution 085 and the declaration that *"the whole of the discovery identified as the Galeón San José constitutes assets to be considered cultural heritage of the nation"*, Colombia directly expropriated the Claimant's alleged investment.[1485] The Claimant's argument has two fatal flaws, namely: (**i**) that there can be no

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1482 *See above* Section IV.

1483 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-B, ¶ 2.

1484 *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000 (**Exhibit CLA-106**), ¶ 103.

1485 *See* Amended Statement of Claim, ¶ 324.

"formal transfer of title" where no title exists to begin with and (**ii**) that Resolution 085 may not possibly be described as an *"open, deliberate and acknowledged"* expropriation.

1170. ***First***, and as explained, the Claimant holds no formal title over the *Galeón San José*. If at all, the Claimant would hold an interest over any findings located at the specific coordinates reported by Glocca Morra in 1982 (which, as explained, are none). Contrary to the Claimant's allegations, at no point did Colombian law accord, nor did the DIMAR or the Colombian courts recognize, any rights held by the Claimant over the *San José*.

1171. ***Second***, and in any event, Resolution 085 did not enact an "*open, deliberate and acknowledged*" expropriation. Indeed, Resolution 085 at no point refers to the Claimant or its predecessor, or any rights allegedly held by them, but merely resolves to "[d]*eclare the Galeón San José as an Asset of National Cultural Interest*."[1486] The Claimant's statement that "[t]*he effect of this, which is undisputed, was to transfer ownership of the entirety of the shipwreck and its contents*" is false.[1487] No outright "transfer" could have occurred by operation of Resolution 085 since, as explained, the rights over the *San José* were not previously held by the Claimant.

c. Resolution 085 did not indirectly expropriate the Claimant's alleged investment

1172. As described above, paragraph 3 of Annex 10-B of the TPA provides the non-exhaustive criteria that the Tribunal must apply to determine the existence of an indirect expropriation. As the Respondent shows, the Claimant has failed to show that any of the elements which would point to an indirect expropriation are met in the present case. First, the alleged economic impact of Resolution 085 on the Claimant's purported rights is conditional and speculative (i). Second, SSA could not have reasonable investment-backed expectations to have an unfettered right over the *Galeón San José*.

i. The alleged economic impact of Resolution 085 on the Claimant's purported rights is conditional and speculative

1173. As explained, for a measure to qualify as an indirect expropriation, one of the *sine qua non* conditions required by the TPA is a substantial deprivation of an investor's investment that "*destroy*[s] *all, or virtually all, o*f [its] *economic value*" in a way that "*approaches total*

1486 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), Article 1.

1487 Amended Statement of Claim, ¶ 324.

impairment".[1488] Moreover, the value of the investment considered to determine the existence of an economic detriment should be "*reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events*."[1489]

1174. It is difficult to think of an economic value as speculative, indeterminate and contingent on uncertain future events as that on which the Claimant intends to substantiate its claim that it suffered a substantial deprivation. Indeed, even if the Claimant had a right over the shipwreck of the *Galeón* (*quod non*), as explained by Mr. Monteiro, any potential recovery of valuable assets from the site is subject to an investment in the order of the millions. Moreover, whether any objects of value may be salvaged and what will be their economic worth is highly uncertain.

1175. In this light, it is simply not possible to determine whether the Claimant (assuming *in arguendo* that is has rights over the *San José*) has indeed sustained a substantial deprivation of its investment. The Claimant's irresponsible allegations fail to satisfy its burden of proof to demonstrate compliance with this requirement.

ii. SSA could not have reasonable investment-backed expectations to have an unfettered right over the *Galeón San José*

1176. As discussed, the existence of "*reasonable investment-backed expectations*" in the context of a claim for expropriation requires an inquiry as to (***i***) whether any binding assurances were made by the State and (***ii***) what was the "*regulatory climate*" at the time of the investment, such that an investor in an "*area traditionally subject to extensive regulation must do so with awareness of*

1488 *See Angel Samuel Seda and others v. Republic of Colombia* (ICSID Case No. ARB/19/6), Submission of the United States of America, 26 February 2021 (**Exhibit RLA-209**), ¶ 25, citing to *Pope & Talbot, Inc. v. The Government of Canada* (UNCITRAL), Interim Award, 26 June 2000 (**Exhibit RLA-116**), ¶ 102; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 360.

1489 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 25. As pointed out by the United States, this principle also applies in the determination of damages (*See* fn. 41). *See also Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company and others* (IUSCT Case No. 56), Partial award, 14 July 1987 (**Exhibit RLA-113**), ¶ 238 (stating that *"*[o]*ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.*").

the regulatory situation", which entails foreseeing that the existing regulations "*might be extended*".[1490]

1177. According to the Claimant, it *is "equally undisputable that Resolution No. 0085 interfered with reasonable investment-backed expectations"*.[1491] The *"reasonable investment-backed expectations"* to which the Claimant refers are threefold: (**i**) that it *"undertook to find the San José under a regulatory scheme that awarded them 50% of the treasure"*; (**ii**) that it would be *"able to enforce their rights"* and (**iii**) that *"a significant portion of the San José shipwreck consisted of treasure."*[1492] None of these alleged expectations meets the relevant standard.

1178. ***First***, the Claimant could not have had a reasonable expectation that the regulatory framework applicable to the finding of the *Galeón* would remain unchanged. Indeed, as explained in greater detail above, at the time of the Claimant's alleged investment in 2008, Colombian cultural heritage was subject to extensive domestic and international regulation at the time, including the following instruments:

- **Article 685 of the Civil Code**, which provides that *"[b]y occupation one acquires dominion over things that do not belong to anyone, and whose acquisition is not prohibited by law or by international law."*[1493] On this basis, at the time of the alleged investment, the Claimant could not have had a reasonable expectation that any rights over a purported finding would be unrestricted.

- **Treaty for the protection of movable monuments (Montevideo, 1933).** In the message from the Colombian Government accompanying the bill submitting the approval of the Treaty to Parliament, the then Minister of Foreign Relations, Mr. Jorge Soto del Coral, expressed that the *bill "interested all sectors of the country, since relics from the heroic times of the Republic may be found everywhere, be it from the pre-Columbian period or from the Colony."*[1494] The Treaty was approved by Law 14 of 1936.[1495]

1490 *Kaloti Metals & Logistics, LLC, v. Republic of Peru* (ICSID Case No. ARB/21/29), Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), fn. 89. *See also Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America, 16 August 2017 (**Exhibit RLA-179**), ¶ 14 and fn 21.

1491 Amended Statement of Claim, ¶ 329.

1492 Amended Statement of Claim, ¶¶ 329-330.

1493 Colombian Civil Code (1873) (**Exhibit R-64**), Article 685 (emphasis added).

1494 Bill and statement of the Foreign Minister, 15 October 1935 (**Exhibit R-263**).

1495 Law 14 of 1936, 22 January 1936 (**Exhibit R-69**).

- **Colombia's entry into the UNESCO on 1947**, and the subsequent issuance by the UNESCO of the *"Recommendation defining international principles to be applied to archaeological excavations"* (1956) and the *"Recommendation for the Protection of Movable Cultural Property"* (1978) which, as described above,[1496] defines *"movable cultural property"* as including *"products of archaeological exploration and excavations conducted on land and under water"*.[1497]

- **Law 163 or 1959, on movable cultural heritage.** As explained above, Article 14 of Law 163 provided that "[f]*indings or inventions consisting of historical or archaeological monuments are not considered to be included in Article 700 of the Civil Code, which shall be subject to the provisions of this Law."*[1498] By virtue of this law, and being cognizant of the historical value of the *Galeón*, the Claimant and Glocca Morra should have known that few objects (if any at all) could be possibly characterized as "treasure".

- **Law Decree 2349 of 1971**, which created the DIMAR and regulated findings of shipwrecks in a two-tiered process, comprising (**i**) an exploration authorization and (**ii**) the execution of contracts for the salvage and exploitation of elements of historical, scientific or commercial value found in shipwrecks.[1499]

- **Political Constitution of 1991**, which, as explained, established that the State ought to promote and encourage access to culture, and that the Nation's heritage is under the protection of the State, hence archaeological and other cultural goods which encompass national identity belong to the nation cannot be marketed or attached.[1500]

- **Law 397 of 1997,** the General Law of Culture, which established: (i) that cultural heritage "*is constituted by all the cultural goods and values that are an expression of Colombian nationality, such as tradition, customs and habits, as well as the set of immaterial and material goods, movable and immovable, that possess a special historical, artistic, (…), archaeological, (…), scientific, (…) interest, (…), and the manifestations, products and representations of popular culture*"; (ii) that the archaeological heritage is made up of '*those movable or immovable items that originate from disappeared cultures, or that belong to the colonial period, as well as human and organic remains related to those*

1496 *See above* Section II.C.1.b.

1497 Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) (**Exhibit RLA-110**), ¶ 1(a)(i).

1498 Law 163 of 1959, 30 December 1959 (**Exhibit R-77**).

1499 Law-Decree No. 2349 of 1971 (**Exhibit R-001**).

1500 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 40.

cultures'; and (iii) that shipwrecked species that have a historical or archaeological value belong to said heritage.[1501]

- **Law 1185 of 2008**, of March 2008, which established the national system for cultural heritage.[1502]

1179. Against this backdrop, it would have been far from reasonable for the Claimant or Glocca Morra to expect that the existing framework at the time of their alleged investment would remain unchanged. Conversely, Resolution 085 was but a reasonable and foreseeable extension of the legal protection of historical and archaeological heritage at the time of SSA's and Glocca Morra's investment. As such, it should have been anticipated by the Claimant and Glocca Morra among the ordinary commercial risks of their activities which, as explained, are not covered by the TPA.

1180. ***Second***, and relatedly, the Claimant's allegation that it was reasonable to expect that a significant portion of the *San José* could be considered treasure is speculative, given the lack of certainty on the cargo that was carried by the *San José* and the portion of it that has survived the passage of time. In any event, what matters is not whether the Claimant could have expected "treasure" to exist, but rather whether it could have reasonably expected that it would have an unfettered right to claim 50% of that alleged "treasure". The answer is a resounding "no", particularly considering that the legal framework at the time included *inter alia* Law 163 of 1959, which excluded historical or archaeological monuments from the regime in Article 700 of the Colombian civil Code.

1181. It follows from the above that the Claimant did not have any reasonable investment-backed expectations that could have been hindered by Resolution 085 and therefore give rise to a potential claim of expropriation.

iii. Resolution 085 constitutes a legitimate regulatory measure issued for the public interest and to protect legitimate public welfare objectives

1182. Further, Resolution 085 was adopted by Colombia in pursuance of a legitimate public welfare objective in application of its sovereign right to regulate. Therefore, absent any "*rare circumstances*" (which the Claimant does not allege), it could not and should not be considered an expropriation.

1501 Expert Report of Justice A. Solarte (**RER-8 [Solarte]**), ¶ 41.

1502 Law 1185 of 2008, 12 March 2008 (**Exhibit R-244**).

1183. As explained, adjudicators generally defer to government authorities when it comes to deciding what constitutes a "*legitimate public welfare objective*", which results in a presumption in favor of the State and a broad interpretation of the concept. Accordingly, the examples listed in paragraph 3(b) of Annex 10-B are not exhaustive – rather, the contours of the notion of "*legitimate public welfare objective*" are to be primarily determined in accordance with domestic law.

1184. Crucially, the Claimant does argue that Resolution 085 was adopted in bad faith. In its Amended Statement of Claim, however, the Claimant argues that "*Colombia did not issue Resolution No. 0085 for a public purpose*", on the basis that "[a] *State cannot simply purport to act with public purpose*", relying to this effect on *ADC v. Hungary.*[1503] In this regard, according to the Claimant, Colombia failed to explain "*why the entirety of the San José shipwreck must be declared property of the State in order to preserve its cultural and historical value*."[1504]

1185. ***First***, the Claimant's assertion is contradicted by the existing international legal framework on the protection of cultural heritage. As described above, the protection of the nation's cultural heritage, which predates the Claimant's investment and is enshrined in the Colombian Constitution, and relevant laws, and has been the object of a variety of domestic and international instruments.[1505] In light of the central importance that this has for the Colombian government, it is indisputable that Resolution 085 was a legitimate exercise of Colombia's right to regulate.

1186. ***Second***, the Claimant's allegation that Colombia failed to explain why Resolution 085 comprises the entirety of the *Galeón San José* shipwreck is easily belied by the evidence on the record. Contrary to the Claimant's allegations, Resolution 085 expressly addresses this point, stating:

> At a glance, objects such as 22 cannons, the iron anchor, ceramic pieces, armour and objects belonging to the ship are easily distinguishable. Each of these objects is unique and unrepeatable. It is known that the contents of the ship include other objects such as gold and silver coins, ingots and jewellery; however, undoubtedly, any analysis of these items under the criterion of repetition, must be carried out in accordance with the principle of unity, following the precepts of the Judgment C-264 of 2014. The principle of unity takes on special relevance in relation to the finding of the *San José Galeón*, since the value of this wreck lies precisely in the whole set of pieces that compose it, which thanks to the state [of preservation] in which they

1503 Amended Statement of Claim, ¶ 337.

1504 Amended Statement of Claim, ¶ 338.

1505 *See above* Section II.K.

> are found and what they represent as a whole, being this particular finding of an undeniable cultural importance. […]
>
> The archaeological discovery of the *San José Galeón* is the most significant in the history of archaeology in our country, and its remarkable state of preservation calls for a rescue operation unlike any ever undertaken in Colombia.[1506]

1187. Precisely, given the unprecedented archaeological value of the *Galeón*, the objects potentially contained in the shipwreck should be considered as a whole to comprehensively and accurately portray colonial maritime culture; the removal of any of these materials would not only risk the loss of cultural heritage but could also potentially endanger valuable scientific information.

1188. Indeed, the principle of unity to which Resolution 085 refers to is a crucial concept in the legal framework for the protection of cultural heritage under Colombian law. In its Decision C-364 of 2014, the Constitutional Court reasoned that "*if a group of properties, having similarity as their main characteristic, form a cultural unit that would lose that sense if one of the properties that form it is detached from the group, in those cases the total set of properties is indivisible and all of them must enter the cultural patrimony of the Nation*."[1507]

1189. This is further confirmed by Justice Linares, who states that the Constitutional Court determined that the unity principle can be applied to items such as shipwrecks as a whole.[1508]

1190. Colombia has a sovereign right to protect its cultural heritage for the benefit of present and future generations, and to do this in line with its domestic law. The Claimant has not alleged, nor could it allege, the existence of any exceptional circumstances justifying a departure from this general principle of deference to a State's determination of what constitutes a legitimate public purpose; this being the case, the Tribunal should dismiss the Claimant's expropriation claim.

4. In any event, Resolution 085 meets the requirements in Article 10.7(1) of the TPA

1191. As the Respondent explains above, the Claimant's claim must fail on the basis of the Claimant's lack of vested rights over the *Galeón San José*. Moreover, even if the Claimant had any rights over Colombia's finding (*quod non*), the Claimant has failed to prove that Resolution 085

1506 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1507 *See* Constitutional Court, Decision C-264 of 2014, 29 April 2014 (**Exhibit R-193**).

1508 Expert Report of Justice A. Linares (**RER-3 [Linares]**), ¶¶217-222.

expropriated said rights, either directly or indirectly. In the second alternative, in the event that the Tribunal understands that the Respondent expropriated the Claimant's alleged investment, said expropriation should be deemed compliant with the requirements in Article 10.7(1) of the TPA.

1192. The Claimant advances two additional arguments to support its claim that the Respondent unlawfully expropriated the Claimant's alleged investment, which the Respondent addressed in turn.

1193. ***First***, the Claimant argues that "*it cannot be disputed that Colombia has failed to pay SSA any compensation for its expropriation*", which would "*on its own*" render an expropriation unlawful.[1509] The Claimant's argument defeats reason and is wrong as a matter of law. As noted by the United Nations Conference on Trade and Development:

> The payment of compensation is a remedy available in case of a dispute and can be awarded by an arbitral tribunal. Particularly in determining the existence of an indirect expropriation and assessing a regulatory measure, the tribunal needs to first characterize the measure before looking into the existence of a duty to pay compensation. When the expropriatory nature of the measure is being opposed, it cannot be expected that the host State makes a pre-emptive payment. […]
>
> [A]n act of expropriation meeting the requirements set forth in international law constitutes a lawful act of the State, and the duty to pay compensation is the consequence of the legal exercise of a recognized sovereign right of a State. This requirement may be met from the outset or after litigation, when the expropriatory nature of the act is established.[1510]

1194. ***Second***, citing to *ADC v. Hungary*, the Claimant avers that Resolution 085 was not issued in accordance with due process, since "*Colombia offered no legal process at all for SSA to participate in*" prior to the issuance of Resolution 085.[1511]

1509 Amended Statement of Claim, ¶ 334.

1510 UNCTAD Series on Issues in International Investment Agreements II – Expropriation (2012) (**Exhibit RLA-89**), pp. 43-44 (emphasis added). As further noted by UNCTAD, at page 44: "[i]*n Santa Elena v. Costa Rica and SPP v. Egypt, where legitimate takings only lacking compensation were at stake, the tribunals never referred to the expropriations as unlawful*" (*See Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award, 17 February 2000 (**Exhibit CLA-105**); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits, 20 May 1992 (**Exhibit CLA-102**) (emphasis added).

1511 Amended Statement of Claim, ¶ 336.

1195. As explained, Resolution 085 was not directed at the Claimant nor intended to affect any rights held by the Claimant, who has no vested rights nor interests over the shipwreck of the *Galeón San José*, which it did not find.

1196. ***Third***, the Claimant seems to have forgotten the very standard that it relied upon. As stated by the tribunal in *ADC v. Hungary* (in the very same excerpt cited by the Claimant):

> [D]ue process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.[1512]

1197. It is undisputed that the Claimant had before it all the mechanisms provided under Colombian law for it to seek judicial redress on the basis of any alleged prejudice inflicted by Resolution 085, including the possibility to seek the annulment of Resolution 085.[1513] It did not. The Claimant should not be allowed to place on the Respondent the blame for its own choice not to pursue the courses of action available to it under Colombian law.

B. BY ISSUING RESOLUTION 085 COLOMBIA DID NOT, AND COULD NOT, VIOLATE THE MINIMUM STANDARD OF TREATMENT PROVISION UNDER THE TREATY

1198. In its Amended Statement of Claim, the Claimant avers that Colombia's conduct *"amounts to a breach of the FET obligation in the TPA and customary international law"*,[1514] and that *"Colombia has failed to provide SSA with FPS for its investment in Colombia, in further breach of the TPA."*[1515] Conveniently and in open disregard of the express terms of the Treaty, the Claimant makes claims under the Fair and Equitable Treatment ("**FET**") and Full Protection and Security ("**FPS**") standards as if they were autonomous standards under the TPA and resorts to inapposite case law to expand the protections of Article 10.5 of the TPA to its convenience.

1199. In the sections below, the Respondent establishes the appropriate standard of Fair and Equitable Treatment and Full Protection and Security under the TPA, which must be construed in accordance with the Minimum Standard of Treatment ("**MST**") under international law (**1**). The

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1512 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of the Tribunal, 2 October 2006 (**Exhibit CLA-118**), ¶ 435 (emphasis added).

1513 Colombian Code of Administrative Procedure (2011) (**Exhibit R-183**), Article 137.

1514 Amended Statement of Claim, ¶ 339.

1515 Amended Statement of Claim, ¶ 389.

Respondent then demonstrates that, contrary to the Claimant's allegations, it did not fail to accord the FET (**2**) and FPS (**3**) required of Colombia in accordance with the MST.

1. The Claimant's improper attempts to expand the scope of the Minimum Standard of Treatment under the TPA are contrary to the express language of the TPA

1200. Article 10.5 of the TPA provides in relevant part:

> **Article 10.5: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[1516]

1201. Further, Annex 10-A provides:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.[1517]

1516 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5.

1517 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Annex 10-A.

1202. A simple reading of the provisions above shows that, on its face, the protection in Article 10.5 of the TPA is limited to "*the customary international minimum standard of treatment of aliens*". This, as the Respondent demonstrates, is fatal to the Claimant's case:

1203. ***First***, the clear terms of Article 10.5 transcribed above, in accordance with their ordinary meaning, show the Contracting Parties' intention that the protection afforded by Article 10.5 should be limited to the minimum standard of treatment.

1204. ***Second,*** and in line with its improper effort to circumvent the Contracting Parties clear understanding as to their obligations regarding FET and FPS provided in Article 10.5 of TPA, the Claimant relies on arbitral decisions that are wholly inapposite as they concern fair and equitable treatment and full protection and security provisions in treaties containing "autonomous" standards of FET and FPS, *i.e.*, not defined by reference to MST or customary international law.

1205. To recall, it is incumbent on the Claimant to prove the existence and content of the relevant obligation under customary international law.

1206. As noted by the United States in its non-disputing party submission in *Al Tamimi v. Oman*: "[t]*he burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law"*.[1518] Arbitral decisions *"interpreting 'autonomous' fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard"* under the TPA.[1519]

1207. Similarly, the tribunal in *Elliot v Korea* stated:

> It also follows from the language of Article 11.5(1) and (2) of the Treaty, when interpreted in accordance with Annex 11-A, that it is the Claimant, as the moving party, that bears the burden of proving, to the Tribunal's satisfaction, that the Respondent's alleged conduct amounts to a breach of the MST obligation, either because it is in breach of a fundamental rule of procedure of customary international law or because it is incompatible with a substantive rule of customary international law governing fair and equitable treatment or full protection and security. To the extent that the

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1518 *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Submission of the United States of America, 22 September 2014 (**Exhibit RLA-157**), ¶ 5; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 273; *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009 (**Exhibit RLA-135**), ¶¶ 600-603.

1519 *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Submission of the United States of America, 22 September 2014 (**Exhibit RLA-157**), ¶ 8.

> Claimant bases its claim on an alleged rule of procedure or a substantive rule of customary international law that has not been specifically endorsed by the State Parties as such in the Treaty itself, or found to qualify as such by international courts or tribunals in decisions that are generally accepted as reflective of customary international law, the Claimant bears the burden of showing that the alleged rule or norm "results from a general and consistent practice of States that they follow from a sense of legal obligation," in accordance with Annex 11-A of the Treaty.[1520]

1208. As expressly provided in Annex 10-A of the TPA, two elements are required to demonstrate the existence of a rule of customary international law: State practice and *opinio juris*.[1521] The same applies to determine the content of MST under customary international law.[1522]

1209. The Claimant has plainly failed to meet the burden of proof that the several elements it avers as part and parcel of the FET and FPS – including the protection of so-called legitimate expectations – constitute obligations under customary international law. Evidently, the inapposite cases it relies upon regarding different standards under other treaties do not advance its case.

1210. ***Second***, the MST in Article 10.5 of the TPA, including the obligation to provide FET and FPS, extends only to "*covered investments*" and does not cover investors. This has also been confirmed by the United States in various non-disputing party submissions in relation to identically worded treaties:

> [A] denial of justice claim, just like any claim alleging a violation of Paragraph 1 of Article 10.5, may not be arbitrated pursuant to Chapter 10 of the TPA if the Claim is for treatment accorded to an investor rather than a covered

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1520 *Elliott Associates, L.P. (USA) v. Republic of Korea* (PCA Case No. 2018-51), Final Award, 20 June 2023 (**Exhibit CLA-176**), ¶ 570 (emphasis added).

1521 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-01bis**), Annex 10-A ("*The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation*.").

1522 *Mason Capital L.P. (USA) and Mason Management LLC (USA) v. Republic of Korea* (PCA Case No. 2018-55), Final Award, 11 April 2024 (**Exhibit RLA-225**), ¶¶ 667-668. *See also* International Court of Justice, *Asylum Case* (Colombia v. Peru), Judgment of 20 XII 50 (**Exhibit RLA-104**), pp. 14-15; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 274.

> investment. It may only be arbitrated if the Claim is for treatment accorded to the Investor's covered investment.[1523]

1211. This is also consistent with the language of the TPA, which provides that "[e]*ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."*[1524]

1212. This means that any claim concerning treatment accorded to an investor – rather than to a covered investment – must be immediately rejected without further consideration as to the merits of the claim.

1213. ***Third***, in an attempt to circumvent the very restrictive standard set forth by the Contracting Parties under Article 10.5, the Claimant contends that "*the treatment under customary international law is a progressive standard that has evolved and has converged with the autonomous FET standard, such that it now provides the same level of protection.*"[1525] This assertion is simply not true, as is made clear by the precise language in Article 10.5 of the TPA. Had the standards of FET and FPS[1526] converged with MST, the Contracting Parties would not have included express terms to the effect that "[t]*he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights*."[1527]

1214. Moreover, the difference between MST and the autonomous standard of FET has been repeatedly emphasized by tribunals. In the words of the tribunal in the recent award in *Lone Pine v. Canada*:

1523 *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), United States of America Oral Submissions, 29 July 2019 (**Exhibit RLA-192**), p. 22:16-21. *See also Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), United States of American Written Submission, 7 December 2018 (**Exhibit RLA-188**), ¶ 3 ("*As a threshold matter, Article 10.5.1 requires a Party to accord 'treatment' to a covered investment. Article 10.5.1 differs from other substantive obligations (e.g., 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a 'covered investment*'.").

1524 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5 (emphasis added).

1525 Amended Statement of Claim, ¶ 344.

1526 This is implied by the language of the TPA (*See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5(1) ("[e]*ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*"). *See also* Amended Statement of Claim, ¶ 342.

1527 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5.

> In the Tribunal's view, Claimant has failed to establish that the customary international law rule on minimum standard of treatment for FET has evolved to such an extent that the protection offered thereunder is akin to the protection offered under autonomous treaty standards of FET.[1528]

1215. Arbitral case law has repeatedly recognized that the MST provision provides a "*floor below which treatment of foreign investors must not fall*".[1529] This is underscored by the language of the TPA, which provides that "[t]*he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights*."[1530]

1216. ***Fourth***, and relatedly, the standard applicable to determine a breach of the MST is high.[1531] In the words of the *Thunderbird v. Mexico* tribunal:

> Notwithstanding the evolution of customary law since decisions such as *Neer* claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high. […] For the purposes of the present case, the

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1528 *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2), Final Award, 21 November 2022 (**Exhibit RLA-215**), ¶ 601 (emphasis added). *See also Mason Capital L.P. (USA) and Mason Management LLC (USA) v. Republic of Korea* (PCA Case No. 2018-55), Final Award, 11 April 2024 (**Exhibit RLA-225**), ¶ 664 (regarding Article 11.5 of the Korea-US FTA, with language identical to Article 10.5 of the TPA, the tribunal found that "*Article 11.5 of the FTA provides that the minimum standard of treatment is not an autonomous standard prescribed by the Treaty but one of customary international law.*").

1529 *See SD Myers v. Canada* (UNCITRAL), Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 259.

1530 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5.

1531 *See Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015 (**Exhibit RLA-166**), ¶ 386 ("*The minimum standard of treatment in customary international law, to which Article 10.5 is expressly linked by virtue of Article 10.5.2, as well as Annex 10-A, imposes a higher threshold for breach. The language of Article 10.5.2 makes it very clear that the State Parties intended to impose only the minimum standard of treatment under customary international law*" (emphasis added)); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (**Exhibit CLA-127**), ¶ 597; *William Ralph Clayton, Bilcon of Delaware, Inc., and others v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015 (**Exhibit RLA-158**), ¶¶ 436, 437, 443-444 (the tribunal confirmed that "*there is a high threshold for the conduct of a host state to rise to the level of*" an FET breach, so "[a]*cts or omissions constituting a breach must be of a serious nature*"); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 263 ("*The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*."); *BG Group Plc v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 (**Exhibit CLA-126**), ¶¶ 301-302 (although agreed with the evolution of the international minimum standard, the tribunal acknowledged that its violation threshold "*still remains high*" by citing the NAFTA tribunal in *Thunderbird*).

> Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[1532]

1217. Thus, in order to constitute a breach of FET under MST, the conduct of the host State must be "'*gross*', '*manifest*', '*complete*' *or such as to* '*offend judicial propriety*'".[1533] Similarly, in *Eco Oro v. Colombia* – on which the Claimant also relies – the tribunal described the relevant standard for FET under MST as follows:

> Having reviewed the relevant decisions, whilst malicious intention, wilful neglect of duty or bad faith are not requisite elements of MST under customary international law, there must be some aggravating factor such that the acts identified comprise more than a minor derogation from that which is deemed to be internationally acceptable. The conduct in question must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards, or there must have been a lack of due process which has led to an outcome which offends a sense of judicial propriety. The treatment complained of must therefore be unacceptable from an international perspective whilst set against the

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1532 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Award, 26 January 2006 (**Exhibit RLA-128**), ¶ 194 (emphasis added). *See also Glamis Gold, Ltd. v. The United States of America* (UNCITRAL), Award, 8 June 2009 (**Exhibit RLA-135**), ¶ 22 ("*the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer*"); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 284 ("*even as more situations are addressed, the required severity of the conduct as held in Neer is maintained*").

1533 *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 285. *See also Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020 (**Exhibit RLA-205**), ¶ 323 ("*the use of language such as 'gross,' 'manifest,' and 'complete lack' indicates that the threshold for showing a breach of this obligation is particularly high*"); *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL), Award, 8 June 2009 (**Exhibit RLA-135**), ¶ 616 ("*an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1)*"); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 (**Exhibit RLA-038**), ¶¶ 112-113 ("*the Tribunal is aware that not every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110, or a denial of due process or fair and equitable treatment […] not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is [a violation of international standards] […] it is undeniable that the Claimant has experienced great difficulties in dealing with SHCP officials, and in some respects has been treated in a less than reasonable manner, but that treatment under the circumstances of this case does not rise to the level of a violation of international law*").

> high measure of deference that international law extends to States to regulate matters within their own borders.[1534]

1218. What is more, numerous tribunals in recent decisions rendered under treaties with identical language to Article 10.5 of the TPA have followed the standard described by the tribunal in *Waste Management v. Mexico (II)*, which underscores that, for a violation of MST to be configured, there must be conduct that is "*arbitrary, grossly unfair, unjust or idiosyncratic*" or "*a manifest failure of natural justice*":

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety –as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[1535]

1219. The Claimants can hardly contest the relevance of the *Waste Management v. Mexico (II)* standard, which was adopted *verbatim* by the *Railroad Development v. Guatemala* award, on which the Claimant relies and cites.[1536]

1220. The Respondent emphasizes two aspects of the predominant position set forth in *Waste Management (II)* regarding the MST standard: (***i***) so-called "legitimate expectations" are not protected by the MST, contrary to what the Claimant wrongly avers,[1537] and (***ii***) for a breach of due process to entail a breach of MST of FET, it must be such that it "*offends judicial propriety*".

1534 *Eco Oro Minerals Corp. v. The Republic of Colombia*, (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (**Exhibit CLA-78**) ¶ 755 (emphasis added). *See also Rand Investments Ltd., William Archibald Rand and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award, 29 June 2023 (**Exhibit RLA-221**), ¶¶ 601, 604 (citing to the reasoning of the tribunal in *Eco Oro* and further stating that "[t]*ribunals have also found that the threshold for breaching the customary international law minimum standard of treatment is high.*" (emphasis added)).

1535 *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award 30 April 2004 (**Exhibit RLA-123**), ¶ 98 (emphasis added). *See also Rand Investments Ltd., William Archibald Rand and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award, 29 June 2023 (**Exhibit RLA-221**), ¶ 601; *Mason Capital L.P. (USA) and Mason Management LLC (USA) v. Republic of Korea* (PCA Case No. 2018-55), Final Award, 11 April 2024 (**Exhibit RLA-225**), ¶ 679; *Red Eagle Exploration Ltd. v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 28 February 2024 (**Exhibit RLA-223**), ¶ 287.

1536 *See* Amended Statement of Claim, ¶ 345.

1537 *See* Amended Statement of Claim, ¶ 350.

In the case of administrative proceedings, this requires "*a complete lack of transparency and candour*". As the Respondent demonstrates, the Claimant's complaints as regards Resolution 085 are wholly unsupported and, even if they were to be true, which is denied, would not raise to the level of MST.

2. The Respondent did not breach its obligations to treat the Claimant's investment fairly and equitably in accordance with the Minimum Standard of Treatment

1221. Having established the correct standard to address the MST provision in the TPA, the Respondent demonstrates why each of the alleged grounds invoked by the Claimant to argue that the Respondent's conduct was contrary to its obligations under Article 10.5 of the TPA must fail.

a. The protection of legitimate expectations does not constitute a rule of customary international law and hence it is not an element of FET under the MST

1222. In its Amended Statement of Claim, the Claimant avers that "*Colombia violated SSA's (and its Predecessors') legitimate expectations by issuing Resolution No. 0085*." [1538] The Claimant's contention is wrong, both as a matter of law and fact.

1223. The MST standard cannot be construed to protect so-called "legitimate expectations" (**i**). In any event, even assuming that "legitimate expectations" would be protected (which is denied), the Claimant has failed to demonstrate that it had any reasonable expectations based on specific representations that were breached by Colombia (**ii**).

i. As a matter of customary international law, the MST does not protect the so-called "legitimate expectations"

1224. Under customary international law, the concept of "legitimate expectations" cannot be considered as an element of the FET standard. As stated, in accordance with the *Waste Management (II)* standard, FET under the MST is strictly limited to (***i***) "*conduct* [that] *is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice*" or (***ii***) conduct that "*involves a lack of due process leading to an outcome which*

[1538] Amended Statement of Claim, ¶ 373.

offends judicial propriety."[1539] Any so-called "legitimate expectations" that an investor may or may not have had at the time of making its investment are therefore not protected and irrelevant for purposes of establishing a potential breach of MST.

1225. The Claimant's own authorities confirm as much: in effect, the award in *Railroad Development v. Guatemala*,[1540] relied upon by the Claimant, expressly adopted the ruling in *Waste Management (II)*, which did not find that fair and equitable treatment in accordance with MST covers legitimate expectations.[1541] Similarly, the *Teco Guatemala Holdings LLC v. Guatemala* award,[1542] on which the Claimant's also relies, disavowed altogether the relevance of the legitimate expectations doctrine in the context of the breach of a MST provision.[1543]

1226. Indeed, multiple tribunals have expressly reiterated that a State's failure to respect an investor's legitimate expectations does not constitute in and of itself a breach of the MST of FET.[1544] In the recent award in *Red Eagle v. Colombia*, the tribunal stated:

1539 *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award 30 April 2004 (**Exhibit RLA-123**), ¶ 98.

1540 Amended Statement of Claim, ¶ 345.

1541 *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award 30 April 2004 (**Exhibit RLA-123**), ¶ 98; *Railroad Development Corporation (RDC) v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, (**Exhibit CLA-147**), ¶ 219.

1542 Amended Statement of Claim, fn. 780.

1543 *Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/17), Award, 19 December 2013, (**Exhibit CLA-149**), ¶ 621 ("*It is clear, in the eyes of the Arbitral Tribunal, that any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs. What matters is whether the State's conduct has objectively been arbitrary, not what the investor expected years before the facts. A willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations*.").

1544 *Mesa Power Group, LLC v. Government of Canada*, (UNCITRAL, PCA Case No. 2012-17), Second Submission of the United States of America, 12 June 2015 (**Exhibit RLA-165**), ¶ 18 ("*it was erroneous to conclude that 'reasonable expectations' are part of the customary international law minimum standard of treatment. A claimant's 'expectations' are not a component element of 'fair and equitable treatment' under the customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' 'expectations.' An investor may develop expectations about the legal regime governing its investment,*

> The majority of the Tribunal is of the view that on the record before it there is insufficient evidence to support the proposition that the doctrine of legitimate expectations, which forms a part of the FET standard in other treaties, is part of the customary MST. The Claimant has not provided the Tribunal with any evidence of either state practice or *opinio juris* to support the existence of such a rule, and the Tribunal is aware of none. The most that can be said is that a State's failure to fulfil a promise made to an investor *may* amount to a breach of the customary MST if it can be shown that the State's actions fall foul of the usual standard outlined above. Legitimate expectations do not, however, receive any privileged treatment under the MST.[1545]

1227. The issue of whether legitimate expectation could be considered as customary international law was specifically addressed by the International Court of Justice (the "**ICJ**") in its Judgment in *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v. Chile*). The ICJ found in this regard:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.[1546]

1228. Conscious of the fatal shortcoming of its contention regarding legitimate expectation as part of customary international law, the Claimant tries to build its case by conflating the standard of FET under MST with cases involving autonomous FET provisions which, as shown above, are

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but those expectations impose no obligations on the State under the minimum standard of treatment. Instead, something more is required than the mere interference with those expectations. As Professor McRae noted in his Dissenting Opinion, 'disappointment is not a basis for finding a violation of Article 1105'"); *Antonio del Valle Ruiz and others v. The Kingdom of Spain* (PCA Case No. 2019-17) Final Award, 13 March 2023 (**Exhibit RLA-219**), ¶ 519; *Rand Investments Ltd., William Archibald Rand and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award, 29 June 2023 (**Exhibit RLA-221**), ¶ 603; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL, PCA Case No. 2012-17), Award, 24 March 2016, (**Exhibit RLA-171**), ¶ 502; *Eli Lilly and Company v. The Government of Canada* (UNCITRAL, ICSID Case No. UNCT/14/2), Submission of the United States of America, 18 March 2016 (**Exhibit RLA-170**), ¶ 13 ("*The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment*.").

1545 *Red Eagle Exploration Limited v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 28 February 2024 (**Exhibit RLA-223**), ¶ 293 (emphasis added).

1546 International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile), Judgment of 1 October 2018 (Merits) (**Exhibit RLA-186**), ¶ 162 (emphasis added).

inapposite. In this regard, the Claimant states that "[t]*he protection of an investor's legitimate expectations is 'firmly rooted in arbitral practice'*",[1547] citing to the award in *Micula v. Romania*, which contains an autonomous FET standard that does not have MST as a "ceiling" of treatment – as does Article 10.5 of the TPA.[1548] Similarly, the Claimant bases its bold assertion that "*legitimate expectations serve as the 'touchstone' to an assessment of whether an investor has been afforded FET under customary international law*"[1549] on *Devas v. India* and *Novenergia II v. Spain* – two cases that, unsurprisingly, were brought under bilateral investment treaties with FET provisions not limited to MST. Similarly unauthoritative are seventeen other awards on which the Claimant relies.[1550]

1547 Amended Statement of Claim, ¶ 350.

1548 *Ioan Micula, Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Award, 11 December 2013 (**Exhibit CLA-148**), ¶ 667. The applicable Romania-Sweden BIT (2002) provides, in its Article 2(3), that "[e]*ach Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures*." (emphasis added)).

1549 Amended Statement of Claim, ¶ 350. The Respondent notes that the Claimant cites to *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India* (UNCITRAL, PCA Case No. 2013-09), Award on Jurisdiction and Merits, 25 July 2016 (**Exhibit CLA-159**), ¶¶ 458, 463, which did not address a breach of MST, but rather an autonomous FET standard (*See* Amended Statement of Claim, fn. 790).

1550 *See* Amended Statement of Claim, ¶¶ 350-355, citing to several cases applying autonomous FET standards: *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (**Exhibit CLA-109**), ¶ 611. *See also Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, PCA Case No. 2001-04), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 302; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia* (ICSID Case No. ARB/16/6), Award, 27 August 2019 (**Exhibit CLA-173**), ¶¶ 1367-1368; *Eureko B.V. v. Republic of Poland* (UNCITRAL), Partial Award, 19 August 2005 (**Exhibit CLA-116**), ¶¶ 226, 231-232; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, (**Exhibit CLA-122**), ¶¶ 192-194; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008 (**Exhibit CLA-129**), ¶¶ 359-364; *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, (**Exhibit CLA-154**), ¶¶ 198-205; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶¶ 563, 575; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, (**Exhibit CLA-167**), ¶¶ 9.130, 9.145 ;*Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN 3467), Final Award, 1 July 2004 (**Exhibit CLA-113**), ¶ 191; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 (**Exhibit CLA-119**), ¶ 133; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 (**Exhibit CLA-126**), ¶ 298; *National Grid P.L.C. v. Argentine Republic*,

1229. The Claimant desperately relies on the award in *Tecmed v. Mexico*[1551] to claim that FET under MST should be construed to protect an investor's "legitimate expectations".[1552] This is to no avail. To recall, the *Tecmed* decision has been heavily criticized, as it failed to adequately establish that the protection of legitimate expectations is part of customary international law. As stated in the *Red Eagle v. Colombia* award:

> With respect to the tribunal that sat in Tecmed, however, the majority of this Tribunal is very far from being persuaded that this view of the MST is correct or even plausible. As explained above, that award relied on no evidence of state practice or opinio juris to support its conclusion as to the existence of such a customary rule, and it appears there is none. It is striking that the Tecmed standard is now rarely (if ever) followed by tribunals and has been strongly criticized in explicit terms by the annulment committee in MTD v. Chile. The Tecmed award is not one on which reliance may be placed.[1553]

1230. It bears recalling that, as pointed out by the annulment committee in *MTD v. Chile*, a finding of liability based on an alleged breach of an investor's legitimate expectations – where no such obligation as regards expectations exists under the treaty – could give rise to an excess of powers:

> [T]he *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable

(UNCITRAL), Award, 3 November 2008 (**Exhibit CLA-131**), ¶ 179; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (**Exhibit CLA-146**), ¶ 513; *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Award, 11 December 2013 (**Exhibit CLA-148**), ¶ 674; *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, (UNCITRAL, PCA Case No. 2012-16), Partial Final Award, 6 May 2016 (**Exhibit CLA-158**), ¶ 248; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Jurisdiction and Liability, 10 November 2017 (**Exhibit CLA-165**), ¶¶ 917-942.

1551 Amended Statement of Claim, ¶ 351.

1552 *Técnicas Medioambientales TECMED S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, (**Exhibit CLA-111**), ¶ 154.

1553 *Red Eagle Exploration Limited v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 28 February 2024 (**Exhibit RLA-223**), ¶ 295 (emphasis added).

> under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[1554]

1231. In light of the above, the Claimant's reliance on *Tecmed* does not advance its case.

1232. Clearly, Claimant's contention that *"the FET standard must be read to protect investments from treatment […] in frustration of the investor's legitimate expectations"* simply holds no water.[1555]

ii. In any event, only reasonable legitimate expectations based on specific commitments would be protected

1233. Even assuming that legitimate expectations would be protected under Article 10.5 of the TPA (*quod non*), the Claimant's claim fails. As the Respondent demonstrates, the Claimant conveniently glosses over the elements required for a claim of FET based on alleged violation of "legitimate expectations" to succeed:

1234. ***First***, arbitral case law has made abundantly clear that only those expectations that are objectively reasonable could be protected. As explained by the tribunal in *Invesmart v. Czech Republic*:

> [A]lthough an investor's expectation is subjective, i.e., what the investor believed to be the import of its dealings with government officials on which it claims to have relied, for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim.[1556]

1554 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 (**Exhibit RLA-129**), ¶ 67 (emphasis added).

1555 Amended Statement of Claim, ¶ 349.

1556 *Invesmart, BV v. Czech Republic* (UNCITRAL), Award, 26 June 2009 (**Exhibit CLA-22**), ¶ 250 (emphasis added). *See also*, *e.g.*, *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010 (**Exhibit CLA-143**), ¶ 228 ("*one must not look single-mindedly at the Claimants' subjective*

1235. In the same vein, the *Saluka v. Czech Republic* tribunal held that the investor's subjective motivations and considerations are not protected. Rather, to be protected, the investor's expectations "*must rise to the level of legitimacy and reasonableness in light of the circumstances*".[1557]

1236. ***Second***, the investor's legitimate expectations must arise from specific promises or commitments made by the State to the investor. Investment tribunals (including those on which the Claimant relies)[1558] have repeatedly held that legitimate expectations "*by definition require a promise of the State on which the Claimants rely to assert a right that needs to be observed*".[1559]

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expectations. The Tribunal must rather examine them from an objective and reasonable point of view"); Campbell McLachlan *et al*., *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed., 2017) (**Exhibit RLA-91**), ¶ 7.190 ("*The requirement of reasonableness of reliance carries the consequence that breach of the standard is determined objectively and not by reference to the investor's subjective expectations*").

1557 *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 304 ("[T]*he scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.*").

1558 *See e.g.*, Amended Statement of Claim, ¶ 352, citing to *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 13 September 2001 (**Exhibit CLA-109**), ¶ 611 ("*The Media Council breached its obligation of fair and equitable treatment by evisceration <u>of the arrangements</u> in reliance upon with the foreign investor was induced to invest*." (emphasis added)). *See also* the cases cited by the Claimant at fn. 794: *Eureko B.V. v. Republic of Poland* (UNCITRAL), Partial Award, 19 August 2005 (**Exhibit CLA-116**), ¶¶ 226, 231-232 (in the Claimant's words: "*finding Poland breached legitimate expectations <u>arising from obligations</u> contained in a share purchase agreement*"(emphasis added)); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008 (**Exhibit CLA-129**), ¶¶ 359-364 (in the Claimant's words: "*finding Ecuador breached legitimate expectations <u>arising from specific payment provisions</u> of a power purchase agreement*" (emphasis added)); *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 (**Exhibit CLA-154**), ¶¶ 198-205 (in the Claimant's words: "*finding Romania breached legitimate expectations <u>arising from representations</u> made in a government notice*" (emphasis added)); *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶¶ 563, 575 (in the Claimant's words: "*finding Venezuela breached legitimate expectations arising from <u>specific representations made in a letter</u>*" (emphasis added)); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018 (**Exhibit CLA-167**), ¶¶ 9.130, 9.145 (in the Claimant's words: "*finding Egypt breached legitimate expectations <u>arising from representations made in a letter</u>*" (emphasis added)).

1559 *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007 (**Exhibit CLA-120**), ¶ 241. *See also*, *e.g.*, *Ioan Micula, and others v.*

Therefore, in cases where "*no promise or commitment had been made by the Respondent*", there cannot be a breach of legitimate expectations.[1560] In particular, matters "*of general policy that did not entail a promise made specifically to the Claimants*" do not to give rise to "legitimate expectations".[1561]

1237. In the words of the *Crystallex v. Venezuela* tribunal:

> A legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration. To be able to give rise to such legitimate expectations, such promise or representation – addressed

Romania (ICSID Case No. ARB/05/20), Award, 11 December 2013 (**Exhibit CLA-148**), ¶ 688 ("[I]*n order to establish a breach of the [FET] obligation based on an allegation that Romania undermined the Claimants' legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable*"); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010 (**Exhibit CLA-144**), ¶ 121; *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RLA-149**), ¶ 9.10; *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007 (**Exhibit CLA-122**), ¶ 191 (the legitimate expectations were based on assurances contained in a joint venture agreement that had been "*endorsed*" by the Government); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, (**Exhibit CLA-129**), ¶ 361 (the tribunal found that legitimate expectations arose from "*the State's representations*" contained in specific payment provisions of a purchase agreement); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CLA-167**), ¶¶ 9.63, 9.83; *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, (**Exhibit CLA-154**), ¶ 195 (the tribunal found that by failing to implement the rescheduling and waivers specifically contained in a letter signed by the Prime Minister and three other Ministers in compliance with a share purchase agreement, Romania obstructed the claimants' legitimate expectations); *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (**Exhibit CLA-116**), ¶ 226 (the legitimate expectations arose from the obligations contained in a purchase agreement).

1560 *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007 (**Exhibit CLA-120**), ¶ 242. As noted by the Claimant, in *Glencore v. Colombia* the tribunal held that "*legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations*". *See Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia* (ICSID Case No. ARB/16/6), Award, 27 August 2019, (**Exhibit CLA-173**), ¶ 1368, as quoted by Claimant in Amended Statement of Claim, ¶ 353.

1561 *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007 (**Exhibit CLA-120**), ¶ 243.

> to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form.[1562]

1238. Similarly, in *Allard v. Barbados*, the tribunal held that a series of statements made by the respondent State, including a letter from the Ministry of Finance and Economic Affairs and statements made by the Deputy Minister during a meeting and a letter from the Permanent Secretary in the Ministry of Physical Development could not be regarded as "*specific representation capable of creating a legitimate expectation*" since they were "*insufficiently specific*". In particular, the tribunal noted that "[t]*he terms and context of these statements do not suffice to support the expression of an intention to create an obligation for the State*".[1563]

1239. **Third**, an investor's legitimate expectations must be assessed in light of *"an objective understanding of the legal framework within which the investor has made its investment"*, *"as it existed at the time that the investment was made"*.[1564] In *Rusoro Mining v. Venezuela*, the

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1562 *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶ 547 (emphasis added). The *Crystallex* tribunal found that the claimant's legitimate expectations arose from "*specific representations*" made in a letter in "*unambiguous*" terms, including that "*the Permit will be handed over*", which "*appears on its face as a positive representation* [] *in clear and precise terms*" made by the State to the investor (*See Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶¶ 562-563, 575. *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010 (**Exhibit CLA-144**), ¶ 121 ("*the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith*."); *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG v. Czech Republic* (PCA Case No. 2014-03), Final Award, 11 October 2017 (**Exhibit RLA-180**), ¶¶ 409, 422 (the tribunal held that to ascertain whether the state has given a specific assurance, "*the form, the content and the clarity of the alleged promise are of critical relevance*". The tribunal concluded that the statements invoked by the claimants "*contain*[ed] *no details of the level of the FIT that is guaranteed*" and that the information was to be found in the regulatory framework "*which was publicly available and which any potential investor would refer to when deciding whether to invest in the Czech Republic*". The tribunal further held that ambiguous representations made by the State "*cannot change*" the applicable legal and regulatory framework.

1563 *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06), Award, 27 June 2016 (**Exhibit RLA-173**), ¶ 199. *See also* ¶¶ 199-208.

1564 *Murphy Exploration & Production Company – International v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2012-16), Partial Final Award, 6 May 2016 (**Exhibit CLA-158**), ¶¶ 248-249. Notably, in concluding that the claimant held legitimate expectations that the terms of a contract would not change except "*within the confines of the law and pursuant to a negotiated mutual agreement*

tribunal dismissed the claimant's FET claim on the basis that the claimant had invested at a time when a particular exchange control regime was in place, without seeking any assurance that its investment would be exempted from the application of this regime:

> Claimant took the decision to invest in Venezuela when the Bolivarian Republic already had an exchange control regime in place, which imposed compulsory repatriation of (at least) 90% of foreign currency earned, required authorization from CADIVI for purchases of foreign currency and defined the Official Exchange Rate. The Bolivarian Republic never made any representation vis-à-vis Rusoro, either before or after the investment, that Rusoro would somehow be exempted from the application of the general exchange control regime. Claimant never developed a legitimate expectation that in due course Venezuela would not adopt more restrictive legislation, and that tolerance of the Swap Market would continue sine die. […] In these circumstances, Rusoro's allegation that the closing of the Swap Market implied a breach of the FET standard must fail.[1565]

1240. In this regard, tribunals have found that investors must conduct a rigorous due diligence process to become acquainted with the legislation and the facts surrounding their investment to bring a claim for an alleged breach of their legitimate expectations. In the words of the *Stadtweke München v. Spain* tribunal:

> The FET standard in the ECT does not, however, protect the investor from any and all changes that a government can introduce into its legislation. As concluded in the previous section, it does not protect it against the changes introduced to safeguard the public interest to address a change of circumstances, nor does it protect the investor who unreasonably and unjustifiably expects that the host government will introduce no amendments will to the legislation governing the investment. In the absence of a specific commitment contractually assumed by a State to freeze its legislation in favor of an investor, when an investor argues – as is the case here – that such expectation is rooted, among others, in the host State's legislation, the Tribunal is required to conduct an objective examination of the legislation and the facts surrounding the making of the investment to assess whether a prudent and experienced investor could have reasonably formed a legitimate and justifiable expectation of the immutability of such

between the contractual partners", the *Murphy* tribunal took into account "*both the terms of the Participation Contract and the legal framework that was in place in Ecuador at the time that [the] Claimant signed up to the Participation Contract*". *See also* ¶ 273.

1565 *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016 (**Exhibit CLA-160**), ¶¶ 532–533 (emphasis added).

> legislation. For such an expectation to be reasonable, it must also arise from a rigorous due diligence process carried out by the investor.[1566]

1241. ***Finally***, the State's legitimate regulatory interests should also be considered *vis-à-vis* the investor's expectations. As noted by the *Saluka v. Czech Republic* tribunal, to determine whether the host State has breached the FET standard, "*a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other*" is required.[1567]

1242. As the Respondent shows below, it is clear that, even if legitimate expectations were protected by the TPA (which they are not), the Claimant has failed to prove the existence of any legitimate expectations compliant with the applicable legal standard.

iii. Resolution 085 did not breach the Claimant's legitimate expectations

1243. In its Amended Statement of Claim, the Claimant avers that "*Colombia violated SSA's (and its Predecessors') legitimate expectations by issuing Resolution No. 0085*."[1568] Even if legitimate expectations were protected under the TPA, which is denied, the Claimant's claim must fail since it has not protected "legitimate expectations" capable of being breached by Colombia.

1566 *Stadtwerke München GMBH and others v. Kingdom of Spain* (ICSID Case No ARB/15/1), Award, 2 December 2019 (**Exhibit RLA-42**), ¶ 264 (emphasis added). *See* also *OperaFund Eco-Invest SICAV PLC and Schwarb Holding AG v. Spain* (ICSID Case No ARB/15/36), Award 6 September 2019 (**Exhibit RLA-195**), ¶ 486. *See also Parkerings-Compagniet AS v. Lithuania* (ICSID Case No ARB/05/8), Award, 11 September 2007 (**Exhibit RLA-131**), ¶ 333; *Charanne BV and Construction Investments SARL v. Kingdom of Spain* (SCC Case No 062/2012), Final Award, 21 January 2016 (**Exhibit RLA-168**), ¶ 505; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain* (ICSID Case No. ARB/15/42), Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 (**Exhibit RLA-201**), ¶¶ 599-601; *Sun Reserve Luxco Holdings SRL v. The Italian Republic* (SCC Arbitration V, 2016/32), Final Award, 25 March 2020 (**Exhibit RLA-202**), ¶ 714.

1567 *Saluka Investments B.V. v. The Czech Republic*, (UNCITRAL, PCA Case No. 2001-04), Partial Award, 17 March 2006, (**Exhibit CLA-60**), ¶ 306. *See also Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015 (**Exhibit RLA-159**), ¶ 614 ("*The fair and equitable standard brings foreign investors into the normative sphere of rational policy in the general interest. It is not meant to favor the investors' interests over other economic and social interests*").

1568 Amended Statement of Claim, ¶ 373.

1244. ***First***, the Claimant's claim that it "*inherited its Predecessors' expectations*" [1569] is unfounded and contrary to the most basic notions of legitimate expectations. The Claimant bases this assertion on a single case, *Renée Rose Levy v. Peru*, stating that the award "*recogniz*[ed] *that legitimate expectations formed at a time preceding the assignment of the shares to the claimant*".[1570] This is wrong. The *Renée Rose Levy* award does not make such statement; to the contrary, after analyzing each of Ms. Levy's seven claims for breach of her legitimate expectations and those of her company, the tribunal rejected all of them.[1571] Therefore, the Claimant's alleged reliance on the only source it can find is gravely flawed. In any event, as explained, legitimate expectations depend on the specific circumstances in which the investor decided to make its investment. In this regard, any "legitimate expectations" of the Claimant should have taken into consideration the existing legal framework at the time, which included several norms adopted after 1982, *inter alia*, the adoption of the 1991 Political Constitution of Colombia, the 1999 Columbus Expeditions and the adoption of Law 1185 of 2008, introducing the National System of Cultural Heritage.

1245. ***Second***, the Claimant cannot allege that, at the time that it made its investment in 2008, it "*reasonably expected it was entitled to 50% of the goods in the San José shipwreck that were treasure*."[1572] As explained,[1573] the evidence presented in the Confidential Report of 1982 was anything but conclusive; indeed, "Target A" reported by GMC was nothing but a rock formation, and the reading of the magnetometer was caused by the very same basket that GMC had placed in the site. Moreover, by the time that the Claimant chose to make its alleged investment, Colombia had already conducted a comprehensive search of the coordinates reported by GMC in 1982, which confirmed that no shipwreck existed in that location, let alone the *San José*.[1574] Therefore, it was far from "reasonable" for the Claimant to have expected, in 2008, that it was entitled to 50% of the *San José*, solely on the basis of the less than substantial and totally inconclusive evidence in the 1982 Confidential Report, which had been investigated and disproven in 1994.

1569 Amended Statement of Claim, ¶ 375.

1570 Amended Statement of Claim, fn. 828.

1571 *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17), Award, 26 February 2014, (**Exhibit CLA-69**), ¶¶ 324-342.

1572 Amended Statement of Claim, ¶ 375.

1573 *See above* Section II.A.

1574 *See above* Section II.D.

1246. The Claimant's reliance on the 2007 Decision of the Supreme Court does not support its case.[1575] As explained, the 2007 Supreme Court Decision did not confer GMC any rights on the *San José*, but merely recognized that GMC had rights to (***i***) the coordinates reported by GMC in the 1982 Confidential Report, *"not including* […] *spaces, zones or other areas*"[1576] and (***ii***) which do not constitute "Movable Assets" pursuant to Law 163 of 1959.[1577] For the avoidance of doubt, the Court clarified that "*there is no evidence in the case file to prove that the complaint filed before the DIMAR by the Glocca Morra Company, whose rights it later assigned to the plaintiff, and to which the present controversy is specific, actually corresponds to a specific or precise shipwrecked vessel and, much less so, that it inexorably or unfailingly is the* '*San José Galeón*'."[1578] Therefore, as of 2008, and despite its reliance on the Supreme Court Judgment of 2007, the Claimant knew or should have known that there was no shipwreck to be found in the reported coordinates, let alone that of the *San José*.

1247. ***Third***, neither GMC not the Claimant could have reasonably assumed, in 1982 or in November 2008, that the regulatory framework under Colombian law would remain unchanged. To recall, since before GMC's application for an exploration authorization, Colombia has had in place a strong legal framework regarding the protection of archaeological and historical heritage, which was becoming increasingly stringent at the time. In fact, as explained, the 2007 Supreme Court Decision already excluded Movable Monuments from any alleged rights recognized to GMC, on the basis of Law 163 of 1959. Hence, already in 1982, GMC could not have reasonably expected that the legal framework on cultural and historical heritage would not evolve.

1575 *See* Amended Statement of Claim, ¶ 375.

1576 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 234-235.

1577 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), p. 234 ("**TO PROVIDE** full and unequivocal protection to the national cultural, historical, artistic and archaeological heritage, including the submerged, reason for which is expressly excluded from the declaration of ownership contained in the second point of the operative part of the first degree sentence, dictated in the present trial by the Tenth Civil Court of the Circuit of the mentioned city on July 6, 1994, each and every one of the properties that correspond or correspond to 'movable monuments', according to the description and reference enshrined in Article 7° of Law 163 of 1959, which are subject to and governed by the protectionist regime contemplated therein, as well as by the constitutional and legal norms that, for the same and specific purpose, have been subsequently issued, characterized by the breadth and generality of the tutelage conferred.")

1578 Supreme Court of Justice of Colombia, Civil Chamber, Judgment No. 08001-3103-010-1989-09134-01, 5 July 2007 (**Exhibit C-28**), pp. 226-227.

1248. In fact, and contrary to the Claimant's statement that "[n]*o legal or other change had reduced the scope of the rights in question*",[1579] crucial changes in the regulatory landscape took place between 1982 and November 2008, namely: (***i***) the adoption of the Constitution of 1991 which, as explained, constitutionalized the protection of cultural heritage and (***ii***) the enactment of Law 397 of 1997, denominated the "General Law on Culture" and (***iii***) Law 1185 of 2008, which, as explained, established the national system for cultural heritage, adopted the same year that the Claimant made its alleged investment. In keeping with this tendency, by 2008, the domestic regulation of cultural heritage had expanded and evolved.

1249. **Fourth**, the Claimant's statement that "[a]*t no point until 2008 (or even thereafter) did SSA (or its Predecessors) have any reason to believe that the entirety of the San José shipwreck was (or could be) cultural patrimony"*,[1580] is belied by the facts. Indeed, only a few months before the Claimant made its alleged investment, Colombia enacted Law 1185 of 2008, which amended the General Law of Culture to introduce provisions specific to the creation of the national system for cultural heritage. Among these, Law 1185 of 2008 amended Article 4(b) of Law 397 of 1997 to provide for the "principle of unity" in cultural heritage, as follows:

> This law defines a special regime of safeguarding, protection, sustainability, dissemination and encouragement for the Nation's cultural heritage assets that are declared as assets of cultural interest in the case of tangible assets and for the manifestations included in the Representative List of Intangible Cultural Heritage, in accordance with the valuation criteria and requirements regulated for the entire national territory by the Ministry of Culture.
>
> The declaration of a tangible property as of cultural interest […] determines that a property or manifestation of the cultural heritage of the Nation is covered by the Special Regime of Protection or Safeguarding provided for in this law.
>
> The declaration of cultural interest may apply to a particular material good, or to a specific collection or set, in which case the declaration shall contain the pertinent measures to preserve them as an indivisible unit.[1581]

1250. Indeed, the "principle of unity" is a central element of Resolution 085 of 2020, which expressly refers to it as the legal basis to declare the totality of the shipwreck of the *San José* a National

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1579 Amended Statement of Claim, ¶ 375.

1580 Amended Statement of Claim, ¶ 377.

1581 Law 1185 of 2008, which amends and adds to Law 397 of 1997 -General Law of Culture- and enacts other provisions, 12 March 2008 (**Exhibit R-244**), Article 1 (emphasis added).

Asset of Cultural Interest.[1582] The Claimant cannot possibly claim that it was not aware of the contents of Law 1185 of 2008, which is specific to its field. Moreover, as explained, tribunals have found that investors must conduct a rigorous due diligence prior to their investment as a condition to avail themselves of any alleged legitimate expectations – a due diligence that the Claimant has not demonstrated, nor even alleged, to have conducted.

1251. ***Fifth***, and finally, as explained, tribunals must weigh investors' legitimate expectations (if any) against the legitimate exercise by the State of its regulatory powers, in pursuit of the public interest. As explained, Resolution 085 was adopted by Colombia legitimately to protect the *Galeón San José* – a historical asset of unique characteristics, that forms part of Colombia's cultural heritage and, as such, must be preserved for the benefit of present and future generations.

b. The Respondent did not treat the Claimant's investment in an arbitrary, unreasonable, or discriminatory manner

1252. In its submission, the Claimant avers that "*Resolution No. 0085 was moreover issued in an unreasonable and arbitrary manner*" which, the Claimant submits, entails a breach of Article 10.5 of the TPA.[1583] The Claimant's argument holds no water. In this sub-section, the Respondent first sets the record straight as regards to the proper standard to be applied to assess the Claimant's claim (***i***) and demonstrates that the Claimant's claim fails to meet the applicable standard and should be dismissed (***ii***).

i. The threshold for arbitrariness and unreasonableness under MST is particularly high

1253. In its Amended Statement of Claimant, the Claimant fails to describe the applicable standard for arbitrariness and unreasonableness under the MST. It is no surprise that the Claimant circumvents the relevant standard in accordance with the case law. As the Respondent shows, the standard for a conduct to be arbitrary or unreasonable under MST is particularly high, and the Claimant's claims fall clearly short of satisfying it.

1254. ***First***, as conveniently omitted by the Claimant, the standard for arbitrariness and unreasonableness under MST is stringent. Indeed, the landmark case on the meaning of

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1582 Ministry of Culture Resolution No. 0085, 23 January 2020 (**Exhibit C-42**), p. 3.

1583 Amended Statement of Claim, ¶ 380.

"arbitrariness" under international law is the *ELSI* case, where the International Court of Justice defined the term as being "*not so much something opposed to a rule of law, as something opposed to the rule of law*", or "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[1584] The definition of "arbitrariness" in *ELSI* has been heralded as "*the most authoritative interpretation of international law*" and is widely adopted by investment tribunals.[1585]

1255. ***Second***, investment tribunals that have not expressly adopted the *ELSI* definition of arbitrariness have set a high threshold for finding that a conduct of a State is arbitrary. For example, in *OI v. Venezuela*, the tribunal held that "[t]*he fundamental idea of arbitrariness is that legality, due process, the right to judicial remedy, objectivity and transparency in the State's management are*

1584 *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Rep. 15 (**Exhibit RLA-114**), ¶ 128.

1585 *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award, 17 January 2007 (**Exhibit CLA-121**), ¶ 318. *See also, e.g., Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016 (**Exhibit RLA-174**), ¶ 390 ("*the ELSI judgment is most commonly referred to by investment tribunals' decisions as the standard definition of 'arbitrariness' under international law*"); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, (**Exhibit CLA-129**), ¶¶ 378, 381-382 ("*the Tribunal will rely on the ICJ's definition of arbitrariness set forth in ELSI*"); *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft GmbH & Co. v. The Czech Republic* (UNCITRAL, PCA Case No. 2010-5), Award, 19 September 2013 (**Exhibit RLA-153**), ¶¶ 4.822-824 ("*In the Tribunal's view the judgment of the Chamber of the International Court of Justice in the ELSI case does indeed provide the appropriate standard*"); *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶ 577 ("An authoritative definition of arbitrariness was given by a Chamber of the ICJ in the *ELSI* case"); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶¶ 291, 293 (the tribunal further held that arbitrary conduct constitutes a breach of FET "*only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive*"); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2), Award, 7 March 2017 (**Exhibit RLA-176**), ¶¶ 522-523; *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, 12 October 2005 (**Exhibit RLA-127**), ¶¶ 177-178; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL Case), Final Award, 24 December 2007 (**Exhibit CLA-126**), ¶ 341; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶ 262; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38), Award, 14 December 2017 (**Exhibit RLA-181**), ¶ 308; *Azurix Corp. v. The Argentine Republic* (ICSID CASE No. ARB/01/12), Award, 14 July 2006 (**Exhibit CLA-117**), ¶¶ 392-393; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (**Exhibit CLA-146**), ¶ 319; *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001 (**Exhibit RLA-118**), ¶ 371.

replaced by privilege, preference, bias, preclusion and concealment".[1586] The same high standard was adopted by the tribunal in *Cargill v. Mexico*:

> The Tribunal thus finds that arbitrariness may lead to a violation of a State's duties under Article 1105, but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.[1587]

1256. In the Amended Statement of Claim, the Claimant relies on *EDF v. Romania* to provide a series of categories of measures that would be considered "*unreasonable or arbitrary treatment amounting to an FET violation*", including measures (a) that inflict damage on the investor without serving any apparent legitimate purpose; (b) that are not based on legal standards but on discretion, prejudice or personal preference; (c) taken for reasons different from those put forward by the decision maker and (d) taken in willful disregard of due process and proper procedure.[1588] The Respondent notes, primarily, that the Claimant's reliance on *EDF v. Romania* is unclear, since the Claimant does not explain in what category of arbitrary conduct would Resolution 085 allegedly fall.

1257. Moreover, the examples defined by the *EDF v. Romania* tribunal and on which the Claimant relies upon reinforce the idea that a high threshold should be applied to find a breach of fair and equitable treatment amounting to a breach of MST. In this regard, investment tribunals have confirmed that the examples defined by *EDF v. Romania* are not meant to displace the stringent test established by the ICJ in *ELSI* but should rather be interpreted in accordance with the stringent standard defined by *ELSI*. For instance, referring to both the *ELSI* definition of arbitrariness and to the categories of measures listed in *EDF v. Romania*, the *Lemire v. Ukraine* award – on which the Claimants also rely –[1589] concluded that "*the underlying notion of*

1586 *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Award, 10 March 2015 (**Exhibit CLA-153**), ¶ 494.

1587 *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 (**Exhibit RLA-136**), ¶ 293 (emphasis added).

1588 *See* Claimant's Amended Statement of Claim, ¶ 356. *See also EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009 (**Exhibit CLA-138**), ¶ 303.

1589 *See* Claimant's Amended Statement of Claim, fn. 798.

arbitrariness is that prejudice, preference or bias is substituted for the rule of law".[1590] Therefore, the stringent standard applicable under international law, as set out by *ELSI*, remains unchanged.

1258. ***Third***, equally high is the threshold to find that a conduct is "unreasonable". As found by the tribunal in *AES v. Hungary*, for the conduct of a State to be considered unreasonable, the conduct must be not linked to a rational governmental policy or be unreasonable for purposes of achieving the stated rational governmental policy:

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.[1591]

1259. As established by the *AES v. Hungary* tribunal, a State action is reasonable when there is *"an appropriate correlation between the state's public policy objective and the measure adopted to achieve it"*.[1592]

1260. ***Fourth***, the threshold for finding a breach of the prohibition against discrimination is also high. In *Sempra v. Argentina* the tribunal held that discrimination requires a "*capricious, irrational or absurd differentiation*".[1593] The Respondent notes that the Claimant has not alleged – nor could it allege – that Resolution 085 discriminated against the Claimant.

1590 *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶¶ 262-263.

1591 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010 (**Exhibit RLA-142**), ¶ 10.3.7.

1592 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010 (**Exhibit RLA-142**), ¶ 10.3.9. *See also EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009 (**Exhibit CLA-138**), ¶ 305 (in denying the claim for unreasonable or discriminatory measures, the tribunal considered the following factors: "*a. there is no evidence of measures applied to Claimant without a legitimate purpose; on the contrary,* [the impugned measures] *have all been held by the Tribunal as justified either by the terms of the contract binding the Parties or by the exercise of the State's police power in the public interest; b. none of such measures was based on discretion, prejudice or personal preference, as made clear by the Tribunal's examination; c. no evidence has been proffered indicating that any such measures were taken for reasons other than those stated by the decision maker; d. as shown by the numerous recourses by Claimant to legal procedures in Romania, including courts proceedings, more than once with a positive outcome for Claimant, due process and proper procedural requirements appear to have been satisfied by Respondent.*").

1593 *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 2007 (**Exhibit RLA-132**), ¶ 319.

1261. ***Fifth***, when analyzing whether a particular measure is unreasonable or arbitrary, tribunals have held that, absent manifest impropriety, the State's liability will not be engaged. As noted by the tribunal in *Saluka v. Czech Republic*, on which the Claimants rely, a breach of the FET standard requires conduct that "*manifestly violate*[s] *the requirements of consistency, transparency, even-handedness and non-discrimination*".[1594]

1262. Similarly, in *Cervin v. Costa Rica*, the tribunal noted that the difference between "*simply illegal*" conduct and arbitrary conduct is that the latter involves a "*deliberate repudiation of the purpose and objectives of a State policy*".[1595]

1263. Accordingly, measures adopted in pursuit of rational policy objectives have been deemed not to be unreasonable or discriminatory. In this vein, the tribunal in *Electrabel v. Hungary* found that the claimant had not proven that Hungary's conduct was "*arbitrary*" as the challenged measures were "*reasonably related to a legitimate policy objective*".[1596] In reaching this conclusion, the tribunal found that the principle that "*a measure will not be arbitrary if it is reasonably related to a rational policy*" encompassed two elements: (***i***) "*the existence of a rational policy*", and (***ii***) "*the reasonableness of the act of the state in relation to the policy*".[1597]

ii. Resolution 085 was neither arbitrary, nor unreasonable

1264. In its Amended Statement of Claim, the Claimant argues that Resolution 085 was arbitrary and unreasonable, "*because Colombia does not appear to have issued Resolution No. 0085 on the basis of scientific or objective analysis*."[1598] According to the Claimant, the Respondent issued Resolution 085 to "*circumvent the Injunction Order and thus obtain full access and rights to the*

1594 *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 307 (emphasis added); Amended Statement of Claim, fn. 806.

1595 *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2), Award, 7 March 2017 (**Exhibit RLA-176**), ¶ 527 (emphasis added) (Unofficial Translation).

1596 *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Award, 25 November 2015 (**Exhibit RLA-167**), ¶ 214. *See also AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010 (**Exhibit RLA-142**), ¶ 10.3.34 (the tribunal reasoned that while Hungary's measures were "*principally motivated by the politics surrounding so-called luxury profits*, […] *it is a perfectly valid and rational policy objective for a government to address luxury profits*").

1597 *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Award, 25 November 2015 (**Exhibit RLA-167**), ¶ 179.

1598 Amended Statement of Claim, ¶ 380.

San José shipwreck."[1599] The Claimant mainly bases this allegation on the circumstance that Resolution 085 "*was issued without the recovery or salvage of the San José shipwreck.*"[1600] In fact, the Claimant goes so far as to allege that "*it is unclear if any analysis was conducted by Colombian authorities at all before issuing Resolution No. 0085.*"[1601]

1265. ***First***, the Claimant has no basis in fact or in law to allege that the Respondent's actions were "*opposed to the rule of law*", as defined by the ICJ in the *ELSI* case. Resolution 085 was adopted within the Colombian legal framework for the protection of cultural heritage in general, and submerged cultural heritage more specifically, particularly Law 1185 of 2008 (already in force when the Claimant made its alleged investment) and Law 1675 of 2013, and in line with the global trends and with Colombia's international commitments to protect its archaeological, historical and cultural heritage.

1266. ***Second***, the Claimant's allegation that "*it is unclear if any analysis was conducted*" prior to the issuance of Resolution 085 is farcical.[1602] A perfunctory reading of Resolution 085's text shows that its technical basis is no other than the final report prepared by MAC following the 2015 campaigns during which Colombia found the *Galeón San José*.[1603] As explained by Colombia's witness, Captain Julio Monroy, the 2015 campaigns entailed a significant technical and economic effort by Colombia, involving foreign and Colombian technicians using high-end technology to explore a vast portion of the Colombian Caribbean sea. The Claimant's portrayal of Resolution 085 as a whimsical measure appearing out of nowhere has no basis, in view of Colombia's considerable and sustained efforts in the search for the *San José*, which culminated with the 2015 Expeditions.

1267. Moreover, Resolution 085 was adopted by the Ministry of Culture after analysis and consultation with the National Heritage Council, integrated by delegates from specialized technical agencies, including the Maritime Directorate and the Colombian Institute of Anthropology and History (ICANH).[1604] Resolution 085 summarizes the key conclusions reached by these experts during the Council meeting of 19 December 2019, after each of the elements required by Law 1675 of 2013,

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1599 Amended Statement of Claim, ¶ 380.

1600 Amended Statement of Claim, ¶ 381.

1601 Amended Statement of Claim, ¶ 382.

1602 Amended Statement of Claim, ¶ 382.

1603 Ministry of Culture Resolution No. 0085 of 2020, 23 January 2020 (**Exhibit C-42**), p. 1.

1604 Ministry of Culture Resolution No. 0085 of 2020, 23 January 2020 (**Exhibit C-42**), p. 1.

which regulates the protection and recovery of Colombia's submerged heritage, were analyzed and complied with.[1605]

1268. **Third**, equally false is the Claimant's contention that *"nothing in the Resolution […] explains why Colombia arrived at this designation over 40 years after it first awarded SSA's Predecessors the license to look for the ship."*[1606] Contrary to the Claimant's assertions, the Resolution explains in detail the circumstances that triggered its issuance – in particular, Colombia's discovery of the *Galeón* in 2015 and the ensuing report submitted by MAC to the Colombian authorities. Evidently, since Colombia only found the *Galeón San José* in 2015, the declaration of the *Galeón* as cultural heritage could not have predated its discovery.

1269. ***Fourth***, the Claimant's contention that Resolution 085 should not have preceded the "*salvage of any items from the San José shipwreck*" holds no water.[1607] Precisely, the rationale informing Resolution 085 was to preserve and protect the shipwreck so that it could be recovered and salvaged once the required technical and financial conditions exist. Had Resolution 085 been issued after the salvage of the assets, as the Claimant would have it, it would not have effectively served its main purpose. Through inclusion of the *Galeón San José* in the National Registry of Submerged Cultural Heritage, Colombia sought to ensure that the *Galeón San José's* site would be protected and secure for future study.

1270. ***Finally***, actions adopted in pursuit of rational public objectives are not "unreasonable", given the large degree of deference that investment tribunals accord to State authorities to pursue public interest objectives. As explained, Resolution 085 was issued to further a legitimate public interest: the preservation of Colombia's historical, archaeological and cultural heritage for posterity. Far from being unreasonable, this is as clear a legitimate use by Colombia of its sovereign prerogatives as any example that may be found in investment case law.

1605 Ministry of Culture Resolution No. 0085 of 2020, 23 January 2020 (**Exhibit C-42**), pp- 2-3. *See also* Law 1675 of 2013, 30 July 2013 (**Exhibit R-191**).

1606 Amended Statement of Claim, ¶ 383.

1607 Amended Statement of Claim, ¶ 381.

c. The Respondent has neither breached any purported "transparency" obligation nor has it denied justice to the Claimant's investment

1271. The Claimant avers that *"*[t]*he manner in which Colombia issued Resolution No. 0085 also lacked transparency and failed to accord due process."* [1608] As the Respondent demonstrates, the Claimant's claims are meritless.

1272. In this sub-section, the Respondent *first* provides the applicable framework to assess a breach of MST of FET relating to allegations of procedural violations (***i***) to then address the Claimant's unwarranted claims regarding the Respondent's alleged lack of "transparency" and failure to afford the Claimant due process (***ii***).

i. There is no obligation for host States to act "transparently" under customary international law

1273. According to the Claimant, "[h]*ost States bear an affirmative obligation to act transparently and with due process*".[1609] To support its wholly unsubstantiated claim, the Claimant once again purposefully conflates MST and autonomous FET standards, relying on a number of cases that involved FET provisions which texts differ completely form that of the MST clause in Article 10.5 of the TPA.[1610] The Claimant's misrepresentation of the applicable standard is to no avail.

1274. ***First***, the concept of "transparency" is simply not included within the minimum standard of treatment. As confirmed by the United States in several Non-Disputing Party Submissions regarding provisions identical to Article 10.5 of the TPA:

> The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no

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1608 Amended Statement of Claim, ¶ 385.

1609 Amended Statement of Claim, ¶ 363.

1610 *See* Amended Statement of Claim, fn. 806, citing to *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000 (**Exhibit CLA-107**), ¶ 83; *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, PCA Case No. 2001-04), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 307; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 (**Exhibit CLA-119**), ¶ 128; *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007 (**Exhibit CLA-121**), ¶¶ 308–309; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (**Exhibit CLA-128**), ¶ 618; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶ 284.

> general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.[1611]

1275. In any event, even assuming that the concept of transparency was to be included within the FET standard under customary international law, which is denied, investment tribunals have repeatedly held that, for lack of transparency to constitute a breach of the FET standard, the required threshold would be stringent. As explained above, in the words of the *Waste Management* tribunal, followed by various other tribunals, "*a complete lack of transparency and candour in an administrative process*" is required.[1612]

1276. Furthermore, even in cases under an autonomous standard of FET – which, as explained, is lower than the MST standard applicable in this arbitration – the relevant standard is high. Indeed, the transparency obligation under an FET autonomous standard requires that "*all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors*".[1613] As cogently stated by the *Urbaser v. Argentina* tribunal, "transparency" does not require host States "*to act under complete disclosure*":

> The host State's handling of matters in transparency cannot mean that it has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment

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1611 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 40. *See also*, *e.g.*, *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua* (ICSID Case No. ARB/17/44), Submission of the United States of America, 28 September 2021 (**Exhibit RLA-212**), ¶ 25; *Vento Motorcycles, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/17/3), Submission of the United States of America, 23 August 2019 (**Exhibit RLA-194**), ¶ 21; *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 (**Exhibit RLA-038**), ¶ 133 (finding that "*it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law*," and holding the British Columbia Supreme Court's decision in Metalclad to be "*instructive*").

1612 *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015 (**Exhibit RLA-166**), ¶ 399; *Waste Management, Inc. v. United Mexican States*, NAFTA, (UNCITRAL, ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (**Exhibit RLA-123**), ¶ 98. *See also*, e.g., *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award 24 March 2016 (**Exhibit RLA-171**) ¶¶ 501,502*; Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States* (ICSID Case No. UNCT/17/1), Final Award 5 June 2020 (**Exhibit RLA-205**), ¶ 363.

1613 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 (**Exhibit CLA-119**), ¶ 128.

> activities. Investors must have trust in the host State's best efforts to sustain their operation on this State's territory.[1614]

1277. ***Second***, and crucially, under the TPA, only a breach of due process that amounts to denial of justice under international law constitutes a breach of the MST required by Article 10.5. This has been widely confirmed by arbitral tribunals; yet, and against the nearly unanimous position by arbitral tribunals, the Claimant relies on two outliers, that did not specifically address this point.[1615] In the words of the tribunal in *Aven v. Costa Rica*, which interpreted a provision identical to that in Article 10.5.2(a) of the TPA:

> Therefore, the claimant investor alleging the breach of the obligation to afford fair and equitable treatment has the burden of proof to show denial of justice, insofar as Article 10.5.2.(a) DR-CAFTA may be applicable. The investor may not be released of such burden invoking that DR-CAFTA does not require the prior exhaustion of domestic remedies to have access to arbitration, because what is at play is not the admissibility of the claim but the merit of the claim. Certainly, for the admissibility of a claim within DR-CAFTA, it is not necessary to have exhausted domestic remedies, but to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty, access to justice and due process for the resolution of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards.[1616]

1614 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016 (**Exhibit RLA-175**), ¶ 628 (emphasis added).

1615 *See* Amended Statement of Claim, ¶ 370. *See also Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/17), Award, 19 December 2013 (**Exhibit CLA-149**), ¶¶ 484, 587; *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012 (**Exhibit CLA-147**), ¶ 219.

1616 *David R. Aven, Samuel D. Aven and others v. The Republic of Costa Rica* (ICSID Case No. UNCT/15/3), Final Award, 18 September 2018 (**Exhibit RLA-185**), ¶ 357 (emphasis added). *See also Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia* (ICSID Case No. ARB/20/7), Award 20 September 2024 (**Exhibit RLA-227**), ¶ 642 ("*With regard to 'due process', the Tribunal notes that for an investor to prevail on a claim for denial of justice 'a very high threshold is required*'.").

1278. For an investor to prevail on a claim for denial of justice, *"a very high threshold is required*".[1617] Specifically, investment tribunals have held that denial of justice under international law involves a "*systemic failure of the State's justice system*".[1618] In its Non-Disputing Party Submissions relating to identically worded provisions, the United States has also set the threshold for denial of justice very high.[1619]

1279. Moreover, there can be no denial of justice until a final decision on the issue has been made by the State's highest judicial authority.[1620] In light of this high threshold, it is not surprising that the Claimant did not argue denial of justice, but rather vaguely claimed that Colombia's actions "*lacked transparency and failed to accord due process*".[1621]

1617 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia* (ICSID Case No. ARB/16/38, Award), 28 February 2020 (**Exhibit RLA-200**), ¶ 472. *See also White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award, 30 November 2011 (**Exhibit RLA-144**), ¶ 10.4.8 ("*It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice*"); *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15), Excerpts of the Award, 6 May 2014 (**Exhibit RLA-156**), ¶ 400 ("*The Tribunal also stresses that the evidentiary threshold to establish a claim of denial of justice is high.*"); *Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016 (**Exhibit RLA-174**), ¶ 499 ("*An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such*").

1618 *See*, *e.g.*, *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (**Exhibit RLA-017**), ¶ 254 (emphasis added);; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Final Award, 23 April 2012 (**Exhibit RLA-012**), ¶ 273 ("*A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.*").

1619 *See*, *e.g.*, *David R. Aven, Samuel D. Aven and others v. The Republic of Costa Rica* (ICSID Case No. UNCT/15/3), Submission of United States of America, 17 April 2015 (**Exhibit RLA-163**), ¶ 13 and fn. 15-17 (US established that "*the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings*" which "*arises, for example, when a State's judiciary administers justice to aliens in a 'notoriously unjust' or 'egregious' manner 'which offends a sense of judicial propriety'.*"); *Eli Lilly and Company v. The Government of Canada* (UNCITRAL, ICSID Case No. UNCT/14/2), Submission of the United States of America, 18 March 2016 (**Exhibit RLA-170**), ¶ 22 (noting the "*high threshold required for judicial measures to rise to the level of a denial of justice in customary international law*"); *Angel Samuel Seda and others v. Republic of Colombia* (ICSID Case No. ARB/19/6), U.S. Submission Pursuant to Article 10.20.2 of the U.S.-Colombia TPA, 26 February 2021 (**Exhibit RLA-209**), ¶ 26 .

1620 *See*, *e.g.*, *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (**Exhibit RLA-017**), ¶ 264; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (**Exhibit RLA-234**), ¶¶ 132, 151-154.

1621 Amended Statement of Claim, ¶ 385.

1280. ***Third***, even when applying the less stringent autonomous FET standard, tribunals have held that only severe due process violations would amount to a breach. As noted by the tribunal in *Krederi v. Ukraine*:

> The core element of due process certainly is that the adjudicator conducts the adjudicatory process in a proper fashion. Thus, serious defects in the adjudicative process, such as violations of equal treatment of the parties, the right to be heard or other core rights of litigants may amount to violations of due process.[1622]

1281. Applying the standard set by the *Tecmed* tribunal – a decision which the Claimant relied upon – [1623] the *AES v. Hungary* tribunal found that there had been no breach of due process since the claimant had had the opportunity to present the "*several procedural shortcomings*" in the implementation of a price review decree to the review of the Hungarian courts,[1624] and held:

> [I]t is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the *Tecmed* Tribunal – that the standard can be said to have been infringed.[1625]

1282. Similarly, in *Genin v. Estonia*, the tribunal held that "*in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action*".[1626] After analyzing

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1622 *Krederi Ltd. v. Ukraine* (ICSID Case No. ARB/14/17), Award, 2 July 2018 (**Exhibit RLA-183**), ¶ 461. *See also Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Final Award, 23 April 2012 (**Exhibit RLA-012**), ¶ 299 ("*The BIT does not grant protection for mere breaches of local procedural law*").

1623 Amended Statement of Claim, ¶ 363.

1624 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010 (**Exhibit RLA-142**), ¶¶ 9.3.65-66.

1625 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010 (**Exhibit RLA-142**), ¶ 9.3.40.

1626 *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001 (**Exhibit RLA-118**), ¶ 371.

several alleged procedural failures by the Estonian authorities, the tribunal concluded, that while these irregularities "*invite*[d] *criticism*", they did not amount to a breach of treaty.[1627]

1283. ***Finally***, and as conveniently overlooked by the Claimant, the case law is clear that there can be no violation of the FET standard (and in particular, a breach of due process) as long as the investor is given the opportunity to challenge the impugned measures before the local courts of the host State. For example, in *Bayindir v. Pakistan*, the tribunal concluded that the claimant had not been denied due process or procedural fairness because "*the record shows that Bayindir was indeed given the opportunity to present its position on numerous occasions throughout the relevant period*".[1628] Similarly, in *Lauder v. Czech Republic* the tribunal rejected the claimant's due process claims on the basis that "*the Czech judicial system has remained fully available to the Claimant*".[1629] As the Respondent demonstrates below, this is fatal to the Claimant's claim, given that they had the opportunity to resort to the Colombian courts – a legal course that they freely chose not to benefit from.

1627 *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001 (**Exhibit RLA-118**), ¶¶ 364-365. *See also International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), NAFTA, Award, 26 January 2006 (**Exhibit RLA-128**), ¶¶ 197-200 (the tribunal found that, while the proceedings "*may have been affected by certain irregularities*", none of these were "*grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment*". The tribunal concluded that despite the irregularities, there was no evidence that the proceedings "*were arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment*." In particular, the tribunal noted that the claimant had been given a full opportunity to be heard and to present evidence at an administrative hearing and that it made use of the opportunity); *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), Award, 2 August 2019 (**Exhibit RLA-193**), ¶¶ 471-472 (the tribunal found that the steps adopted by Spain for a regulatory reform, "*imperfect though they may have been*", were not a breach of the FET standard because it provided the investors "*with ample opportunities to be heard, to reach to the changes at issue and to 'engage the host state in dialogue about protecting [their] legitimate expectations'.*"); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Final Award, 23 April 2012 (**Exhibit RLA-012**), ¶ 287 (the tribunal held that "*procedural irregularities*" would only constitute a breach of the FET standard if they amount to "*severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable as required by the notion of procedural denial of justice.*").

1628 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009 (**Exhibit CLA-135**), ¶¶ 347-348.

1629 *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001 (**Exhibit RLA-119**), ¶ 314. *See also Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia (I)* (ICSID Case No. ARB/16/6), Award, 27 August 2019 (**Exhibit CLA-173**), ¶ 1319 ("*The private individual must have an opportunity to have the case revisited, this time by an independent and impartial judge, with the guarantee of a formal adversarial procedure*").

ii. The Claimant has had full and adequate access to the Colombian courts to protect its alleged investment

1284. The Claimant contends that Colombia's issuance of Resolution 085 "*lacked transparency and failed to accord due process*",[1630] as it was allegedly (***i***) "*shrouded in secrecy*" and (***ii***) that Colombia failed to notify and allow SSA to participate in the process leading to its issuance. The allegations are bound to fail:

1285. ***First***, the Claimant has not argued – nor could it argue – that the Respondent has denied justice to the Claimant's investment. As explained above, this alone should suffice to dismiss the Claimant's claim for a breach of MST based on an alleged breach of due process.

1286. ***Second***, contrary to the Claimant's disingenuous assertion that "*Colombia does not dispute that Resolution No. 0085 was shrouded in secrecy*", Colombia publicized Resolution 085 in accordance with the law.[1631] Indeed, Resolution 085 was published in the Official Gazette on 10 February 2020, a mere six business days after it was issued, and it did not enter into force until its publication, as expressly stated in the text of the Resolution.[1632]

1287. Furthermore, Colombia's intention to declare the entirety of the *Galeón* protected cultural heritage was no secret. Much the contrary, it was publicized: in a statement of 19 October 2019, over three months prior to the issuance of Resolution 085, the then Vice President of Colombia, Ms. Marta Lucía Ramírez Blanco, issued a public statement by which she declared, *inter alia*:

> The *San José Galeón* belongs to Colombians, for Colombians and for humanity. […]
>
> The *San José Galeón* is unique and indivisible! In it lies an important and valuable part of our history and our cultural trajectory. There, in the depths of the sea, is not only a pile of cannons, vessels and jewels, nor a handful of coins. There is a part of our history and of the trajectory of the new world and it should never be depressed. [...]
>
> For all of the above, given the public interest and the reinforced constitutional protection, based on the law of submerged cultural heritage and the current jurisprudence, we have decided that in the next few days we will present to the National Council of Cultural Heritage the final report of the exploration carried out, with the request to recognize the *San José* and

1630 Amended Statement of Claim, ¶ 385.

1631 Amended Statement of Claim, ¶ 386.

1632 Colombian Official Journal, No. 51.223, 10 February 2020 (**Exhibit R-226**), p. 15.

> all the elements of the shipwreck as a unique and indivisible collection, whose testimony will allow to know our historical and cultural trajectory and therefore, will declare it as Cultural Patrimony in its integrity, if after analysing the exploration report it considers it pertinent.[1633]

1288. ***Third***, equally unavailing is the Claimant's allegation that Colombia did not "*notify, much less allow SSA to participate in the process leading to Resolution No. 0085*".[1634] Colombia first notes that it was not obliged by law to notify SSA of Resolution 0085, which was a general act as a matter of administrative law. Under Colombian law, general administrative acts, such as Resolution 085, do not require notification. Any alleged "failure" of the Respondent to notify the Claimant and allow the Claimant to be involved prior to the issuance of Resolution 085 is therefore far from constituting "*a wilful disregard of due process of law or an extreme insufficiency of action*".[1635] In any event, as explained, "*procedural shortcomings*" have not been considered sufficient to meet the high threshold of a breach of MST of FET (nor a breach of an autonomous FET provision, for that matter) – particularly, considering that the Claimant had ample chance to resort to other avenues of legal action against the Resolution, had it so wished.

1289. ***Fourth***, and finally, claims for breach of due process when the investors had the opportunity to seek redress from the local courts and failed to do so have been routinely disregarded by arbitral tribunals. The same should apply here: the Claimant could have requested the annulment of Resolution 085 before the Colombian courts.[1636] It chose not to do so. In fact, other parties that opposed to Resolution 085 initiated annulment proceedings in Colombia, which are still ongoing. Having failed to make use of the available recourses provided by the judicial system, the Claimant cannot claim a breach of due process.

1633 Statement of the Vice President of Colombia, Ms. Marta Lucía Ramírez Blanco, 9 October 2019 (**Exhibit R-222**) (emphasis added).

1634 Amended Statement of Claim, ¶ 387.

1635 *See e.g.*, *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Rep. 15 (**Exhibit RLA-114**), ¶ 128.

1636 Colombian Code of Administrative Procedure and Administrative Litigation (Law No. 1437 of 2011) (selected articles) (**Exhibit R-183**), Article 137 ("*Any person may request, in person or through a representative, that administrative acts of a general nature be declared null and void.*").

d. The Claimant cannot circumvent specifically negotiated terms of the TPA via a Most Favored Nation clause to "import" the FET standard in the Colombia- Switzerland BIT

1290. Well aware of the very restrictive scope of the MST standard in the TPA, the Claimant relies on the TPA's most-favored nation ("**MFN**") clause in Article 10.4 of the TPA to "import" the autonomous FET standard as provided for in Article 4.2 of the Switzerland-Colombia BIT.[1637] This attempt is founded on the Claimant's erroneous claim that "[i]*t is well accepted by tribunals that MFN provisions such as Article 10.4 of the TPA can be used to import a more favorable FET provision from a Treaty with a non-Party State*",[1638] which the Claimant supports using inapposite case law. The Claimant's attempt at using the MFN clause artificially to broaden the terms and scope of protection specifically agreed by the Contracting Parties should be rejected for the following reasons:

1291. ***First***, the Claimant's attempt at importing, via the MFN clause, an autonomous FET standard into the TPA contradicts the express language of Article 10.5 of the TPA, pursuant to which the fair and equitable treatment and full protection and security standards do not require treatment in addition to or beyond that required by the minimum standard of treatment under customary international law. The United States, in its Non-Disputing Party submission in *Gramercy v. Peru* – a case that concerned provisions that are identical to Articles 10.4 and 10.5 of the TPA – pushed back against a similar attempt by the investor, stating:

> Article 10.4 [cannot] be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice. As noted in the submissions on Article 10.5 above, Article 10.5.2 clarifies that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."[1639]

1637 *See* Amended Statement of Claim, ¶ 347.

1638 Amended Statement of Claim, ¶ 347.

1639 *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States of America, 21 June 2019 (**Exhibit RLA-191**), ¶ 57 (emphasis added). *See also Omega Engineering and Rivera v. Panama* (ICSID Case No. ARB/16/42), Submission of the United States of America, 3 February 2020 (**Exhibit RLA-198**), ¶ 10.

1292. Importing a treatment beyond that expressly agreed upon by the Contracting States to the TPA through the MFN provision in Article 10.4 of the TPA would render Article 10.5 meaningless. Unsurprisingly, none of the cases on which the Claimant relies to assert that it is entitled to "import" a wholesale treaty protection using the MFN provision of the TPA contains an MST provision comparable to Article 10.5 of the TPA.[1640]

1293. ***Second***, the Claimant's interpretation of the MFN provision in the TPA effectively renders the phrase "*in like circumstances*" in Article 10.4 of the TPA redundant. Indeed, if Colombia and the U.S. had truly intended for Article 10.4 to allow investors to rely on provisions arising from other investment treaties, it would have been unnecessary for these investors to be required to identify an investor "*in like circumstances*" (i.e., a relevant comparator). In other words, if the Claimant's interpretation of Article 10.4 was correct, the clause "*treatment no less favorable than that it accords to* [investors/investments…] *of any non-Party*" would have been sufficient to give effect to this intent. In light of the principle of *effet utile* – a "*cardinal rule of treaty interpretation*" – [1641] it is incontrovertible that Colombia and the United States intended for Article 10.4 to serve a different purpose; namely, to protect investors and investments against *de facto* discriminatory treatment.''

1640 *See* Amended Statement of Claim, fn. 784. Specifically: Article 3(1) of the Mongolia-Russia BIT (1995) considered in *Sergei Paushok v. Mongolia* contains an autonomous FET standard (*See Sergei Paushok, CJSC Golden East Company, and others v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011 (**Exhibit CLA-145**), ¶ 252); Article 2(2) of the Chile-Malaysia BIT (1992) considered in *MTD v. Chile* also contains an autonomous FET standard (*See MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (**Exhibit CLA-112**), ¶ 107); the Pakistan-Turkey BIT (1995) considered in *Bayindir v. Pakistan* only refers to FET in its Preamble and contains no specific provision in the dispositive (*see Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)* (ICSID Case No. ARB/03/29), Award, 14 November 2005 (**Exhibit CLA-135**), ¶¶ 154-155); the Turkey-Kazakhstan BIT (1995) considered in *Rumeli v. Kazakhstan* only refers to FET in its Preamble and contains no specific provision in the dispositive (*See Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (**Exhibit CLA-128**)); finally, the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (2014) considered in *Hesham v. Indonesia* does not contain an FET provision (*See Hesham Talaat M. Al-Warraq v. The Republic of Indonesia* (UNCITRAL), Final Award, 15 December 2014 (**Exhibit CLA-152**)).

1641 *See*, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (**Exhibit RLA-126R2**), ¶ 248 ("*It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective*").

1294. Several investment tribunals faced with requests comparable to the Claimant's have found that MFN clauses containing the phrase "*in like circumstances*" only afforded investors protection against *de facto* discrimination and were not meant to allow the importation of substantive protections from other investment treaties.[1642] The ruling of the tribunal in *İçkale İnşaat v. Turkmenistan* is apposite in this regard:

> Investors cannot be said to be in a "similar situation" merely because they have invested in a particular State; indeed, if the terms "in similar situations" were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause "treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country" and "treatment no less favourable than that accorded […] to investments of investors of any third country." Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.[1643]

1295. The United States has expressed its agreement with this proposition. In its Non-Disputing Party submission in the case of *Kaloti Metals & Logistics, LLC v. Republic of Peru* – a case concerning an identical MFN clause to Article 10.4 in the Peru-U.S. TPA – the United States stated that the mere existence of more favorable autonomous FET standards in other investment treaties does not amount to discriminatory treatment:

> If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, a claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to

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1642 *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award, 8 March 2016 (**Exhibit RLA-169**), ¶¶ 328-329 ("*Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State.* […] *It follows that, given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State*."). *See*, also, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Award, 4 May 2021 (**Exhibit RLA-210**), ¶¶ 780, 784.

1643 *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award, 8 March 2016 (**Exhibit RLA-169**), ¶ 329. *See*, also, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Award, 4 May 2021 (**Exhibit RLA-210**), ¶ 783.

> investors of a non-Party or another Party. Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.[1644]

1296. In light of the above, the Claimant's reliance on cases addressing MFN provisions containing no language requiring investors to identify other investors "*in like circumstances*" to establish that the treatment had indeed been discriminatory is to no avail.[1645]'

1297. ***Third***, the Claimant's interpretation of "treatment" in Article 10.4 is inconsistent with the principle of *ejusdem generis*. Pursuant to this principle, a general term can only be interpreted to include items that are *of the same class* as those that are listed after the general term.[1646] In this light, the general term "treatment" in Article 10.4 of the TPA, can only be interpreted to include items that are *of the same class* as that of treatment "*with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*".[1647] On an ordinary reading, this list clearly concerns measures that were taken by a Contracting State towards a foreign investor or investment during the life cycle of an investment and does not include general standards of protection accorded under

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1644 *Kaloti Metals & Logistics, LLC v. Republic of Peru*, ICSID Case No. ARB/21/29, Submission of the United States of America, 26 May 2023 (**Exhibit RLA-220**), ¶ 16 (emphasis added); *see*, also, *Latam Hydro LLC, Ch Mamacocha S.R.L v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021 (**Exhibit RLA-213**), ¶ 42.

1645 *See* Article 3(2) of the Mongolia-Russia BIT (1995) considered in *Sergei Paushok v. Mongolia* (*seeSergei Paushok, CJSC Golden East Company, and others v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011 (**Exhibit CLA-145**), ¶ 514); Article 3(1) of the Chile-Malaysia BIT (1992) considered in *MTD v. Chile* (*See MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (**Exhibit CLA-112**), ¶ 101).

1646 *See* International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, 1978 (**Exhibit RLA-100**), Article 10, p. 27.

1647 *ICS Inspection and Control Services Limited v. The Argentine Republic (I)* (PCA Case No. 2010-09), Award on Jurisdiction, 10 February 2012 (**Exhibit RLA-52**), ¶ 297 ("*The next relevant aspect of the MFN provision at Article 3(2) is its reference to the "management, maintenance, use, enjoyment or disposal of" investments. In order to further elucidate the meaning of "treatment" intended by the Contracting Parties, this passage must be interpreted in accordance with the principle of ejusdem generis to determine what class of matters the MFN clause relates to and can therefore attract from other treaties*").

international investment agreements. Unsurprisingly, none of the Claimant's alleged authorities address clauses with a similar restriction.[1648]''

1298. ***Lastly***, as demonstrated above, even under autonomous FET standard, a stringent standard would be applicable to each of the Claimant's claims under FET, which the Claimant has failed to meet.

e. Moreover, under International Law, tribunals should extend a high measure of deference to States' power to regulate

1299. Finally, it is widely recognized under international law that a determination of a breach by a State *"must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders".*[1649] Other tribunals have referred to the State's "*regulatory flexibility to respond to changing*

1648 *See* Amended Statement of Claim, fn. 784. Specifically: Article 3(2) of the Mongolia-Russia BIT (1995) considered in *Sergei Paushok v. Mongolia* (*See Sergei Paushok, CJSC Golden East Company, and others v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011 (**Exhibit CLA-145**), ¶ 514); Article 3(1) of the Chile-Malaysia BIT (1992) considered in *MTD v. Chile* (*See MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (**Exhibit CLA-112**), ¶ 101); Article II(2) of the Pakistan-Turkey BIT (1995) considered in *Bayindir v. Pakistan* (*See Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)* (ICSID Case No. ARB/03/29), Award, 14 November 2005 (**Exhibit CLA-135**), ¶ 156); Article II(1) of the Turkey-Kazakhstan BIT (1995) considered in *Rumeli v. Kazakhstan* (*See Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (**Exhibit CLA-128**), ¶ 558); Article 8(1) of the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (2014) considered in *Hesham v. Indonesia* (*See Hesham Talaat M. Al-Warraq v. The Republic of Indonesia* (UNCITRAL), Final Award, 15 December 2014 (**Exhibit CLA-152**), ¶ 545).

1649 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 263; *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶¶ 263, 305; *Mercer International Inc. v. Government of Canada*, NAFTA (ICSID Case No. ARB(AF)/12/3), Award, 6 March 2018 (**Exhibit RLA-182**), ¶ 7.42. *See also*, *e.g.*, *William Ralph Clayton, Bilcon of Delaware, Inc., and others v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015 (**Exhibit RLA-158**), ¶¶ 440-41 (tribunal agreed that a determination of FET breach "*must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*"); *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CLA-140**), ¶ 505 (the tribunal recalls the "*high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*"); *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RLA-149**), ¶ 8.35 ("*Hungary would enjoy a reasonable margin of appreciation in taking such measures before being held to account under the ECT's standards of protection*.").

circumstances in the public interest".[1650] The determination of whether the Respondent has breached its obligations to accord FET under the MST needs to be made in this light. This is particularly so when the State's actions concern the protection of legitimate public welfare objectives, as in this case. As found by the tribunal in *Unglaube v. Costa Rica*:

> Where, however, a valid public policy *does* exist, and especially where the action or decision taken relates to the State's responsibility "for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states," such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders.[1651]

1300. In the same vein, the *Al Tamimi v. Oman* tribunal underscored the high threshold required for a State's conduct to be considered a breach of the FET standard when the impugned actions have been adopted by the State to protect legitimate public welfare objectives:

> In the Tribunal's view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard. That is particularly so, in a context such as the US–Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment.[1652]

1301. To recall, in *Al Tamimi v. Oman*, the investor had been arrested and prosecuted for allegedly violating Omani environmental laws by operating quarries without the necessary permits, and he was later acquitted. The tribunal rejected the claimant's FET claim holding that a State must be able to take legal action when it comes to alleged violation of its laws, even if that position turns out to be wrong, provided it does so in good faith and with appropriate due process.

1650 *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RLA-149**), ¶ 7.77.

1651 *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica* (ICSID Case Nos ARB/08/1 and ARB/09/20), Award, 16 May 2012 (**Exhibit RLA-146**), ¶ 246 (emphasis added).

1652 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RLA-166**), ¶ 390 (emphasis added).

1302. The same principle was upheld by the tribunal in *Red Eagle v. Colombia*:[1653]

> As long as the Tribunal is satisfied that the Respondent has acted for a legitimate purpose – which in this case, it very plainly has, as the Tribunal is unanimous in concluding, then it has no business questioning how the Respondent has chosen to balance these competing interests (unless it can be shown that the choice was made in an arbitrary or discriminatory way).
>
> […]
>
> In determining whether measures taken by a State are arbitrary to the point of being shocking, a tribunal is bound to be sensitive to the real-world difficulties of government decision-making in the face of legitimate objectives that may pull in different directions. In the search for balance, and in the face of competing pressures, different arms of the same government may give expression to different and potentially conflicting priorities, and over time the direction taken may change.

1303. Clearly, the same deference should be applied in this case, where, as demonstrated, the Respondent issued Resolution 085 for a clearly discernible public purpose in line with the guidelines and developments in international law and its domestic laws.

1304. Finally, it bears recalling that, as reiterated by investment tribunals, FET provisions are not insurance policies against business risk or poor business decisions.[1654] Investors are expected to

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1653 *Red Eagle Exploration Limited v. Republic of Colombia* (ICSID Case No. ARB/18/12), Award, 28 February 2024 (**Exhibit RLA-223**), ¶¶ 308-309.

1654 *See*, *e.g.*, *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000 (**Exhibit CLA-107**), ¶ 64 (BITs "*are not insurance policies against bad business judgments*"); *Waste Management, Inc. v. United Mexican States*, NAFTA (UNCITRAL, ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (**Exhibit RLA-123**), ¶ 114 ("[A]*s investment tribunals have repeatedly said, 'Investment Treaties are not insurance policies against bad business judgments'*"); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (**Exhibit CLA-112**), ¶ 178 ("*BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen*"); *CMS Gas Transmission Company v. Argentine* (ICSID Case No. ARB/01/8), Award, 12 May 2005 (**Exhibit CLA-115**), ¶ 248 ("*The tribunal found that while the financial crisis 'had in itself a severe impact on the Claimant's business*', '*this impact must to some extent be attributed to the business risk the Claimant took on when investing in Argentina'*"); *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009 (**Exhibit CLA-138**), ¶ 217 (investor "*may not rely on a [BIT] as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework*"); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010 (**Exhibit CLA-144**), ¶ 124 ("*BITs 'are not insurance policies against bad*

carry out their own risk assessment prior to making an investment, and to accept responsibility for any losses out of their own business judgment, which includes regulatory risk. This is particularly the case in this instance where: (***i***) the Claimant's predecessors undertook a highly risky endeavour, (***ii***) in a venture that is highly speculative and most of the times nothing more than a chimera, as shown by Colombia's experts De Castro and Quadrant, (***iii***) with knowledge that they were operating in a highly – and increasingly – stringent legal framework, and (***iv***) where, by the Claimant's own admission, GMC failed properly to report the coordinates of the alleged finding, in violation to Colombian law.

3. Contrary to the Claimants' weak contentions, Colombia did not fail to offer adequate protection to its alleged investment

1305. The Claimant contends that Colombia has "*failed to provide SSA with FPS for its investment in Colombia*",[1655] allegedly "*fail*[ing] *to ensure the legal security of SSA's rights*" and to protect the *San José* shipwreck from being tampered with.[1656]

1306. The Claimant's submission is meritless as a matter of law and fact. In regard to the applicable standard, the Claimant distorts – once again – the scope of protection specifically negotiated and agreed by the Contracting States in Article 10.5 of the TPA (**a**). Moreover, on the facts, there is simply no basis for a tenable argument on FPS (**b**). For these reasons, the Claimant's contention that Colombia failed to provide full protection and security to its investment, in line with the MST, must fail.

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business judgments'"); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016 (**Exhibit RLA-175**), ¶ 591 (FET standard "*is not an insurance policy against bad business*").

1655 Amended Statement of Claim, ¶ 389.

1656 Amended Statement of Claim, ¶¶ 395-396.

a. Contrary to the Claimant's allegations, the FPS under the Treaty is limited to the MST and excludes commercial and legal security, stability of legal environment

1307. Contrary to the Claimant's allegation that *"*[t]*he FPS standard requires the host State to guarantee a legally stable and secure investment environment, both physical and economic"*,[1657] the Full Protection and Security provided under the MST is strictly restricted to police protection.

1308. **First**, the ordinary meaning of Article 10.5 of the TPA makes it plain that the host State must merely *"provide the level of police protection required under customary international law"*,[1658] but "*do*[es] *not require treatment in addition to or beyond"* that, and *"do*[es] *not create additional substantive rights".*[1659] That is: Article 10.5 is limited to investments (not investors, as shown), and merely concerns protection against physical damage or interference, not against any other kind of impairment of an investor's investment.

1309. ***Second***, even in connection with treaties with a far less stringent standard of FPS and without a similarly worded clarification by the Contracting States as the one referred above, investment tribunals have reiterated that the "*full protection and security*" standard is "*not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force*".[1660] As stated by the

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1657 Amended Statement of Claim, ¶ 391.

1658 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5.2.

1659 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CLA-1bis**), Article 10.5.2.

1660 *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 (**Exhibit CLA-60**), ¶ 484. *See also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exhibit CLA-151**), ¶ 622 ("*While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property*"); *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* (ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4), Award, 16 June 2010 (**Exhibit CLA-142**), Part IX, ¶¶ 9-12; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶¶ 632-635; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (**Exhibit CLA-128**), ¶ 668; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 (**Exhibit CLA-126**), ¶¶ 324-328; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19), Award, 30 October 2017 (**Exhibit CLA-44**), ¶¶ 8.44-8.46; *Indian*

tribunal *Crystallex v. Venezuela*, limiting the protections provided by the FPS standard to physical security "*better accords with the ordinary meaning of the terms*", whereas interpreting the FPS standard to extend to legal security would risk significant overlap with the FET standard, which in turn would contravene the *effet utile* principle.[1661]

1310. *A fortiori*, when the applicable treaty expressly confines FPS to physical protection, as does the TPA, the standard cannot be reasonably understood – let alone forced, as the Claimant attempts to do in this case – to extend to legal security.[1662]

1311. ***Third***, and as acknowledged by the Claimant, the standard of FPS is not one of strict or absolute liability, but rather one of due diligence.[1663] This is because, as noted by leading commentators, "*the focus* [of the standard] *is on the acts or omissions of the State in addressing the unrest that gives rise to the damage*".[1664]

Metals & Ferro Alloys Ltd v. Republic of Indonesia (PCA Case No. 2015-40), Final Award, 29 March 2019 (**Exhibit RLA-189**), ¶ 267 ("*Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security*"); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic* (SCC Case No. 088/2004), Partial ward, 27 March 2007 (**Exhibit RLA-130**), ¶¶ 201, 203 (the tribunal interpreted a provision providing for "*full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third state, whichever is more favorable to the investor concerned*", as applying only to physical violence against the investor, including mobs, insurgents and hired thugs).

1661 *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶¶ 632-634. In fact, this risk of overlap has materialized in the Claimant's submissions, giving the identity between a large portion of its FET and FPS claims (*See* Amended Statement of Claim, ¶ 395).

1662 *See*, *e.g.*, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (**Exhibit CLA-117**), ¶ 408 (the tribunal distinguished between the agreements limiting FPS to the level of police protection required under customary international law and those where the terms "full protection and security" are qualified by "full", in which case the standard could be extended beyond physical security).

1663 *See* Amended Statement of Claim, ¶ 391 ("[t]*o satisfy this standard, the host State is required to exercise* […] *due diligence*"). *See also* Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995) (**Exhibit RLA-87**), pp. 60–61 ("*The* [full protection and security] *standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability' which would render a host State liable for any destruction of the investment if caused by persons whose acts could not be attributed to the State*").

1664 Campbell McLachlan *et al.*, *International Investment Arbitration: Substantive Principles* (Oxford University Press, Second Edition, 2017) (**Exhibit RLA-2017**), ¶ 7.253.

1312. Notably, investment tribunals have held that the FPS standard only obliges the host State to exercise a level of due diligence that is reasonable under the specific circumstances:

> [T]he Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty.[1665]

1313. In this same vein, in *El Paso v. Argentina*, the tribunal held that a State need only take reasonable actions within its power to avoid harm to the investment:

> It should be emphasised that the obligation to show "due diligence" does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury.[1666]

1314. Moreover, it is well established that, when assessing the adequacy of a State's response under the FPS standard, the State's actions should be assessed in light of the circumstances of each case and the resources available to the State in question. As noted by two leading commentators:

> Although the host State is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host State in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified subjective standard – the host State must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic

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1665 *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001 (**Exhibit RLA-119**), ¶ 308.

1666 *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011 (**Exhibit CLA-146**), ¶ 523. *See also Cengiz Insaat Sanayi Ve Ticaret A.S. v. The State of Libya* (ICA Case No. 21537/ZF/AYZ), Final Award, 7 November 2018 (**Exhibit RLA-187)**, ¶ 406 (noting that "[r]*easonableness must be measured taking into consideration the State's means and resources and the general situation of the country*"); *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RLA-149**), ¶ 7.83.

> civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.[1667]

1315. ***Fourth***, the threshold for a breach of the FPS standard is extremely high, as confirmed by the Claimant's own authorities. Indeed, in *AMT v. Zaire*, "*disastrous consequences*"[1668] ensued from the attacks on the claimant's investment by the Zairian armed forces, which "*destroyed, damaged and carried away all the finished goods and almost all the raw materials and objects of value found on the premises*".[1669] As a result, the claimant's investment was "*permanently closed*".[1670] In *AAPL v. Sri Lanka*, the claimant's investment was destroyed while the area was under "*the exclusive control of the governmental security force*", which was combatting insurgents.[1671]

1316. In sum, the MST of FPS standard in Article 10.5 of the TPA provides protection only to the physical integrity of the Claimant's alleged investment. Further, and in any event, the standard is one of due diligence and carries a very high threshold. As demonstrated below, the Claimant has not shown that Colombia's acts meet this high threshold. Much to the contrary, if anything, Colombia has ensured the protection of the *San José* – which in any event was not found by the Claimant or its predecessors.

b. In any event, even if the FPS were to have the extended scope proposed by the Claimant, *quod non*, the Claimant's allegation that Colombia has violated the FPS protection fails

1317. The Claimant argues that "Colombia has failed to protect SSA and its investment in Colombia",[1672] because it allegedly: (**i**) *"failed to ensure the legal security of SSA's rights in the San José*

1667 Andrew Newcombe and Lluis Paradell, in *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009) (**Exhibit RLA-88**), p. 310 (emphasis added).

1668 *American Manufacturing & Trading, Inc. v Republic of Zaire* (ICSID Case No. ARB/93/1), Award, 21 February 1997 (**Exhibit CLA-103**), ¶ 6.08. *See* Amended Statement of Claim, fn. 851.

1669 *American Manufacturing & Trading, Inc. v Republic of Zaire* (ICSID Case No. ARB/93/1), Award, 21 February 1997 (**Exhibit CLA-103**), ¶ 3.04.

1670 *American Manufacturing & Trading, Inc. v Republic of Zaire* (ICSID Case No. ARB/93/1), Award, 21 February 1997 (**Exhibit CLA-103**), ¶ 3.04. *See* Amended Statement of Claim, fn. 852.

1671 *Asian Agricultural Products Ltd v. Sri Lanka* (ICSID Case No. ARB/87/3), Final Award, 27 June 1990 (**Exhibit CLA-101**), ¶ 85.

1672 Amended Statement of Claim, ¶ 394.

shipwreck" [1673] and (**ii**) allowed the shipwreck site to be tampered with. [1674] The Claimant's allegations hold no water.

1318. ***First***, as is evident, the Claimant simply rehashes its argument for a breach of FET as an FPS violation, accusing Colombia of having acted "*in a manner that was contrary to SSA's legitimate expectations, arbitrary and unreasonable and lacked due process and transparency*." [1675] The Respondent rebutted at length each of these allegations above and to avoid repetition it refers to its rebuttal above.

1319. **Second**, the Claimant's allegations *that "the shipwreck site has been tampered with"* and that Colombia breached its FPS obligations under the MST "[b]*y reportedly allowing this conduct to take place despite its supposed control over the site"* are plainly false.[1676] Mr. Morris has provided no convincing evidence of anomalies compatible with tampering or looting activities. Moreover, even if the "scours and depressions" alleged by Mr. Morris were to exist: as explained, FPS imposes a standard of due diligence, not strict liability. It is unclear how the Claimant expects that the Respondent could have exercised due diligence to protect a shipwreck of whose location it was unaware of until 2015.

* * *

1320. In sum, the Claimant's contentions that Colombia has failed to observe its obligations under the MST clause in the TPA are based on an interpretation of Article 10.5 of the TPA that is contrary to its ordinary meaning, has no basis on the law, is incorrect on the facts and altogether incapable of meeting the legal standard for a violation of the MST standard under the TPA.

VI. THE CLAIMANT'S ALLEGED DAMAGES ARE UNWARRANTED AND, IN ANY EVENT, COMPLETELY SPECULATIVE

1321. In its Amended Statement of Claim, the Claimant starts its submission on damages recalling that the ruling in *Chorzów Factory* to claim that reparation for an international wrongful act must be integral.

1673 Amended Statement of Claim, ¶ 395.

1674 Amended Statement of Claim, ¶ 396.

1675 Amended Statement of Claim, ¶ 395.

1676 Amended Statement of Claim, ¶ 396.

1322. It then requests the Tribunal to award it *"monetary damages and any applicable interest"*, including *"in lieu of restitution"*[1677] for Colombia's alleged breaches of Articles 10.5 and 10.7 of the TPA. It also requests pre- and post-interest award and costs.[1678] The Claimant estimates that its alleged loss to be between US$ 3.5 billion and US$ 9.1 billion, as of 14 June 2024[1679].

1323. Colombia has demonstrated in the previous sections that, contrary to the Claimant's unwarranted contentions, it has not committed any wrongful acts. Any losses the Claimant might have suffered do not result from Colombia's Resolution 085, as the resolution concerns the *Galeon San José*, which the Claimant did not find.

1324. To recall, determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, *i.e*., damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage measured in an amount of money.

1325. Claimant refers to the standard of full reparation but does not say a single word concerning the requirement of causation.

1326. As a prerequisite for compensation under international law, a claimant must prove, based on persuasive evidence, that the harm suffered by it is the logical and necessary direct consequence of the respondent State's unlawful conduct at issue. This proposition is based on customary international law principles of State responsibility[1680] and has been repeatedly affirmed by investment tribunals.[1681] As precisely explained by the *Archer Daniels v. Mexico* tribunal:

1677 Claimant's Amendment Statement of Claim ¶ 397.

1678 Claimant's Amendment Statement of Claim ¶ 397.

1679 Claimant's Amendment Statement of Claim ¶ 416.

1680 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *INTERNATIONAL* LAW COMMISSION (2001) (**Exhibit CLA-108**), Articles 31, 36(1).

1681 *Nordzucker AG v. The Republic of Poland* (UNCITRAL Case), Third Partial and Final Award, 23 November 2009 (**Exhibit RLA-231),** ¶ 64 (holding that "[t]*he damages demonstrated by Nordzucker therefore have no causal link with the breach which the Arbitral Tribunal decided in its second Partial Award to have been committed by Poland*."). *See also S.D. Myers, Inc. v Government of Canada* (UNCITRAL Case),

> Determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, i.e., damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money.[1682]

1327. Accordingly, it is the responsibility of tribunals to assess, based on the evidence presented by the claimant, whether the wrongful act in question directly caused the loss claimed. Mere assertions that the loss claimed has resulted from the breach are not sufficient. As the tribunal in *UPS v. Government of Canada* explained, "*a claimant must show* […] *that it has persuasive evidence of damage from the actions alleged to constitute breaches of* [the treaty] *obligations*."[1683]

1328. In this case, the Claimant has failed to demonstrate that the harm for which it seeks compensation for was directly caused by the alleged specific wrongful acts of Colombia. SSA has not even attempted to prove causation. Instead, SSA has merely asserted, without supporting evidence, that but for Colombia's alleged breaches, SSA would have been entitled to 50% of the value of the "treasure" from the *Galeón San José*. Any damage or loss it sustains cannot have resulted from Resolution 085, simply because the Claimant did not have any rights to the *San José*; it merely had some property rights to an alleged finding in the area

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Partial Award, November 13, 2000 (**Exhibit CLA-12**), ¶ 316 (holding that "*the economic losses claimed by* [the investor] *must be proved to be those that have arisen from a breach of the* [treaty]."). *See also Biwater Gauff (Tanzania) Limited v. Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 (**Exhibit CLA-127**), ¶ 798 (holding that "*in all the circumstances that the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005. In other words, none of the Republic's violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place.*"). *See also Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016 (**Exhibit RLA-232**), ¶ 190.

1682 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5), Award, 10 July 2008 (**Exhibit RLA-230**), ¶ 282. *See also S.D. Myers, Inc. v Government of Canada* (UNCITRAL Case), Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 316; *Metalclad Corporation v The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000 (**Exhibit CLA-106**) ¶ 115.

1683 *United Parcel Service of America Inc. v. Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits, 24 May 2017 (**Exhibit RLA-233**), ¶ 38 (emphasis added). *See also S.D. Myers, Inc. v Government of Canada* (UNCITRAL Case), Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 316.

at the Reported 1982 Coordinates. There could not be a more clear case where an act of the State could not be deemed the cause of a Claimant's claim.

1329. Crucially, the Claimant has failed to prove the quantum of its alleged loss,[1684] with a degree of certainty.[1685]

1330. Despite relying on *Chorzów*, the Claimant conveniently glosses over a crucial aspect of the ruling in *Chorzów*, namely that under international law, damages that are uncertain cannot be compensated. To be recoverable, the damages claimed, "*must be neither speculative nor too remote*".[1686] The Permanent Court of International Justice clearly articulated this rule in the landmark Chorzów Factory case, where it ruled that:

> In these circumstances, the Court can only observe that the damage alleged to have resulted from completion is insufficiently proved. Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.[1687]

1684 *S.D. Myers, Inc. v Government of Canada* (UNCITRAL Case), Partial Award, 13 November 2000, (**Exhibit CLA-12**), ¶ 316 (holding that "*the burden is on* [the claimant] *to prove the quantum of the losses in respect of which it puts forward its claims*."). *See e.g.*, *9REN Holding S.Á.R.L. v. Kingdom of Spain* (ICSID Case No. ARB/15/15), Award, 31 May 2019 (**Exhibit RLA-117**), ¶ 405 (holding that "[i]*n this respect, the Claimant bears the legal burden of proving its case on compensation. This general principle is well established under international law: onus probandi actori incumbit. If and to the extent that the Claimant does not prove its case on the assessment of compensation, it follows that its claim for compensation must be reduced or, where no loss is established, altogether dismissed by the Tribunal.*"). *See also The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013 (**Exhibit RLA-124**), ¶ 190 (holding that "*it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms*").

1685 *See Amoco International Finance Corp. v. Islamic Republic of Iran* (Iran U.S. Claims Trib, Case No. 56, Chamber 3), Award No. 310-56-3, Partial Award, 14 July 1987 (**Exhibit RLA-113**. See also *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Award, 25 July 2007 (**Exhibit CLA-123**), ¶ 51 (holding that "[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements."). See also *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3), Award, 16 June 2010 (**Exhibit CLA-142)**, ¶ 12.56 (holding that "if that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.").

1686 *S.D. Myers, Inc. v Government of Canada* (NAFTA Arbitration under UNCITRAL Rules), Second Partial Award (Damages), 21 October 2002 (**Exhibit RLA-164**), ¶ 173.

1687 *Case Concerning the Factory at Chorzów (Germany v. Poland)* (PCIJ Series A No. 17), Judgment, 13 September 1928 (**Exhibit CLA-99**), pp. 56-57.

1331. Numerous tribunals have confirmed that in order for "*damages to be recoverable* [they] *must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss*,"[1688] and that "one of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."[1689]

1332. This principle has been repeatedly confirmed by other investment tribunals. For example, in *Khan Resources v. Mongolia*, the tribunal held that:

> The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain.[1690]

1333. In the words of the *Crystallex* tribunal, the standard of proof is high – requiring a showing of certainty of the existence of damages.[1691]

1688 *Rudloff Case (US v. Venezuela),* IX RIAA 255, 1903-1905 (**Exhibit RLA-177**), p. 258.

1689 *Amoco International Finance Corp. v. Islamic Republic of Iran* (Iran U.S. Claims Trib, Case No. 56, Chamber 3), Award No. 310-56-3, Partial Award, 14 July 1987 (**Exhibit RLA-113**), ¶ 238 (emphasis added). *See also LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Award, 25 July 2007 (**Exhibit CLA-123**), ¶ 51 (holding that "[t]*ribunals have been reluctant to provide compensation for claims with inherently speculative elements*."). *See also Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3), Award, 16 June 2010 (**Exhibit CLA-142**), ¶ 12.56 (holding that "*if that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent*.").

1690 *Khan Resources Inc., et al. v. Mongolia* (PCA Case. No. 2011-09), Award on the Merits, 2 March 2015 (**Exhibit RLA-196**) ¶ 375 (emphasis added). *See also Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014 (**Exhibit CLA-151**), ¶¶ 685-686 (holding that "[c]*laimant bears the burden of proving its claimed damages* […] *the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely "possible*")*. See also Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Award, 17 December 2015 (**Exhibit RLA-229**), ¶ 175 (holding that "*the burden of proof falls on the Claimant to show it suffered loss. The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain*"). *See also Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN 3467), Final Award, 1 July 2004 (**Exhibit CLA-113**), ¶ 210 (holding that "*contingent and undeterminate damage cannot be awarded*"). *See also Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008 (**Exhibit RLA-230**), ¶ 39 (holding that "*the tribunal must avoid speculative benefits in its damages calculation*").

1691 *Crystallex International Corporation v The Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CLA-157**), ¶ 867.

1334. Thus, for a claim for damages to succeed, the damages must exist with certainty and cannot be speculative. That is the standard that the claimant bears the burden of proving, as held by investment tribunals.

1335. The aforementioned principle has also been consistently applied by investment tribunals. For example, in *S.D. Myers v. Canada*, the tribunal confirmed that "*the burden is on* [the claimant] *to prove the quantum of the losses in respect of which it puts forward its claims*."[1692]

A. SSA'S DAMAGES CLAIM IS SPECTACULARLY SPECULATIVE

1336. In assessing Claimant's alleged loss, the Claimant relies on a valuation report prepared by Noel Matthews ("**FTI Report**") of FTI Consulting, Inc. group ("**FTI**"). The FTI Report asserts that the loss can be calculated based on the market value of the Claimant's investment, had the expropriation not occurred.[1693] This methodology is one of the major flaws in Claimant's claim and FTI's approach to valuation. As explained by the Respondent's Legal Expert Daniel Flores in Quadrant's Report, "[i]*t is not possible to determine any fair market value of the San José items before they are recovered*".[1694]

1337. FTI's estimated damages range from US$ 3.5-9.1 billion. According to Quadrant's Report, this is problematic for two reasons.

1338. ***First***, the multi-billion range of damages claimed by SSA fails to meet the definition of fair market value, as it does not provide a precise amount but rather represents speculative calculations with an estimated error margin of 6 million dollars.[1695]

1339. ***Second***, it is an opinion based on insufficient and non-existent information, as there is simply not enough data to define an amount with reasonable certainty.[1696] Additionally, the calculation relies on an excessive number of assumptions, which significantly undermine any attempt to establish the fair market value of the Claimant's allegedly expropriated right to 50 % of the *Galeón*.

1692 *S.D. Myers, Inc. v Government of Canada* (NAFTA Arbitration under UNCITRAL Rules), Partial Award, 13 November 2000 (**Exhibit CLA-12**), ¶ 316.

1693 Expert Report of FTI (**CER-4 [FTI]**), ¶ 3.4.

1694 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 26.

1695 Expert Report of FTI (**CER-4 [FTI]**), ¶ 4.20.

1696 Expert Report of FTI (**CER-4 [FTI]**), ¶ 4.6.

1340. As described by damages expert Daniel Flores, "*Claimant's experts' valuation of the Claim is speculation on top of speculation: what could be there, which everyone agrees is unknown, and what it could be sold for, which Claimant's experts speculate on, while agreeing that such a sale would be 'unprecedented.'*"[1697] In fact, FTI acknowledges the foregoing, as they indicate in their report that "*there is inevitable uncertainty regarding the exact contents on the ship and, therefore, the value of those contents*".[1698] Without concrete knowledge of the ship's content, any valuation is a mere guess, as there is always a possibility that little or even nothing be recovered.

1341. As per the Claimant, the Morris Report concludes that it is *"more likely than not"* that SSA locates the *Galeón*.[1699] While "*more likely that not"* suggests a probability greater than 50%, it does not imply certainty. Despite this lack of certainty, FTI confidently assumes that 100% of the items at the shipwreck site of the *San José* would be recovered.[1700]

1342. In summary, FTI simply relies on Dr. Hebb's estimates of the likely content of the *Galeón San José* and Mr. Forster's current valuation of the contents and assumes, on instruction, that 100% of this content would be classified as treasure and would be recovered and sold.[1701] FTI takes all of these assumptions as certain and makes no adjustment to the value. However, this approach is flawed. Colombia has demonstrated that SSA and its predecessors did not find the *Galeón San José* and, even if they had, the content and conditions of the *Galeón* still remain unknown. As such, it is not possible to determine a fair market value for the items before their recovery. [1702]

1. SSA's claim for damages is spectacularly speculative

1343. Concretely, the FTI Report relies on the following expert reports presented by SSA: (*i*) the expert *report* of Mr. Jeffrey D Morris, a marine archaeologist ("**Morris' Report**"), (*ii*) the expert report of the historian Dr. David Hebb ("**Hebb's Report**"), and (*iii*) the expert report of Mr. John Foster ("**Foster's Report**").

1697 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 7.

1698 Expert Report of FTI (**CER-4 [FTI]**), ¶ 4.6.

1699 Amended Statement of Claim, ¶ 13(e).

1700 Expert Report of FTI (**CER-4 [FTI]**), ¶ 1.15(3).

1701 Expert Report of FTI (**CER-4 [FTI]**), ¶ 1.15.

1702 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 26.

1344. As outlined in Quadrant's Report, the Claimant's damages claim is based on the opinion of multiple experts. However, none of these experts provide concrete evidence supporting SSA's statements.[1703] Despite relying on a group of experts, the claimed damages range over US$ 5.7 billion, highlighting the lack of clarity and consistency among the experts over the subject matter.[1704] This variance shows their inability to determine the alleged damages with reasonable certainty.

1345. FTI's values are largely derived from Mr. Foster's calculations.[1705] Quadrant's Report establishes that Foster's estimate of US$ 3.7 to 9.4 billion for 50% of the items of the *Galeón San José* is based on oversimplified calculations: an estimated number of items supposedly in the *Galeón*, multiplied by an estimated value per item. However, these estimates are speculative, unsupported, and unreliable as to date. It is unknown (*i*) what was aboard the *San José*; (*ii*) how much has survived, and how much of it can even be found; (*iii*) if found, how much can be recovered and in what condition; and (*iv*) how many of the recovered items can be sold at auctions.[1706] Evidence of these circumstances is shown below:

1346. ***First***, regarding the contents of the *Galeón*, there is no reliable method to determine what was aboard the *Galeón* or how many items it carried, with the exception of the 64 bronze cannons.[1707] Dr. Hebb acknowledges that since there is no manifest of the *San José* "*no one knows exactly what the San José had aboard her when she sank*". [1708] Despite this acknowledgement, he estimates the *Galeón* contents based on the weight of historical evidence, knowledge of what was on other Spanish treasure ships, and modern photographs released by Colombia.[1709] As stated in Quadrant's Report, this is not enough to determine the number of items aboard the *San José* with reasonable certainty. Dr. Hebb's findings are based on a series of estimates that have a dramatic effect on the calculations.[1710]

1703 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), Section III.B.

1704 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 36.

1705 Expert Report of FTI (**CER-4 [FTI]**), ¶ 4.12, Table 4-1; ¶ 4.20, Table 4-2.

1706 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 27.

1707 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶¶ 28-29.

1708 Expert Report of Mr. D. Hebb (**CER-2 [Hebb]**), ¶ 127. *See also* Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 26; Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶ 3.7.

1709 Expert Report of Mr. D. Hebb (**CER-2 [Hebb]**), ¶ 127. *See also* Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 26.

1710 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 28-29.

1347. ***Second***, as emphasized in Quadrant's Report, Mr. Foster failed to distinguish that the claim should be based on 50% of what might be recovered from the *Galeón*, rather than 50% of everything that was aboard the *Galeón San José*. Mr. Foster assumes that half of all the gold that might have been aboard the *San José* is part of the claim,[1711] without accounting for the possibility that much of it may never recovered or found.[1712] Importantly, in addition to the significant flaws in FTI's assumptions identified in Quadrant's Report, SSA's expert also makes an inexcusable inference: the provided amount is based on the presumption that all recoverable items can be classified as treasure rather than submerged cultural heritage.

1348. ***Third***, for other items, such as emeralds, Mr. Foster lacks evidence to assert that they were aboard the San José. Consequently, he relies on recoveries from different shipwrecks to support his conclusion. This is simply unacceptable, as they provide no justifications for why these different shipwrecks should be comparable to the *San José*.[1713]

1349. ***Fourth***, as with any other historic wreck, it is uncertain how many items survived and in what condition they exist today. Mr. Foster acknowledges that: "*Condition will be a primary factor in the sale value of any object recovered from the San José. Unfortunately, without being able to examine or even view the objects, their condition is uncertain*."[1714] Despite these uncertainties, Mr. Foster continues to assume that the items found will be in excellent condition[1715] and may be sold for their full price.

1350. ***Fifth***, it is impossible to know how much can be recovered or by what means. Nevertheless, FTI was instructed to assume not only that 100% of the items found at the shipwreck site could be recovered, but also that this recovery could be completed in three months.[1716] In this regard, Mr. Del Cairo points out that experience with similar projects, particularly those conducted in shallow waters, shows that proposing a recovery period of 90 days is unrealistic, unless key scientific aspects are deliberately disregarded.[1717]

1711 Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶¶ 5.2-5.8.

1712 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 30.

1713 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 31.

1714 Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶ 3.10.

1715 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 32.

1716 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 33.

1717 Expert Report of C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 269-277.

1351. ***Sixth,*** the values of the items provided by Mr. Foster are highly speculative. For most of the items, the estimates are only supported on "*consultations with specialists in certain areas*."[1718] Most of these specialists have not produced any documents to verify Mr. Foster's estimates.[1719]

1352. ***Finally***, with respect to the auction costs, Mr. Foster states that without "*knowing precisely what is to be sold from the cargo of the San José, it is difficult to estimate commission rates*."[1720] Despite this, he provides a 1-2% estimate without substantial and concrete evidence.[1721]

1353. In summary, as explained in Quadrant's Report, the Claimant's claim for damages is based on the following six layers of speculation:

1354. ***First***, the experts assume the presence of emeralds and presentation coins "*in spite of a complete lack of evidence, there would be <u>any</u> emeralds or presentation coins aboard, let alone at the quantity and prices that Claimant's experts assume.*"[1722]

1355. With respect to the presentation coins, Quadrant concluded that:

> <u>[T]here is no support for the presence of any presentation coins on the San José</u>. If there were, Mr. Foster's prices are unrealistically high, even before considering the negative effect that the introduction of even a fraction of the presentation coins that Mr. Foster assumes would have on by reducing the prices.[1723]

1356. With respect to the quantity, Mr. Foster concludes that he "would expect" there to be 1,000 presentation coins on the *San José*.[1724] However, this conclusion is unsupported by any evidence. Instead, Mr. Foster reached this estimate based on the speculation that, over a span of five years, two mints would produce one 4-escudos and one 8-escudos presentation coins for fifty dignitaries.[1725] Daniel Sedwick, the auctioneer upon whom Mr. Foster relies, sustains that only

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1718 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 34.

1719 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 34.

1720 Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶¶ 4.20, 4.22. *See also* Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 34.

1721 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 35.

1722 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 8.

1723 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 106 (emphasis added).

1724 Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶ 5.32.

1725 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 98.

41 8-escudos presentation coins are known to exist, with just nine dating from before the *Galeón*.[1726] Additionally, there are no examples of presentation coins from Peru, from where the coinage on the *San José* came from.[1727] Regarding the price, Mr. Foster based his valuation on two sales,[1728] which according to Quadrant, are overstated by 20%.[1729] A broad review of auction data shows that prices are generally lower,[1730] with coins being valued almost entirely for their the quality and rarity.[1731] As Quadrant concludes, "*it is essential to know the quality of the coins before applying a value.*"[1732]

1357. As to the emeralds, the claim includes an estimated value between US$ 300 million and US$ 2,250 million for 50% of the 30,000 emeralds that Mr. Foster estimates would be recovered from the *San José,* based on consultation with Ms. Joanna Hardy.[1733] However, Ms. Hardy does not provide any documentation to support her lower and upper price estimates.[1734] She acknowledges that determining the value of any emerald before the recovery is speculative and her valuation is given only as *"subject to physical inspection",*[1735] which is impossible for potential emeralds at the bottom of the sea.[1736] Furthermore, Mr. Foster reduced Ms. Hardy's lower value by 75% due to uncertainties about the condition of the emeralds.[1737]

1358. In terms of quantity, Mr. Foster's estimates are based on the 6,000 emeralds recovered from the Atocha, concluding that this suggests a total 30,000 emeralds aboard the *San José*.[1738] Additionally, this estimate assumes that there were 162 emeralds per passenger.[1739] This

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1726 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 98.

1727 Expert Report of Quadrant Economics (**RER-7**) **[Quadrant]**, ¶ 99.

1728 Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶¶ 5.37-5.39.

1729 Expert Report of Quadrant Economics (**RER-7 [Quadrant**), ¶¶ 97, 102.

1730 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 107.

1731 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 101.

1732 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 103.

1733 Expert Report of FTI (**CER-4 [FTI]**), Table 4-1; Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶¶ 8.6, 8.17.

1734 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 117.

1735 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 120.

1736 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 120.

1737 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 116.

1738 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 108.

1739 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 111.

calculation is wrong because it does not provide any rationale or support for dividing the emeralds by person.[1740] Mr. Foster adjusts his per passenger calculation arbitrarily.[1741] It is for this reason that Quadrant's report states that "*there is no evidence of any emeralds aboard the San José and, if there were, Mr. Foster's values are unrealistic and unreliable*."[1742]

1359. ***Second***, there is speculation concerning "*the peso value of the gold and silver aboard the San José*."[1743] There is significant speculation regarding the peso value of the gold and silver aboard the *San José*, which constitutes the bulk of Claimant's experts' valuation – up to US$ 6.9 billion.[1744] As explained by Quadrant, Mr. Foster's support for this figure is based solely only on a 1981 letter from Dr. Lyon, who was employed by Claimant's Alleged Predecessors.[1745] However, Professor Lane explains that a review of historical documents indicates that the amount of gold and silver aboard would have been less than half of the estimated value.[1746]

1360. ***Third***, the Claimant's experts' reports rest on the "*assumption that the San José would have more gold than silver aboard*."[1747] Since gold pesos are much more valuable than silver pesos,[1748] the Claimant assumes that the vast majority – 71% – of the pesos would be gold.[1749] However, the evidence suggests that, like other shipwrecks, the *San José* would have had predominantly silver aboard. Professor Lane explains that the assumptions about the quantity of gold on the San José are unrealistic,[1750] and that the majority of the pesos would have been silver – not gold.[1751] This is consistent with all known shipwrecks, which predominantly contain silver. For example, as explained by Quadrant, *Nuestra Señora de las Mercedes* (1786) contained almost

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1740 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 112.

1741 Expert Report of Quadrant Economics (**RER-7[Quadrant]**), ¶ 114.

1742 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 107 (emphasis added).

1743 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 9.

1744 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 9.

1745 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶¶ 41-44, Figure 3.

1746 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 283-287.

1747 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 10.

1748 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 10.

1749 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 43.

1750 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 15, 16, 247-249.

1751 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 15, 16, 118, 127-140.

entirely silver.[1752] Additionally, a review of auction data for shipwreck bullion over the past decade shows a 26% gold ratio.[1753]

1361. Moreover, although Dr. Hebb acknowledges that the gold ratio on Spanish galleons is typically low, he estimates that the gold ratio would fall in wide range of 43-70%.[1754] As explained by Quadrant, even Dr. Hebb's low-end estimate is too high, and the 71% gold ratio chosen by Mr. Foster is entirely inconsistent with other estimates of gold and silver production in South America at the time the San José sank.[1755]

1362. ***Fourth***, an assumption is based about "*the collector value of the gold and silver aboard the San José*". This assumption is reflected in the fact that the total value claimed for the gold and silver in the damages claim is twenty times the metal value of the gold and silver alone.[1756]

1363. With respect to gold coins, the majority of Claimant's experts' valuation is based on their collector value, with estimates ranging from 12 to 27 times the metal content or melt value.[1757] Mr. Foster cites the auction price of nine 4- and 8-escudos gold coins, with a price of US$ 8-35 thousand each.[1758] He assumes that the coins from the *San José* would sell for more than these coins because of the higher quality[1759] – despite images showing the *San José* coins to be of very poor quality, Mr. Foster concludes that all of the 8 escudos of the San José would sell for up to US$ 50,000 – 43% more than a coin that is already the finest of its year. According to Quadrant, this assumption is unrealistic, particularly when applied to 100,000 coins.[1760] Data provided by Quadrant shows that in the case of 8 escudos coins, "*only a few known examples can sell for over US$ 30 thousand and in years with several dozen examples they tend to sell for about half that, around US$ 15 thousand.*"[1761]

1752 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 49.

1753 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**)), ¶ 49.

1754 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**) ¶¶ 49-50.

1755 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶¶ 50-51.

1756 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 11.

1757 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 59.

1758 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 61.

1759 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 62.

1760 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 63.

1761 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 65.

1364. Regarding silver coins, most of the value estimated by Mr. Foster is for the collector value. Claimant's experts assume that 50,000 of the "finest" silver coins from the *San José* would be auctioned at a premium price, between US$ 2,550 - 6,360 each.[1762] However, according to Quadrant's Report, Mr. Foster failed to consider the market data on silver coins, leading to inflated calculations.[1763] For the sale price, Mr. Foster relies on Mr. Christopher Webb, who did not provide any supporting documentation for his opinion and does not appear as an expert in this arbitration.[1764]

1365. In contrast to Mr. Foster's approach, Quadrant's report cites data on Sedwick's May 2024 semiannual auction, which featured about 400 shipwreck silver 8 reales.[1765] From that information, it is evident that over 70% of these coins sold for US$ 1,000 or less and only 20 coins sold within Mr. Foster's range of US$ 2,550 - 6,360 per coin.[1766] In fact, contrary to Mr. Foster's assumptions, even without corrosion, crudely struck coins sell at around US$ 500.[1767]

1366. Regarding the gold and silver bullion, the Claimant's experts assert that bullion constitutes approximately 40% of the peso value of the gold and silver allegedly on the *San José*.[1768] As explained by Quadrant, Claimant's experts overstate the quantity and value of the bullion.[1769] Specifically, Mr. Foster overstates the amount of gold bullion abroad the *San José* by 8%, even if his assumptions about its peso's value were accurate.[1770] This same is true for the silver bullion, which Mr. Foster overstates by 7%.[1771]

1367. ***Fifth,*** there is an assumption "*that auction prices today would represent the prices for the coins that might be recovered from the San José*."[1772] The Claimant's experts engage in speculation by assuming that current auction prices for coins would apply to coins that maybe recovered from

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1762 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 68.

1763 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 83-89.

1764 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶¶ 69-72.

1765 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 73-75.

1766 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 75.

1767 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 76.

1768 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 81.

1769 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶¶ 81-89.

1770 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 84.

1771 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 96.

1772 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 12.

the *San José*.[1773] Mr. Foster's premium prices are based on auction sales for collectible coins that are valued for their rarity. As explained by Quadrant, the main error of this approach is that it mixes two worlds. Mr. Foster uses prices for coins that are rare and highly valued by collectors today, and then applies those prices to a scenario where the coins would no longer be rare, given the large quantities that he assumes will be recovered.[1774] Mr. Foster makes no adjustment to account for the market impact of introducing such a high volume of coins.

1368. As explained by Quadrant, shipwreck coins can command a premium over non-shipwreck coins. However, the ability to sell a large number of coins assumes the existence of a large market for collectables, which does not currently exist. In fact, most of these coins would sell closer to the value of their metal content alone.[1775] Additionally, the overall coin market is not large enough to absorb such high volume. For example, Heritage Auctions sells around US$ 400 million in coins annually, of which only about US$ 100 million are world and ancient coins.[1776]

1369. Additionally, gold and silver coins currently command high prices and are expensive because they are rare. The data for these coins shows that their quantity is limited. After the introduction of hundreds of thousands of coins, these coins would no longer be rare.[1777] In Quadrant's review of auction data (which contains about 400 shipwreck silver 8 reales),[1778] over 70% of these coins sold for US$ 1,000 or less. Only 20 coins sold within Mr. Foster's range of US$ 2,550 to 6,360 per coin.[1779] Thus, Mr. Foster's prices for silver coins are unrealistically high, even at current market prices. The introduction of so many coins would certainly cause a dramatic reduction in prices.

1370. ***Sixth,*** that "*the items would be recovered in the condition that Claimant's experts assume,*"[1780] with many items expected to be in "excellent" condition.[1781] For example, Mr. Foster assumes that any coin without corrosion (like he assumes the silver coins from the *San José* to be) would obtain a high price. As explained by Quadrant Report, this is not correct. Even without corrosion,

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1773 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 12.

1774 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 12.

1775 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 53.

1776 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 54.

1777 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 8.

1778 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶¶ 73-79.

1779 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 77.

1780 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 13.

1781 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 13. *See also* Expert Report of Mr. J. Foster (**CER-3 [Foster]**), ¶¶ 5.25, 5.34, 6.4, 8.7, 10.5.

crudely struck coins sell at around US$ 500, [1782] and coins with a more complete strike, or rare types, could be sold for around US$ 2,000 - 2,500.[1783] In fact, very few shipwreck silver 8 reales reach even the lower end of Mr. Foster's price range of US$ 2,550 - 6,360. For example, at the Sedwick May 2024 auction, only 20 coins, or 5%, of all shipwreck silver 8 reales sold for a price of US$ 2,500 or higher.[1784]

1371. There is no evidence to suggest that coins from the *San José* would be especially well struck. Additionally, the data shows that the 50,000 coins that the Claimant's experts assume would be sold would lead to a massive influx of coins. [1785] This large supply would almost certainly cause the market prices to crash.[1786]

1372. In sum, Claimant's speculation is so exaggerated that one of Quadrants conclusions reads:

> Excluding emeralds and presentation coins would reduce the Claim by about 25%. Reducing the peso value by half would reduce the Claim by about 40%. Removing the collector value of gold and silver would reduce the Claim by 70%. All of this is even before considering the uncertainty surrounding the cost and time to recover items from the San José.[1787]

1373. But SSA's damages claims are not only based on assumptions regarding valuation but also suffer from flaws in the historical and archaeological assessment of its alleged losses, for at least, the following reasons:

1374. ***First***, the Claimant has inflated its claim for damages by relying on a limited and convenient assessment of historical evidence. Both Mr. Foster's appraisal and FTI's estimation of the alleged losses rely heavily on Dr. Hebb's analysis of the likely value of the known contents aboard the *San José* at the time of its sinking, which he categorizes as "conservative" [1788] and "reasonable."[1789] As Dr. Lane has indicated, Dr. Hebb's proposed values (between 7 and 9 million

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1782 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 76, Figure 8.

1783 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 77.

1784 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 78.

1785 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 79.

1786 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 79.

1787 Expert Report of Quadrant Economics (**RER-7 [Quadrant]**), ¶ 16.

1788 Expert Report of Mr. D. Hebb (**CER-2 [Hebb]**), ¶ 143.

1789 Expert Report of Mr. D. Hebb (**CER-2 [Hebb]**), ¶ 152.

pesos)[1790] rest on circumstantial evidence and seem to be a deliberate overestimation. Notably, Dr. Lane's analysis of Hebb's sources, combined with the study of additional archival sources and relevant information concerning the production of precious metals in the Spanish colonies at the time, led him to conclude that Hebb's hypothesis is fundamentally incorrect for various reasons. Among them, the following stand out:

(**i**.) There is no evidence to support the claim that gold production was particularly high at the time.[1791]

(**ii**.) The gold to silver proportion of the cargo sent from Lima to Panama did not reflect a higher amount of gold.[1792] Dr. Hebb's interpretation of the sources on which he bases this particular estimation stretches from an inadequate reading of relevant documents.[1793]

(**iii**.) Given that emeralds paid to the King as taxes were put aboard the fleets in Cartagena, it would not be reasonable to assume that the *San José* was loaded with a significant number of emeralds in Portobello. Thus, the likelihood of raw emeralds being put aboard the *San José* in the amount stated by Mr. Foster is very low.[1794]

(**iv**.) Hebb's assessment of the unregistered cargo is not trustworthy, as it is founded in a speculative exercise which ignores the limited incentives for smugglers, among other factors.[1795]

1375. In short, Dr. Hebb's inadequate reading of the sources help him and Mr. Foster in reaching higher estimates than those which could be reasonably inferred from historical evidence. This exercise, as Dr. Lane notes, is nothing more than a house of cards based on speculation.[1796] In addition to the clear fact that it is currently impossible to determine exactly what the *San José* carried when it sank, the inaccuracies in Hebb's historical assessment indicate that Claimant's calculation of its

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1790 Expert Report of Mr. D. Hebb (**CER-2 [Hebb]**), ¶¶ 10(iv), 152.

1791 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 15, 106, 108, 122.

1792 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 16, 247-249, 282.

1793 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 16, 60, 259, 290.

1794 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶ 142.

1795 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶¶ 94-95, 312-313 and Section XI.

1796 Expert Report of Dr. K. Lane (**RER-2 [Lane]**), ¶ 239.

alleged losses exploits this intrinsic uncertainty to inflate the sum that it has sought as compensation. SSA's claim rises from absolute speculation to egregious overestimation.

1376. ***Second***, Mr. Morris's proposal for a salvage operation presents an unrealistic, uninformed, and simply irresponsible schedule, which cannot be seriously considered. As a result, Claimant's estimate of the costs associated with the salvage operation is grossly underestimated, once again inflating its alleged losses without justification.

1377. Claimant also relies on Mr. Morris's report to provide the Tribunal with an assessment of the costs it would incur if granted the opportunity to carry out a salvage operation focused solely on retrieving the contents of the San José for marketing and sale.[1797] Mr. Morris estimates these costs at US$ 84 Million.[1798] Moreover, Mr. Matthews subtracts these costs from his assessment of Claimant's alleged loss.[1799] According to SSA, this is a conservative approach.[1800] However, as Mr. Del Cairo and Mr. Monteiro demonstrate, this estimate is unreasonable and lacks any scientific basis.[1801]

1378. Mr. Del Cairo has pointed out that Morris overlooks critical factors necessary to determine the costs associated with any salvage operation.[1802] Basic elements such as the type of vessel and infrastructure required, the class and the units of remote sensing equipment, and details about transportation systems are missing from Mr. Morris's estimation, making it inaccurate.[1803] As Mr. Del Cairo states, there are simply no elements to evaluate the feasibility of such an operation in budgetary and financial terms.[1804]

1379. However, the deficiencies in Mr. Morris's proposal do not stop at cost estimation. Mr. Del Cairo also observes that the proposed operation would be senseless from an archaeological perspective. First and foremost, this proposal plainly ignores the fact that the *San José*'s resting place is an archaeologically protected area, and that any operation carried out at the site would

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1797 Expert Report of Mr. J. Morris (**CER-1 [Morris]**), Section V.

1798 Expert Report of Mr. J. Morris (**CER-1 [Morris]**), ¶ 68.

1799 Expert Report of FTI (**CER-4 [FTI]**), ¶ 2.8.

1800 Amended Statement of Claim, ¶ 413.

1801 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), Section XIII. *See also* Expert Report of Mr. F. Monteiro (**RER-4 [Monteiro]**), ¶¶ 154-176.

1802 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), ¶ 267.

1803 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), ¶ 267.

1804 Expert Report of Mr. C. del Cairo (**RER-1[del Cairo]**), ¶ 268.

need to comply with scientific and ethical standards – a factor which would impact the schedule of any prospective project.[1805] Moreover, Mr. Del Cairo highlights that experience from similar projects, particularly those conducted in shallow waters, shows that proposing a duration of 90 days is unrealistic, unless key scientific aspects are deliberately disregarded.[1806]

1380. Aside from purely archaeological aspects, Mr. Del Cairo also notes that Morris's proposal is potentially inconsistent with existing regulations of at-sea operations in Colombian waters which, due to meteorological conditions, make a 24/7 operation simply irresponsible.[1807]

1381. Additionally, Mr. Monteiro notes that Morris's proposal does not even account for meteorological aspects, equipment malfunctions, software problems and other potential delays. Notably, in his opinion, Mr. Morris is proposing a salvage operation which follows the "grab and smash" approach and which does not care for the conservation of the site whatsoever.[1808] Indeed, Mr. de Castro considers that Mr. Morris's "*hectic excavation pace proposed would make it impossible for the authorities surveying the proposed salvage operations to supervise the "salvage" works of SSA, and act to mitigate the inevitable destructions that such an operation would entail*."[1809]

1382. Furthermore, Mr. Monteiro asserts that Mr. Morris neglects to account for the need for proper 3D mapping[1810] and, more importantly, the potential discovery of valuable fragile and delicate artifacts – such as those made of organic materials – and even human remains. These items need to be treated with a degree of care and respect, which simply cannot be guaranteed by 90 days, 24/7 operation.[1811]

1383. Clearly, Mr. Morris's estimates are unreliable. The key takeaway is simple yet crucial: SSA underestimates the scale of a proper salvage operation, likely attempting to reduce its hypothetical costs. Once again, Claimant's damage assessment lacks credibility. It is as

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1805 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 271-272.

1806 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 270-278.

1807 Expert Report of Mr. C. del Cairo (**RER-1 [del Cairo]**), ¶¶ 274-275.

1808 Expert Report of Mr. F. Monteiro (**RER-4 [Monteiro]**), ¶¶ 14, 156.

1809 Expert Report of Mr. F. Monteiro (**RER-4 [Monteiro]**), ¶ 159.

1810 Expert Report of Mr. F. Monteiro (**RER-4 [Monteiro]**), ¶ 163.

1811 Expert Report of Mr. F. Monteiro (**RER-4 [Monteiro]**), ¶ 164.

speculative as it is unreasonable and, essentially, irresponsible. Any operation of this magnitude would naturally take more time and, thus, be more expensive.

1384. The speculative nature of the Claimant's claim was also recognized when the Claimant sued Colombia in the United States, claiming that the *San José* shipwreck contained between US$ 4-17 billion. In 2011, the US District Court rejected Claimant's claim as time-barred and dismissed the damages claim, ruling:

> [The 2007 SCJ Decision] decision cannot be considered a money judgement; it simply decided how the *San Jose* treasure should be divided if and when it is excavated. In addition, SSA states that the *San Jose* treasure is worth between $4 billion and $17 billion, but that is SSA's own estimate, and there is no indication that the Colombia Supreme Court accepted its accuracy. Plaintiff, in fact, makes a multi-billion-dollar error in requesting $17 billion in compensatory damages, because even if the Colombian court accepted SSA's valuation, SSA would only be entitled to half that value—$2 billion to $8.5 billion—if it prevailed. In any event, a $6.5-billion-dollar range is hardly a specific sum.[1812]
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> Additionally, with respect to the first case before the US District Court, in his decision of 2011, the judge noted that Claimant's "… characterization of the Colombia Supreme Court's decision does not qualify as a money judgment under the UFMJR."[1813] In the judge's opinion, this was because, "[the] Colombian court … did not order that SSA be paid a 'sum of money'."[1814]

1385. In conclusion, Claimant's claim of damages must be rejected, as it is based entirely on hypothetical scenarios, relying on assumptions and false comparisons.

2. Even if the Claimant were to be consider to have rights to the San Jose, Law 163 of 1959 excludes movable monuments and commemorative objects from the category of treasure

1386. Article 7 of Law 163 of 1959 states that movable monuments are those "*enumerated in the Treaty concluded between the American Republics on the defense and conservation of the*

1812 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-19**), pp. 10-11 (emphasis added).

1813 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-19**), p. 9.

1814 United States District Court for the District of Columbia, Civil Action No. 1:10-cv-02083 (JEB)-2083, Memorandum Opinion, 24 October 2011 (**Exhibit R-19**), pp. 9-10.

historical patrimony, in the 7th American International Conference, to which Colombia adhered by Law 14 of 1936."[1815]

1387. In turn, Article 1.b) of Law 14 of 1936 states that the following are considered movable monuments:

> From the colonial period: weapons of war, work utensils, costumes, medals, coins, amulets and jewellery, designs, paintings, engravings, plans and geographical charts, codices, and all rare books due to their scarcity, form, content, objects of goldsmithing/silversmithing, porcelain, ivory, tortoiseshell, lace, and in general, all memorial pieces that have historical or artistic value.[1816]

1388. Therefore, even omitting Resolution 85, under Laws 14 of 1936 and 163 of 1959 – in force at the time Resolutions 048 and 534 were enacted– the items mentioned above would not qualify as treasure, as confirmed by the 2007 SCJ Decision.[1817]

1389. Consequently, were SSA entitled to any compensation, such compensation would have to be calculated after excluding any property that falls into the categories mentioned in Law 14 of 1936.

3. In any event, if damages were awarded to the Claimant, they must be reduced by 20% considering that percentage of Mr. Danilo Devis and successors

1390. In its 1994 Judgement, the 10th Civil Judge of Barranquilla recognized "*Danilo Devis as the owner of 10% of the rights declared in* [the] *ruling in favor of Sea Search Armada."*[1818] The Judge based this decision on SSA's assertion that it *"assigned in favor of its counsel, Dr. Danilo*

1815 Law 163 of 1959 (**Exhibit R-77**), Article 7.

1816 Law 14 of 1936 (**Exhibit R-69**), Article 1.

1817 Supreme Court of Justice of the Republic of Colombia, Judgment of 5 July 2007 (**Exhibit C-28**), p. 234 (stating that the property recognized in the first instance ruling referred "*solely and exclusively to those assets which, on the one hand, due to their characteristics and features, in accordance with the circumstances and the guidelines indicated in this judgement, are still susceptible of being legally qualified as treasure* […]").

1818 10th Judge of the Circuit of Barranquilla, Judgement of 6 July 1994 (**Exhibit C-25**), p. 33.

Devis, 10% of its rights in the process, which was recognized by a judicial order dated December 16, 1991, in which he was allowed to act in the process in his own name […]."[1819]

1391. Furthermore, in SSA's petition before the IACHR, Mr. Danilo Devis requested the IACHR to recognize him as petitioner in the proceedings, together with SSA, in his condition as "*assignee of 20% of the rights recognized in favor of SSA through judgement of 5 July 2007 of the Supreme Court of Justice.*"[1820]

1392. Mr. Devis clarified that 10% of his rights were recognized by the Civil Judge of Barranquilla and by the SCJ in the domestic proceedings initiated by SSA against the Republic of Colombia, and that the additional 10% was assigned through a services agreement entered into with SSA on 29 January 2001.[1821]

1393. Consequently, any amount recognized to SSA in these proceedings must be reduced by 20% considering that it is owned by Mr. Devis, or his successors, who are not claimants in these proceedings.

B. THE CLAIMANT'S CLAIM FOR INTEREST SHOULD BE REJECTED

1394. SSA claims that it "*is entitled to both pre- and post- award interest*"[1822] but does not estimate an amount.

1395. Colombia hereby reserves its right to elaborate on this matter in case SSA makes reference to this matter in the subsequent stages of these proceedings.

C. THE CLAIMANT IS NOT ENTITLED TO COSTS OR EXPENSES

1396. The Claimant is advancing unmeritorious and abusive claims that have caused the Respondent to incur considerable and unnecessary costs to defend their rights in this arbitration. For this reason, not only is the Claimant not entitled to any costs or expenses, but it should be directed to bear the entirety of the Respondent's costs and the costs of the arbitration.

1397. The Respondent reserves all its rights to supplement its request for costs.

1819 10th Judge of the Circuit of Barranquilla, Judgement of 6 July 1994 (**Exhibit C-25**), p. 3.

1820 Sea Search Armada, Petition to the IACHR, 15 April 2013 (**Exhibit R-21**), p. 26.

1821 Sea Search Armada, Petition to the IACHR, 15 April 2013 (**Exhibit R-21**), p. 26-28.

1822 Amended Statement of Claim, ¶ 417.

VII. REQUEST FOR RELIEF

1398. On the basis of the foregoing, the Republic of Colombia respectfully requests the Arbitral Tribunal to:

(1) **Declare** that it lacks jurisdiction over the Claimant's claims;

(2) In the alternative, **dismiss** the entirety of the Claimant's claims on the merits;

(3) In the alternative, **declare** that the Claimant is not entitled to the damages they seek, or to any damages;

(4) **Order** the Claimant to pay to the Republic of Colombia all costs incurred in connection with this arbitration, including, without limitation, the costs of the arbitrators and PCA, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

(5) Grant such further relief against the Claimant as the Tribunal deems fit and proper.

1399. The Republic of Colombia reserves its right to amend and supplement its pleadings and request for relief.

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