

PCA Case No. 2023-37

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

and

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

Between:

SEA SEARCH-ARMADA, LLC

(“Claimant”)

- and -

THE REPUBLIC OF COLOMBIA

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

**Decision on the Application by the Kingdom of Spain
for Leave to Intervene as Non-disputing Party**

Arbitral Tribunal

Mr. Stephen L. Drymer (Presiding Arbitrator)

Mr. Stephen Jagusch KC

Dr. Claus Von Wobeser

Registry

Mr. José Luis Aragón Cardiel

Permanent Court of Arbitration

Tribunal Assistant

Ms. Dina Prokić

30 December 2023

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BRIEF PROCEDURAL BACKGROUND	1
III. SPAIN'S APPLICATION.....	1
IV. THE PARTIES' RESPONSES.....	3
A) Claimant's Response.....	3
B) Respondent's Observations.....	4
V. DISCUSSION	5
VI. DECISION	9

I. INTRODUCTION

1. The present Decision comprises the Tribunal's ruling on the *Application for Leave to Intervene as Non-Disputing Party* dated 15 December 2023 ("**Application**") submitted by the Kingdom of Spain ("**Spain**"). Among other matters, it addresses whether Spain may be recognized as an *amicus curiae* or third person under the relevant conventional and procedural rules governing this arbitration, namely, Art. 10.20.3 of the TPA and Art. 4 of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* ("**UNCITRAL Transparency Rules**").

II. BRIEF PROCEDURAL BACKGROUND

2. On 14 December 2023, during the first of two days of public hearing on Respondent's preliminary objections pursuant to Art. 10.20.5 of the TPA ("**Hearing**"), Spain sought leave to file a written submission in the arbitration as an *amicus curiae*.
3. As noted above, Spain subsequently filed its Application on 15 December 2023.
4. Later that same day, following the conclusion of the Hearing, the Tribunal requested the Parties to provide reasoned responses to the Application by no later than 22 December 2023.
5. As discussed more fully below, Claimant argues that the Application should be rejected.¹ Respondent, for its part, asks the Tribunal to "defer the substantive analysis on Spain's Application at least until a decision is made in the proceedings under Article 10.20.5 of the TPA;" or, should the case advance to the merits and should Respondent submit an objection pursuant to Art. 10.20.4 of the TPA, until the resolution of such an objection.²

III. SPAIN'S APPLICATION

6. Spain seeks leave to intervene in this arbitration on the ground, it says, that "[t]here is a legal dispute between the Kingdom of Spain and the Republic of Colombia over the ownership of the remains of the Galleon San José ... a Spanish Navy warship sunk in naval combat against an English squadron in 1708".³
7. Spain contends that it has never abandoned its rights under international law as the flag State of the San José⁴, which rights derive from the "principle of sovereign immunity of state vessels,

¹ Claimant's Response ("**Response**") to Spain's Application dated 22 December 2023, ¶¶1, 9.

² Respondent's Observations ("**Observations**") on Spain's Application dated 22 December 2023, ¶¶1, 13 and footnote 1.

³ Spain's Application, ¶¶ 2, 5, 11, 20, 44.

⁴ Spain's Application ¶ 3.

the main consequence of which is the maintenance of the property of the flag state, in other words, the Kingdom of Spain.”⁵

8. Accordingly, in Spain's submission, “the San José and its remains [are] public property of the [Spanish] State, Spanish underwater cultural heritage and, therefore, with the legal nature of public domain according to [Spanish] domestic legislation.”⁶
9. Spain argues that “[t]he exact location of the wreck is one of the questions that is still to be determined and could support the ultimate resolution of the case in favour of Spain ...”⁷ According to Spain, “Colombia publicly maintains that the remains of the San José are in its territorial sea ... [but] there are serious doubts about the exact location of the Galleon, which may be in whole or in part in the Colombian contiguous zone.”⁸
10. In any event, says Spain, “independently of the exact location of the wreck, according to domestic and international law the Galleon is Spanish public property.”⁹ Moreover, the resting place of the San José is an archaeological site that “should be respected as a war grave.”¹⁰
11. According to Spain, its intervention in the arbitration is vital, “as it could establish that Colombia, the Respondent, is not in fact the owner” of the Galeón San José, which in turn means that “not only could the arbitral claim be dismissed, but the tribunal may lack jurisdiction to even hear the dispute.”¹¹ It claims that it seeks to “safeguard its interests regarding the property of the Galleon,”¹² to defend “its position” with respect to the Galleon,¹³ to protect its “underwater cultural heritage,”¹⁴ and generally to assist the Tribunal in respect of these issues.¹⁵

⁵ Spain's Application ¶ 29. In support of the principle of sovereign immunity of State vessels and aircraft Spain refers *inter alia* to Art. 3 of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926), Arts. 8 and 9 of the Geneva Convention on the High Seas (29 April 1958), and various articles of the United Nations Convention on the Law of the Sea (10 December 1983). Spain's Application ¶¶ 23-28.

⁶ Spain's Application, ¶3. See also: ¶34 referring to the Spanish Civil Code of 1889; Law 33/2003, of 3 November 2003, on Public Administration Patrimony; Law 48/1960, of 21 July 1960, on Air Navigation; the Commercial Code of 1885; Decree 2055/1969, of 25 September 1969, regulating the exercise of underwater activities; and Law 16/1985, of 25 June 1985, regulating Spanish Historical Heritage.

⁷ Spain's Application, ¶12.

⁸ Spain's Application ¶¶15-16.

⁹ Spain's Application ¶13.

¹⁰ Spain's Application, ¶¶14, 17.

¹¹ Spain's Application, ¶41.

¹² Spain's Application, ¶6.

¹³ Spain's Application, ¶37.

¹⁴ Spain's Application, ¶42.

¹⁵ Spain's Application, ¶¶38-44.

12. According to Spain, the legitimacy of its intervention “arises from the fact that it has a right over the subject matter of the dispute in the present arbitration, for which reason, its position may be affected by any decision that may be rendered in these proceedings, and it must be heard and its rights must be clarified.”¹⁶ Put differently: “no right can be recognized to a third party on the basis of a property whose ownership is already in dispute.”¹⁷
13. In sum, Spain asks the Tribunal to:¹⁸
- (i) grant it “leave to intervene in the present proceedings”;
 - (ii) allow it to “file a written *amicus curiae* submission” in which it “defends its position and explains to the Arbitral Tribunal why it considers the remains of the Galleon to be public property of the Kingdom of Spain”;¹⁹
 - (iii) allow it “access to the documents filed in the case, to the extent necessary for its intervention”; and
 - (iv) allow it to “attend hearings in order to present oral arguments and respond to questions”.
14. As the legal basis for its intervention, Spain invokes Art. 4 of the UNCITRAL Transparency Rules, Art. 10.20.3 of the TPA and sections 13.2 and 13.3 of PO1.²⁰

IV. THE PARTIES' RESPONSES

A) CLAIMANT'S RESPONSE

15. Claimant asks the Tribunal to reject the Application as substantially deficient as well as “disruptive and premature and this stage of the proceedings.”²¹
16. First, it says, Spain has failed to comply with the requirements set out in Article 4(2) of the UNCITRAL Transparency Rules.²²

¹⁶ Spain's Application, ¶22.

¹⁷ Spain's Application, ¶44.

¹⁸ Spain's Application, ¶45.

¹⁹ Spain's Application, ¶37.

²⁰ Spain's Application, ¶10.

²¹ Claimant's Response, ¶1.

²² Claimant's Response, ¶3.

17. Second, Claimant considers the Application to be disruptive as it was filed in the middle of the Hearing, "after the Parties have already made their written and oral submissions and are weeks away from the Tribunal's decision on Respondent's Article 10.20.5 Preliminary Objections."²³
18. Finally, it says, "Spain has failed to identify any factual or legal issue in the Art. 10.20.5 proceeding on which Spain would provide a helpful perspective to the Tribunal."²⁴
19. In Claimant's submission:

"Spain's purported ownership of the San José shipwreck does not impact any of the Tribunal's considerations under Article 10.20.5, which are limited to Colombia's jurisdictional objections under the TPA, and have no relation to Spain's submissions on its purported ownership of the wreck under various other treaties, such as the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, to which Colombia is not even a party, or Spain's domestic law, which has no relevance to this dispute."²⁵
20. Claimant further notes that, "to the extent Spain is seeking to intervene in the next phase of the arbitration, its submission is premature, as the Parties have not even filed their first set of written submissions on the merits", such that "the relevance of any submission Spain would make cannot yet be determined."²⁶
21. Should Spain's Application nonetheless be granted, Claimant requests that Spain be required to provide an undertaking on costs.²⁷

B) RESPONDENT'S OBSERVATIONS

22. Respondent requests that the Tribunal defer the substantive analysis on Spain's Application, at least until a decision is made in the proceedings under Art. 10.20.5 of the TPA.²⁸ This is because:
 - (i) Respondent activated the expedited procedure in Art. 10.20.5 of the TPA, which mandates that the proceedings on the merits be suspended;

²³ Claimant's Response, ¶4.

²⁴ Claimant's Response, ¶5.

²⁵ Claimant's Response, ¶5.

²⁶ Claimant's Response, ¶6.

²⁷ Claimant's Response, ¶¶1, 9.

²⁸ Respondent's Observations, ¶¶1, 13.

- (ii) the current proceedings are not about the ownership or property rights over the Galeón San José; and
 - (iii) Spain's Application does not assist the Tribunal in the analysis of Respondent's jurisdictional objections.²⁹
23. It adds that, should the case proceed to a merits phase, and in the event that Colombia elects to submit an objection pursuant to Art. 10.20.4 of the TPA in that phase, the Tribunal's analysis of Spain's Application should be deferred until the resolution of such an objection.³⁰
24. Echoing its submissions during the recent Hearing, Respondent argues that the arbitration "is not about the property of San José, since Claimant has never been recognized any rights over that specific shipwreck."³¹ Considering that the arbitration "does not concern any property rights over the Galeón San José, Spain has failed to prove any interest in the arbitral proceeding."³²
25. Moreover, it argues, Spain has failed to prove the extent to which its submission would assist the Tribunal in deciding any of Colombia's jurisdictional objections, that is, whether Claimant "(i) is a protected investor; (ii) possesses a protected investment conferred pursuant to domestic law; (iii) submitted a claim requiring to necessarily pass judgment on pre-TPA State conduct and facts; or (iv) submitted a claim well beyond the three-year limitation period."³³ Spain has, therefore, failed to demonstrate how it meets the requirements of Art. 4(3)(b) of the UNCITRAL Transparency Rules.

V. DISCUSSION

26. As stated above, Spain seeks leave to intervene in the present arbitration pursuant to Art. 10.20.3 of the TPA, Art. 4 of the UNCITRAL Transparency Rules and Sections 13.1 and 13.2 of PO1.
27. **Article 10.20.3 of the TPA** provides:
- "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party. Each submission shall identify the author and any person or entity that has provided, or will provide, any financial or other assistance in preparing the submission."

²⁹ Respondent's Observations, ¶5.

³⁰ Respondent's Observations, footnote 1.

³¹ Respondent's Observations, ¶6. See also: ¶9.

³² Respondent's Observations, ¶11.

³³ Respondent's Observations ¶12.

28. **Article 4 of the UNCITRAL Transparency Rules** is directly applicable to Spain's situation here:

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a **person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s))**, to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.
2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:
 - (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
 - (b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
 - (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);
 - (d) **Describe the nature of the interest that the third person has in the arbitration;** and
 - (e) **Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.**
3. **In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:**
 - (a) **Whether the third person has a significant interest in the arbitral proceedings; and**
 - (b) **The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.**
4. **The submission filed by the third person shall:**

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third party.

(emphasis added)

29. As for Procedural Order No. 1, Section 13 reads:

13. Submissions from Non-Disputing Parties and *Amicus Curiae*

13.1 Pursuant to Article 10.20.2 of the TPA, a non-disputing party to the TPA may make oral and written submissions regarding the interpretation of the TPA pursuant to the Procedural Calendar. The Parties may comment on any non-disputing party submissions in their rebuttal pleadings.

13.2 Pursuant to Article 10.20.3 of the TPA, the Tribunal shall have the authority to accept and consider *amicus curiae* submissions.

13.3 Should the Tribunal receive a request for leave to make a non-disputing party or *amicus curiae* submission, the Tribunal will give the necessary directions, following consultation with the Parties.

30. As stated in Art. 4(2)(e) of the UNCITRAL Transparency Rules, a "third person" such as Spain – that is, a person that is neither "a disputing party" (in this case, SSA and Colombia) nor "a non-disputing Party to the Treaty" (here, the United States, which indeed filed a Non-Disputing Party submission) – must identify "specific issues of fact or law in the arbitration that the third person wishes to address in its written submission."

31. Spain's Application does not do that. Instead, it focuses on the argument that the Galeón San José is Spain's property, which is not an issue in the arbitration. As both of the disputing parties have indicated numerous times in their written and oral pleadings, and as the Tribunal itself is cognizant, for the time being the entire question of ownership of the San José or its treasure – even as between SSA and Colombia – is not an issue to be determined by the Tribunal; and the question may never become such an issue if Respondent's jurisdictional plea is accepted.

32. Spain may well have an “interest ... in the arbitration” (Art. 4(2)(d) of the UNCITRAL Transparency Rules), perhaps even a “significant interest in the arbitral proceedings” (Art. 4(3)(a)). The Tribunal makes no findings in this regard, although it does of course take Spain's allegations in this respect into consideration. Yet even if these allegations are assumed to be correct, it would still be an insufficient basis on which to grant Spain's requests, in view of the second limb of Art. 4(3) which requires the Tribunal to consider:

“(b) The extent to which the submission [from a third person] would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.”

33. Throughout its Application, Spain asserts that there exists a legal dispute between itself and Colombia over the ownership of Galeón San José. It provides no support whatsoever for this assertion, nor any specific information regarding the alleged basis, commencement, stage, status, forum or other particulars of any such dispute. The Tribunal is compelled to note (not that this point is in any way determinative) that this is the first and only time that it has heard of such “dispute” in these proceedings. Colombia itself says nothing in this regard in its Observations. Be that as it may, such a dispute could not arise under the TPA, from which the Tribunal derives essential aspects of its authority. And although Spain's desire to “defend its interests and those of the underwater heritage,”³⁴ in a way that “can help ... to the advancement of the common historical knowledge between Spain and Colombia and in the preservation and conservation of property that make up the subaquatic cultural heritage for the benefit of humanity”³⁵ is laudable, the Tribunal is not persuaded that this arbitration is the appropriate forum in which to address Spain's various claims.

34. The Tribunal's jurisdiction, if any, arises from and is circumscribed by the TPA. Currently, under the TPA, the Tribunal is mandated to determine solely whether: ³⁶

- (i) Claimant is a protected investor under Art. 10.28 of the TPA;
- (ii) Claimant possesses a qualifying “investment” under Art. 10.28 of the TPA;
- (iii) the Tribunal has *ratione temporis* jurisdiction under Art. 10.1.3 of the TPA; and
- (iv) Claimant's claims are time-barred by the 3-year limitation provision set forth in Art. 10.18.1 of the TPA.

³⁴ Spain's Application, ¶42.

³⁵ Spain's Application, ¶43.

³⁶ The Tribunal is also asked to determine Colombia's request for security for costs, as well as both Parties' requests for an award of costs pursuant to Art. 10.20.6 of the TPA.

35. The Parties are in agreement – albeit for different reasons – that Spain is unlikely to provide relevant assistance to the Tribunal at this time, when an award or decision on Respondent's objections under TPA Art. 10.20.5 is yet to be issued. The Tribunal agrees. Even on its face – and contrary to Spain's allegation in this respect³⁷ – the Application fails to disclose a basis on which Spain could conceivably assist the Tribunal in the determination of those issues.
36. Lastly, but not least, it is obvious that an intervention by Spain at this time – after the conclusion of the Hearing on Colombia's jurisdictional objections, and with the Tribunal decision on those objections due very shortly – would be highly disruptive of the proceedings, including the Parties' rights and the Tribunal's obligations under Art. 10.20.5 of the TPA.

VI. DECISION

37. For all of the reasons discussed above, the Tribunal rejects Spain's Application.
38. This decision is without prejudice to a potential further application by Spain in the event that the case proceeds to the merits and Spain is able to demonstrate, in accordance with Art. 4(3) of the UNCITRAL Transparency Rules, that it has a significant interest in, and that it would assist the Tribunal in, the determination of a factual or legal issue related specifically to the merits of the dispute under the TPA as pleaded by the Parties.

[Signatures on the following page]

³⁷ Spain's Application, ¶41.

PLACE OF ARBITRATION: LONDON, UNITED KINGDOM
DATE: 30 DECEMBER 2023

THE ARBITRAL TRIBUNAL:



Mr. Stephen Jagusch KC



Dr. Claus Von Wobeser



Mr. Stephen L. Drymer
(Presiding Arbitrator)