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 (USA)

("Claimant")

- and -

THE REPUBLIC OF COLOMBIA

("Respondent", and together with Claimant, the "Parties")

DECISION ON RESPONDENT'S PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.5 OF THE UNITED STATES-COLOMBIA TPA

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

16 February 2024

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LIST OF DEFINED TERMS

1982 Report	*Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia* dated 26 February 1982
1994 Press Release	Press release issued by the Colombian Government on 7 July 1994
2007 Supreme Court Decision	Judgment issued by the Supreme Court on 5 July 2007
ANDJE	Respondent's legal representative (*Agencia Nacional de Defensa Jurídica del Estado*)
Answer or Answer to Notice of Arbitration	Respondent's *Respuesta a notificación de arbitraje* dated 18 January 2023
APA	Asset Purchase Agreement entered into between Armada Company, a Cayman Islands exempted company limited by shares as the Managing Member and as Trustee for the Partners of Sea Search-Armada Limited Partnership, a Cayman Islands limited partnership, and Sea Search-Armada, LLC, a Delaware limited liability company on 18 November 2008
Art. or Arts.	Article or Articles
C-[#]	Claimant's exhibit
CLA-[#]	Claimant's legal authority
Civil Court	10th Civil Court of Barranquilla Circuit
Civil Court Action	Lawsuit filed by SSA Cayman before the Civil Court on 13 January 1989
Civil Court Decision	Judgment issued by the Civil Court on 6 July 1994
Claimant or SSA	Sea Search-Armada, LLC
Columbus	Columbus Exploration Inc.
Constitutional Court Action	Action filed by SSA Cayman before the Colombian Constitutional Court in June 1993
CSJ	Colombian Supreme Court of Justice, or Supreme Court
Decision on Spain's Intervention Application	*Decision on the Application by the Kingdom of Spain for Leave to Intervene as Non-disputing Party* dated 30 December 2023
DC District Court	U.S. District Court for the District of Columbia
DIMAR	Colombia's General Directorate of the Maritime and Port Authority (*Dirección General Marítima y Portuaria*)

Discovery Area	The "Discovery Area" as defined in the 1982 Report
GMC	Glocca Morra Company Limited Partnership
GMC Inc.	Glocca Morra Company Inc.
Hearing	Hearing held in Bogotá, Colombia from 14 to 15 December 2023
Injunction Order	*Secuestro* ordered by the Civil Court on 12 October 1994 covering the area described by the 1982 Report
Joint Chronology	Joint Chronology of Key Facts developed by the Parties and submitted to the Tribunal on 11 December 2023
Mr. Rodríguez's Request	*Motion to Testify and Intervene* submitted by Mr. Isidoro Rodríguez on 22 January 2024
Non-disputing party	United States of America
Notice of Arbitration or NoA	Claimant's *Notice of Arbitration and Statement of Claim* dated 18 December 2022
Parties	SSA and Colombia
PO1	Procedural Order No. 1 (with Procedural Timetable) dated 22 August 2023
PCA	Permanent Court of Arbitration
R-[#]	Respondent's exhibit
Rejoinder	Claimant's *Rejoinder to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA* dated 19 November 2023
Resolution No. 0025	Resolution No. 0025 dated 29 January 1982
Resolution No. 0048	Resolution No. 0048 dated 29 January 1980
Resolution No. 0066	Resolution No. 0066 dated 4 February 1981
Resolution No. 0085	Resolution No. 0085 of 23 January 2020
Resolution No. 0204	Resolution No. 0204 of 24 March 1983
Resolution No.0249	Resolution No. 0249 dated 22 April 1982
Resolution No. 0354	Resolution No. 0354 of 3 June 1982
Resolution No. 0753	Resolution No. 0753 dated 18 October 1980
Respondent or Colombia	The Republic of Colombia
Response or Response to Art. 10.20.5 Submission	Claimant's *Response to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA* dated 21 September 2023
Reply	Respondent'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 dated 20 October 2023
RLA-[#]	Respondent's legal authority
Spain's Intervention Application	*Application for leave to intervene as non-disputing party in the resubmission proceeding* filed by the Kingdom of Spain on 15 December 2023
Superior Court Decision	Judgment of the Superior Court of Barranquilla dated 7 March 1997
SSA Partners	Armada Partners (a U.S. company), San Joseph Partners (a U.S. company), Royal Capitana Partners (a Cayman Islands company), and Sea Search Joint Venture (a Cayman Islands company), and Armada Company (a Cayman Islands company)
SSA Predecessors	Glocca Morra Company Inc., GMC and SSA Cayman
Submission or Art. 10.20.5 Submission	Respondent's *Submission pursuant to Article 10.20.5 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America* dated 22 July 2023
Superior Court	Superior Court of the Judicial District of Barranquilla
ToA	Terms of Appointment dated 22 August 2023
Tr. Day #	Transcript of the Hearing. The English version of the Award refers to the English Transcript, whereas the Spanish version of the Award refers to the Spanish Transcript.
TPA or Treaty	United States – Colombia Trade Promotion Agreement of 15 May 2012
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (as revised in 2021)
USD	United States dollar
U.S. Litigation	Litigation initiated by SSA against Colombia on 7 December 2010 before the D.C. District Court
U.S. Submission	*Submission of the United States of America* dated 8 December 2023

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I. INTRODUCTION

1. As explained more fully below, this Decision addresses a raft of jurisdictional objections raised in accordance with a preliminary procedure specifically provided for in Article 10.20.5 of the United States-Colombia Trade Promotion Agreement of 15 May 2012.

A. THE PARTIES & THEIR COUNSEL

2. The claimant in this arbitration is Sea Search-Armada, LLC., a U.S. registered company, incorporated in the State of Delaware, with its business address at 9187 Clairemont Mesa Blvd., Suite 6, #334, San Diego, California, 92123 ("**SSA**" or "**Claimant**"). Claimant is represented in these proceedings by Mr. Rahim Moloo, Mr. Robert Weigel, Ms. Anne Champion, Mr. Jason Myatt, Ms. Ankita Ritwik, Ms. Victoria R. Orlowski, Ms. María L. Banda, Mr. Pablo Garrido and Ms. Martina Monti of Gibson, Dunn & Crutcher LLP and Mr. José Zapata of Holland & Knight, Colombia.

3. The respondent in this arbitration is the Republic of Colombia, a sovereign State (the "**Respondent**" or "**Colombia**"). Respondent was represented in these proceedings by Ms. Martha Lucía Zamora Ávila, Ms. Ana María Ordoñez Puentes, Mr. Giovanny Vega-Barbosa, Mr. Camilo Valdivieso León, Ms. Manuela Sossa Sánchez, Ms. Juana Martínez Quintero, Ms. Mariana Reyes Munera and Mr. Juan Camilo Mejía Pinillos of the *Agencia Nacional de Defensa Jurídica del Estado de Colombia* ("**ANDJE**").

B. BACKGROUND OF THE DISPUTE

4. As more fully explained in this Decision, the arbitration concerns a dispute arising from Respondent's alleged "unlawful expropriation of and interference with [Claimant's] rights to approximately USD 10 billion worth of treasure found by [Claimant's] predecessors over 40 years ago."[1] The treasure, as described by Claimant, was found with the shipwreck of a 300-year old galleon, the San José, in Colombian waters.

5. In Claimant's submission, after the Colombian Supreme Court of Justice ("**CSJ**" or "**Supreme Court**") confirmed that Claimant had rights to 50% of the treasure it had discovered and reported, the Colombian Ministry of Culture issued **Resolution No. 0085**, declaring that the entirety of the San José was not treasure but an "Asset of National Cultural Interest" and therefore exempt from the CSJ ruling, thus depriving Claimant of its rights to 50% of its discovery.

6. Claimant argues that, through these actions, Respondent breached Arts. 10.7, 10.5, 10.3 and 10.4 of the *United States – Colombia Trade Promotion Agreement* of 15 May 2012 (the "**TPA**" or "**Treaty**") regarding expropriation and compensation, minimum standard of treatment, national treatment and most-favoured nation treatment. It seeks the restitution of its rights or,

[1] NoA, ¶3.

in the alternative, full compensation for the damages caused in an amount estimated to be USD 10 billion, plus the corresponding interest.

7. On 22 July 2023, Respondent submitted several objections to the Tribunal's jurisdiction pursuant to Article 10.20.5 of the TPA. The Tribunal decides those objections in this Decision.

C. THE ARBITRATION AGREEMENT

8. Article 10.16 of the TPA provides as follows:

> Article 10.16: Submission of a Claim to Arbitration
>
> 1. 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) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> (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,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

D. APPLICABLE LAW

9. Article 10.22 of the TPA provides as follows:

Article 10.22: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws, and

(ii) such rules of international law as may be applicable.

3. A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 20.1.3 (Free Trade Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

E. CONSTITUTION OF THE TRIBUNAL

10. The Tribunal is composed of Mr. Stephen Jagusch KC, Dr. Claus Von Wobeser, and Mr. Stephen L. Drymer serving as President of the Tribunal.

11. Claimant appointed Mr. Stephen Jagusch KC, a national of New Zealand, as a co-arbitrator in its *Notice of Arbitration and Statement of Claim* dated 18 December 2022. Respondent appointed Dr. Claus Von Wobeser, a national of Mexico and Germany, as a co-arbitrator on 14 March 2023. In due accord with the protocol agreed by the Parties for the appointment of the presiding arbitrator, Mr. Stephen L. Drymer, a national of Canada, was appointed, and the Tribunal deemed constituted, on 7 June 2023.

12. The appointment of the Tribunal was recorded in the Terms of Appointment dated 22 August 2023 ("**ToA**"), which were drawn up and executed further to a first procedural meeting involving the Parties and the members of the Tribunal on 25 July 2022. Also on 22 August 2023, the Tribunal issued Procedural Order No. 1 ("**PO1**") governing certain procedural elements of the arbitration.

F. APPLICABLE ARBITRATION RULES

13. Pursuant to Art. 10.16(3)(c) of the TPA, the arbitration rules applicable to these proceedings are the UNCITRAL Arbitration Rules, as revised in 2021 (the "**UNCITRAL Rules**").

G. SEAT OF THE ARBITRATION

14. Pursuant to the agreement of the Parties, the legal place (or "seat") of the arbitration is London, United Kingdom.

H. LANGUAGE OF THE ARBITRATION

15. As set out at paragraph 2 of PO1, the languages of the arbitration are English and Spanish (subject to certain specifics concerning the language of correspondence, Parties' submissions and documents, as well as oral testimony).

16. In accordance with paragraph 2.2.4.1 of PO1, this Decision is issued in English with an accompanying translation into Spanish. Both language versions shall be equally authentic. Any disagreement between the Parties as to interpretation shall be decided as necessary by the body tasked with determining the matter.

I. ASSISTANT TO THE TRIBUNAL

17. As indicated at paragraph 8.1 of the ToA, with the agreement of the Parties, the Tribunal appointed Ms. Dina Prokić, a national of Canada, Hungary and Serbia, as Assistant to the Tribunal.

J. ADMINISTERING INSTITUTION

18. As recorded at paragraph 11.1 of the ToA, by agreement of the Parties, the Permanent Court of Arbitration (the "**PCA**") acts as Registry and administers the arbitral proceedings. Mr. José Luis Aragón Cardiel, PCA Legal Counsel, was designated to act as Registrar and Secretary to the Tribunal.

K. PROCEDURAL CALENDAR

19. Paragraph 3.1 of PO1 reads as follows:

> The procedural calendar is set forth in Annex 1 to this order and is issued after consultation with the Parties. By their respective communications of 8 August 2023 the Parties, having taken note of Article 10.20.5 of the TPA, consented to the procedural calendar, to which they do not and will not object. The Parties hereby agree that they will not seek to challenge the decision on the Respondent's objections pursuant to Article 10.20.5 of the TPA based solely on the fact that the award might be issued later than 17 February 2024 and agree to waive any challenge on those grounds.

II. PROCEDURAL HISTORY

20. On 18 December 2022, Claimant submitted its *Notice of Arbitration and Statement of Claim* ("**Notice of Arbitration**" or **NoA**").

21. On 18 January 2023, Respondent submitted its *Respuesta a notification de arbitraje* ("**Answer to Notice of Arbitration**" or "**Answer**").

22. On 22 July 2023, Respondent filed a Submission pursuant to Article 10.20.5 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America ("**Art. 10.20.5 Submission**", or "**Submission**") in which it requested the Tribunal to:

> (i) order the suspension of any proceedings on the merits;
>
> (ii) open a jurisdictional phase pursuant to Article 10.20.5 of the TPA; and
>
> (iii)set a procedural calendar that allows it to decide the objections to jurisdiction on an expedited basis, and in any case, no later than 180 days after this request."[2]

23. As noted above, on 25 July 2023, the first procedural meeting took place, further to which the Tribunal executed the ToA and issued PO1 on 22 August 2023.

24. On 21 September 2023, Claimant filed its *Response to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA* ("**Response to Art. 10.20.5 Submission**" or "**Response**").

25. On the same date, in connection with section 4.4 of the ToA, Claimant confirmed to the Tribunal, through its counsel, that no third party is financing its representation or participation in the arbitration, although its counsel is engaged under a contingency fee arrangement.

[2] Submission, ¶127. On 26 July 2023, Respondent submitted an amended version of its Submission which contained corrections to various clerical errors in the document initially filed on 22 July. On 1 August 2023, Respondent filed a redacted version of its Jurisdictional Submission (the sole redacted paragraph being paragraph 114).

Claimant's counsel has in place "a general and confidential financing facility agreement with a third party not involved in this proceeding in order to offset contingency fee agreements entered into by the firm.[3]

26. On 5 October 2023, in relation to Claimant's counsel's email,[4] Respondent requested, through its counsel, that the Tribunal, make the following rulings: (i) "take note that there is a third-party financing [Claimant]'s representation in these proceedings;" (ii) "draw the appropriate consequences form Claimant's failure to comply with Section 4.4. of the [ToA];" (iii) "order Gibson Dunn & Crutcher to disclose the terms of the financing agreement and the identity of the third party involved in such agreement," or alternatively "to order Gibson Dunn & Crutcher to inform whether the financing agreement includes the funder's obligation to cover a potential adverse decision on costs" to Claimant.[5]

27. On 9 October 2023, Claimant opposed Respondent's requests of 5 October 2023.[6]

28. On 11 October 2023, the Tribunal denied Respondent's requests of 5 October 2023.

29. On 20 October 2023, Respondent filed 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 ("**Reply**").

30. On 19 November 2023, Claimant filed its Rejoinder to Respondent's Preliminary Objections pursuant to Article 10.20.5 of the TPA ("**Rejoinder**").

31. On 6 December 2023, the Tribunal convened the Parties to a pre-hearing conference.

32. On 8 December 2023, the United States of America filed a non-disputing party submission pursuant to Article 10.20.2 of the TPA entitled *Submission of the United States of America* (the "**U.S. Submission**").

33. On 14 and 15 December 2023, the hearing concerning Respondent's jurisdictional objections took place in Bogota, Colombia (the "**Hearing**"). A public webcast of the Hearing was made available on the PCA's website. The following persons attended the Hearing:

The Tribunal*:*

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

[3] Email from Gibson Dunn to the Tribunal, 21 September 2023 (**R-39**).

[4] Email from Gibson Dunn to the Tribunal, 21 September 2023 (**R-39**).

[5] Email from the ANDJE to the Tribunal, 5 October 2023 (**R-41**).

[6] Email from Gibson Dunn to the Tribunal, 9 October 2023 (**R-40**).

***Assistant to the Tribunal**:*

Ms. Dina Prokić

For Claimant

Mr. Rahim Moloo
Ms. Ankita Ritwik
Mr. Mark Regn
Ms. Kathleen Regn
Mr. Robert L. Weigel
Mr. Pablo Garrido
Ms. Martina Monti
Mr. José Zapata
Mr. Steven Perles

For Respondent

Ms. Martha Lucía Zamora Ávila
Ms. Ana María Ordóñez Puentes
Mr. Giovanny Vega-Barbosa
Mr. Camilo Valdivieso
Ms. Juana Martínez
Ms. Manuela Sossa
Ms. Mariana Reyes
Mr. Juan Camilo Mejía
Ms. Jennyfer Díaz Ramírez
Mr. Leiver Palacios
Mr. Hermánn León
Mr. William Pedroza

For the United States of America

Mr. David M. Bigge (remotely)

For the PCA

Mr. José Luis Aragón Cardiel
Ms. Ji Soo Kim (remotely)
Ms. Magdalena Legris (remotely)

Interpreters

Ms. Silvia Colla
Mr. Daniel Giglio

Court Reporters

Ms. Marjorie R. Dauster
Mr. Virgilio Dante Rinaldi

IT/AV

Mr. Nicholas Wilson

34. Also on 15 December 2023, the Kingdom of Spain filed the *Application for leave to intervene as non-disputing party in the resubmission proceeding* ("**Spain's Intervention Application**").

35. On 22 December 2023, at the Tribunal's request, the Parties' provided their observations on Spain's Intervention Application.

36. On 30 December 2023, the Tribunal dismissed Spain's Intervention Application by way of a *Decision on the Application by the Kingdom of Spain for Leave to Intervene as Non-disputing Party* ("**Decision on Spain's Intervention Application**"). Spain's Intervention Application was rejected on the following grounds:

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."

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.

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."

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," 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" is laudable, the Tribunal is not persuaded that this arbitration is the appropriate forum in which to address Spain's various claims.

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:

(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.

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 respect – the Application fails to disclose a basis on which Spain could conceivably assist the Tribunal in the determination of those issues.

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.

37. On 22 January 2024, Mr. Isidoro Rodríguez, a third party individual purporting to be "the Legal Representative from 1988 to the present of Sea Search-Armada and Armada Company LLP" submitted a *Motion to Testify and Intervene* ("**Mr. Rodríguez's Request**").

38. The Tribunal invited the Parties to submit their comments on Mr. Rodríguez's Request, which were filed on 25 January 2024.

39. On 31 January 2024, the Tribunal rejected Mr. Rodríguez's Request on the following grounds:

> Mr. Rodríguez seeks leave to "testify and intervene" in these proceedings *inter alia* on the following grounds:
>
> > *This motion to testify and intervene is filed pursuant to the authority and fiduciary duties of Witness Isidoro Rodriguez as the Legal Representative from 1988 to the present of Sea Search-Armada and Armada Company LLP … in the Republic of Colombia.*
> >
> > *The motion is filed based on the record evidence of ongoing acts of fraud against the Republic of Colombia (Respondent) in violation of the Colombian Commercial Code and a business conspiracy since 1992 failure to not pay wages to its Legal Representative ... There was not and could not have been any Board of Directors of a dissolved entity to either revoke Isidoro Rodriguez's Power of Attorney in Colombia, or to transfer property and contract rights with the authorization of DIMAR in accordance with the Commercial Code Art. 495.*

> *In sum, Claimant co-conspirator Jack Harbeston and Claimant Sea Search Armada L.L.C (California entity) have filed void ab initio false claims (Claimant's Exhibits) to the rights of Sea Search-Armada and Armada Company LLP … that had been dissolved in 2002 (Exhibit 3).*

Mr. Rodríguez also notes that his Request is filed in support of Respondent's challenge to the standing of Claimant in this proceeding:

> *Therefore, motion is filed in support Respondent's challenges as to the standing of Sea Search-Armada, LLC ("Claimant"), and jurisdiction of this proceeding, because 23 years after the unlawful dissolving of Cayman Island Entities in 2002 (Exhibit 2) the Claimant was established in California to fraudulently obfuscate its identity.*

According to Mr. Rodríguez, he also "controls" any property rights that were held by Claimant prior to its purported dissolution:

> *The Cayman Island LLP was unlawfully dissolved, and control of its property rights were transferred to Isidoro Rodriguez as Legal Representative.*

Having taken note of Mr. Rodríguez's assertions and the Parties' observations thereon, the Tribunal must reject Mr. Rodríguez's Request.

At the outset, the Tribunal recalls that there is no procedural basis in the United States-Colombia Trade Promotion Agreement ("TPA"), the UNCITRAL Rules or the UNCITRAL Transparency Rules for a third-party private individual to assert a right to "testify and intervene" in this investor-State arbitration.

Second, to the extent that Mr. Rodríguez could be understood to be seeking leave to intervene as an *amicus curiae* under the TPA, the Tribunal considers that he is ill-suited to perform the role of a 'friend of the court'. It appears to the Tribunal that Mr. Rodríguez's Request, reduced to its essence, is ultimately made in furtherance of his – purported – private rights: he refers to a "failure to not pay wages [*sic*]" and also purports to have "control of [the] property rights" of Claimant. That Mr. Rodriguez's Request is made in strict furtherance of his personal interests is also confirmed by the fact that Mr. Rodríguez, the Claimant and its Predecessors have been engaged in a decades-long litigation before U.S. courts concerning largely the same facts in respect of which Mr. Rodríguez seeks to "testify and intervene" in this arbitration. The Tribunal cannot allow an *amicus curiae* submission (even if, for the sake of argument, that were how Mr. Rodríguez's request to "testify and intervene" were understood) to be used as a vehicle for the pursuit of the interests of private third-party litigants against the disputing Parties in this investor-State arbitration.

For these reasons, the Tribunal rejects Mr. Rodríguez's Request. While the record would support other grounds for the rejection of Mr. Rodríguez's Request, the Tribunal declines to address them for reasons of arbitral economy.

III. KEY FACTS

40. As advanced above, although the immediate question at issue is the Tribunal's jurisdiction, the merits of the underlying dispute concern the discovery of a long-sought 18th century treasure: the shipwreck of the famed Spanish galleon, the *San José* (or, *Galeón San José*). SSA claims that one of its predecessors-in-interest discovered the shipwreck off the coast of Colombia in the 1980s, entitling it under prevailing Colombian law to 50% of the value of the treasure; an entitlement, it says, Colombia purported to eviscerate in 2020 when it declared the Galéon San José and its contents – still strewn across the ocean floor – an "asset of national cultural interest".[7] For its part, Colombia not only contests SSA's entitlement to any share of the treasure, but also disputes that Claimant's predecessor actually discovered the San José.[8]

41. Nonetheless, certain facts are not in dispute. Events have undeniably taken place, agreements have been entered into, discussions and communications between the Parties and others have occurred, statements have been made, judgments have been issued. A number of such facts are described in this section. It is noted that the descriptions here are drawn to a large extent from the extensive and exceptionally helpful Joint Chronology of Key Facts developed by the Parties and submitted to the Tribunal on 11 December 2023 ("**Joint Chronology**").

A. CLAIMANT AND ITS PREDECESSORS

42. On 29 January 1980 a Delaware company named Glocca Morra Company Inc. ("**GMC Inc.**") obtained an underwater exploration permit issued by Colombia's General Directorate of the Maritime and Port Authority (*Dirección General Marítima y Portuaria*, "**DIMAR**") **Resolution No. 0048**.[9] The scope of this permit, which is discussed in greater detail below, is disputed between the Parties.

43. Later that year the founders of GMC Inc. incorporated a Cayman Islands company, Glocca Morra Company Limited Partnership ("**GMC**") to which GMC Inc. assigned its interests under Resolution No. 0048, which transfer was authorized by DIMAR by virtue of Resolution No. 753 of 13 October 1980.[10]

44. In 1983, GMC transferred its rights in the permit to its parent company, SSA Cayman, whose limited partners included Armada Partners (a U.S. company), San Joseph Partners (a U.S. company), Royal Capitana Partners (a Cayman Islands company), Sea Search Joint Venture (a Cayman Islands company), and Armada Company (a Cayman Islands company) (together "**SSA Partners**"), in accordance with DIMAR's Resolution No. 204 of 24 March 1983.[11]

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[7] NoA, ¶3, 7; Response, ¶2.

[8] Submission, ¶30, 151-157, 178; Reply, ¶3-5; Rejoinder, ¶38.

[9] Response, ¶22-23; Answer, ¶14; Rejoinder, ¶37.

[10] Answer, ¶16; Submission, ¶23; Response, ¶31; Joint Chronology, p. 2 (item 6).

[11] Submission, ¶33; Response, ¶51; Joint Chronology, p. 5 (item 17).

45. According to Claimant, on 18 November 2008, SSA Cayman transferred its assets and liabilities to Claimant, SSA, a U.S. registered company, pursuant to an Asset Purchase Agreement ("**APA**").[12]

46. GMC Inc., GMC and SSA Cayman are collectively referred to as the "**SSA Predecessors**".[13]

B. THE GALEÓN SAN JOSÉ AND ITS DISCOVERY(IES)

47. The Galeón San José has been lying on the bottom of the Caribbean Sea since it sank on 8 June 1708 in the midst of a naval battle between Spain and Britain, taking with it most of its crew, passengers and, in Respondent's words "the biggest treasure in the history of humanity,"[14] or, in Claimant's words, "the most valuable cargo ever shipped from the New World, estimated to include over 7 million pesos, 116 steel chests full of emeralds, and 30 million gold coins" (currently estimated at approximately USD 20 billion).[15] The history of the San José and its substantial value (whatever the precise figure may be) are not disputed.

48. The discovery of Galeón San José and its location, however, are controversial.

49. According to Claimant, after a two-year search costing many millions of dollars, GMC submitted to Colombia a "*Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia*" dated 26 February 1982 (the "**1982 Report**"), reporting the discovery of what it claims was the San José.[16] This was followed by a confirmation by Oceaneering International, Inc., a specialized subsea engineering firm which SSA Cayman had hired to "provide positioning to aid in the recovery" of the reported target.[17]

50. According to Respondent, there is no conclusive evidence that SSA's Predecessor(s) in fact found the Galeón San José.[18] The 1982 Report did not mention the Galeón San José and GMC never supplemented it to expressly note that it had found the Galeón San José.[19] Rather, the 1982 Report merely noted the possible existence of a shipwreck that could date from the colonial period.[20] Respondent alleges that an independent study conducted in 1994 by Columbus Exploration Inc. ("**Columbus**"), which was hired "for the purpose of developing an oceanographic investigation to test the Hypothesis of the discovery of the Galeón San José in the area reported in the 1982 Confidential Report,"[21] concluded that the Galeón San José was

[12] Submission, ¶69; Response, ¶96; Rejoinder, ¶94; Joint Chronology, p. 13 (item 44).

[13] Response, ¶2.

[14] Submission, ¶2.

[15] NoA, ¶14; Response, ¶15; Rejoinder, ¶24, 27.

[16] Answer, ¶18; Submission, ¶26; Response, ¶41.

[17] Response, ¶53; Rejoinder, ¶46.

[18] Submission, ¶30.

[19] Submission, ¶27; Reply, ¶32, 34, 36, 41.

[20] Answer, ¶19.

[21] Reply, ¶64, 65.

not in the area reported by GMC.[22] This conclusion was accepted by Colombia and published in a press release dated 7 July 1994 ("**1994 Press Release**").[23]

51. Colombia submits that the Galeón San José was in fact discovered by a third party hired by Colombia (Maritime Archaeology Consultants Switzerland) on 27 November 2015, as announced by the country's President on 5 December 2015.[24]

C. ATTEMPTS TO SALVAGE THE GALEÓN SAN JOSÉ

52. According to Claimant: "On 12 March 1982, GMC sent a letter to DIMAR with potential terms for a salvage contract for the San José. […]."[25] According to Respondent, this letter simply contains a recount of the facts, without providing evidence of the alleged discovery of the Galeón San José.[26]

53. On 23 August 1984, DIMAR sent a letter to SSA Cayman announcing that it was attaching a "Draft Contract for the Archaeological Study and Salvage of Shipwrecked Goods."[27]

54. On 2 November 1984, DIMAR sent SSA Cayman a letter. According to Claimant, the letter referred to a potential salvage contract for the San José shipwreck, offering to divide the salvaged goods on a sliding scale. [28] According to Respondent, the letter clarified that the company only held the privileges granted by law to a reporter of a treasure; informed the company that it was just another bidder in the process; and informed the company that any contract was just a "possibility."[29]

55. On 9 November 1984, SSA Cayman sent DIMAR a letter. According to Claimant, through this letter SSA Cayman accepted its terms as set out in the 2 November 1984 letter.[30]

56. In the following years, according to Claimant, SSA Cayman continued its good faith negotiations for a salvage contract with DIMAR. Colombia, however, began courting various States, including the U.S., Sweden, Brazil, the United Kingdom, France, Italy, Norway and Japan, to conclude a Government-to-Government contract to "search for and recover the

[22] Submission, ¶57-62. *See also* Response, ¶78.

[23] Reply, ¶68.

[24] Response, ¶120; Submission, ¶99; Reply, ¶460; Joint Chronology, p. 25 (item 82).

[25] Response, ¶45; Rejoinder, ¶58.

[26] Joint Chronology, p. 4 (item 12).

[27] Joint Chronology, p. 6 (item 23).

[28] Response, ¶60; Reply, ¶60; Joint Chronology, p. 7 (item 25).

[29] Joint Chronology, p. 7 (item 25).

[30] Response, ¶61-62; Appendix D to Reply (Respondent's Chronology of Key events), p. 3; Joint Chronology, p. 7 (item 26).

Spanish treasureship [sic] 'San José'." [31] On 17 July 1988, Colombia entered into a Memorandum of Understanding with the Swedish Government.[32]

57. According to Respondent, the fact that Colombia contacted different States, and entered into a Memorandum of Understanding with the Swedish Government instructing it to identify the area of the search "in the first place within the coordinates declared by Sea Search Armada", bolsters its argument that the SSA Predecessors had not found the Galeón San José.[33]

58. On 16 March 2010, SSA proposed a joint salvage operation with the Government of Colombia.[34]

D. GOVERNMENTAL DECREES AND RESOLUTIONS

59. As previously mentioned, the first resolution relevant to this dispute, by which DIMAR granted GMC Inc.'s request for an underwater exploration permit to search for shipwrecks within a specified area of Colombia waters, was Resolution No. 0048 of 29 January 1980.[35] While Claimant argues that Resolution No. 0048 made clear that the exploration permit was issued for the purpose of finding the San José,[36] Respondent contends that, given GMC Inc.'s expressed purpose of the request ("to seek for the existence of shipwrecked species, treasures, or any other elements of historic, scientific, or commercial value")[37] the resolution was simply authorizing GMC Inc. to "carry out underwater explorations in specific areas – delineated by specific coordinates – of the Colombian sea for a period of two years."[38] Resolution No. 0048 was subsequently extended on 29 January 1982 for three months by virtue of **Resolution No. 0025**[39] and on 22 April 1982 for an additional 3 months by virtue of **Resolution No. 249**[40].

60. On 13 October 1980, upon request by GMC Inc., DIMAR issued **Resolution No. 753**, authorizing GMC Inc. to transfer the rights previously granted by Resolution No. 0048 of 1980 to Glocca Morra Company.[41]

61. On 4 February 1981, upon request by GMC, DIMAR issued **Resolution No. 066**, increasing the exploration areas granted to GMC Inc. in Resolution No. 0048 of 29 January 1980.[42]

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[31] Response, ¶65. *See also* Reply, ¶63.

[32] Response, ¶66.

[33] Reply, ¶63-64.

[34] Submission, ¶72; Response, ¶102; Reply, ¶224; Joint Chronology, p. 14 (item 49).

[35] Response, ¶22-23; Submission, ¶21-22; Rejoinder, ¶30; Joint Chronology, p. 2 (item 4).

[36] Response, ¶23; Rejoinder, ¶31-32.

[37] Submission, ¶21.

[38] Submission, ¶22.

[39] Submission, ¶25; Response, ¶40; Joint Chronology, p. 3 (item 9).

[40] Submission, ¶28; Response, ¶40; Joint Chronology, p. 4 (item 14).

[41] Submission, ¶23; Response, ¶31; Joint Chronology, p. 2 (item 6).

[42] Answer, ¶17; Submission, ¶24; Response, ¶32; Joint Chronology, p. 2 (item 7).

62. On 3 June 1982, through **Resolution No. 0354**, DIMAR recognized GMC as a "reporter of treasures or shipwrecked species in the coordinates referred to in the 'Confidential Report on the Underwater Exploration carried out by Glocca Morra Company in the Caribbean Sea, Colombia 26 February 1982'."[43] According to Claimant, this resolution fully integrated the 1982 Report and gave GMC rights to the Discovery Area as defined in the 1982 Report (the "**Discovery Area**").[44] According to Respondent, the fact that "Resolution No. 0354 simply recognized Glocca Mora Company as a reporter of treasures or shipwrecked species, without even mentioning the Galeón San José" supports the proposition that Resolution No. 0048 never authorized Claimant to search for the Galeón San José specifically.[45]

63. On 24 March 1983, DIMAR recognized the transfer of GMC's rights to SSA Cayman and authorized it "to conduct exploration work approved for the assignor" in prior DIMAR resolutions (*i.e.* Nos. 0048, 0066, 0025, 0249 and 0354) by virtue of **Resolution No. 204**.[46]

64. On 10 January 1984, the President of Colombia issued Decree No. 12,[47] and on 18 September 1984 - Decree No. 2324.[48] In Claimant's view, these two decrees: "(i) reduced the percentage share of treasure that the finder of a shipwreck would receive from 50% of the treasure itself to 5% of the gross value of whatever was salvaged; and (ii) eliminated any preferential rights to a salvage contract to the declarants of a treasure."[49] Conversely, Respondent notes Presidential Decree No. 2324 "reaffirmed DIMAR's authority to grant exploration permits, receive reports of findings and decide upon them. It also provided DIMAR's authority to carry out the necessary steps for entering into and perfecting salvage contracts."[50]

65. On 24 July 2002, Decree No. 1561 was issued regarding DIMAR's authority.[51]

66. On 30 December 2009, Decree No. 5057 was issued regarding DIMAR's authority.[52]

67. On 23 January 2020, the Ministry of Culture issued Resolution No. 0085, which "[d]eclare[d] the Shipwreck of the Galeón San José an Asset of National Cultural Interest."[53]

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[43] Answer, ¶20; Submission, ¶31; Response, ¶46; Joint Chronology, p. 4 (item 15).

[44] Response, ¶49.

[45] Reply, ¶27.

[46] Submission, ¶33; Response, ¶52; Joint Chronology, p. 5 (item 17).

[47] Submission, ¶34-40; Response, ¶63; Joint Chronology, p. 6 (item 20).

[48] Submission, ¶42-47; Response, ¶63; Joint Chronology, p. 7 (item 24).

[49] Response, ¶63.

[50] Joint Chronology, p. 7 (item 24).

[51] Joint Chronology, p. 12 (item 41); Decree No. 1561 of 2002, 24 July 2002 (**R-14**).

[52] Joint Chronology, p. 14 (item 48); Decree No. 5057 of 2009, 30 December 2009 (**R-16**).

[53] Answer, ¶34; Submission, ¶113; Response, ¶135-141; Reply, ¶155.

E. LEGAL PROCEEDINGS

68. Claims to the Galeón San José have given rise to legal proceedings in three different fora prior to this arbitration: the courts of Colombia; the United States Federal Court; and the Inter-American Commission on Human Rights. These proceedings featured prominently in the Parties' pleadings.

1) Litigation in Colombia

69. Over the course of three decades, multiple levels of Colombian courts have dealt with lawsuits brought by SSA's Predecessors.

70. On 13 January 1989, SSA Cayman filed a lawsuit ("**Civil Court Action**") before the 10th Civil Court of Barranquilla Circuit (the "**Civil Court**").[54] In these proceedings Claimant asked the Civil Court to confirm the following:

> As GMC had been recognized by DIMAR's Resolution No. 0354 as the reporter of treasure, Colombia had no rights over any of the goods of economic, historical, cultural or scientific value that qualified as treasures and were found in the Colombian continental platform or in Colombia's exclusive economic zone, within the coordinates and surrounding areas referred to in the 1982 Report;
>
> In the alternative, and if the Civil Court concluded that the goods were not located in the Colombian continental shelf or in Colombia's exclusive economic zone but instead were located in Colombia's territorial sea, then SSA Cayman had rights over 50% of the treasure while Colombia had rights over the remaining 50%; and
>
> SSA Cayman had a right to salvage the shipwrecked goods and to enter into a salvage contract with Colombia on a preferential basis.[55]

71. Respondent notes that, "through the lawsuit, SSA Cayman sought 'the recognition of 50% or the totality of the right of property over the assets of economic, historical, cultural or scientific value that possess the quality of treasures that are located in the coordinates and contiguous areas referred to in the 'Confidential Report on Underwater Exploration' in the Caribbean Sea of Colombia, dated 16 February 1982, submitted by the Glocca Morra Company […]."[56]

72. In parallel with the Civil Court Action, in June 1993, "SSA Cayman's counsel filed an action before the Constitutional Court […] to invalidate certain provisions that sought to reduce a declarant's stake from 50% to 5% of the declared treasure" ("**Constitutional Court Action**").[57]

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[54] Answer, ¶1 (on p. 8); Submission, ¶52; Response, ¶69.

[55] Response, ¶69.

[56] Joint Chronology, p. 10 (item 31).

[57] Response, ¶75; Rejoinder, ¶105(a); Joint Chronology, p. 10 (item 32).

73. On 10 March 1994, the Colombian Constitutional Court issued constitutionality judgment C-102 of 1994, declaring the unconstitutionality of two provisions of Decree No. 2324: Art. 188 (which defined "shipwrecked antiques" as "shipwrecked species that had not been rescued in the terms referred to in article 710 of the Civil Code") and Art. 191 (which provided that a person who is recognized as a reporter "will be entitled to a participation of five per cent (5%) over the gross value of what is subsequently found in the coordinates").[58] According to Claimant, this judgment invalidated "Colombia's attempt to radically alter the apportionment regime from 50/50 to 95/5." [59]

74. On 6 July 1994, the **Civil Court** rendered a judgment ("**Civil Court Decision**"), declaring:[60]

> [T]hat the goods of economic, historic, cultural, and scientific value that qualify as treasures belong, in common and undivided equal parts (50%), to the Colombian Nation and to Sea Search Armada, which goods are found within the coordinates and surrounding areas referred to in the [1982 Report], which is part of resolution number 0354 of June 3, 1982, of [DIMAR] that recognized that this company holds declarant's right to such goods; whether these coordinates and their surrounding areas are located in or correspond to the territorial sea, the continental platform, or the Exclusive Economic Zone of Colombia.[61]

75. According to Claimant, "this corresponds to the Discovery Area described in the 1982 Report."[62]

76. On 10 August 1994, SSA Cayman filed for a protective injunction with the Civil Court to protect "the movable property of economic, historical, cultural and scientific value that has the quality of treasures" that was the subject of the Civil Court Decision.[63]

77. On 12 October 1994, the Civil Court granted SSA Cayman's request and imposed a *secuestro* (or, in Claimant's words, an "injunctive measure") covering the area described by the 1982 Report (as 'the site identified in the indicated coordinates or in their 'vicinity'") ("**Injunction Order**").[64] While Claimant states that the "Civil Court thus reiterated its recognition of SSA Cayman's rights by issuing the injunction over the area described in the 1982 Report,"[65] Respondent emphasizes the Court's clarification that those proceedings "did not relate to the salvage, finding or discovery of the location of the so-called 'Galeón San José', or whether or

[58] Submission, ¶44, 45, 55; Response, ¶75; Joint Chronology, p. 11 (item 34).

[59] Response, ¶75.

[60] Answer, ¶22; Submission, ¶56; Reply, ¶72 Response, ¶76; Rejoinder, ¶71; Joint Chronology, p. 11 (item 35).

[61] Response, ¶76 (Claimant's translation); 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994 (**C-25**).

[62] Joint Chronology, p. 11 (item 35).

[63] Response, ¶85; Reply, ¶74; Joint Chronology, p. 12 (item 38).

[64] Response, ¶86; Submission, ¶63; Rejoinder, ¶79; Joint Chronology, p. 12 (item 39).

[65] Response, ¶87.

not it was located in the reported coordinates or in its surrounding areas."[66] Rather, the proceedings aimed to establish "whether the discovery reported by [GMC] granted property rights over the assets (treasure) found in the reported site, regardless of whether they were the remains of the Galeón San José or any other ship."[67]

78. On 7 March 1997, the Superior Court of Barranquilla (the "**Superior Court**") confirmed the Civil Court Decision and the Injunction Order in full ("**Superior Court Decision**").[68]

79. On 5 July 2007, the CSJ rendered its decision (the "**2007 Supreme Court Decision**").[69] According to Claimant, the 2007 Supreme Court Decision recognized SSA's rights to 50% of any shipwrecked goods that qualify as treasure at the coordinates and the surrounding area as expressed in the 1982 Report.[70] Respondent notes that the 2007 Supreme Court Decision modified the judgments of first and second instance in the understanding that the property rights were referred only and exclusively to the assets: (i) susceptible of being qualified as treasure, and (ii) found in the coordinates referred to in the 1982 Report, "*without including different spaces, zones or areas*."[71]

80. On 16 December 2016, Colombia requested that the Civil Court lift the Injunction Order.[72]

81. On 31 October 2017, the 3rd Civil Court of Barranquilla lifted the Injunction Order at Colombia's request.[73]

82. On 29 March 2019, following SSA's appeal from the 31 October 2017 judgment, the Superior Court of Cartagena reinstated the Injunction Order.[74] According to Claimant, "the Colombian Superior Court reinstated an injunction protecting SSA's rights by preventing Colombia from unilaterally attempting to salvage the shipwreck."[75] Contesting Claimant's reading of this decision, Respondent underscores that "the Superior Court could not -, and in fact did not- recognize SSA Cayman Islands' rights in accordance with its interpretation of the 2007 CSJ Decision."[76]

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[66] Submission, ¶64.

[67] Submission, ¶64.

[68] Response, ¶88; Submission, ¶65; Rejoinder, ¶80; Joint Chronology, p. 12 (item 40).

[69] NoA, ¶31; Submission, ¶66; Rejoinder, ¶81.

[70] Joint Chronology, p. 13 (item 42).

[71] Joint Chronology, p. 13 (item 42).

[72] Response, ¶125; Rejoinder, ¶125; Colombia's Challenge Of Injunction Order Before 10th Civil Court of the Circuit of Barranquilla, 16 December 2016 (**C-91**); Joint Chronology, p. 27 (item 89).

[73] Submission, ¶105, 109; Reply, ¶227; Response, ¶125; Rejoinder, ¶126; Joint Chronology, p. 29 (item 92).

[74] Submission, ¶109; Response, ¶131; Rejoinder, ¶127; Joint Chronology, p. 31 (item 99).

[75] Response, ¶4.

[76] Reply, ¶82.

2) Litigation in the United States

83. On 7 December 2010, SSA filed a complaint against Colombia in the U.S. District Court for the District of Columbia (the "**DC District Court**" and the "**U.S. Litigation**").[77] In this action Claimant alleged that: "(a) Colombia had breached the salvage contract it was negotiating with SSA; or (b) Colombia had committed conversion by refusing to allow SSA to initiate salvage operations; and (c) the U.S. court should enforce the 2007 Supreme Court Decision as a foreign judgment."[78] Respondent states that Claimant alleged "expropriation of its ownership rights", as well as "a breach of contract", and claimed damages of USD 17 billion.[79]

84. On 24 October 2011, the DC District Court dismissed SSA's claims.[80]

85. On 8 April 2013, the United States Court of Appeals for the District of Columbia Circuit confirmed the DC District Court's judgment, stating that the District Court properly granted Colombia's motion to dismiss.[81]

86. On 23 April 2013, SSA filed a new civil action against Colombia, again before the DC District Court, claiming that "SSA has suffered damages including the loss of amounts invested in the preparation for salvage operations as well as funds expended in responding to the GOC's actions and threats."[82]

87. On 20 November 2014, SSA invited Colombia to attempt a negotiated solution regarding the enforcement of the 2007 CSJ Decision.[83]

88. On 22 December 2014, the Minister of Culture of Colombia wrote to SSA.[84] According to Claimant, by means of this letter the Minister of Culture confirmed its intent to negotiate a mutually beneficial resolution if SSA withdrew all pending litigation. According to Respondent, the Minister of Culture conditioned any possibility of dialogue to SSA LLC definitively ceasing legal actions of any kind.

89. On 19 January 2015, SSA informed Colombia that it agreed to the withdrawal of the proceedings before the DC District Court.[85]

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[77] Response, ¶103; Submission, ¶74; Rejoinder, ¶103; Joint Chronology, p. 15 (item 51).

[78] Response, ¶103. *See also* ¶105.

[79] Submission, ¶74; Reply, ¶100, 101, 103.

[80] Response, ¶106; Submission, ¶78; Reply, ¶105; Rejoinder, ¶108; Joint Chronology, p. 15 (item 53).

[81] Submission, ¶85; Reply, ¶112; Joint Chronology, p. 16 (item 57).

[82] Submission, ¶86; Joint Chronology, p. 13 (item 58).

[83] Submission, ¶87; Response, ¶108.

[84] Submission, ¶88; Response, ¶108; Joint Chronology, p. 16 (item 59).

[85] Response, ¶109; Submission, ¶89; Joint Chronology, p. 17 (item 60).

90. On 30 January 2015, the DC District Court granted Colombia's motion to dismiss.[86]

91. On 9 February 2015, SSA submitted a "motion to alter or amend the Court's Judgment and statement of points and authorities in support thereof."[87] Shortly thereafter, on 20 February 2015, SSA formally withdrew this motion and the U.S. Litigation at large.[88]

3) Proceedings before the Inter-American Commission of Human Rights

92. On 29 March 2013, Claimant filed a petition with the IACHR citing violations of its rights to property and judicial protection.[89]

93. On 19 January 2015, at the same time as it agreed to withdraw its pending claims before the DC District Court, Claimant also informed Colombia that it agreed to the withdrawal of the proceedings before the IACHR.[90]

IV. COLOMBIA'S OBJECTIONS TO JURISDICTION

94. For the reasons discussed below, the Tribunal dismisses Respondent's jurisdictional objections.

95. In arriving at this conclusion, the Tribunal is mindful that Claimant has not asked the Tribunal to make a positive finding of jurisdiction. Rather, Claimant asks that the Tribunal "reject Colombia's objections pursuant to Article 10.20.5 of the TPA […]" This was further confirmed at the Hearing:

> ARBITRATOR JAGUSCH: […] My understanding is that there is an application before us [Respondent's Art. 10.20.5 application] to accept or to reject. Accepting it would effectively terminate the proceedings because we would find that we lack jurisdiction. But what would "rejecting it" mean? Would it mean that jurisdiction objections may still be pursued subsequently? And the reason I raise this is it ties in with my discussion with Mr. Moloo earlier where I asked what your primary relief was. And you said our primary relief was that you thought that we would issue a decision or an award as appropriate, now finding that we do have jurisdiction. So, you can see how that's a related issue. But also tied up with that is that's not actually your pleaded position. So, (a), it's not the relief you formally sought. And (b), I query whether you have the power or whether we would have the power, in any event, to give an affirmative ruling on jurisdiction at this stage. […]
>
> MR. MOLOO: […] I guess that will depend on Colombia's answer to my – of course, I'm not permitted to ask them questions in this proceeding. But to the extent that they

[86] Submission, ¶90.

[87] Submission, ¶92; Joint Chronology, p. 17 (item 62).

[88] Response, ¶109; Rejoinder, ¶106; Joint Chronology, p. 17 (item 64).

[89] Response, ¶107; Submission, ¶8; Joint Chronology, p. 16 (item 56).

[90] Response, ¶109; Submission, ¶89; Joint Chronology, p. 17 (item 60).

> have not – that they do not intend to raise – or reserve the right to raise additional jurisdictional objections, then I would submit the Tribunal could find – make an affirmative finding of jurisdiction. But it is correct to [deny] the objections.
>
> ARBITRATOR JAGUSCH: You say "could". I presume you mean "could" in the sense that we have available to us what we need to do it.
>
> MR. MOLOO: yes.
>
> ARBITRATOR JAGUSCH: How about the procedural regularity of us making an affirmative finding of jurisdiction when that is not the application before us, and nor sensibly construed is your reply. Nor can that be construed as a request for an affirmative ruling on jurisdiction.
>
> MR. MOLOO: No. and that's why I – it would require Colombia to accept that they do not have other jurisdictional objections and do not intend to make any. But I think that it is a point well taken that the primary relief side, as it currently stands, is denial – definitive denial of the objections. […] It is true that our request for relief is to reject the objections that are raised. I suppose we would defer the question if additional jurisdictional objections were raised at some later stage what our position would be with respect to those. But I think for present purposes, it would probably suffice – I'm trying to assist the Tribunal here, with my answer at least – to reject the objections that are raised by the Respondent. […] I reserve our position with respect to their ability to raise additional jurisdictional objections under the rules.

96. In deciding the issues before it, the Tribunal has carefully considered all of the arguments and evidence submitted by the Parties. The Tribunal has also considered the extensive legal authorities submitted by the Parties, even as, like many arbitral tribunals before it,[91] it recognises that it is not bound by awards rendered in other arbitrations.

97. Similarly, the Tribunal's analysis follows the approach adopted by the tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador*, which, in its Decision on Respondent's Preliminary Objections under Articles 10.20.4 and 10.20.5 of the CAFTA, wrote: "Given the Tribunal's decisions below and its concern not to prejudge, or even be seen to prejudge, the Parties'

[91] *See, e.g.*, *Jan Oostergetel et al. v. Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Final Award, 23 April 2012, ¶145 (**RLA-12**); *Kingdom of Lesotho v. Swissborough Diamond Mines (Pty) Limited*, Judgment, SGHC 195, 2017, ¶103 (**RLA-19)**; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶22 (**RLA-23**); *Quiborax S.A., Non-metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶46 (**RLA-31**); *Bayindir Insaat Turizm Ticaret ve Sanayi A.S v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶76 (**RLA-33**); *Jan Oostergetel et al. v. Slovak Republic,* UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010, ¶62 (**CLA-23**); *Victor Pey Casado and Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶119 (**CLA-62**); *Tekfen-TML Joint Venture et al. v. State of Libya,* ICC Arbitration No. 21371/MCP/DDA, Final Award, 11 February 2020, ¶7.3.12 (**CLA-74**).

respective cases [on the merits] in these arbitration proceedings, it is necessary for the Tribunal to state the grounds for its decisions as succinctly as possible."[92]

98. The Tribunal first addresses, below, the particularities of the decision-making process under Art. 10.20.5 of the TPA and the question of deference (if any) it ought to give to Claimant's factual allegations at this stage. It then proceeds to address the Joint List of Agreed Issues submitted to the Tribunal by the Parties on 2 December 2023, namely [93]:

a. Whether Claimant is a protected investor under Art. 10.28 of the TPA;

b. Whether Claimant possesses a qualifying "investment" under Art. 10.28 of the TPA;

c. Whether the Tribunal has *ratione temporis* jurisdiction under Art. 10.1.3 of the TPA;

d. Whether Claimant's claims are time-barred by the 3-year limitation provision set forth in Art. 10.18.1 of the TPA;

e. Whether Colombia is entitled to security for costs; and

f. Whether either Party is entitled to an award on costs pursuant to Art. 10.20.6 of the TPA.

1) <u>Respondent's position</u>

99. In its Reply, Respondent clarifies how, in its view, the Tribunal should approach the facts alleged and argued by the Parties.[94]

100. First, considering that Respondent's preliminary objections, and the supporting facts, are completely independent from the merits, Claimant's request that Respondent's jurisdictional objections be addressed on a *prima facie* basis should be dismissed.[95]

101. According to Respondent, Claimant's argument that the Tribunal must take its factual allegations as true should likewise be dismissed. Unlike Art. 10.20.4 of the TPA, Article 10.20.5 does not require the Tribunal to assume Claimant's factual allegations as true.[96] Moreover, even in the context of applications brought under the equivalent of Art. 10.20.4 of the TPA, tribunals have confined the presumption of truthfulness only to the facts outlined in the notice (or amended notice) of arbitration, not those that are included in subsequent written or oral

[92] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶244 (**CLA-25**).

[93] *See* Joint List of Proposed Issues dated 2 December 2023.

[94] Reply, ¶165-186.

[95] Reply, ¶172, 174.

[96] Reply, ¶178-182.

submissions.[97] Specifically, the presumption of truthfulness "is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT."[98]

102. Against this backdrop, and as further elaborated in the sections that follow, Respondent submits that Claimant has failed to establish the Tribunal's jurisdiction over the present dispute.[99]

2) Claimant's position

103. In analyzing Respondent's jurisdictional objections, Claimant submits that the Tribunal should consider the facts that relate to the merits on a *prima facie* basis to achieve the object and purpose of Art. 10.20.5 of the TPA.[100] This provision envisages "an efficient and cost-effective mechanism," not a "mini trial."[101] Relying on decisions of other arbitral tribunals in similar situations, Claimant urges the Tribunal to assume that the facts it advances are true for the purposes of the *prima facie* test, unless the evidence submitted by Respondent does not conclusively contradict Claimant's allegations, which it does not.[102]

104. To the extent that Respondent's jurisdictional objections rely on facts that are inconsistent with Claimant's allegations, they must be denied at this stage.[103] Moreover, the vast majority of the factual issues raised by Respondent are inextricably intertwined with the merits of the Arbitration and quantum of damages, such that any determination thereon must be deferred until the merits phase of the proceeding.[104]

105. Ultimately, Claimant posits that the Tribunal "must determine its jurisdiction based on [Claimant's] claims, not [Respondent's] version of them."[105]

3) Non-disputing party's position

106. Contrary to the Parties, both of which submitted during the Hearing that the Tribunal has the discretion to decide whether to determine certain issues finally at this juncture or defer them to

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[97] Reply, ¶183; *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶90 (**CLA-25**).

[98] Reply, ¶184; *Chevron Corporation (U.S.A). and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador,* Interim Award, 1 December 2008, ¶109 (**CLA-19**).

[99] Reply, ¶186.

[100] Response, ¶143; Rejoinder, ¶142.

[101] Response, ¶147.

[102] Response, ¶152.

[103] Response, ¶154.

[104] Rejoinder, ¶141.

[105] Response, ¶247.

the merits, the Non-disputing party did not state a position on the matter when asked, preferring to "reserve […] its position on this question."[106]

107. It nonetheless observed that even if one were to assume the existence of such discretion, that would not equate to accepting Claimant's facts as true for the purposes of making jurisdictional determinations.[107] The Non-disputing party emphasized the distinction between objections under Art. 10.20.4 and Art. 10.20.5 of the TPA. Whereas Art. 10.20.4(c) of the TPA includes a provision requiring a tribunal to assume the facts alleged by a claimant as true for the purposes of "deciding an objection under [that] paragraph," Art. 10.20.5 includes no requirement that a tribunal assume a claimant's factual allegations to be true.[108]

108. As such, "the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim" at the jurisdictional stage.[109]

4) Analysis

(a) Observations on Decision-making under Art. 10.20.5 of the TPA

109. Given the extent of the Parties' pleadings on numerous issues of fact – issues that seemingly cover the gamut of questions related to the merits of SSA's claims, including whether SSA's predecessors discovered the wreck of the San José and its treasure; whether that discovery was reported to the Colombian authorities and recognised by them; whether on the contrary the wreck was in fact discovered by Colombia itself; and the location of the wreck and treasure – the Tribunal considers it useful to address briefly the approach to be taken in addressing such questions, it being noted that this Decision is the culmination not of a bifurcated jurisdictional phase in the sense typically known to investment tribunals but of a fairly *sui generis* proceeding under the TPA (as well as under other treaties incorporating the same expedited preliminary procedure).

110. In their written pleadings the Parties appeared to disagree on the nature, extent and exercise of the Tribunal's decision-making authority under Art. 10.20.5 TPA – specifically, the extent to

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[106] Tr. Day 1, 306: 3-10 ("Mr. Bigge: The United States has not examined whether the exercise of such discretion is permitted or appropriate given the express terms of Article 10.20.5, and, therefore, reserves its position on this question. We note in this regard that we submitted a Non-Disputing Party submission in the Bridgestone matter, which was discussed earlier by the Tribunal, but we did not opine on this particular issue.").

[107] Tr. Day 1, 306: 11-19 ("Mr. Bigge: In any event, the exercise of discretion to join jurisdiction to the merits is not the same as accepting the Claimant's facts as true for the purposes of making jurisdictional determinations. Whenever the jurisdictional determination is made, the Claimant bears the burden to prove the facts necessary to establish jurisdiction, whether that jurisdictional determination is now, in accordance with Article 10.20.5, or later on the basis of a deferral for the merits.").

[108] U.S. Submission, ¶4.

[109] U.S. Submission, ¶3; Tr. Day 1, 305: 14-22 ("Mr. Bigge: Thus, this Tribunal is tasked with determining whether it has jurisdiction in this phase of the proceeding. The Tribunal may not presume Claimant's allegations to be true for the purposes of deciding the jurisdictional objections. Rather, the Claimant bears the burden of demonstrating any facts necessary to establish jurisdiction at this phase. And these facts must be proven for the Tribunal to find that it has jurisdiction even if those facts also relate to the merits of the claim.").

which the Tribunal must determine definitively the numerous disputed facts addressed by the Parties during the preliminary/jurisdictional stage of proceedings, and on what basis; and whether the Tribunal has the discretion generally enjoyed by arbitral tribunals to join certain jurisdictional objections to the merits.

111. At the Hearing, the Parties appeared to converge on the approach articulated in *Bridgestone Licensing Services, Inc. et al. v. Republic of Panama*, with Colombia itself highlighting paragraph 118 of that award, which reads:

> Where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.

112. The Tribunal agrees that it is only issues of fact "that will not fall for determination at the hearing of the merits" that might properly be determined at the jurisdictional stage. However, not every issue of fact that is independent of the merits requires determination when deciding the question of jurisdiction, but only *those factual issues that need to be determined in order to decide the question*.

113. Importantly, the Parties agree that by virtue of the interaction between Art. 10.20.5 of the TPA and Art. 21 of the UNCITRAL Rules, the Tribunal has discretion either to decide Respondent's jurisdictional objections now or join them to the merits. In Respondent's view, this discretion may be exercised only in respect of the factual issues that are intertwined with the merits, whereas questions of fact that are not intertwined with the merits and that concern the Tribunal's jurisdiction ought to be decided at this stage on the basis of the factual record as it currently stands.[110] Claimant, however, disagrees with Respondent's proposition. In Claimant's view, if the Tribunal considers that it would benefit from further evidence regarding facts that it deems necessary to determine for purposes of deciding jurisdiction, it should either give the Parties an opportunity to present such evidence now, or defer its determination to the merits phase.[111] Both Parties consider, however – indeed they repeatedly insisted – that the Tribunal

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[110] Tr. Day 2, 468: 15-25, 469: 19-25, 470: 1 ("Mr. Vega-Barbosa: We do submit that you have discretion in deciding. What we submit is that if you were to consider that the relevant facts for deciding on the particular preliminary objections that we are submitting are enough, you should decide the preliminary objections now. But as we said on the very first day, your discretion includes the possibility to, for example, join this question with the merits. Decide it now. […] Based on the explanation of the relationship between Article 10.20.5 and the relationship with Article 21 of the 2021 UNCITRAL Rules and the principle of the burden of proof, is that if you consider that Claimant has failed to provide you with the relevant facts that are necessary to establish jurisdiction, you should decide now that you don't have jurisdiction.").

[111] Tr. Day 2, 470: 6-19, 471: 3-10 ("Mr. Moloo: If I'm understanding the Tribunal's questions correctly, if there is a jurisdictional fact that the Tribunal needs to determine – feels it needs to determine now and it does not have sufficient evidence, I think it has discretion, of course, to ask the Parties to answer any questions that they have in my submission. And if the Tribunal had such a question that it would be appropriate to give the Parties an opportunity to respond to any question the Tribunal has with respect to any such evidence.

President Drymer: In other words, file or submit further evidence in the course of this expedited preliminary phase?

Mr. Moloo: yes. […] I think the Tribunal has discretion with respect to both of them. One of them is if the Tribunal decides that it wants to make a determination now on this expedited basis but feels it has a particular question or needs particular

has all relevant information before it to rule finally on Colombia's jurisdictional objections at this juncture.[112]

114. In performing the exercise which it is called to complete under Art. 10.20.5 of the TPA, the Tribunal will address (i) whether Claimant's factual allegations are to be assumed as true; (ii) which Party bears the burden of proof at this preliminary stage; and (iii) whether the Tribunal may defer the resolution of certain issues to the merits stage, if it considers that further evidence is required to determine those issues.

115. With respect to, first, item (i) in the preceding paragraph, though both Arts. 10.20.4 and 10.20.5 of the TPA mandate that the Tribunal decide objections in expedited fashion,[113] only Art. 10.20.4 of the TPA expressly requires the Tribunal to "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim,"[114] as rightly noted by Respondent[115] and the Non-disputing party.[116] Considering that Respondent's objections go to the Tribunal's jurisdiction and are brought under Art. 10.20.5 of the TPA, the presumption in Art. 10.20.4(c) does not apply in the present case. In any event, there is no need for the Tribunal to ascertain whether a *prima facie/pro tem* factual test applies outside of

information from one of the Parties, then it has the discretion to ask for that during this phase. It also has the discretion to kick that issue to the next phase.").

[112] Tr. Day 1, 185: 6-8 ("Mr. Moloo: However, I can say with confidence that you can definitively determine any purely jurisdictional fact, purely jurisdictional fact at this stage."); Tr. Day 2, 331: 6-12 ("Mr. Vega-Barbosa: Yesterday, in response to Mr. Drymer's question, we expressed the view that although the Tribunal's discretion can be exercised, for example, by deciding the preliminary objections at this juncture, or by deciding to join the analysis with the merits, our view was that the Tribunal had everything at its disposal to dismiss the case at this jurisdictional stage."), 408: 14-25 and 409: 1-5 ("Mr. Moloo: But my submission to you is that all of these are capable of being decided now.

Arbitrator Jagusch: Can I just – I just want to be very clear what your position is in response to the application before us. Is it that the jurisdictional objections can and should be resolved now in your favor? Is that your primary position?

Mr. Moloo: That is my primary position.

Arbitrator Jagusch: Okay. And your alternative is otherwise we exercise our discretion and join it to the merits.

Mr. Moloo: To the extent there are factual issues that are related to questions on the merits, then yes.

Arbitrator Jagusch: Thank you.

Mr. Moloo: Then those should be joined to the merits. Correct.").

[113] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶16 (**CLA-25**) ; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶220 (**CLA-54**); *The Renco Group, Inc. v. Republic of Peru,* UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, ¶214, 222 (**CLA-36**).

[114] *Jin Hae Seo v. Republic of Korea,* HKIAC Case No. 18117, Final Award, 27 September 2019, ¶79-84 (**CLA-52**); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶220 (**CLA-54**).

[115] Reply, ¶178-182.

[116] U.S. Submission, ¶4.

the test mandated under Art. 10.20.4(c) of the TPA: as explained below, the Tribunal's findings are made on a *prima facie* basis.

116. With respect to burden of proof, the general rule that the party relying on a disputed fact bears the burden of proving it,[117] applies also in circumstances where, as here, a factual determination is required in respect of issues that can be severed from the merits for stand-alone consideration at the jurisdictional phase. In other words, it is for Claimant to prove the facts supporting the Tribunal's jurisdiction in this case.[118] More generally outside the realm of factual determinations, however, the burden of persuading the Tribunal to grant the jurisdictional objections at issue in this case lies with Respondent as the Party making those objections. Indeed, the tribunal in *Pac Rim*, when deciding on objections under Arts. 10.20.4 and 10.20.5 of the DR-CAFTA (which are substantively identical to Arts. 10.20.4 and 10.20.5 of the TPA), held that "it is of course for the Respondent to discharge the burden of satisfying the Tribunal that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings."[119] The Tribunal sees no reason why the same should not be true in this case, nor has Colombia attempted to show how or why that statement might be incorrect or inapplicable.

117. Finally, with respect to the question whether the Tribunal may defer issues to the merits phase, the Tribunal notes with reassurance the Parties' reliance on the Decision on Expedited Objections in *Bridgestone Licensing Services, Inc. et al. v. Republic of Panama*,[120] as it provides the most comprehensive framework:

> 118. Where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction. This is the position as far as Objection No. 3 asserting a denial of benefits is concerned.
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> 119. Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a prima facie decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct. It will then be open to the

[117] *Jin Hae Seo v. Republic of Korea,* HKIAC Case No. 18117, Final Award, 27 September 2019, ¶86 (**CLA-52**).

[118] *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, ¶190 (**RLA-20**), *citing Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶2.8-2.9.

[119] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶111, 114 (**CLA-25**).

[120] Response, ¶150; *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017 (**CLA-46**); Tr. Day 1, 184: 20-25 ("Mr. Moloo: What I would submit to this Tribunal, however, is in exercising its discretion under the UNCITRAL Rules, that is the test that should apply and that is the test that indeed Bridgestone applied because it makes sense."); Tr. Day 2, 331: 18-20 ("Mr. Vega-Barbosa: The relevant quote from Bridgestone is Paragraph 118, which was quoted by Claimant in its written response to Colombia's Article 10.20.5 objection.").

> respondent, if its preliminary objection fails, to have a second "bite at the cherry" at the merits hearing on the basis of the facts that will then be determined.
>
> 120. The Tribunal rejects Panama's submission that it has no authority on an expedited objection to competence under Article 10.20.5 to reach a decision on a prima facie basis and to join the issue of competence to the merits of the dispute. Such authority is essential if the Tribunal is to be in a position to prevent the hearing of the expedited objection turning into a mini, or even a maxi, trial. It is also consonant with the obligation under Article 10.20.5 to "suspend any proceedings on the merits." **A decision to join the objection to the merits of the dispute will satisfy the Tribunal's obligation under Article 10.20.5 to issue an expedited decision on the objection.**
>
> 121. It is, however, open to the Tribunal to make a determinative finding of fact and to base a final award or decision upon this at the expedited phase if it considers this appropriate. In this case, Panama's Expedited Objections, apart from Objection No. 3, do not raise any significant issues of fact. Far from disputing the facts alleged by the Claimants, Panama's objections are essentially based upon these. The Claimants have adduced a body of evidence in support of their pleaded case, but again this evidence has not been significantly challenged. The issues are essentially issues of law, not fact.
>
> (emphasis added)

118. Considering the Parties' agreement that the Tribunal enjoys discretion by virtue of Arts. 10.20.5 of the TPA and 21 of the UNCITRAL Rules, and based on the above *dicta* from *Bridgestone*, and other cases which were decided under treaties with substantively identical language to that of the TPA,[121] the Tribunal understands that it may make a final determination of the facts if it is able to do so. However, if there is a risk that in deciding a factual issue the Tribunal may prejudge questions going beyond the question of its jurisdiction, the Tribunal may postpone that determination to the merits stage.[122]

119. As further elaborated below, the Tribunal considers that the factual issues that require determination at this stage, even if limited in number and scope, could potentially impact the merits of the dispute and, therefore, out of an abundance of caution, the Tribunal will only decide those issues on a *prima facie* basis, as per paragraph 119 of *Bridgestone*. However, reaching such *prima facie* conclusions still requires the Tribunal to test the strength of Respondent's objections, and so to a certain extent Claimant's affirmative case on jurisdiction,

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[121] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶226, 228 (**CLA-54**).

[122] Between the two Hearing days, on 15 December 2023 (at 00:21 ET) by way of a letter sent by the PCA to the Parties, the Tribunal asked the Parties to identify: (i) "what factual (not legal) issues must the Tribunal resolve to determine the jurisdictional issues under Article 10.20.5 of the TPA", (ii) "of those factual issues, which are contested", (iii) "of the contested factual issues, which are capable of being resolved definitively in the present expedited preliminary phase (i.e. which are *not* intertwined with the merits of the case)?" The Parties' answers to these questions, given during the Hearing on 15 December 2023 and in their power point presentations, are incorporated in the discussion below, to the extent relevant and helpful (*see, e.g.*, ¶128).

to determine whether Respondent's jurisdictional challenge should succeed – a substantive exercise requiring a commensurate degree of analysis, particularly in view of the number and complexity of the issues that lie for determination before the Tribunal at this early stage of the proceedings.

A. JURISDICTION *RATIONE PERSONAE* (ART. 10.28 OF THE TPA)

1) Respondent's position

120. According to Respondent, the Tribunal lacks jurisdiction *ratione personae* because Claimant has never invested in Colombia and, therefore, is not a protected foreign investor within the meaning of Art. 10.28 of the TPA.[123] It argues that in treaties like the TPA, "it is imperative to meet the expectations of the State parties by proving that the corporation that seeks its protection has actively and personally invested in order to secure the alleged investment."[124] A purported investor cannot simply rely on an ownership or control interest through the contribution of other persons.[125] Neither is incorporation sufficient to entitle one to the protection afforded by the treaty.[126] Rather, Article 10.28 of the TPA provides that an "investor" must be someone who "has made an investment in the territory" of Colombia, such that an allegation of "rights on a sea area on which there may be an asset theoretically capable of constituting an investment" is insufficient.[127]

121. Respondent underscores that, although "Claimant argues it made an investment in Colombia, [it] makes no effort to demonstrate, as required by Article 10.28 of the TPA, that it acquired what it considers the asset constitutive of a protected investment by investing in the territory of Colombia."[128] In Respondent's view, none of the following evidence, invoked by Claimant, constitutes proof of an investment in Colombia:[129]

- SSA Cayman's payment and performance obligations to various vendors involved in the search for and identification of the Galeón San José;
- SSA Cayman's investment of over USD 11 million;
- SSA Cayman's negotiations with the Colombia authorities for a salvage contract between 1983 and 1984;
- efforts to enforce SSA Cayman's rights;

[123] Answer, ¶56-57; Submission, ¶134-141; Reply, ¶187-232.

[124] Reply, ¶192-199.

[125] Reply, ¶192.

[126] Reply, ¶195.

[127] Submission, ¶135; Reply, ¶189-190.

[128] Submission, ¶138; Reply, ¶218-232.

[129] Reply, ¶219-232.

- letters from Danilo Devis Pereira in March 2010 which proposed the establishment of rules and the joint recovery of the Galeón San José;

- US Civil Action before the DC District Court;

- petition filed before the IACHR; (viii) Claimant's appeal of the Third Civil Court of Barranquilla;

- correspondence between the US Embassy in Colombia and Claimant;

- Claimant's letters to the Legal Secretary of the President of Colombia and the Antiquities Commission in September 2017, to the newly elected President Iván Duque in August 2018, and to the Vice-President of Colombia in December 2018 and March 2019.

122. Since Claimant "cannot prove that it invested in Colombia in order to acquire ownership or control over DIMAR Resolution No. 0048 of 29 January 1980 and/or DIMAR Resolution No. 0354 of 3 June 1982," Respondent requests the Tribunal to find it has no jurisdiction *ratione personae*.[130]

2) Claimant's position

123. Claimant submits that it is an investor that made a qualifying investment in Colombia by acquiring virtually all of the assets and rights of its predecessor, SSA Cayman, in 2008.[131] Contrary to Respondent's contentions, Claimant asserts that its rights are not derived from the 2007 CSJ Decision but from the DIMAR resolutions, "as 'confirmed' by the 2007 Supreme Court Decision."[132]

124. Respondent's arguments in its Submission about the insufficiency or the incompleteness of SSA Cayman's asset transfer to SSA are, in Claimant's view, meritless.[133] The APA, pursuant to which SSA Cayman sold "substantially all of the assets to SSA" is a valid and fully executed intra-company agreement that transferred SSA Cayman's vested rights in the discovered shipwreck to SSA (including the rights to benefit from DIMAR's licenses).[134] While certain assets were excluded from assignment, none of these relate to SSA Cayman's rights to the San José.[135] Pursuant to the APA, Claimant "owns and "controls" the rights vested under, *inter alia*, DIMAR's Resolution No. 0048 of 29 January 1980 (which was extended by Resolutions

[130] Submission, ¶140-141.

[131] Response, ¶161; Rejoinder, ¶148-151.

[132] Response, ¶206-209.

[133] Response, ¶171.

[134] Response, ¶165, 170, 174.

[135] Response, ¶171.

Nos. 0066 of 1 February 1981, 0025 of 9 January 1982, 249 of 22 April 1982) and Resolution No. 0354 of 3 June 1982.[136]

125. In its Rejoinder, in response to Respondent's Reply, Claimant argues that that the TPA does not require a protected investor: (i) to have "actively" or "personally" invested; and (ii) to contribute capital to Colombia.[137] The cases cited by Respondent in support of the argument that Claimant must have "actively" or "personally" invested are of little use, since they either involved differently-worded treaties,[138] or were set aside at the seat of arbitration.[139] Respondent's second prong of the argument is based on a mischaracterization of the relevant provision of the TPA.[140] The TPA neither requires "the act of investing in Colombia", nor that Claimant's acts "bring substantial benefit to Colombia."[141]

126. Therefore, Claimant is an "investor" within the meaning of Art. 10.28 of the TPA.

3) Non-disputing party's position

127. The Non-disputing party did not address the notion of "investor of a Party." Its submissions on the definition of "investment" are summarized at section IV.C.3) below.

4) Analysis

128. Article 10.28 defines an "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.
>
> (emphasis added)

129. During the Hearing, Respondent submitted that when determining whether Claimant is an "investor of a Party," the following factual issues must be determined:[142]

- "Whether Claimant [has met] its burden of proof that it invested in Colombia to secure the alleged investment;

[136] Response, ¶176; Rejoinder, ¶171.

[137] Rejoinder, ¶153-166.

[138] Rejoinder, ¶154, 157-161.

[139] Rejoinder, ¶155, 156.

[140] Rejoinder, ¶163.

[141] Rejoinder, ¶164-166.

[142] Respondent's Closing Statement, slide 47.

- Whether the APA [constitutes] a sufficient basis to meet the burden of proof that Claimant invested in Colombia to secure the alleged Investment;

- Whether the alleged assumed but deferred and unsigned liability with Chicago Maritime Corporation [constitutes] a sufficient basis to meet the burden of proof that Claimant invested in Colombia to secure the alleged investment;

- Whether the alleged assumed liability under the 1988 management contract with IOTA Partners [constitutes] a sufficient basis to meet the burden of proof that Claimant invested in Colombia to secure the alleged investment;

- Whether the exchanges of correspondence and sums invested by SSA LLC in order to initiate litigation against the Republic of Colombia before the DC District Court and the IACH [constitute] a sufficient basis to meet the burden of proof that Claimant invested in Colombia to secure the alleged Investment."

130. Claimant, on the other hand, advanced the following questions:[143]

- "whether SSA is a US enterprise;

- whether SSA "made" an investment by acquiring it; and

- whether the investment is in the territory of Colombia."

131. Considering that the notion of "investor of a Party" in Art. 10.28 of the TPA is inextricably linked to the notion of "investment" – to paraphrase the tribunal in *Clorox España S.L. v. Bolivarian Republic of Venezuela*, (annulled, but not in this specific point) they are two sides of the same coin[144] – and that Respondent itself appears to have treated the two objections jointly during the Hearing,[145] the Tribunal deems it appropriate and efficient, in light of the fact that Claimant's US nationality appears uncontested,[146] to deal comprehensively with Respondent's *ratione personae* objection together with its *ratione materiae* objection in the following section.

[143] Claimant's Rebuttal and Closing Statement, slide 5.

[144] *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶787 (**RLA-30**).

[145] *See, e.g*. Respondent's Opening Statement, slides 108-146. *See also* Reply, ¶215, 244, 247, where essentially identical arguments are made with respect to both *ratione personae* and *ratione materiae* objections.

[146] Certificate of Formation of Sea Search-Armada, LLC, 1 October 2008 (**C-29**). Other than a somewhat speculative mention in its Answer (¶57), Respondent has not contested Claimant's US nationality in its written submissions or during the Hearing. Claimant acknowledged the absence of contestation during the Hearing. *See* Tr. Day 2, 409: 13-15.

B. JURISDICTION *RATIONE MATERIAE* (ART. 10.28 OF THE TPA)

1) Respondent's position

132. Respondent submits that the Tribunal lacks jurisdiction because Claimant does not own or control the alleged investment.[147] In its Submission, apart from contesting Claimant's reliance on the various DIMAR Resolutions, Respondent argued that the 2007 CSJ Decision was not a protected investment under the TPA.[148] Claimant's president, Mr. Harbeston, explicitly declared in a "widespread and highly influential newspaper in Colombia" that Claimant's title of property was derived from the 2007 CSJ Decision.[149] However, "an order or judgment entered in a judicial or administrative action" is explicitly excluded from the definition of "investment" found at Art. 10.28 of the TPA by virtue of footnote 15.[150] As such, in Respondent's submission, Claimant cannot be deemed to have a protected investment under the TPA.

133. In its Reply to Claimant's Response, Respondent urges the Tribunal to view Article 10.28 of the TPA through the prism of the three requisite characteristics of an investment set out in sub-paragraphs (g) and (h) of that Article, none of which, in its view, is present: (i) commitment of capital or other resources; (ii) the expectation of gain or profit; and (iii) the assumption of risk.[151]

(a) The requirements under Art. 10.28 of the TPA are not met

134. In Respondent's submission, Claimant's argument that it has an investment because it controls or owns the relevant DIMAR Resolutions must fail.[152] First, there is no evidence of Claimant's contribution of capital.[153] The "commitment of capital or other resources" is inherent in the act of investing, since without such commitment of resources, the asset, even if belonging to the claimant, would not be the result of it having invested.[154] Mere ownership of an asset would not amount to a protected investment.[155]

135. Here, Respondent asserts that Claimant has failed to prove that it personally invested in Colombia after signing the APA with SSA Cayman Islands.[156] Moreover, there is no evidence that assignment has ever been completed, i.e. that the conditions, envisaged in the APA, under which SSA Cayman had promised to transfer certain assets to Claimant, have been fulfilled.[157]

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[147] Answer, ¶44-49; Submission, ¶238-271.

[148] Submission, ¶238, 266-271.

[149] Submission, ¶268.

[150] Submission, ¶266.

[151] Reply, ¶237-241.

[152] Submission, ¶238-252.

[153] Submission, ¶246-252; Reply, ¶242-253.

[154] Reply, ¶243.

[155] Reply, ¶246.

[156] Reply, ¶247.

[157] Submission, ¶240-245; Reply, ¶247-248.

Ultimately, Claimant has not only brought no substantial benefit to Respondent, but has in fact negatively impacted Colombia by extending a dispute initiated on 7 July 1994 for more than 30 years and requiring the State to expend significant resources in different fora to defend itself.[158]

136. Second, Respondent argues that Claimant fails to prove that it made any substantial commitment of capital from which an expectation of gain or profit can be derived.[159] This is because, when entering into the APA, Claimant "knew or at least should have known the Colombian government had already denied any property rights over the Galeón San José."[160]

137. Third, in Respondent's view, Claimant did not assume any risk with the alleged investment.[161] This is because, "when entering the APA, both SSA Cayman Islands and SSA LLC knew that any rights SSA Cayman Islands claimed to have over Galeón San José were definitively and undoubtedly quashed by the 2007 CSJ Decision, in conjunction with the 1994 Press Release".[162] As such, any risk concerning the alleged rights over the Galeón San José had already materialized with the 2007 CSJ Decision.

(b) Claimant never owned or controlled a protected investment under Art. 10.28(g) of the TPA

138. According to Respondent, at no time did Claimant own or control a protected investment under Art. 10.28(g) of the TPA because: (i) the DIMAR resolutions were not conferred to Claimant pursuant to Colombia's domestic law, and (ii) the DIMAR Resolutions do not create *in rem* rights under domestic law over specific shipwrecks, let alone over the Galeón San José.[163]

139. Respondent submits that the relevant DIMAR Resolutions were not transferred to Claimant in compliance with Colombian law.[164] Under Art. 10.28(g) of the TPA, "licenses, authorizations, permits and similar rights" have to be "conferred pursuant to domestic law" in order to qualify as a protected "investment".[165] Pursuant to Colombian domestic law, DIMAR has the exclusive power to grant authorizations for marine exploration activities, including by authorizing the assignment of exploration rights between private parties.[166] Indeed, DIMAR authorized the assignment of exploration rights from GMC Inc. to Glocca Morra Company in 1980, and from Glocca Morra Company to SSA Cayman Islands in 1983.[167] By contrast, the assignment of rights to Claimant was not authorized by DIMAR, which makes such transfer non-compliant

[158] Reply, ¶250.
[159] Reply, ¶255.
[160] Reply, ¶256, 259.
[161] Reply, ¶262-269.
[162] Reply, ¶265.
[163] Reply, ¶272.
[164] Submission, ¶238, 253-265; Reply, ¶273-287.
[165] Submission, ¶254; Reply, ¶273.
[166] Submission, ¶256-257.
[167] Submission, ¶262.

with Colombian domestic law, thereby undermining Claimant's argument that it has an investment within the meaning of Art. 10.28(g) of the TPA.[168]

140. In Respondent's view, the conduct of Claimant's alleged predecessor shows that the assignment of exploration rights from SSA Cayman Islands to Claimant required DIMAR's authorization.[169] Both GMC and SSA Cayman Islands understood that the assignment of rights required DIMAR's authorization.[170]

141. Colombia further asserts that it is not estopped from arguing that the assignment of rights from SSA Cayman Islands to Claimant required DIMAR's authorization because:[171]

- only SSA Cayman Islands (not SSA) acted as plaintiff in civil proceedings that led to the 2007 CSJ Decision;
- Colombia had clearly and consistently denied any property rights based on the 1982 Report;
- in the U.S., Colombia's motion to dismiss was made under Federal Rule of Civil Procedure 12(b)(6), which required the factual allegations presented by the SSA to be presumed as truthful;
- Colombia successfully opposed the recognition and enforcement of the 2007 CSJ Decision on the basis that it was not a money judgment.[172]

142. Furthermore, Respondent submits that DIMAR Resolutions No. 0048 and No. 0354 do not create *in rem* rights over any specific shipwreck, let alone the Galeón San José.[173] This is because "a resolution recognizing a private company as a reporter of treasures does not create any *in rem* rights over the reported species, much less to unreported species as in the case of Glocca Morra Company, but rather a mere expectation of a right, which is completely contingent on the reporter positively establishing that a reported species is in fact in the reported area, and moreover, on the States expressing its positive desire to extract the shipwrecked species."[174] Notably, Resolution No. 0048 did not authorize exploration of Colombian waters in search for the Galeón San José, nor was it intended or could have been intended to create any specific *in rem* right. Rather it merely designated certain areas in which the company was authorized to develop underwater exploration activities.[175] Similarly,

[168] Submission, ¶263-265.
[169] Reply, ¶274, 281.
[170] Reply, ¶276.
[171] Reply, ¶274, 282-287.
[172] Reply, ¶283, 284, 285.
[173] Reply, ¶288-310.
[174] Reply, ¶298.
[175] Reply, ¶292.

Resolution No. 0354 did not create any *in rem* right over the Galeón San José; it merely recognized GMC as a reporter of the treasures referred to in the 1982 Report.[176]

143. That these resolutions do not create *in rem* rights can also be ascertained, in Respondent's view, from the civil proceedings arising out of the Civil Action filed by SSA Cayman Islands in 1983.[177] The 2007 CSJ Decision is likewise exemplary.[178]

2) <u>Claimant's position</u>

144. Claimant observes that the term "Investment" is defined broadly in Art. 10.28 of the TPA and encompasses "every asset" that is capable of being owned or controlled, irrespective of whether that control or ownership is "direct[]" or "indirect[]".[179] An investment under the TPA can be described by any of the following characteristics: a commitment of capital (not a "contribution" of capital, as Respondent erroneously argues)[180] or other resources, expectation of gain or profit, or assumption of risk.[181] Accordingly, Claimant submits that it is not required for the investor to have committed the capital itself.[182] Even the "commitment of capital or other resources" is not a necessary criterion for every investment to exist.[183] Yet, the SSA Predecessors (GMC and its parent company GMC Inc., SSA Cayman) spent thousands of man hours and over USD 11 million in exploring, finding and reporting the wreck of the San Jose, and additional amounts to support the enforcement of their legal rights to the discovery.[184] By means of the APA, SSA made a "commitment of capital", since it assumed the obligation to pay "as and when due" SSA Cayman's "Assumed Liabilities."[185] Additionally, Claimant's "commitment of capital" is likewise evident from the significant amount of money, time and resources spent to salvage the San José shipwreck.[186] As such, Claimant concludes that its acquisition of SSA Cayman's assets, rights and interests under the APA plainly has the "characteristics of an investment".[187]

145. Contrary to Respondent's contention, Claimant posits that the APA, which was neither governed by Colombian law nor executed by Colombian parties, did not need to be approved

[176] Reply, ¶294, 301.
[177] Reply, ¶303-306.
[178] Reply, ¶305, 306.
[179] Response, ¶164; Rejoinder, ¶168.
[180] Response, ¶187.
[181] Response, ¶164; Rejoinder, ¶172, 178-208.
[182] Rejoinder, ¶184.
[183] Rejoinder, ¶179.
[184] Response, ¶167, 190; Rejoinder, ¶183, 193-194, 204.
[185] Response, ¶189; Rejoinder, ¶173, 190, 191.
[186] Response, ¶191; Rejoinder, ¶162, 189.
[187] Rejoinder, ¶172.

by DIMAR.[188] The TPA does not condition the assignment of the "investment" on compliance with Colombian law.[189] Even when a legality requirement is read into the treaty, tribunals have held that the illegality must be serious (e.g. act of fraud or corruption) to deprive a tribunal of jurisdiction.[190] Furthermore, Respondent has offered no legal authority to support its argument that DIMAR's authorization was required in order for the SSA Cayman's conferral of rights to the SSA to be valid.[191] In fact, the term "conferred pursuant to domestic law" is not a characteristic of the investment, but rather a condition of the validity of the underlying instrument (and Colombia is yet to identify any legal basis for its assertion that the sale was invalid).[192] Additionally, the transfer of SSA Cayman's assets to Claimant was part of the reorganization of the SSA Partners' investment, which is permitted in international investment law and under the TPA.[193] Finally, in none of the previous court proceedings (before the Colombian and US courts, the IACHR or in the Parties' negotiations) did Respondent contest the validity of SSA Cayman's assignment.[194] Respondent's contention that it was not "required to raise" any challenges to the assignment before is, in Claimant's view, "preposterous."[195]

146. Furthermore, Claimant notes that Article 10.28 of the TPA also specifies that "investment" includes "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law" (paragraph (g)), as well as "other tangible or intangible, movable or immovable property, and related property rights" (paragraph (h)).[196] Contractual rights – "such as those granted under the APA – and those derived from licenses or similar rights conferred pursuant to domestic law were unequivocally contemplated as investments."[197] According to Claimant, "Colombia makes no objections […] to the categorization of SSA's investment under Article 10.28(h)," nor does it dispute "that the types of investments listed in Article 10.28(a)-(h) of the TPA are merely indicative."[198]

147. In its Rejoinder, Claimant also responded to Colombia's new objections that the investment lacks an "expectation of gain or profit" and the "assumption of risk".[199] Claimant submits that these objections are belated, since they were not raised within 45 days of the Tribunal's constitution.[200] Moreover, these objections are unfounded. The TPA does not require that the

[188] Response, ¶196.
[189] Response, ¶194; Rejoinder, ¶212.
[190] Response, ¶197.
[191] Response, ¶199; Rejoinder, ¶214-217.
[192] Rejoinder, ¶212, 213.
[193] Response, ¶203.
[194] Response, ¶204.
[195] Rejoinder, ¶219.
[196] Response, ¶177, 180; Rejoinder, ¶209.
[197] Response, ¶178.
[198] Rejoinder, ¶209.
[199] Rejoinder, ¶175-176.
[200] Rejoinder, ¶197, 203.

commitment of capital must be made with the expectation of gain or profit, or that the expectation of gain or profit cannot be found without a commitment of capital or other resources.[201] As such, case law based on differently worded treaties is irrelevant.[202]

148. By reference to Respondent's contention that Claimant has no investment because the DIMAR resolutions did not grant *in rem* rights, Claimant submits it is both "unclear and untenable".[203] First, said objection is improper as it is not responsive to Claimant's Response.[204] Second, there is nothing the TPA that requires Claimant's rights to be *in rem* in order to constitute an investment.[205] Had there been any doubt that Claimant had fully vested rights, the Colombia Supreme Court would have decided differently, instead of rejecting the very arguments Colombia is advancing in this Arbitration.[206]

3) Non-Disputing Party's position

149. According to the U.S., the enumeration of a type of an asset in Art. 10.28 of the TPA is "not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment" because "it must still always possess 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."[207] The U.S. further submits that "it is implicit that the protections in Chapter Ten only apply to investments made in compliance with the host state's domestic law at the time that the investment is established or acquired."[208] It nonetheless notes that "trivial violations of the applicable law will not put an investment outside the scope of Article 10.28."[209]

4) Analysis

150. In its Notice of Arbitration, Claimant argued that the 2007 CSJ Decision itself effectively confirms that it "owns" and "controls" "directly", among others, "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law" which grant SSA the authorization to explore, discover, and acquire rights to discoveries in Colombian waters, including through:

[201] Rejoinder, ¶199.
[202] Rejoinder, ¶205-207.
[203] Rejoinder, ¶220.
[204] Rejoinder, ¶221.
[205] Rejoinder, ¶222.
[206] Rejoinder, ¶224.
[207] U.S. Submission, ¶7.
[208] U.S. Submission, ¶8.
[209] U.S. Submission, ¶8.

- DIMAR Resolution No. 0048 of 29 January 1980 authorizing GMC Inc. to search for shipwrecks (later broadened and extended by DIMAR Resolutions, including Nos. 0066 of 1 February 1981; 0025 of 29 January 1982; 249 of 22 April 1982); and

- DIMAR Resolution No. 0354 of 3 June 1982 recognizing GMC as reporter of the shipwrecked treasures and artefacts and acknowledging GMC "as claimant of the treasures or shipwreck."[210]

151. In its subsequent written pleadings, Claimant submitted that SSA made a qualifying investment in Colombia in 2008 by virtue of the APA by acquiring virtually all of the assets and rights of its predecessor, SSA Cayman, including rights to 50% of the treasure in the Discovery Area, which were originally vested in GMC by Resolutions Nos. 0048 and 0354 and Arts. 700 and 701 of the Civil Code[211] and were later transferred to SSA Cayman.[212]

152. While it is "well established that rights arising from contracts may amount to investments,"[213] the Tribunal must consider Claimant's alleged investment in light of Art. 10.28 of the TPA which defines "investment" as follows:

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> **(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law**; and

[210] NoA, ¶66-67. *See also* Response, ¶176.

[211] Response, ¶179; Rejoinder, ¶171.

[212] Response, ¶161; Rejoinder, ¶151.

[213] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary,* 2022, p. 126, ¶148 (**CLA-20bis**).

> **(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges**;
>
> (emphasis added)

153. During the Hearing, Respondent identified the following factual issues as being relevant to the Tribunal's ruling on its *ratione materiae* objection:[214]

- "whether Article 701 allows for the recognition of 50% rights in respect to a specific treasure not found in another's land;
- whether DIMAR Resolution No. 0048 [was] granted for the specific purpose of looking for the Galeón San José;
- whether DIMAR Resolution No. 0354 recognized Glocca Morra Company as a reporter of the Galeón San José in particular;
- whether the 1982 Confidential Report reported the finding of the Galeón San José in particular;
- whether the Columbus Report, as adopted by Colombia, rejected the hypothesis of the finding of the Galeón San José by Glocca Morra Company;
- whether the 2007 CSJ Decision declared any rights over the Galeón San José in particular;
- whether the 2007 CSJ Decision declared any rights over areas different or additional to the specific coordinates indicated in the 1982 Confidential Report."

154. Claimant, conversely, proposed only two issues for determination at this juncture:[215]

- "whether SSA 'owns or controls' 50% of the treasure in the Discovery Area; and
- whether rights to 50% of the treasure in the Discovery Area had investment characteristics such as (a) commitment of capital; (b) commitment of other resources; (c) expectation of gain or profit; (d) assumption of risk; and (e) duration."

155. In the Tribunal's view, as already anticipated at paragraph 119 above, many if not all the factual issues that have been proposed by Respondent for determination (listed above) need not (and, in fact, cannot) be decided at this stage, as they are inextricably linked to the merits of the dispute. The Tribunal would require such issues to be fully aired on the basis of additional factual and/or expert evidence to be in a position to reach a final determination.

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[214] Respondent's Closing Statement, slide 48.

[215] Claimant's Rebuttal and Closing Statement, slide 5.

156. Conversely, in the Tribunal's view, Claimant's list of proposed issues for determination in connection with Respondent's *ratione materiae* objection properly captures the analysis required under the textual definition of "investment" in Art. 10.28 of the TPA.

157. At this stage, therefore the Tribunal's inquiry is twofold: it must first analyze whether DIMAR Resolutions Nos. 0048 and 0354 created or recognised rights capable of comprising an "investment", and if so, whether such rights were validly acquired by Claimant. This inquiry does not require the Tribunal to rule on whether or not those rights pertained to the Galeón San José. In analyzing Respondent's *ratione materiae* objection, the Tribunal will largely mirror the structure laid out both under Art. 10.28 of the TPA and in Respondent's Reply, such that it will first consider whether Claimant's alleged investment possesses the characteristics of an investment (**IV.C.4(a)**), and thereafter whether Claimant "owns" or "controls" such an investment (**IV.C.4(b)**).

(a) Does Claimant's alleged investment possess the characteristics of an "investment" within the meaning of Art. 10.28 of the TPA?

158. As already noted, Art. 10.28 of the TPA defines the term "investment" as "every asset […] that has the characteristics of an investment". This provision includes a non-exhaustive list of such "characteristics" that are considered to be intrinsic to an investment: "[…] including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

159. Although the TPA does not preclude the Tribunal from assessing characteristics other than those listed in Art. 10.28 of the TPA when determining whether a qualifying investment exists, the Tribunal will focus its inquiry on the three characteristics, or criteria, expressly identified by the parties to the TPA: the commitment of capital or other resources (i); the expectation of gain or profit (ii); and the assumption of risk (iii).

i. Did Claimant's alleged investment include a commitment of capital or other resources?

160. The Tribunal will address first whether Claimant's alleged investment (i.e. the acquisition of SSA Cayman's purported rights to 50% of the treasure in the Discovery Area by way of the APA) includes a "commitment of capital or other resources".

161. In its written pleadings, Respondent used the terms "*contribution* of capital" [216] and "*commitment* of capital" interchangeably, [217] always denying that Claimant's purported investment displayed such a feature in the present case. Claimant, on the other hand, emphasized the importance of the applicable treaty language, which at Art. 10.28 refers to a

[216] Submission, ¶246-252.

[217] Reply, ¶242-253.

"*commitment* of capital or other resources" (as opposed to a "contribution"), [218] and argued that the alleged investment indeed reflects such a "commitment."[219] According to Claimant, the word "commitment" denotes the intention of the TPA contracting parties to include promises to provide capital or other resources in the future.[220]

162. Art. 10.28 of the TPA does not define the term "commitment". However, to the extent such term has been interpreted and applied in investment treaty arbitration practice, the authorities cited by Respondent on this issue mostly appear to either use the terms "contribution" and "commitment" interchangeably, or to favour "commitment".

163. For example, in *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, where a *ratione materiae* objection was partially upheld due to there being no proof of "any contribution whatsoever,"[221] when interpreting the notion of "investment" in Art. 25 of the ICSID Convention, the tribunal stated that "a **contribution** of assets (that is, a **commitment** of resources), risk and duration are all three part [*sic*] of the ordinary definition of investment" (emphasis added).[222] The tribunal in *KT Asia Investment Group B.V. v. Republic of Kazakhstan* echoed this idea.[223]Similarly, in *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, again in the context of Art. 25 of the ICSID Convention, the tribunal noted that "to qualify as an investment, the project in question must constitute a substantial

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[218] Response, ¶187. *See also* Tr. Day 1, 254: 15-24; Tr. Day 1, 260:16-25, 261:1-6 ("President Drymer: If I understand you correctly, in your use of this authority [*RSM v. Grenada*], this does not turn on the magic of the word "commitment" versus "contribution" since in Malicorp they were talking about a contribution of capital.

Mr. Moloo: Correct.

President Drymer: Right?

Mr. Moloo: I think the term "commitment" makes it even more clear –

President Drymer: Right.

Mr. Moloo: -- that it's referring to something that had not – that has not been expended, because it's talking about a commitment as opposed to a contribution. […] So I think in our case it's even more poignant.")

[219] Tr. Day 1, 258: 20-25, 259:1-15 ("Mr. Moloo: So the question is not whether or not the investor contributed or, in fact, committed – not just committed, but contributed capital, but whether or not the investment reflects a commitment. And in this case, actually, a contribution of capital. Nonetheless, SSA itself committed capital in many ways. It assumed several liabilities, including the payment of contractual obligations. It assumed the requirement to distribute profits amongst the Economic Interest Holders. It assumed certain contracts that had along with them certain obligations. And if you go to the next slide, you can see what some of those were. Among other things, there was a management agreement that had management fees associated with it that were deferred. There was in the limited partnership agreement an obligation, so a liability to pay Chicago Maritime Corporation USD 1.2 million. These were all assumptions of liability and commitments to make the payments that were assumed by SSA, specifically in the APA when they acquired their investment in 2008.")

[220] Response, ¶187; Claimant's Opening Statement, slides 112-113.

[221] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶232 (**RLA-31**).

[222] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶219 (**RLA-31**).

[223] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8 Award, 17 October 2013, ¶166, 170, 173 (**RLA-41**).

commitment on the side of the investor" and that, "in the case at hand, it cannot be seriously contested that Bayindir made a significant **contribution**" (emphasis added).[224]

164. In *Romak S.A. v. Republic of Uzbekistan*, the tribunal was "required to interpret the term 'investments' as found in Article 1(2) of the BIT,"[225] which provision did not refer to either "contribution" or "commitment." The tribunal in that case noted that the "'ordinary meaning' of the term 'investments' is the **commitment** of funds or other assets with the purpose to receive a profit, or 'return,' from that commitment of capital" (emphasis added).[226]

165. Though the relevant definition in the underlying treaty in *Komaksavia Airport Invest Ltd. v. Moldova* made no reference to either "commitment" or "contribution", the tribunal noted that the noun "investment", according to common dictionary definitions, means variously: "the outlay of money usually for income or profit: capital outlay; **the act of** putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this; or the act of investing money in something or the money that you invest, or the thing that you invest in" (emphasis added).[227] In other words, according to the tribunal in that case, "inherent in the notion of an investment is some ***contribution*** which is made in an attempt to earn a return over *a period of time*, a process that necessarily involves the possibility or risk of not earning a return" (italics in the original; emphasis in bold added).[228] The tribunal also referred to common dictionary definitions of the verb "invest": "**to commit (money)** in order to earn a financial return; to put money, effort, time, etc. into something to make a profit or get an advantage; or to buy property, shares in a company, etc. in the hope of making a profit" (emphasis added).[229]

166. While these decisions provide useful guidance for the Tribunal's present enquiry, the Tribunal agrees with Claimant in that the specific language of the TPA should be the starting point of the analysis: 'commitment', not 'contribution', is the controlling term for present purposes. The views expressed in *Malicorp Limited v. Egypt* and *RSM Production Corporation v. Government of Grenada*, where tribunals held that "commitment" entails promises to make contributions in the future, are persuasive.[230] Based on the current record, the Tribunal is unpersuaded by

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[224] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶131 (**RLA-33**).

[225] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, ¶176 (**RLA-40**).

[226] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, ¶177 (**RLA-40**).

[227] *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶150 (**CLA-26**) (emphasis added).

[228] *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶151 (**CLA-26**).

[229] *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶154 (**CLA-26**).

[230] Claimant's Opening Statement, slides 112-113.

Respondent's position that "Claimant's alleged investment does not include a "commitment of capital or other resources" as referenced in Art. 10.28 of the TPA.

167. The Tribunal understands that Claimant's argument with respect to "commitment," at a high level, is two-fold: (a) Claimant's Predecessors committed capital and other resources, which suffices for an "investment" to exist because Claimant need only demonstrate that it acquired assets that constitute an investment, not that it committed capital or other resources itself;[231] (b) in any event, Claimant itself committed capital or other resources (which may include know-how, equipment, personnel and services) [232] by acquiring SSA Cayman's assets, rights and interests under the APA.[233]

168. Conversely, Respondent submits that Claimant must have demonstrated that it committed "substantive capital of its own", [234] i.e. that it "actively and personally" invested, which Respondent contends Claimant has not done.[235] In Respondent's view, therefore, "mere legal ownership or control of assets is not enough to establish a commitment of capital or other resources."[236] The Tribunal is not persuaded by this argument.

169. The Tribunal notes that under Art. 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."[237] The Tribunal takes inspiration from *Renée Rose Levy de Levi v. Peru*, wherein the tribunal found that claimant's acquisition of rights and shares free of charge from a relative did not "mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the [c]laimant by perfectly legitimate legal instruments."[238]

170. The Tribunal is unable to read the TPA in a manner that aligns with Respondent's submission, not only because of the specific language employed in the TPA, but also because the authorities proffered and relied on by Respondent in support of its position are inapposite. Those authorities concern differently worded treaties, all of which tie the notion of "investment" to "investor". Notably, the Cyprus-Moldova BIT at issue in *Komaksavia Airport Invest Ltd. v.*

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[231] Response, ¶183; Rejoinder, ¶183-186; Claimant's Opening Statement, slide 107-109; Tr. Day 1, 259:1-15.

[232] Tr. Day 1, 261: 7-13. *Mason Capital L.P. (U.S.A.) and Mason Management LLC (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, ¶206-207 (**CLA-53**); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶295-297 (**CLA-66**); *Tekfen-TML Joint Venture et al. v. State of Libya*, ICC Arbitration No. 21371/MCP/DDA, Final Award, 11 February 2020, ¶7.3.5, 7.3.11, 7.3.12 (**CLA-74**). *See also* Response, ¶186.

[233] Response, ¶189; Rejoinder, ¶172-173, 187, 193, 195; Claimant's Opening Statement, slide 110-114.

[234] Reply, ¶217.

[235] Reply, ¶247, as well as ¶191-208 wherein Respondent argues its objection *ratione personae.*

[236] Reply, ¶245-246.

[237] Claimant's Opening Statement, slide 107; Tr. Day 1, 256: 17-25, 257:1-4.

[238] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶148, (**CLA-69**).

Republic of Moldova defined "investments" as "every kind of asset **invested by investors**, for the purpose of acquisition of economic benefit or other business purpose, of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter […]" (emphasis added).[239]

171. According to the tribunal in that case, the phrase "invested by investors" "reinforced the understanding that the Contracting Parties [to the Cyprus-Moldova BIT] expected that any investor seeking to invoke the BIT would have made an actual contribution of some sort, in connection with its putative investment."[240] Explaining that "this flows from the ordinary meaning of the term 'invested,' which is a past tense verb, referring to a prior act of 'investing'", the tribunal continued to make a distinction between "investing," on the one hand, and "owning" and "holding" on the other.[241] In the tribunal's view in that case, while "investing" refers to a "form of conduct, the taking of an act", "owning" and "holding" connote "legal title or possession", such that the terms cannot be conflated.[242]

172. Although the tribunal in the *Komaksavia Airport case* dismissed the investor's claims on the basis of lack of jurisdiction *ratione materiae*, its analysis is of limited use to the Tribunal here. Notably, the TPA definition of "investment" does not require that an asset be "invested by investors," as pointed out by Claimant.[243] As the *Komaksavia Airport* tribunal itself acknowledged, "the phrase 'invested by investors' is not present in all BIT definitions of investment",[244] and, in the great majority of cases, "ownership of shares by an investor […] will in general be considered as sufficient for fostering international protection."[245]

173. *Clorox España S.L. c. La República Bolivariana de Venezuela*, another case heavily cited by Colombia, contained a similar phrase in the definition of "investment" at Article I(2) of the Spain-Venezuela BIT, which was the following: "*todo tipo de activos **invertidos por inversores** de una Parte Contratante en el territorio de la otra Parte Contratante* […]" (emphasis added).[246]

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[239] *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶145 (**RLA-26**).

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

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

[242] *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶154 (**RLA-26**).

[243] Rejoinder, ¶157-159.

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

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

[246] *Clorox España S.L. c. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶799 (**RLA-30**).

174. Yet, even in that case the tribunal made comments that could be construed as contradicting or at least undermining the position taken by Colombia here:[247]

> *803. Sin embargo,* ***aunque el Tratado exija una acción de invertir por el inversor, nada en su texto permite excluir que el inversor invierta en una inversión ya realizada por un tercero originalmente en el territorio de la otra parte Contratante. Tal y como acertadamente lo observa la Demandante****:* "El TBI no prohíbe que Clorox Spain se convierta en un inversor protegido al adquirir acciones de Clorox Venezuela en vez de realizar la inyección inicial de fondos en las operaciones de Clorox Venezuela". *Además, contrario a lo que afirma la Demandada,* ***nada en el texto del Tratado refleja que las Partes Contratantes hayan pretendido excluir "*****las cadenas indirectas de propiedad o titularidad*****"***.
>
> (emphasis added)

175. Moreover, as the tribunal in *Addiko Bank AG v. Montenegro* noted, the "*Clorox* tribunal, in interpreting the terms 'assets invested by investors', did not state that the investor had to have an active role in order to have an investment that is protected, but only that the claimant has to make a showing of an 'investment action'*, i.e*. that claimant *did something* that could be deemed *investing*"[248] (emphasis in the original).

176. In any event, as pointed out by Claimant,[249] that award was annulled at the seat of arbitration precisely because the tribunal had read additional requirements into the treaty.[250]

177. Apart from the authorities cited by Respondent, it is noted that the argument that the phrase "invested by investors" limits treaty protections only to "active" investors was made (and rejected) in a number of other cases. For instance, in *Vladislav Kim et al. v. Republic of Uzbekistan* the tribunal held that the applicable treaty contained no distinction between active and passive investors, despite the inclusion of the phrase "invested by investors" in the definition of "investment".[251] In *Addiko Bank AG v. Montenegro*, the tribunal similarly concluded that "the words 'assets invested by an investor' does not mean […] that the investment must

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[247] *Clorox España S.L. c. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶803 (**RLA-30**).

[248] *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶359 (**CLA-80**).

[249] Rejoinder, ¶155-156.

[250] *A v. Bolivarian Republic of Venezuela*, 4A_306/2019, Judgment, 25 March 2020, ¶3.4.2.7 (**CLA-75**) ("There is no reason to infer from the phrase "invested by investors" the requirement of an active investment that must have been made by the investor itself in return for consideration. Quite to the contrary, the BIT does not contain any requirements going beyond the holding by an investor of one contracting party of assets in the territory of the other contracting party. Consequently, the Arbitral Tribunal cannot be followed when it relies on additional conditions, which it considers not to be fulfilled in the present case, to declare that it lacks jurisdiction.")

[251] *Vladislav Kim et al. v. Republic of Uzbekistan*, ICISD Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶10, 306-308, 310-312 (**CLA-39**).

have been an 'active investment' that was made 'through the contribution of resources to Montenegro or an exchange of resources to acquire an asset."[252]

178. In the light of all of the above, the Tribunal is unable to conclude at this juncture that there is a requirement under the TPA for an "active" and "personal" investment by the purported investor, whether express or by necessary implication. Even if, for the sake of argument, such a requirement were actually expressed or implied by the TPA, the Tribunal would nonetheless remain unconvinced by Respondent's argument.

179. Whatever the precise magnitude of the commitment required by the TPA, the Tribunal has no basis to doubt at this stage that SSA's Predecessors poured significant resources into their exploration efforts.[253] Considering the absence of contradictory evidence on this point, and given that these facts may be tested further in a subsequent stage of the proceedings, as per paragraph 119 of *Bridgestone* the Tribunal proceeds on the assumption that these facts as pleaded by Claimant are correct, that is, that Claimant's Predecessors committed capital or other resources within the meaning of Article 10.28 of the TPA.

180. For similar reasons, the Tribunal has 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. Pursuant to the APA, [254] among other things Claimant assumed liabilities not only to SSA Cayman's "Economic Interest Holders" but also to its creditors.[255] The Tribunal shares the views of the tribunal in *Saluka v. The Czech Republic*, which held that it would be incorrect to exclude from the definition of "investor" those "who purchase shares as part of what might be termed bare profit-making or profit-taking transactions."[256]

181. Finally, the Tribunal is not persuaded by Respondent's argument that Art. 10.28 of the TPA is an expression of the idea that "the alleged investor must make a meaningful transfer of resources into the economy of the host State," [257] which was Respondent's answer to Claimant's argument that it undertook an economic commitment "that brought substantial benefit to Colombia by finding and attempting to salvage the San José shipwreck." According to Respondent, SSA's statement is "completely unacceptable and […] plainly false" because SSA has actually "negatively impacted Colombia by extending a dispute established on 7 July

[252] *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶319 (**CLA-80**).

[253] *See* DIMAR Resolution No. 0354, 3 June 1982 (**C-13**): "[…] the reporting company *has conducted exploration* in various areas of the Caribbean Sea pursuant to several authorizations issued by this Directorate […]" (emphasis added, Tribunal's translation). *See also* Communication from Glocca Morra Company to DIMAR, 12 March 1982 (**R-5**); Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia, 26 February 1982 (**C-10**); Claimant's Opening Statement, slide 108.

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

[255] Rejoinder, ¶187; Claimant's Opening Statement, slide 116; Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988 (**C-58**).

[256] *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, ¶209 (**CLA-60**).

[257] Reply, ¶215, 244.

1994 for more than 30 years and requiring Colombia to expend significant resources in different for a to defend from an artificial allegation of property rights over the Galeón San José."[258]

182. The Tribunal notes, as does Claimant, that reference to a "meaningful transfer of resources into the economy of the host State" is absent from the TPA.[259] The Tribunal further notes that the notion of contribution to the host State's "economic development" as a characteristic of an investment is fairly unique to *Salini* and has become somewhat contentious.[260] Certain tribunals have not considered this feature to rank among the characteristics of an "investment", but rather as one of its consequences.[261] Others have underscored that it is not a decisive factor.[262] In *RSM Production Corporation v. Government of Grenada*, which concerned an agreement for the exploration of oil in maritime areas, the tribunal held that the condition of "the contribution to the economic and social development of the host State […] must be assessed in consideration of a successful adventure" because "it is not the actual or the final contribution that matters" (since exploration may not lead to exploitation).[263] As such, the fact that a venture may not have yielded the desired results should not, in the Tribunal's view, negate the expenditures made in the hopes of a different, positive, outcome. However, since the TPA does not condition the notion of "investment" on a contribution to the host State's "economic development," as announced at paragraph 166 above, the Tribunal need not decide, and will refrain from deciding, whether such a contribution was present in the case at hand.

ii. Did Claimant's alleged investment include the expectation of gain or profit?

183. The second characteristic of an investment identified in Article 10.28 of the TPA is the "expectation of gain or profit". Respondent asserts that Claimant "could not have had an expectation of gain or profit regarding the Galeón San José."[264] It derives this conclusion from its reading of the 1994 Press Release (by which, it says, the Colombian government "adopted the report made by Columbus Exploration, which conclusively determined that no shipwreck was found in the coordinates indicated in the 1982 Confidential Report"),[265] and the 2007 CSJ

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[258] Reply, ¶249-250, 252.

[259] Rejoinder, ¶181.

[260] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶225 (**RLA-31**); *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶240 (**CLA-57**); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶111 (**CLA-63**); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶295 (**CLA-66**).

[261] *Víctor Pey Casado and Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶232 (**CLA-62**).

[262] *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021, ¶346 (**CLA-80**).

[263] *RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶244 (**CLA-21**).

[264] Reply, ¶256.

[265] Reply, ¶257; Letter from President's Office to DIMAR informing of Press Release, 8 July 1994 (**R-11**); Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994 (**R-12**).

Decision (by which, it contends, "the CSJ confirmed that SSA Cayman Islands had no rights over the Galeón San José").[266]

184. The Tribunal is not persuaded by this argument, for many reasons. When Claimant's Predecessors embarked upon this venture in the 1970s, they must have expected to make a profit.[267] Without definitively interpreting the meaning or scope of Art. 701 of the Civil Code, nor treading on other legal or factual ground necessarily left to the merits, the Tribunal observes that on its face Art. 701 appears to provide a potential basis for such an expectation by providing that the "treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery."[268] Claimant filed into evidence a 1981 letter, which describes the "San Joseph [*sic*] Treasure Estimate." [269] Arguably, SSA's Predecessors could have expected half of the amounts indicated therein.

185. Although it may be debated (and presumably will be debated on the merits, and decided at that stage) whether or to what extent the 1994 Press Release or the 2007 CSJ Decision definitively resolved the question of ownership of the Galeón San José, 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: [270]

> **SECOND:** In accordance with the preceding ruling, the aforementioned second item of the trial court judgment is **MODIFIED**, with the understanding that the property recognized therein, in equal parts, for the Nation and the plaintiff, refers solely and exclusively to assets that, on the one hand, due to their own characteristics and features, in accordance with the circumstances and the guidelines indicated in this ruling, may legally qualify as treasure, as provided by Article 700 of the Civil Code and in accordance with 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, to those goods referred to in Resolution 0354 of June 3, 1982, issued by the General Maritime and Port Directorate, that is, to those that are in "the coordinates referred

[266] Reply, ¶25; Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**C-28**).

[267] Claimant's Opening Statement, slide 117. *See also* Tr. Day 1, 263: 1-10 ("Mr. Moloo: Was there an expectation to make profit? Well, I'm a bit surprised that Colombia suggests that there was not despite saying that there was this – this was the biggest treasure in the history of humanity. Of course there was an expectation to make a profit. And it's not just the fact that this was the biggest treasure in the history of humanity, but the Civil Code itself made it clear that if we find the treasure, we get half of it. So of course there was an expectation to make a profit when – and that's reflected in the investment that's made.")

[268] Colombian Civil Code, 31 May 1873, Art. 701 (**C-1**) (Claimant's translation).

[269] Letter from Dr. Eugene Lyon, 21 September 1981 (**C-7**).

[270] Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007 (**C-28**) (Claimant's translation). *See also* Letter from the Minister of Culture to Sea Search Armada, 17 June 2016 (**R-28**) ("**The Supreme Court of Justice's ruling** is clear, it does not admit interpretations and no alleged rights over the Galeón San José can be inferred from it, as you claim. It **refers to possible rights over the possible shipwreck that may exist in the coordinates reported by you and which are established in the confidential report of 1982, without them being related to a specific shipwreck**." (Respondent's translation, emphasis added)).

> to in the 'Confidential Report on Underwater Exploration conducted by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982," which does not include other spaces, zones, or areas.
>
> **THIRD:** Notwithstanding the determinations adopted in the two previous points, **CONFIRM** the rest and pertinent, the aforementioned judgment of first instance.

186. Specifically – though without making any determinations as to the scope and content of the rights at issue – the Tribunal notes that the CSJ appears to have recognised some form of rights or entitlement to such assets or goods that "may legally qualify as treasure" as provided by Colombian law and that "are referred to in Resolution 0354 of June 3, 1982 […], that is, to those that are in 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.

187. Similarly, Claimant itself must have expected some gain or profit in 2008 when it entered into the APA, which provides that "profits and proceeds from [SSA Cayman's] Business were to be allocated and distributed in specified amounts and or percentages."[271] As such, and as mentioned above, regardless whether under the TPA an 'expectation of profit' must exist at the time of the initial investment or, in circumstances where there is a subsequent transfer of ownership, at the time a claimant itself acquires the investment, it appears to the Tribunal that such characteristic was present at all stages relevant for the present analysis.

iii. Did Claimant's alleged investment include an assumption of risk?

188. An "assumption of risk" is the third and final characteristic of an investment specified in TPA Article 10.28. In this respect, Respondent has contested that Claimant assumed "any risk by acquiring the supposed 'assets' from SSA Cayman Islands."[272] According to Respondent, "any 'risk' with regards to the alleged rights over the Galeón San José had already materialized with the 2007 CSJ Decision" because it "definitively and undoubtedly quashed" any rights SSA Cayman claimed to have over the Galeón San José.[273]

189. As stated in the previous section, the Tribunal is not persuaded at this stage that the 2007 CSJ Decision had the effect Respondent seeks to ascribe to it. As discussed above, the CSJ appears rather to have recognized that SSA's Predecessors possessed certain rights or entitlement. The nature and extent of those rights is a matter for the merits.

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[271] Asset Purchase Agreement between Armada Company and Sea Search-Armada, LLC, 18 November 2008, recitals (**C-30bis**).

[272] Reply, ¶264.

[273] Reply, ¶265, 266.

190. The Tribunal agrees with Claimant's submission that a degree of risk is inherent in the "treasure searching" business.[274] Although the Tribunal is unaware of any other case involving an alleged sunken treasure, and no such case was brough to its attention by the Parties, it considers that the comments of the tribunal in *RSM Production Corporation v. Government of Grenada* apply here by analogy: "[N]ot only is an exploration agreement not significantly distinct in nature from the agreement to exploit known resources, but if anything, it is even more of an investment on the part of the private party given the magnitude of the commercial risk involved".[275]

191. The Tribunal likewise agrees with Claimant's contention that a degree of risk was inherent in its assumption of liabilities under the APA (i.e. the obligation to pay not just the SSA Partners but also the creditors and third parties to which the SSA Partners owed debt).[276]

192. At this stage, the Tribunal struggles to deny that the alleged investment included an assumption of risk.

193. In sum, the Tribunal's analysis suggests that Claimant's investment displayed at all relevant times the three characteristics of an investment identified in Art. 10.28 of the TPA: a "commitment of capital or other resources", an "expectation of gain or profit" and an "assumption of risk". Accordingly, the Tribunal rejects on a *prima facie* basis Respondent's argument that the assets for which Claimant requests production under the TPA do not qualify as an "investment" under the TPA".

(b) Does Claimant own or control a protected investment in accordance with Art. 10.28 of the TPA?

194. Having concluded that Respondent has failed to establish at this juncture that Claimant's claims in this arbitration are not premised on an "investment", the ensuing question is whether Claimant can be said to own or control such presumed investment as required under Article 10.28 of the TPA for the investment to qualify for treaty protection. A related – yet distinct – question going to the Tribunal's jurisdiction *ratione personae* is whether Claimant attempted "through concrete action to make, is making, or has made an investment in the territory of another Party", in which case it would qualify as an "investor of a Party" also under Article 10.28

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[274] Claimant's Opening Statement, slides 115, 116; Tr. Day 1, 262: 2-7, 17-25 ("Mr. Moloo: Of course, as I say, assumed risk. There was the risk of – and its predecessors assumed risk. This investment reflects the assumption of risk. That risk, to be clear, is we are going to expend a lot of money to try and find something, and if we don't find it, those expenses, that time is sunk. Apologies for the second pun of the day. […] But that sunk cost, as it were, at the risk of not finding anything, is, of course, an assumption of risk. SSA itself also assumed risk. They assumed liabilities, as I mentioned earlier. And it that also is an assumption of risk by this Claimant specifically to the extent that that's something that the Tribunal finds is relevant for the reasons I've said. I don't think it is, but there you have it. SSA as well in the APA itself assumed all of the liabilities of its predecessor.")

[275] *RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶243 (**CLA-21**).

[276] Rejoinder, ¶204.

of the TPA. Bearing in mind this distinction, the Tribunal will address these separate but interconnected questions as an ensemble.

195. At the outset, Respondent questions Claimant's ability to qualify as an investor because its claim is based on an assignment to it of rights and obligations by SSA Cayman, which assignment was invalid under Colombia law since it was not authorized by DIMAR.

196. Respondent has provided no expert evidence on this point (or on Colombian law more generally). Neither has Claimant. Each Party invokes the other's conduct as a basis for their arguments: Respondent refers to the contemporaneous conduct of Claimant's Predecessors as evidence of their understanding of the need to obtain DIMAR's authorization to assign any rights derived from DIMAR resolutions,[277] whereas Claimant points to Respondent's failure to invoke the absence of DIMAR's authorization in various court proceedings and communications with Claimant over many years.[278]

197. The Tribunal will first consider whether Claimant has shown that the conditions of the APA were met (**i**), and thereafter address the question of DIMAR's authorization (**ii**). As already noted, the Tribunal's *prima facie* conclusions on these issues are relevant to Respondent's objections *ratione materiae* and *ratione personae*.

i. Has Claimant shown that the conditions of the APA were met and that the transaction closed?

198. Respondent has submitted that Claimant failed to provide evidence that the conditions agreed upon in the APA (Art. 2.1) were complied with, that the assets relevant to this arbitration were part of the transaction (i.e. that they were not excluded by virtue of Art. 1.2), and that the transaction effectively closed.[279]

199. In response, Claimant argued that the APA "was validly signed and executed by the parties' authorized representatives, confirming that its closing occurred to their satisfaction."[280] Furthermore, Claimant submitted that "the APA constitutes a broad transfer of substantially all of SSA Cayman's assets,"[281] and that none of the assets that had been excluded from

[277] Submission, ¶261-265; Reply, ¶275-281; Tr. Day 2, 391: 10-17 ("Mr. Vega-Barbosa: Okay. And, moreover, we say that coming back to DIMAR was necessary because, as a matter of principle, you have to come to DIMAR every time you need to carry out marine exploration. And the conduct of the alleged predecessors was absolutely consistent that even after the 1982 Confidential Report, even after Resolution 354, they considered that they still needed marine exploration for the purposes of identification.").

[278] Response, ¶204; Rejoinder, ¶218-219; Tr. Day 2, 430: 18-25, 431: 1 ("Mr. Moloo: But to answer your question, Mr. President, we are advancing an estoppel argument with respect to the conduct of the State and the pronouncements of its courts with respect to the rights of SSA. Nowhere in the submissions that I have heard over the last two days have we been pointed to any law in Colombia that shows that DIMAR was required to authorize the transfer of the rights that we now possess. Nowhere. They refer to course of conduct.")

[279] Submission, ¶242-245.

[280] Response, ¶172.

[281] Response, ¶170.

assignment related to SSA Cayman's rights to the San José.[282] In support of its position, Claimant invoked a judgment of the Appellate Court of Illinois, which provides that under Illinois law (which governs the APA) a party's assent is most commonly indicated through a signature (albeit, in the absence of a signature, it may also be derived from a party's acts and conduct).[283]

200. The Tribunal is not persuaded that Claimant has failed to meet its burden of proof. The APA[284] is signed by Claimant and SSA Cayman's trustee (Armada Company). It is further noted that in its observations on Spain's Intervention Application,[285] Respondent apparently confirms that SSA Cayman's rights were successfully transferred to Sea Search Armada, LLC in accordance with the contract terms and its governing law, even if it disputes the validity of that transfer under Colombian law:

> That SSA Cayman's rights were successfully transferred to Sea Search Armada, LLC (see, Response by Ms. Ordoñez to President Drymer's question, Transcripts, p. 475, paras. 7-11), simply implies that they were transferred through the 2008 APA, and in no way can be construed as an acceptance of the fact that Resolution No. 354 was conferred pursuant to domestic law. As argued by Colombia in these proceedings, even if the transfer was successfully made via the APA, conferral of the relevant rights under Colombia's domestic law still required DIMAR's authorization (See, Colombia's Article 10.20.5 Submission, ¶ 260).Colombia has not abandoned and continues to defend its argument that DIMAR's authority remains necessary even after Resolution No. 354 was issued, and that it remains all the more relevant as long as marine exploration is needed, as is the case here, given that all exploration rights had ceased at the time of the APA.

ii. Were the rights created by DIMAR's resolutions, on which SSA bases its claims in the arbitration, validly conferred pursuant to Colombian law?

201. By reference to the requirement in item (g) of the definition of "investment" at Art. 10.28 of the TPA that any investment taking the form of "licenses, authorizations, permits, and similar rights" must be "conferred pursuant to domestic law" to qualify for treaty protection, Respondent asserts that the assignment of SSA Cayman's rights derived from DIMAR Resolutions Nos. 0048 and 0354 to Claimant required DIMAR's authorization. Because such authorization was never granted, says Respondent, Claimant never acquired the associated rights in accordance with Colombian law, thus depriving the Tribunal of jurisdiction.

202. More precisely, Respondent frames this portion of its objection as one concerning a so-called legality requirement. It argues that, because DIMAR unquestionably has authority over underwater exploration insofar as further exploration is required, and because "the 1982 Confidential Report and the 2008 APA recognize that further exploration was required, SSA

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[282] Response, ¶171.

[283] *Abrogast v. Chicago Cubs Baseball Club, LLC,* IL App (1st) 210526, 16 November 2021, ¶21 (**CLA-79**).

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

[285] Respondent's observations on Spain's Intervention Application dated 22 December 2023, fn 15.

LLC could not have been conferred SSA Cayman Islands' exploration rights without DIMAR's approval." [286] Respondent contends that Claimant's Predecessors knew that DIMAR's authorization "was necessary for the new holder to have the pertinent rights under Colombian law," as evidenced by their contemporaneous conduct.[287] During the Hearing Respondent also argued (seemingly for the first time, in response to the Tribunal's question) that exploration rights granted pursuant to a DIMAR resolution are *intuitu personae*.[288]

203. Claimant, for its part, denies that the phrase "conferred pursuant to domestic law" amounts to a legality requirement,[289] and underscores the absence in Respondent's pleadings of any reference to a provision of Colombian law that would support Colombia's position. [290] Furthermore, Claimant submitted that Respondent "cannot reasonably allege in view of the decisions of its own courts in 1994, 1997, 2007 and 2019 – that the underlying permits are somehow deficient under Colombian law."[291]

204. The Tribunal begins its inquiry with a consideration of Decree No. 2349 of 1971, by which DIMAR was established and which provides in relevant part at Arts. 3 and 4: [292]

> **Article 3**. The functions or attributions of the General Directorate of Maritime and Port Authority are:
>
> […]
>
> 17. To regulate, control and authorize the marine and coastal exploration and construction.
>
> […]
>
> 21. To regulate and authorize the recovery of shipwrecked species.

[286] Submission, ¶256; Reply, ¶12.

[287] Submission, ¶261-265; Reply, ¶275-281.

[288] Respondent's Closing Statement, slide 52; Tr. Day 2, 385: 10-18 ("Mr. Vega-Barbosa: And it's whether the rights granted under Resolution 48 are strictly linked to GMC Inc., the entity that requested the exploration rights, meaning whether these rights are *personalísimos* or *intuitu personae*. And we say that there is no doubt. They are *intuitu personae*. These rights were granted, as the relevant exhibit shows, [DIMAR Resolution No. 0048, 29 January 1980 (**C-2**)], only and specifically to GMC Inc., and they detailed very specific obligations for the exploring company.") See also Tr. Day 2, 392: 4-12 ("Mr. Vega-Barbosa: Second, we say the assignment of exploration rights by DIMAR is made *intuitu personae*. This means in a scenario where Resolution No. 48 is still in force, the transfer of exploration right would have still required DIMAR authorization. Additionally, in the present case, the authorization was necessary because there was a declared need to carry out further marine exploration for the purposes of identification of a particular shipwreck. That never changed.")

[289] Response, ¶194.

[290] Response, ¶202.

[291] Response, ¶195, 204; Rejoinder, ¶218-219.

[292] Decree No. 2349 of 1971, 3 December 1971 (**R-1**) (Respondent's translation).

> **Article 4**. The functions of the Director General are:
>
> 5. 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.

205. When asked during the Hearing what was "the legal basis or provision under Colombian law that requires DIMAR's authorization prior to the transfer of rights under Resolution No. 0048," Respondent pointed to its Submission wherein it referenced Arts. 3 and 4 of Decree No. 2349.[293] Although by 2008 Decree No. 2349 was no longer in force, Respondent stated that DIMAR's authority had remained "pretty much the same" under Decree No. 2324 of 1984.[294]

206. At this stage, the Tribunal does not read Arts. 3 or 4 of Decree No. 2349 as requiring DIMAR's authorization for an intra-company assignment of rights and obligations (among which are the alleged rights derived from DIMAR resolutions on which SSA bases its claims). Their terms are much narrower. In particular, the Tribunal observes that DIMAR's competences, as well as those of its Director General, would appear to be circumscribed to authorizing activities that preceded Claimant's purported discovery of the San José in 1982 (i.e "[t]o regulate, control and authorize the marine and coastal exploration", "[a]uthorize the activity and operation of foreign ships in Colombian waters" and "[a]uthorize the maritime and ports exploration, investigation, construction and exploitation") or activities that have not yet been performed, such as the salvage of the San José (i.e. "[t]o regulate and authorize the recovery of shipwrecked species"). Indeed, it is undisputed that GMC Inc. requested and obtained authorization from DIMAR to transfer its rights to conduct *underwater exploration activities* in Colombian waters under Resolution No. 0048 to GMC in October 1980.[295] This is consistent with DIMAR's overall role as the State agency in charge of regulating maritime activities in Colombian waters. By

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[293] Respondent's Closing Statement, slide 54; Tr. Day 2, 386: 15-25, 387: 1-8 ("Mr. Vega-Barbosa: For the next question, which is: What the legal basis or provision under Colombian law that requires DIMAR authorization prior to the transfer of rights under Resolution No. 48? And we have noted that Claimant have many times asserted that we have not come with any type of legal justification of why the transfer of DIMAR authorizations required also DIMAR authorization, and we say that we are surprised with that. Because since our Article 10.20.5 submission, we made clear that the basis for that is the fact that it is DIMAR pursuant to Decree 2349 of 1971, who regulates and authorized the recovery of shipwrecked species, that regulates and authorizes a recovery of shipwrecked species, the one that issued resolutions to authorize the activity and operation of foreign ships in Colombian waters, authorizes the maritime imports exploration, investigation, construction, and exploitation in Colombian sea beds. So, we think there is a clear basis for their request.")

[294] Respondent's Closing Statement, slide 55; Tr. Day 2, 388:1-7.

[295] Answer, ¶16; Submission, ¶23; Response, ¶31; Joint Chronology, p. 2 (item 6).

contrast, the rights Claimant asserts derive from Resolutions Nos. 0048 and 0352 are, at their core, property rights over a treasure it claims to have *already* discovered as a result of past exploratory efforts. Thus, the proposition that the assignment of *property* rights derived from Resolutions No. 0048 and No. 0352 required DIMAR's authorization would seem to be inconsistent with the express terms of Arts. 3 and 4 of Decree No. 2349 and to go beyond the scope of DIMAR's mandate under Colombian law.

207. Furthermore, Respondent acknowledged that, in this case, DIMAR's authorization was actually not required in respect of Resolution No. 0048 because that Resolution had already long expired by 2008.[296] Respondent further submitted that Claimant would "need to come back to DIMAR in case marine exploration was still needed."[297] In sum, Colombia has 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.

208. In the light of this conclusion, the question whether the issue of DIMAR's authorization pertains to the "legality requirement" is moot.[298]

209. Similarly, the Tribunal is unable at this stage to agree with Colombia that the conduct of Claimant's Predecessors demonstrates their understanding that authorization as required for the transfer of rights under DIMAR resolutions.

210. First, whether further marine exploration was required in 2008 is disputed between the Parties[299] and cannot be decided at this stage.

211. Second, what SSA's Predecessors' conduct indicates is their understanding that DIMAR's authorization is required when it comes to carrying out "underwater exploration operations"[300] or "the identification and rescue of the shipwreck"[301]. Yet, even when Claimant's Predecessors needed to engage in such activities, they did not always seek DIMAR's *prior* authorization. As is apparent from GMC Inc.'s request to DIMAR dated 9 September 1980, it informed DIMAR that it "*has assigned* its submarine exploration rights […] to GMC".[302] Claimant's Predecessors'

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[296] Respondent's Closing Statement, slide 56; Tr. Day 2, 386: 5-9 ("Mr. Vega-Barbosa: And the answer is pretty straightforward. The authorization by DIMAR was not necessary, but for a reason that is not associated with the nature, scope, and extent of DIMAR's competences, but with the fact that Resolution 48 has already expired.").

[297] Tr. Day 2, 388: 12-13.

[298] The Tribunal notes that the issue of "legality" typically is a ground for denying the existence of an "investment" only in the most serious of cases. *See, e.g.*, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, ¶151-56 (**CLA-49**). *See also Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶396, 406-08 (**CLA-39**).

[299] Reply, ¶277; Tr. Day 2, 392: 8-12; Response, ¶201.

[300] Request AF 01196877 from Glocca Morra Company Inc. to Dimar, 9 September 1980, p. 1 (**R-3**).

[301] Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia, 26 February 1982, pp. 5-6 (**R-4**).

[302] Request AF 01196877 from Glocca Morra Company Inc. to Dimar, 9 September 1980, p. 1 (**R-3**) (Respondent's translation).

conduct does not support Respondent's contention that DIMAR's authorization was required for a general assignment of rights and obligations arising under DIMAR resolutions (especially if the assignee has no intention of engaging in marine exploration). As such, the conduct of Claimant's Predecessors confirms the Tribunal's understanding of Arts. 3 or 4 of Decree No. 2349, as explained above.

212. In conclusion, Respondent has failed to establish at this stage that Claimant's investment was not validly "conferred pursuant to domestic law" as per item (g) of the definition of "investment" in Article 10.28 of the TPA.

iii. Did DIMAR Resolutions no. 0048 and no. 00354 create in rem rights over any specific shipwreck?

213. In its Reply[303] Respondent contests Claimant's alleged investment because none of the relevant resolutions created any *in rem* rights.[304] To support its point, Respondent refers to Resolution No. 173 of 1971 and No. 016 of 1974 (both mentioned in Resolution No. 0048 of 1980), by which DIMAR first recognized Reynolds Aluminium Europe S.A. "as a claimstaker for the wreck called Capitana San José", and then "expressly granted exploration rights to carry out underwater exploration activities over the very same shipwrecked species to another company, Friendship S.A." [305] According to Respondent: [306]

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

214. The problem with this particular argument is, first, that it is devoid of any form of support for this "better view", and, second, that it is not at all clear why the fact that the rights in question may not be *in rem* is detrimental to Claimant's case. As noted by SSA, there "is nothing in the TPA that requires SSA's rights to be *in rem* rights in order for them to be protected as an investment." [307] Similarly, as noted above, the Tribunal is convinced that Claimant's Predecessors possessed or were entitled to certain rights derived from the relevant resolutions, as confirmed by the 2007 CSJ Decision. While the nature and content of those rights are matters for the merits phase of the proceedings, the Tribunal has already concluded that Claimant had *some* form of right amounting to an "investment" in the sense of Article 10.28 of the TPA.

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[303] Reply, ¶288-310.

[304] Reply, ¶292-296.

[305] Reply, ¶296-297; DIMAR Resolution No. 0048, 29 January 1980 (**C-2**) (Claimant's translation).

[306] Reply, ¶298.

[307] Rejoinder, ¶222.

215. The Tribunal does not accept Respondent's argument.

(c) Conclusion

216. Based on the record as it currently stands, the Tribunal is simply unable to conclude at this stage, as Respondent asserts, that SSA is not an "investor of a Party" or that the alleged investment did not reflect the characteristics of "investment" referred to in Art. 10.28 of the TPA. Considering in particular that the TPA does not contain language requiring an "active" and "personal" commitment on the part of an investor, and that the holding or acquisition of shares in a company,[308] or rights arising from contracts[309] have been held to amount to investments, the Tribunal cannot exclude at this juncture that Claimant also "owns or controls" a qualifying investment under Article 10.28 of the TPA or that such ownership or control could also satisfy the requirement that Claimant "attempts through concrete action to make, is making, or has made an investment in the territory of another Party", thus qualifying as an "investor of a Party" within the meaning of Art. 10.28 of the TPA.

217. The Tribunal is similarly unpersuaded by Respondent's argument that Claimant failed to demonstrate it invested "in the territory" of Colombia.[310] As noted by Claimant, "precluding investors from conducting acts of investing outside of the host State would be inconsistent with the TPA's express protection of 'every asset that the investor owns or controls, directly or indirectly."[311]

218. Accordingly, the Tribunal dismisses Respondent's *ratione materiae* and *ratione personae* objections.

C. JURISDICTION *RATIONE TEMPORIS* (ART. 10.1.3 OF THE TPA)

1) Respondent's position

219. Respondent further denies that the Tribunal has jurisdiction *ratione temporis* on the basis that the alleged acts or omissions underlying Claimant's claims took place before the TPA's entry into force on 15 May 2012.[312] In making this objection, Respondent invokes:

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[308] *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, ¶221 (**CLA-60**); *Guaracachi America Inc., Rurelec Plc. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶352-355 (**CLA-68**).

[309] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2022, p. 126, ¶148 (**CLA-20bis**).

[310] Reply, ¶209-232.

[311] Rejoinder, ¶164. *See also Guaracachi America Inc., Rurelec Plc. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶358 (**CLA-68**).

[312] Answer, ¶50-55; Submission, ¶142-200; Reply, ¶311-366.

- Art. 10.1.3 of the TPA, which provides that "[f]or greater certainty, this Chapter [i.e. TPA Chapter 10] does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement";

- Art. 28 of the Vienna Convention on the Law of Treaties governing the non-retroactivity of treaties;

- customary international law, under which Respondent says that the principle of non-retroactivity is firmly established; and

- Art. 13 of the Articles on Responsibility of States for Internationally Wrongful Acts, pursuant to which "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".[313]

220. Respondent also asserts that well before the TPA's entry into force Colombia had unequivocally:[314]

- challenged and scientifically defeated the hypothesis that the Galeón San José was located in the area of the 1982 coordinates in a 1994 Press Release which contained the results of the analysis carried out by Columbus, such that assuming, *quod non*, that GMC had property rights over the Galeón San José, the violation of said alleged rights and legitimate expectations would have unequivocally taken place by then;[315]

- denied any right to the recovery of the shipwreck, including the purported rights deriving from the 2007 CSJ Decision, in a letter from the Legal Secretary of the Office of the Colombian Presidency dated 24 March 2010;[316] and

- "refused to comply with the 2007 CSJ Decision in the manner requested by Sea Search Armada, including through State conduct capable of depriving Claimant's alleged property rights of any value."

221. In Respondent's view, as per Claimant's own "admission" before the DC District Court, as of 27 April 2010 Colombia had not only already denied the existence of any shipwreck in the area of the coordinates or its proximities, but had also claimed ownership of the Galeón San José.[317]

222. Colombia argues that post-treaty State conduct, including Resolution No. 0085 of 23 January 2020 – the impugned "measure" as pleaded by SSA – is immaterial.[318] When the alleged

[313] Submission, ¶143-146; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 (**RLA-4**).

[314] Submission, ¶151.

[315] Submission, ¶152-157; Reply, ¶69.

[316] Submission, ¶158-161.

[317] Submission, ¶165.

[318] Submission, ¶170-200.

breach arises out of situations that ceased to exist or were fully crystallized before the date on which the relevant treaty entered into force, investment tribunals have concluded they lack jurisdiction *ratione temporis*.[319] When acts that post-date the entry into force of a treaty are rooted in pre-treaty conduct, tribunals have also upheld jurisdictional objections *ratione temporis*.[320]

223. In Respondent's view, the Tribunal should reach the same conclusion in this case, because, first, Resolution No. 0085 did not fundamentally change the *status quo*. Respondent "has always held that [the 2007 CSJ Decision] conferred Claimant limited rights over a specific area located within specific coordinates."[321] The fact that by virtue of the 2020 resolution Respondent proclaimed the Galeón San José (which was not within those specific coordinates, but rather, as Claimant argues, in their "immediate vicinity",[322] and which Respondent itself discovered in 2015) an asset of national cultural interest is irrelevant.[323]

224. Second, Respondent considers that Resolution No. 0085 did not give rise to an "independent action" that dispenses with analysis of pre-treaty conduct.[324] On the contrary, any analysis of the legality of the Resolution No. 0085 "would necessarily and unavoidably require a finding going to the lawfulness of Colombia's decision to deny Glocca Morra Company any rights over the Galeón San José, judged against treaty commitments that were not in force at the time."[325]

225. In its Reply to Claimant's Response, Respondent submits that:[326]

- The Tribunal is not required to assume the date of Claimant's 'impugned measure' as the sole relevant date for the *ratione temporis* analysis, contrary to Claimant's contentions (which are based on a misrepresentation of legal authorities).[327] Nothing prevents Respondent from shedding light on the relevant facts, as necessary to prove that the alleged breach is in fact rooted in pre-TPA State conduct.[328]

[319] Reply, ¶315.
[320] Submission, ¶179-180, 182; Reply, ¶314.
[321] Submission, ¶173.
[322] Response, ¶10, 43, 49, 121.
[323] Submission, ¶173, 186.
[324] Submission, ¶187-200.
[325] Submission, ¶198.
[326] Reply, ¶317.
[327] Reply, ¶320-325.
[328] Reply, ¶325.

- Resolution No. 0085 is not only irrelevant but is not an independently actionable act. Neither case law,[329] nor the facts of the case support Claimant's position that Resolution No. 0085 is an independently actionable act.[330] Notably:[331]

    - DIMAR never authorized GMC Inc. to search for the Galeón San José;

    - The 1982 Report did not report the finding of the Galeón San José, and in fact shows that further exploration for the purposes of identification has always been necessary;

    - Colombia has never recognized the alleged discovery of the Galeón San José by Glocca Morra Company;

    - Colombia expressly denied that the Galeón San José had been discovered by Glocca Morra Company by adopting the content of the 1994 Columbus Report; and

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

226. According to Respondent, in order to assess the lawfulness of Resolution No. 0085, the Tribunal must necessarily evaluate the lawfulness of pre-TPA acts. It is impossible to assess the legality of Resolution No. 0085 *vis-à-vis* SSA without assessing first the legality of Colombia's pre-treaty acts through which any and all property rights Claimant may have had over the Galeón San José were definitively denied.[332] Even if one were to accept that it was not until the 2007 CSJ Decision that the legal status of SSA Cayman Islands *vis-à-vis* the Galeón San José was fully defined, the Tribunal would by force have to analyze whether the interaction between the 1994 Press Release, and the 2007 CSJ Decision, led to the absolute nullification of any property rights SSA Cayman Islands could have had over the Galeón San José, as well as the legality of said measure.[333]

227. Even if accepted as true, *quod non*, Respondent asserts that the alleged breaches were fully crystallized before the entry into force of the TPA. The evisceration of the alleged property rights over the Galeón San José was a fully consolidated situation.[334] Even if the Tribunal were to consider that Claimant's situation was not fully consolidated with the 2007 CSJ Decision, it was undoubtedly consolidated by 7 December 2010, when the US Civil Action was filed before the DC District Court.[335]

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[329] Reply, ¶330-337.

[330] Reply, ¶338-342.

[331] Reply, ¶340.

[332] Reply, ¶346.

[333] Reply, ¶348.

[334] Reply, ¶354.

[335] Reply, ¶354.

228. Neither the Tribunal nor Colombia are prevented from challenging Claimant's characterization of the relevant measures, which, in any case, does not constitute an attempt to recast Claimant's claims. Respondent is entitled to contest Claimant's factual characterization, especially when it is evident that Claimant's allegations are "completely distorted and frivolous with the sole purpose of artificially establishing the Tribunal's jurisdiction."[336]

2) Claimant's position

229. According to Claimant, Respondent's *ratione temporis* objection is unfounded because Claimant's claims arose eight years after the TPA came into effect.[337] Notably, all of Claimant's claims arise from Resolution No. 0085 of 23 January 2020,[338] which is not the "continuation of" any pre-TPA measures" [339] but rather an independently actionable breach (as acknowledged by Colombia). [340] In any event, tribunals have rarely refused temporal jurisdiction on the basis that a separate post-treaty measure is not 'independently actionable' (i.e. is "nothing but a mere continuation of a pre-TPA measure").[341]

230. The principal flaw in Respondent's objection, says SSA, "is that it disregards the TPA's wording, which excludes from the Tribunal's purview, not '*disputes*,' but '*measures'* 'which ceased to exist before' the TPA's entry into force."[342] Respondent's "insistence that the Tribunal should use the date of consolidation of 'Claimant's legal status' to assess its jurisdiction under Art. 10.1.3 has no textual, jurisprudential or, indeed, rational basis."[343] As such, "the *ratione temporis* assessment must be pegged to the date of Resolution No. 0085 – i.e., the impugned expropriatory measure upon which Claimant's case is based – not any earlier date on which a broader dispute between the parties first arose."[344] It is this resolution that "fully expunged" any of the rights in the Galeón San José that Claimant had been trying to enforce in Colombian, US and IACHR proceedings.[345] It is this resolution that constituted "an arbitrary reversal in Colombia's position."[346]

231. Claimant has not made any claims for relief arising from Respondent's actions before the date of Resolution No. 0085.[347] According to Claimant, Respondent cannot point to any of its

[336] Reply, ¶365.
[337] Response, ¶210; Rejoinder, ¶227, 230.
[338] Response, ¶215.
[339] Rejoinder, ¶243.
[340] Response, ¶223-238; Rejoinder, ¶240-249.
[341] Rejoinder, ¶241.
[342] Response, ¶218; Rejoinder, ¶229.
[343] Rejoinder, ¶239.
[344] Response, ¶220.
[345] Rejoinder, ¶248.
[346] Rejoinder, ¶244.
[347] Response, ¶216; Rejoinder, ¶230.

measures predating the TPA that give rise to Claimant's claims.[348] Claimant asserts that Colombia's pre-treaty acts are merely referenced in its submissions to provide factual context and explain the historic background of the impugned measures.[349] Colombia's pre-treaty acts had no impact on the validity or content of Claimant's investment.[350]

232. According to Claimant, Respondent's argument raised that "by virtue of the 1994 Columbus Press Release and its correspondence thereafter denying the existence of the shipwreck at the pinpoint coordinates in the 1982 Report, 'before Resolution No. 0085 SSA LLC had no[] property right whatsoever over the Galeón San José'" misses the mark.[351] First, Respondent's "unilateral assertions that the San José was not at certain pinpoint coordinates had no impact whatsoever on the legal validity of SSA's rights to 50% of the treasure in the Discovery Area."[352] Second, Claimant considers that the determination of the facts relating to what the Discovery Area contained and the value of what it contained at the time of the issuance of Resolution No. 0085 ought to be deferred to a subsequent stage of the proceedings.[353]

3) Non-disputing party's position

233. The US emphasized the rule against retroactivity, according to which "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 also fall outside the Tribunal's jurisdiction."[354]

4) Analysis

234. Respondent had originally submitted that, in deciding its *ratione temporis* objection, the Tribunal should apply the two-pronged test established in *Spence v. Costa Rica*,[355] which would require it to determine whether: "(i) the act that post-dates the treaty fundamentally changed the *status quo* of the claimant's investment; and (ii) such act is 'independently actionable', such that the 'alleged breach [can] be evaluated on the merits without requiring a

[348] Rejoinder, ¶230.

[349] Response, ¶242.

[350] Rejoinder, ¶238.

[351] Rejoinder, ¶245.

[352] Rejoinder, ¶246.

[353] Rejoinder, ¶247.

[354] U.S. Submission, ¶9 *citing Astrida Benita Carrizosa v. Colombia,* ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶153.

[355] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 (**RLA-18**). The Tribunal notes that this award was subsequently corrected, and that Claimant filed the corrected version as **CLA-41**. The Tribunal will hereinafter refer to said corrected version: *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**CLA-41**).

finding going to the lawfulness of pre-[treaty] conduct[.]'"[356] In its Reply, Respondent argued that the Tribunal must determine: "(i) whether the alleged breach is independently actionable, or whether it is rather necessarily linked to other acts of the State that took place before the date of the TPA's entry into force […]; (ii) whether the evaluation of the alleged breach entails the evaluation of the lawfulness of other pre-TPA State acts […]; [and] (iii) whether the alleged breach corresponds to a situation that ceased to exist or was fully settled before the date of the TPA's entry into force."[357]

235. During the Hearing, Respondent identified two legal issues as being relevant in the context of its *ratione temporis* objection: (i) "whether, as alleged by Claimant, the date of its selected impugned measure is the only relevant date for the purposes of the *ratione temporis* analysis; [and] (ii) whether a selected measure falls within the jurisdiction *ratione temporis* of the Tribunal just because it can formally be placed post-TPA."[358] As for the factual issues that it says need to be determined, Respondent highlighted the following:[359]

- "Whether the Columbus Report, as adopted by Colombia, rejected the hypothesis of the finding of the Galeón San José by Glocca Morra Company;
- Whether the 2007 CSJ Decision denied any rights over the Galeón San José in particular;
- Whether the 2007 CSJ Decision denied any rights over areas different or additional to the specific coordinates indicated in the 1982 Confidential Report;
- Whether the 2010 US Civil Action contains an admission of expropriation, arbitrariness and discrimination against SSA LLC."

236. Respondent's position, reduced to its essence, is that the Tribunal lacks jurisdiction *ratione temporis* because Resolution No. 0085 is not independently actionable under the TPA.[360]

237. In Claimant's view, the factual issues relevant to the Tribunal's determination include the following:

- "What is the impugned measure?
- Did Resolution No. 0085 occur after the TPA came into effect?

[356] Submission, ¶180; *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶237(b) (**CLA-41**).

[357] Reply, ¶316.

[358] Respondent's Opening Statement, slide 150.

[359] Respondent's Closing Statement, slide 49.

[360] Respondent's Opening Statement, slides 152, 163-164; Submission, ¶187-200; Reply, ¶328-342. This assertion has been central to Respondent's pleadings throughout.

- Is Resolution No. 0085 independently actionable?"[361]

238. Similar to the factual issues raised with respect to the *ratione materiae* objection, the Tribunal notes that the factual submissions Respondent advanced at the Hearing in relation to its *ratione temporis* objection would require the Tribunal to dive deeply into matters that lie at the heart of the merits of the parties' dispute (e.g. the legitimacy of the Columbus Report, which is contested by Claimant;[362] the relevance of references to "Galeón San José" or lack thereof in the 2007 CSJ Decision, etc.).

239. The Tribunal is, however, grateful to Respondent for having clarified and distilled the relevant legal issues to two principal questions, the first being whether "the date of [Claimant's] selected impugned measure is the only relevant date for the purposes of the *ratione temporis* analysis." The answer to this query depends on the relevant treaty language.

240. The legal framework relevant to Respondent's *ratione temporis* objection includes Articles 1.3 and 10.1 of the TPA, which provide:

> **Article 1.3: Definitions of General Application**
>
> ***measure*** includes any law, regulation, procedure, requirement, or practice;
>
> - - - - - - -
>
> **Article 10.1: Scope and Coverage**
>
> 1. This Chapter applies to **measures** adopted or maintained by a Party related to:
>
> a) Investors of another Party;
>
> b) Covered investments; and
>
> c) With respect to Articles 10.9 and 10.11, all investments in the territory of the Party.
>
> […]
>
> 3. For greater certainty, this Chapter does not bind any Party in relation to **any act or fact** that took place or any situation that ceased to exist before the date of entry into force of this Agreement.
>
> (emphasis added)

241. As noted in *Astrida Benita Carrizosa v. Republic of Colombia*, a case brought under the TPA in which Colombia raised a similar argument to its plea in this case: "[T]he text of the TPA

[361] Claimant's Rebuttal and Closing Statement, slide 5.

[362] Rejoinder, ¶14, 144, 258; Claimant's Opening Statement, slides 51-52.

contains no temporal limitation with respect to disputes that may come under the Tribunal's jurisdiction," […] Art. 10.1.3 of the TPA […] "excludes any pre-treaty 'act or fact', but is silent on pre-treaty disputes."[363] As such, "the fact that the broader dispute concerning the alleged mistreatment of the Claimant's purported investment in Colombia may have arisen before the TPA's effective date does not mean that the TPA condoned Colombia's repeated mistreatment of the Claimant's investment after its entry into force."[364]

242. Although the case arose under a different treaty, the award in *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru* is likewise of assistance, given the identical wording of the relevant temporal provision in the applicable treaty. In that case, the tribunal emphasized the importance of the concept of "measure"[365] and noted a "significant problem" with respondent's argument: it did not conform to the treaty's actual wording.[366] Considering the particular wording of the U.S.-Peru BIT, the tribunal held that "the relevant date for establishing temporal jurisdiction is […] not the date when an investment dispute arose, but the date when an impugned 'law, regulation, procedure, requirement or practice' was 'adopted or maintained' by the host State,"[367] and it is up to the claimant to identify the contested measure.[368] In the tribunal's view, the contested measures constituted actionable breaches and could not "be excluded from the scope of protection of the Treaty merely because they are related to pre-Treaty acts and facts."[369]

243. For similar reasons, the Tribunal considers that, for the purposes of Art. 10.1.3 of the TPA, it must consider the measure identified by Claimant, i.e. Resolution No. 0085, which post-dates the TPA's entry into force.

244. What matters then is whether the alleged breach of the TPA can be said to be "independently justiciable".[370] This leads to the second legal issue raised by Respondent: whether a selected

[363] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award,19 April 2021, ¶135 (**RLA-23**).

[364] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award,19 April 2021, ¶138 (**RLA-23**).

[365] *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶317-319 (**CLA-57**).

[366] *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶333 (**CLA-57**).

[367] *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶336 (**CLA-57**).

[368] *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶337 (**CLA-57**).

[369] *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC v. Republic of Peru*, Final Award, 6 December 2022, ¶344 (**CLA-57**).

[370] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶222 (**CLA-41**).

measure falls within the jurisdiction *ratione temporis* of the Tribunal just because it can formally be placed post-TPA.[371]

245. The tribunal in *Berkowitz* found that "a breach that is alleged to have 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"[372] (emphasis in the original).

246. Other tribunals have ruled in a similar manner. For example, in a ruling on preliminary objections brought under the equivalent of Art. 10.20.5 of the TPA that examined a provision identical to Art. 10.1.3 of the TPA, the tribunal in *The Renco Group, Inc. v. Republic of Peru* noted:[373]

> […] in order not to pass judgment on the lawfulness of conduct predating the entry into force of the Treaty, **the allegedly wrongful conduct postdating the entry into force of the Treaty must "constitute an actionable breach in its own right" when evaluated in the light of all of the circumstances, including acts or facts that predate the entry into force of the Treaty.** On this essential reading of both *Mondev* and *Berkowitz*, the Parties and the US would seem to agree.[374]
>
> (emphasis added)

247. Similarly, in the words of the *Astrida Benita Carrizosa v. Republic of Colombia* tribunal, "if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the treaty tribunal's jurisdiction, ***irrespective of whether such conduct may pertain to a broader pre-treaty dispute***"[375] (emphasis added). Put differently, "unless the post-treaty conduct […] is itself capable of constituting a breach of the TPA, **independently from the question of (un)lawfulness of the pre-treaty conduct**, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction" (emphasis added).[376]

248. Though the Tribunal is aided by the reasoning of the *Astrida Benita Carrizosa v. Republic of Colombia* tribunal, it diverges on the conclusion. Notably, in *Astrida Benita Carrizosa v. Republic of Colombia*, the tribunal upheld the objection because, *inter alia*, claimant's response to the tribunal's question did not "point to an independent allegation raised against the 2014

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[371] Respondent's Opening Statement, slide 150.

[372] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶222 (**CLA-41**).

[373] *The Renco Group, Inc. v. Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶139 (**CLA-55**).

[374] *The Renco Group, Inc. v. Republic of Peru* (II), PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶146 (**CLA-55**).

[375] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶143 (**RLA-23**). *See also* ¶149.

[376] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶153 (**RLA-23**).

Order," rather it "corroborate[d] that the proceedings ending with the 2014 Order necessarily called for a finding about the lawfulness of the 2011 Decision."[377]

249. Based on the current state of the record, that does not appear to be the case here. During the Hearing, Claimant's counsel persuasively argued that Resolution No. 0085 was the first act taken by Colombia that purportedly had the effect of negating any rights that SSA or its Predecessors may have had, ev*en if Colombia were to recognize Claimant's discovery of the Galeón San José*:

> MR. MOLOO: We're not asking this Tribunal to rule on the conformity of pre-treaty acts or even acts that happened longer than three years ago. Those facts are here because they're relevant factual background to the dispute that's before this Tribunal. But ultimately the dispute and what we are alleging is the measure that breached the TPA in this particular case is, of course, **Resolution No. 85, because that is the measure that for the first time – if you go to the next slide – for the first time says it doesn't matter if you found the San José. Because even if you found it, it is cultural patrimony. It – you don't – none of it is treasure. So you get 50 percent of zero. That's the first time that they say even if it's the San José, you get zero. It's the first time that the government takes a measure that eviscerates our legal rights**.[…] the day before the January 23, 2020 resolution, did we think we had rights? And the answer is: of course we did. […] In our submission, this is not a continuation of a situation that was already crystallized as Colombia puts it. Because never before had our legal rights been eviscerated. Never before had Colombia said, You – if you found the San José, if that's what was at – they said you didn't find the San José. But that's a different point. That's a factual dispute. They never said that the legal rights to which you had, whatever it is that's at that – at that reported coordinates. […] In those coordinates, you get zero of it because it's all cultural patrimony. So there may have been a factual dispute about did we find it, did we not find it. But this is the first time where even if we did find it, we get zero.[378]
>
> (emphasis added)

250. Although directly prompted by the Tribunal, Respondent repeatedly refused to engage with Claimant's point.[379]

251. At this stage, the Tribunal is swayed by Claimant's analysis. Whatever Colombia's conduct over the years may have been, whatever Claimant or its Predecessors may have believed about the effects of that conduct on its rights, at this stage, Resolution No. 0085 appears to have been something else entirely. Respondent itself is unable to disagree. For the purposes

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[377] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, ¶161 (**RLA-23**).

[378] Tr. Day 1, 278: 21-25, 279: 1-11, 18-20, 23-25, 280: 1-7, 16-20.

[379] Tr. Day 2, 354: 7-25, 355: 1-25, 356: 1-3, 362: 16-25, 363: 1-25, 364:1-20, 366: 3-25, 367: 1-23.

of this preliminary phase, the Tribunal cannot agree with Respondent that Resolution No. 0085 was not "independently actionable".

252. In arriving at this conclusion, the Tribunal is comforted by the fact that, on their face, the most recent judgments of the Colombian courts on the matter of the San José appear to recognize that *as late as 2019* Claimant (or its Predecessors) possessed certain rights.[380] What those rights are, need not be decided now. At this juncture, the Tribunal need only "determine *prima facie* whether a treaty breach could have occurred if the Claimant is able to substantiate its claim on the merits in further proceedings."[381]

253. For the reasons stated above, on a *prima facie* basis in line with paragraph 119 of *Bridgestone*, the Tribunal dismisses Respondent's *ratione temporis* objection.

D. JURISDICTION *RATIONE VOLUNTATIS* (ART. 10.18.1 OF THE TPA)

1) Respondent's position

254. Colombia contends that the Tribunal lacks jurisdiction *ratione voluntatis* since the claim was submitted to arbitration more than three years after the date on which Claimant first acquired or should have acquired knowledge of the alleged breach and the damages incurred as a result (Art. 10.18.1 of the TPA).[382] As Claimant's NoA is dated 18 December 2022, Claimant's claims would be time-barred under Art. 10.18.1 of the TPA if it first acquired or should have acquired such knowledge at any time before 18 December 2019,[383] which, in Respondent's submission, it did.[384]

255. Respondent's primary argument is that any conduct that may have resulted in international liability occurred before the TPA's entry into force (since Claimant first acquired knowledge of the alleged breaches before 15 May 2012).[385] This is because, by this date, Colombia had communicated to the SSA Predecessors that they had not in fact found the Galeón San José and thus did not have any rights over it.[386] Respondent had also, by that date, issued the 1994 Press Release whereby it confirmed that GMC had not found any shipwreck in the coordinates

[380] 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994 (**C-25**); 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994 (**C-26**); Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997 (**C-27**); Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019 (**C-39**).

[381] *The Renco Group, Inc. v. Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, ¶148 (**CLA-55**).

[382] Submission, ¶201-237; Reply, ¶370-371.

[383] Submission, ¶202.

[384] Submission, ¶208. *See also* Reply, ¶378.

[385] Submission, ¶211; Reply, ¶379, 395-398.

[386] Reply, ¶395.

reported in the 1982 Report, much less the Galeón San José.[387] Furthermore, the 2007 CSJ Decision was clear in that it did not confer to Claimant any rights over the Galeón San José.[388]

256. Even if the foregoing were not the case, Respondent submits that Claimant's claims would still be time-barred.[389] Respondent highlights that:

a. Claimant expressly admitted that the alleged breaches had crystallized, and the damage had already perfected by 7 December 2010.[390] In 2010 Claimant stated that Colombia was exercising dominion and control over its chattels and that it had allegedly deprived it of its possessions.[391] Since 2010, Claimant had certainty of the damage or loss it could have incurred due to the alleged breach, and had in fact quantified said damage between USD 4 billion and USD 17 billion.[392]

b. On Claimant's own account, the alleged expropriation took place on 26 November 2012, "when, in bad faith, Colombia rejected the access to the shipwreck in any form".[393]

c. Claimant also argued, before the United States District Court for the District of Columbia, that the Government allegedly treated it unjustly and discriminatorily before 18 December 2019.[394]

d. At several instances between 2015 and 2018, Claimant knew or should have known of the alleged unlawful expropriation and resulting damage.[395] This is because:

i. In a letter of 20 May 2015, Claimant expressly conceded that it knew that "Colombia only recognized property rights on the basis of the 2007 CSJ Decision in respect of assets located in the precise coordinates stated in the 1982 Confidential Report, where no shipwreck was identified."[396]

ii. On 5 December 2015, the President of Colombia publicly announced that an archaeological site corresponding to the Galeón San José had been found.[397] By way of this announcement, "Colombia attempted to cast doubt on GMC's

[387] Reply, ¶395.
[388] Reply, ¶396.
[389] Submission, ¶211.
[390] Reply, ¶375, 386, 399-405.
[391] Reply, ¶400.
[392] Reply, ¶402.
[393] Submission, ¶213-214; Reply, ¶406-412.
[394] Submission, ¶215.
[395] Reply, ¶413-422.
[396] Reply, ¶413.
[397] Reply, ¶414.

location for the San José and claimed that it had found the shipwreck at different coordinates than those reported by GMC".[398]

iii. On 17 June 2016, in response to Claimant's letter, the Ministry of Culture made clear that Claimant had no rights over the Galeón San José.[399]

iv. On 30 November 2016, the Minister of Culture reiterated Colombia's long-standing position denying Claimant any rights over the Galeón San José.[400]

v. On 5 January 2018, the Ministry of Culture sent a letter to Claimant, stating it had no rights whatsoever over the Galeón San José since its predecessors had not found it.[401]

257. Alternatively, Respondent states that by 17 June 2019, Claimant knew or should have known of the alleged expropriation breach and the loss incurred.[402] Specifically, by means of the communication from the Vice President of the Republic of Colombia dated 17 June 2019, Claimant was informed that no shipwreck was found at the coordinates reported in 1982 and that Claimant had no right over the Galeón San José or its cargo,[403] and that the 1982 Report had not recognized that Claimant had any property rights.[404] In Respondent's view, this letter meets the two criteria outlined in Art. 10.18.1 since: (i) it clearly states on multiple occasions that Claimant had no rights over the Galeón San José or its content because it was not located in the coordinates reported by its predecessors in 1982; and (ii) by 17 June 2019, Claimant had certainty of the loss incurred.[405] Furthermore, Claimant's argument that, both in respect of the Presidential announcement of 5 December 2015 and the communication from the Vice President of the Republic of Colombia of 17 June 2019, Colombia refused to allow Claimant to visit the site to confirm the location of the shipwreck Colombia found in 2015, are clear admissions of Claimant's knowledge prior to 18 December 2019.[406]

258. As such, Respondent considers that Claimant's argument that its purported rights were affected by Resolution No. 0085 of 2020 fails, since that resolution has no impact on this case. [407] First, Claimant knew or should have known the alleged unlawful expropriation of its alleged property rights over the Galeón San José had perfected well before 23 January 2020

[398] Submission, ¶216; Statement from President Santos on the discovery of the San José Galleon, 5 December 2015 (**C-37**) (Claimant's translation).

[399] Reply, ¶415.

[400] Reply, ¶417.

[401] Reply, ¶421.

[402] Reply, ¶423-429.

[403] Submission, ¶222.

[404] Reply, ¶424.

[405] Reply, ¶428.

[406] Submission, ¶224; Reply, ¶386.

[407] Submission, ¶231-237; Reply, ¶386, 392, 463-465.

(as evident from the 1994 Press Release, and the 2007 CSJ Decision).[408] Second, through Claimant's express admission, the alleged unlawful expropriation and several alleged instances of arbitrariness crystallized well before 18 December 2019, all with the alleged purpose of denying Claimant's alleged property rights over the Galeón San José.[409]

259. Claimant is likewise prevented from raising alleged breaches of the TPA's FET and FPS standards since it should have known about them before 18 December 2019.[410] Notably, Claimant knew or should have known about these alleged violations and its consequent alleged loss or damage as soon as the TPA entered into force on 15 May 2012,[411] or, alternatively, by 17 June 2019.[412] Resolution No. 0085 has no impact on Claimant's rights since, by the time it was issued, (i) it was clear that Claimant had no rights over the Galeón San José because its Predecessors had not found it, and (ii) Colombia had communicated on several occasions that it did not recognize to Claimant or its Predecessors any rights over the Galeón San José before 18 December 2019.[413]

260. As for the alleged violations of TPA Arts. 10.3 and 10.4, concerning the National Treatment and Most-Favoured Nation standards, Respondent submits that it has not consented to arbitrate those claims.[414] As soon as the TPA came into force, Claimant should have known about Colombia's alleged favouring of domestic and foreign investors.[415] Furthermore, after 17 June 2019, SSA should have known, with certainty, that Colombia recognized that operators from a different nationality had found the Galeón San José.[416] Therefore, any claims regarding these standards brought by Claimant after 17 June 2022 are clearly time-barred.

2) <u>Claimant's position</u>

261. According to SSA, Respondent's time-bar objection is meritless as it completely disregards the TPA's clear language and rests upon Respondent's "recasting of SSA's claims."[417] The Tribunal must take Claimant's claim as pled by Claimant, and not as Colombia attempts to replead it, especially in the context of an expedited preliminary objections phase where the evidentiary record is not fully developed, such as the present phase.[418] Moreover,

[408] Reply, ¶464.
[409] Reply, ¶464.
[410] Reply, ¶432.
[411] Reply, ¶436-441.
[412] Reply, ¶442-447.
[413] Reply, ¶433.
[414] Reply, ¶448-462.
[415] Reply, ¶450-456.
[416] Reply, ¶450, 457-462.
[417] Response, ¶254, 262; Rejoinder, ¶251, 256.
[418] Response, ¶263-268; Rejoinder, ¶257.

Respondent's authorities are inapposite, as they dealt with different treaty language and/or sources of a tribunal's jurisdiction.[419]

262. Considering the language of Art. 10.18.1 of the TPA, which includes "breach" and "loss or damage", two cumulative facts are relevant in Claimant's submission: the breach allegedly committed by the host State and the existence of loss or damage caused by such breach.[420] Accordingly, Claimant considers the critical date for the purposes of Art. 10.18.1 of the TPA to be 18 December 2019 (i.e. three years before the issuance of SSA's NoA on 18 December 2022).[421]

263. In Claimant's view, it is untrue that the Tribunal "must assess the existence of the underlying dispute" in every case when considering the temporal limitation.[422] Rather, the measure that "divested SSA's rights of all their value, leading to SSA's claim for damages" is Resolution No. 0085 by which Colombia retroactively declared the entirety of the San José cultural patrimony.[423] This resolution was issued on 23 January 2020 and became public on 13 February 2020.[424] Claimant could not have known that it had completely lost the value of its rights to discovery before the issuance of said resolution.[425] Respondent offered no evidence "to show that Resolution No. 0085 was merely a confirmation or a continuation of prior measures," and provided no "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."[426]

264. While Claimant was aware of Colombia's conduct prior to Resolution No. 0085, in its view that is irrelevant because, until the enactment of Resolution No. 0085, Claimant had valuable rights, which had been consistently upheld by the Colombian courts and were confirmed by the Colombian Supreme Court.[427]

3) <u>Non-disputing party's position</u>

265. The US emphasized that, for the purposes of Art. 10.18.1 of the TPA, "an investor *first* acquires knowledge of an alleged breach and loss […] as of a particular 'date'" and it cannot acquire it multiple times or on a recurring basis.[428] Notably, "subsequent transgressions by a Party

[419] Response, ¶255.
[420] Response, ¶253; Rejoinder, ¶253.
[421] Response, ¶257; Rejoinder, ¶253.
[422] Response, ¶255; Rejoinder, ¶254.
[423] Response, ¶258, 271.
[424] Response, ¶258.
[425] Response, ¶258.
[426] Rejoinder, ¶255.
[427] Response, ¶269-270.
[428] U.S. Submission, ¶12.

arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby."[429] Where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression."[430] The U.S. cautioned that to permit claimant to do so would "render the limitations provisions ineffective."[431]

4) Analysis

266. Article 10.18.1 of the TPA provides that:

> 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 brough 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)

267. The Parties agree that the critical date for the purposes of this article is 18 December 2019.[432]

268. To paraphrase the *Berkowitz* tribunal, Claimant "must show […] that [it] ha[s] a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which [it] first became aware in the period after"[433] 18 December 2019.

269. During the Hearing, Respondent submitted that the relevant factual issues to be decided in the context of its *ratione voluntatis* objection are the following:[434]

- "Whether Claimant admitted before the IACH that it gained knowledge of the alleged expropriation without compensation of its rights over the Galeón San José as a result of several instances of arbitrariness, as well as of the resulting damage as early as 26 November 2012;

- Whether between 2015 and June 2019, Claimant gained knowledge of the alleged expropriation without compensation of its rights over the Galeón San José as a result of several instances of arbitrariness, as well as of the resulting damage;

[429] U.S. Submission, ¶12.

[430] U.S. Submission, ¶13.

[431] U.S. Submission, ¶13.

[432] Submission, ¶202; Reply, ¶372; Response, ¶257; Rejoinder, ¶253.

[433] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶163 (**CLA-41**).

[434] Respondent's Closing Statement, slide 50.

- Whether the 2019 reinstatement of the [Injunction] Order contains a recognition of rights over the Galeón San José."

270. None of these factual issues, however, relate to the breaches as "alleged" by Claimant in its NoA. Notably, in the NoA Claimant argued that, by issuing Resolution No. 0085 in 2020, Colombia unlawfully expropriated its investment in contravention of Art. 10.7 of the TPA, failed to accord it FET and FPS in contravention of Art. 10.5 of the TPA, and breached its National Treatment and MFN obligation in contravention of Arts. 10.3 and 10.4 of the TPA.[435] Said resolution was not at issue before the IACH, in the period between 2015 and June 2019, nor in the 2019 reinstatement of the Injunction Order.

271. Highlighting the TPA's language, Claimant submitted that the Tribunal's inquiry consisted of the following questions:

- "What is the alleged breach?

- Did SSA know (or should it have known) that Resolution No. 0085 was issued before 18 December 2019?

- Did SSA know (or should it have known) that it incurred loss or damage as a result of Resolution No. 0085 before 18 December 2019?"[436]

272. Claimant emphasized that whatever may have been the case on the dates indicated by Respondent, as recently as 29 March 2019 the Court of Appeals for the Judicial District of Baranquilla-Atlántico recognized that Claimant possessed certain rights:

> MR. MOLOO: In my submission, the question that's critical for this Tribunal is to ask--and as I think we all agreed is when is it that we knew that we lost our rights? And when is it that we knew that we had definitively suffered the loss that we are claiming in this arbitration as a result of the measure that is being impugned? No matter all of the stuff that happens in the reports is moot in my submission, because ultimately after that we have discussions with the Colombian Government, but critically, critically, in March 2019, the Superior Court reinstates an injunction that confirms our rights. And in correspondence, it's clear that we understand--understand that our rights had not been permanently deprived, which is under international law the test for expropriation. Not only are we saying that we don't think our light--our rights had been permanently deprived, but the Colombian courts are saying that. […][437]

273. Indeed, based solely on the face of the judgment in question it appears that, when reinstating the Injunction Order on 29 March 2019, the Court of Appeals held that the lifting of the Injunction Order had caused harm to the Plaintiff as it was "depriving [it] of the only tool it has at its

[435] NoA, ¶72-85.

[436] Claimant's Rebuttal and Closing Statement, slide 5.

[437] Tr. Day 1, 281: 7-23, 282: 22-25, 283: 1-24.

disposal to enforce the 1994 and 1997 judgments, due to the failure to perform an action that is not in its power to perform."[438]

274. As noted in the Tribunal's analysis on Respondent's *ratione temporis* objection, what those rights may have been and whether the 2019 judgment (and the other judgments referenced therein) pertained to the Galeón San José need not be determined in this preliminary stage. They are quintessentially issues that fall for determination at the hearing of the merits.

275. As appears from the Parties' "Joint Chronology of Key Facts," the only other communication from Colombia between the date of Court of Appeals judgment (29 March 2019) and Resolution No. 0085 (23 January 2020), is the letter of the Vice-President of Colombia, through which he:

a. "informed [SSA] that the verification of the coordinates reported in 1982 was already performed through Contract No. 544 of 1993, whose results allowed to conclude that 'in 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;'

b. reminded SSA that it 'holds no right over the Galeón San José or its content because it is not located at the coordinates reported by that company;'

c. confirmed that 'the coordinates reported by Maritime Archaeology Consultants Switzerland (MACS) do not correspond to those reported by Glocca Morra Company and do not overlap with these coordinates.'"[439]

276. This letter, however, could not have triggered the limitation period. Over the course of the Parties' "relationship", multiple letters have been exchanged and, in between those exchanges, Colombian courts rendered judgments that appear to have recognized to Claimant (or its Predecessors) certain rights. Assuming that the circumstances were indeed such that Claimant (or its Predecessors) were periodically reassured of its (their) rights by Colombian courts, it would lead to an absurd result to hold that Claimant knew or should have known of the "breach alleged" and the "loss incurred" before 18 December 2019 (and the Tribunal was not provided with any legal authority that would enable it to conclude that way). The Tribunal recalls here Claimant's submission during the Hearing:

> PRESIDENT DRYMER: I don't know what your friends will say tomorrow, but presumably it will be something along the lines that the prescription clock started to tick--the three-year clock started to tick--the moment you said we believe we've been permanently deprived.

[438] Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, p. 6 (**C-39**) (Claimant's translation).

[439] Letter from the Vice-President of Colombia to SSA, 17 June 2019 (**C-40**) (Claimant's translation); Joint Chronology, p. 32 (item 100).

> MR. MOLOO: And I would say as of 2019, we did not think we were permanently deprived.
>
> PRESIDENT DRYMER: No, but beforehand you did. […] Whatever happened afterwards, the clock had started to tick four years earlier.
>
> MR. MOLOO: And I think it is--again, as I say, I think it's somewhat irrelevant. Because if 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"; right? So, I don't see--because then, what that basically means is--if you have recognized rights by the State, they can now expropriate them without any recourse. Because I thought I had been expropriated ten years ago, and I'd made a mistake, but you know what? They're saying: "No, you now have these rights"--but, forever and always, I can never now enforce those rights that the Court is recognizing ever again. So, that just can't be, in my view.[440]

277. At this stage, and on the record as it currently stands, the Tribunal is swayed by Claimant's argument. Respondent's *ratione voluntatis* objection is dismissed.

V. COSTS AND SECURITY FOR COSTS

A. RESPONDENT'S POSITION

278. Respondent requests that the Tribunal exercise the discretion granted to it under Art. 10.20.6 of the TPA and award Respondent "reasonable costs and attorney's fees incurred in submitting or opposing the objection," given the frivolity of Claimant's claims.[441]

279. Additionally, Respondent seeks security for costs. In its view, the frivolity of Claimant's claims and the reasonable – and feasible – possibility that Respondent's jurisdictional objections will succeed, coupled with the fact that Claimant has no assets in Colombia against which an order of costs could be enforced and that it is being aided by a third-party funder should prompt the Tribunal to exercise its authority under Art. 26(3) of the UNCITRAL Arbitration Rules and order Claimant to provide security for costs in the amount of no less than USD 800,000 pending the Tribunal's decision on jurisdiction.[442]

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[440] Tr. Day 1, 285: 14-25, 286: 1-16.

[441] Submission, ¶272, 282, 283, 287; Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015 (**R-25**); Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015 (**R-27**); Free Trade Agreement between Colombia and United States, Section 10, 22 November 2006 (**RLA-6**).

[442] Submission, ¶288; Reply, ¶466-486; Email from Gibson Dunn to the Tribunal, 21 September 2023 (**R-39**); Email from Gibson Dunn to the Tribunal, 9 October 2023 (**R-40**). The amount stated in Respondent's Submission was USD 300,000 (*see* ¶290).

B. CLAIMANT'S POSITION

280. According to Claimant, Respondent's assertion that Claimant's claims are "blatantly frivolous" lacks merit because: (i) it is premised on the idea that Claimant chose to initiate the arbitration instead of abandoning its rights, which is not a basis for an adverse costs order; and (ii) it is based on a severely distorted representation of the relevant facts; and lacks any legal basis. Considering Respondent's "meritless" jurisdictional objections and its blatant and repeated mischaracterization of Claimant's case and the facts in pursuit of its aims, Claimant therefore seeks an order of costs against Respondent.[443]

281. With respect to security for costs, Claimant considers Colombia's request to be patently deficient since it lacks "concrete evidence that security for costs is necessary or urgent here" or that "SSA is unable or unwilling to pay adverse costs," and as such must be rejected.[444]

C. ANALYSIS

1) Costs

282. Claimant is clearly "the prevailing party" in this phase of the arbitration. Respondent's jurisdictional objections under Art. 10.20.5 of the Treaty have been dismissed in their entirety.

283. In the exercise of its discretion under Art. 10.20.6 and generally under Art. 40(1) of the UNCITRAL Rules, the Tribunal reserves the issue for a future decision, order or award.

2) Security for Costs

284. In the circumstances, Respondent's request for security for costs "pending the Tribunal's decision on jurisdiction," based as it is on the alleged risk that SSA may not be able to satisfy an award of costs against it, is moot.

285. This does not preclude Respondent from advancing a similar request during a subsequent phase of the proceedings. In the event that it elects to do so, however, the Tribunal hopes that Colombia will bear in mind that security for costs is not ordered lightly and that exceptional circumstances must generally be present.[445] Without deciding the matter, the Tribunal notes

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[443] Response, ¶286.

[444] Response, ¶290; Rejoinder, ¶267.

[445] *Sergei Paushok et al. v. Government of Mongolia*, Order on Interim Measures, 2 September 2008, ¶39 (**RLA-51**); *RSM Production v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶48 (**RLA-52**) (also **CLA-35**); *Tennant Energy, LLC v. Government of Canada*, Procedural Order No. 4, 27 February 2020, ¶173-174, 176 (**RLA-54**); *Victor Pey Casado and Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, *Decision sobre la adopción de medidas provisionales solicitadas por las partes*, 25 September 2001, ¶88-89 (**CLA-14**); *RSM Production Corporation et al. v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶5.17 (**CLA-27**); *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶42 (**CLA-29**); *Sergei Viktorovich Pugachev v. Russian Federation*, Interim Award, 7 July 2017, ¶377-378 (**CLA-43**); *The Estate of Julio Miguel Orlandini-Agreda and Compañia Minera Orlandini Ltda v. Plurinational State of*

that such circumstances are not particularly evident from the Parties' submissions and pleadings to date, nor is it evident that the contingency fee arrangement between Claimant and its counsel and/or the confidential general financing facility to which counsel's law firm is a party amount to "third party funding".

VI. DECISION

286. The Tribunal recalls that Claimant has not asked the Tribunal to make a positive finding of jurisdiction.[446] Additionally, the Parties have acknowledged the Tribunal's discretion under Arts. 10.20.5 of the TPA and 21 of the UNCITRAL Rules, and in line with the *Bridgestone* approach[447] according to which "[w]here an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing" and "it is usual […] to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct."[448]

287. For these reasons, the Tribunal confirms that: (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.

288. On this basis, the Tribunal:

a. **DISMISSES** Colombia's objections pursuant to Art. 10.20.5 of the TPA;

b. **REJECTS** Colombia's request for security for costs;

c. **RESERVES** the issue of costs for a further order, decision or award.

[*Signatures on the following page*]

Bolivia, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶149 (**CLA-51**); *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3: Decision on the Parties' Requests for Provisional Measures, 23 June 2015, ¶121 (**CLA-70**).

[446] *See* section IV above.

[447] *See* section IV.4(a) above.

[448] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶119 (**CLA-46**).

PLACE OF ARBITRATION: LONDON, UNITED KINGDOM

DATE: 16 FEBRUARY 2024

THE ARBITRAL TRIBUNAL:

Mr. Stephen Jagusch KC

Dr. Claus Von Wobeser

Mr. Stephen L. Drymer
(Presiding Arbitrator)