PCA Case No. 2023-37

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

SEA SEARCH-ARMADA, LLC

Claimant

and

THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA

Respondent

CLAIMANT'S AMENDED STATEMENT OF CLAIM

GIBSON, DUNN & CRUTCHER LLP
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United States of America

14 June 2024

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Claimant, Sea Search-Armada, LLC ("**SSA**" or "**Claimant**"),[1] hereby submits its Amended Statement of Claim dated 14 June 2024 ("**SSA's Statement of Claim**") in support of its claim pursuant to the United States-Colombia Trade Promotion Agreement (the "**TPA**"), in accordance with Annex 1 of Procedural Order No. 3, dated 8 April 2024.

2. This dispute arises out of the Republic of Colombia's ("**Colombia**" or "**Respondent**") unlawful expropriation of and interference with SSA's rights to approximately USD 3.5-9.1 billion worth of treasure found by SSA's corporate predecessors over 40 years ago.

3. In the early 1980s, SSA's predecessor, a U.S. company called Glocca Morra Company Inc. ("**GMC Inc.**") sought and obtained authorization from Colombia to search for and report any discoveries in Colombian waters of the shipwreck of the San José galleon, which was known to contain one of, if not the, largest lost treasures. The San José was a Spanish galleon that blew up and sank almost three hundred years earlier, in 1708, following a battle against a British squadron that was trying to capture the ship for its treasure. To find the ship, GMC Inc. hired a team of historians who, after years of research, were able to, through contemporaneous eyewitness accounts and surviving ship logs, narrow down the search area to where they believed the San José disappeared.

4. GMC Inc. later assigned its rights, including its authorization to conduct underwater exploration, to Glocca Morra Company Limited Partnership ("**GMC**"), which later assigned its rights to its parent company, Sea Search-Armada Limited Partnership ("**SSA Cayman**") (GMC Inc., GMC and SSA Cayman together "**SSA's Predecessors**"). Over the course of two years, SSA's Predecessors employed what was at the time state-of-the-art technology, including sonars, magnetometers, remotely operated vehicles ("**ROVs**") capable of taking underwater video footage, and even a submarine for visual observation, to painstakingly search the licensed area. SSA's Predecessors spent a considerable amount of time and resources on this endeavor,

[1] Unless defined herein, this submission uses the same defined terms as those in its Notice of Arbitration and Statement of Claim dated 18 December 2022 ("**Notice of Arbitration**"), Claimant's Response to Colombia's Preliminary Objections dated 20 September 2023 ("**SSA's Response**"), and Claimant's Rejoinder to Colombia's Preliminary Objections dated 19 November 2023 ("**SSA's Rejoinder**").

amounting to over USD 11 million at the time. This was one of the most sophisticated and expensive shipwreck search missions documented up until that point in history.

5. By the end of 1982, SSA's Predecessors found an area of significant interest as it displayed several signs of the San José shipwreck. This included several scattered wood piles that appeared to have been violently separated from a ship, and which, when tested, turned out to be from the same era and of the same type of wood that would have been used to build the San José. Moreover, there was a strong magnetic signal from the area indicating a large amount of iron-based objects that would normally be found from a shipwreck like the San José, likely emanating from objects like iron cannons (and other items used as ballast for the ship), anchors, fasteners, etc. Finally, the crew reported seeing parts of the shipwreck (including cannons, wood piles, and even ceramics) with their own eyes. SSA's Predecessor thereby reported its finding to Colombian authorities and was granted the status of being the declarant (and thereby, under extant Colombian law, owner of 50%) of the treasure in the shipwreck.

6. It was not just SSA's Predecessors who believed they had found and reported the location of the San José shipwreck—Colombian officials believed the same. Colombian Navy officials accompanied SSA's Predecessors on every exploration expedition and enthusiastically reported that they had found the San José shipwreck, including by observing objects like cannons and pieces of ceramic which left little doubt that they were in the "*San José area*."[2] On this basis, Colombia's *ad-hoc* Committee on Shipwrecked Goods ("**Committee on Shipwrecked Goods**") declared that the information provided by SSA's Predecessors "*seem*[ed] *to indicate that the remains of the San Jose have been located*"[3] and proceeded for the next several years to engage in attempts to identify and salvage the shipwreck. These efforts included negotiating contracts for the salvage of the San José shipwreck, first with SSA's Predecessor and then with other potential contractors, all while acknowledging that SSA's Predecessor had originally found the shipwreck. Indeed, when Colombia entered into a Memorandum of Understanding ("**MoU**") with Sweden to identify and recover the treasure of the San José, Colombia directed Sweden to "***start in the first place within***

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2 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 16 (SSA's Unofficial Translation).

3 **Exhibit C-150 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 004, 8 November 1983, PDF p. 2 (SSA's Unofficial Translation).

the coordinates declared by Sea Search Armada" and, moreover, recognized the obligation to compensate SSA (albeit at an improperly reduced rate).[4] There is no rational reason why Colombia would have directed Sweden to start at SSA's reported area unless Colombia believed SSA had discovered the shipwreck. In fact, Colombia's conduct after 1982 was consistent with the position that SSA had located the wreck of the San José.

7. Colombia's attempts to recover the San José shipwreck ultimately appear to have dissolved amidst allegations of corruption and corporate piracy. And in the process, they sought to strip SSA's Predecessors of their full rights (by reducing the share that they would be given). SSA's Predecessors were initially willing to compromise, but as time went on, they had had enough by then, and decided to seek recognition of their rights through the Colombian courts. For the next two decades, SSA's Predecessors won victory after victory before domestic courts. In particular, in 1994, the Colombian Court granted SSA's Predecessor an injunction prohibiting Colombia from taking any measures to recover goods from the shipwreck area reported by SSA's Predecessors. And finally in 2007 the Colombian Supreme Court ("**Supreme Court**") confirmed that SSA had rights to 50% of the treasure from the shipwreck area that SSA's Predecessors had discovered and reported.

8. Having succeeded in confirming its rights before Colombian courts, SSA's Predecessor transferred them to SSA in 2008. In exchange for acquiring these rights, SSA undertook to compensate the original investors in the SSA's Predecessors with any proceeds it recovered in portions equivalent to the size of their investments. SSA then attempted to engage in discussions with Colombian authorities to recover the San José shipwreck but was met with stalling tactics. Accordingly, SSA sought to enforce its rights abroad; specifically, before U.S. courts and the Inter American Commission on Human Rights ("**IACHR**").

9. Ultimately Colombia agreed to resume discussions but only on the condition that SSA terminate the U.S. and IACHR proceedings. SSA relented and dropped its claims in January 2015, following which the Parties began to discuss the terms of the recovery

[4] **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, arts. 2, 5 (emphasis added) (SSA's Unofficial Translation).

and extent of SSA's rights, including the parameters of the area over which the San José shipwreck was located and thus over which SSA had rights. Yet while Colombia had convinced SSA to terminate ongoing legal proceedings with the pretext of discussing recovery, Colombia had secretly contracted with another maritime operator, Maritime Archaeology Consultants Limited ("**MAC**") to supposedly confirm the location of the San José shipwreck. By the end of the year, in December 2015, MAC and Colombia reported finding the San José shipwreck. In fact, it appears Colombia shared the location reported by SSA's Predecessors with MAC as MAC has reported that it made its discovery after it "*returned to the search area determined by previous historical research.*"[5] Leaked reports of the coordinates at which MAC supposedly found the San José suggest that it is very much within the area reported by SSA's Predecessors.

10. SSA accordingly reached out to the Government in an attempt to jointly verify the discovery but, again, Colombia stalled the process, while simultaneously announcing their own plans for the salvage of the San José shipwreck. SSA therefore pointed out that there was still an injunction in effect that prevented Colombia from accessing the area reported by SSA's Predecessors. Then, 22 years after the injunction was issued, Colombia sought to revoke it. If the wreck of the San José was not situated in the area reported by SSA, Colombia's attempt in 2016 to lift the injunction preventing the removal of items at SSA's reported area, just after MAC had "found" the shipwreck in 2015 would have been without any purpose. In 2019, the Colombian courts, again, denied Colombia's efforts to do so and instead reaffirmed SSA's rights to its discovery. SSA promptly notified Colombia that the Court would soon begin enforcing the injunction.

11. In response, just a few months later, on 23 January 2020, Colombia's Ministry of Culture issued Resolution No. 0085 ("**Resolution No. 0085**") declaring the **entirety of the San José** a "*National Asset of Cultural Interest*." Thus, overnight, SSA lost rights to 50% of its discovery, or approximately USD 3.5-9.1 billion, the entire value of which has been captured by Colombia. Colombia's issuance of Resolution No. 0085 to claim

[5] **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck/.

for itself the entirety of the San José shipwreck blatantly violates its obligations under the TPA.

a. First, by issuing Resolution No. 0085 Colombia has unlawfully expropriated SSA's rights to 50% of the San José shipwreck's treasure. Now the entirety of the treasure belongs to Colombia; yet Colombia has not compensated SSA for taking its share. Colombia has accordingly violated its obligations to refrain from unlawful expropriation under Article 10.7 of the TPA.

b. Second, Resolution No. 0085 contravened SSA's legitimate expectation that its right to 50% of the San José's treasure would be upheld and that at least some, if not most, of the objects found in the San José shipwreck would be categorized as treasure. Indeed, this had been Colombia's position consistently for years. Colombia's sudden reversal of its position with Resolution No. 0085, which was in itself issued arbitrarily and without notice, due process or transparency, violates Colombia's obligation to accord fair and equitable treatment ("**FET**") under the Article 10.5. of TPA.

c. Third, by issuing Resolution No. 0085, Colombia also failed to protect SSA's rights. Rather, Colombia's actions completely undermined the legal security to which SSA's investment was entitled. What is more, photographic evidence of the wreck site suggests that it may have been pilfered, which has already prompted a criminal complaint against the Government. Thus, Colombia has also failed to ensure SSA's investment full protection and security ("**FPS**") under Article 10.5 of the TPA.

12. As a result of Colombia's actions, SSA's rights have lost all value. The San José shipwreck contained considerable treasures, which are now all the property of the State. International law requires SSA to be made whole. Thus, SSA is entitled to damages equivalent to the value of 50% of the treasure aboard the San José, equaling approximately USD 3.5-9.1 billion, after taking into account expenses SSA would have incurred in salvaging and marketing it.

13. In support of its claims, SSA submits the following with its Statement of Claim:

a. An updated index of factual exhibits and legal authorities;

b. Factual exhibits **C-1bis**, **C-133** to **C-226** and legal authorities **CLA-99** to **CLA-177**;

c. Mr. Roy Robert Doty's witness statement, dated 13 June 2024 ("**CWS-1 [Doty]**"). Mr. Doty worked for SSA's Predecessor during Phase Two of the search for the San José.

d. Captain John Swann's witness statement, dated 14 June 2024 ("**CWS-2 [Swann]**"). Captain Swann was the pilot of the Auguste Piccard submarine during Phase Three of the search for the San José.

e. Expert report by underwater archeologist Mr. Jeffrey D. Morris, dated 11 June 2024 ("**CER-1 [Morris]**"). Mr. Morris provides expert evidence on SSA's Predecessors' findings and concludes that, more likely than not, they did indeed find the San José.

f. Expert report by historian Dr. David Hebb, dated 14 June 2024 ("**CER-2 [Hebb]**"). Dr. Hebb provides expert evidence on the historical context of the San José and the naval action that led to her loss and a description of what the historical record says about the ship's contents and their value.

g. Expert report by valuer and auctioneer Mr. John Foster, dated 14 June 2024 ("**CER-3 [Foster]**"). Mr. Foster provides expert evidence on how the items recovered from the San José would be sold and what their value would be.

h. Expert damages report by Mr. Noel Matthews from FTI Consulting LLP, dated 14 June 2024 ("**CER-4 [FTI]**"). Mr. Matthews quantifies the damages owed to SSA, relying upon the expert evidence of Dr. Hebb and Mr. Foster.

i. Expert report by Justice Gloria Ortíz on Colombian law, dated 14 June 2024 ("**CER-5 [Ortíz]**"). Justice Ortíz, a former Judge on the Colombian Constitutional Court, provides expert evidence on the 2007 Supreme Court Decision and Resolution No. 0085 and their significance on SSA's rights under Colombian law.

14. In addition to this Introduction and Executive Summary, SSA's Statement of Claim proceeds as follows.

a. In **Section II**, SSA sets out the key factual background.

b. In **Section III**, SSA explains that it has jurisdiction over the dispute.

c. In **Section IV**, SSA explains how Colombia has breached the substantive standards of the TPA by unlawfully expropriating SSA's investment and breaching its obligations to provide FET and FPS.

d. In **Section V**, SSA describes and quantifies the damage caused to SSA as a result of Colombia's breaches.

e. In **Section VI**, SSA sets out its requests for relief.

II. BACKGROUND TO THE DISPUTE

15. SSA has already set out the key factual events in its Response and Rejoinder to Colombia's Preliminary Objections. Below, SSA details the factual background, specifically on SSA's Predecessors' discovery of the San José shipwreck (**Sections II.A** and **II.B**); attempts by SSA's Predecessor to salvage the San José shipwreck (**Section II.C**); ensuing litigation in Colombia resulting in the 2007 Supreme Court Decision confirming SSA's Predecessor's rights to the San José shipwreck (**Section II.D**); SSA's attempts to enforce its rights as confirmed by the Supreme Court (**Section II.E**); Colombia's supposed re-discovery of the San José shipwreck (**Section II.F**); Colombia's adoption of Resolution No. 0085, resulting in the complete evisceration of SSA's rights (**Section II.G**); SSA's attempts to protect its rights to the treasure after Resolution No. 0085 (**Section II.H**); and Colombia's latest attempts to salvage the San José (**Section II.I**).

A. SSA's Predecessors Discover The San José Shipwreck

(a) The San José Shipwreck

16. Between around 1550 and 1800, virtually all commerce between metropolitan Spain and her colonies in the Americas and Far East was carried out by annual fleets from Spain that supplied her colonies with merchandise and then returned home with the riches of the New World.[6] One of these fleets, the *Tierra Firme flota*, served South America, including present-day Cartagena.[7] The fleet set forth from Spain to Nombre de Dios, in present-day Panama, to sell the merchandise they carried. Here, the fleet would reload with the riches of the New World before sailing back to Spain.[8]

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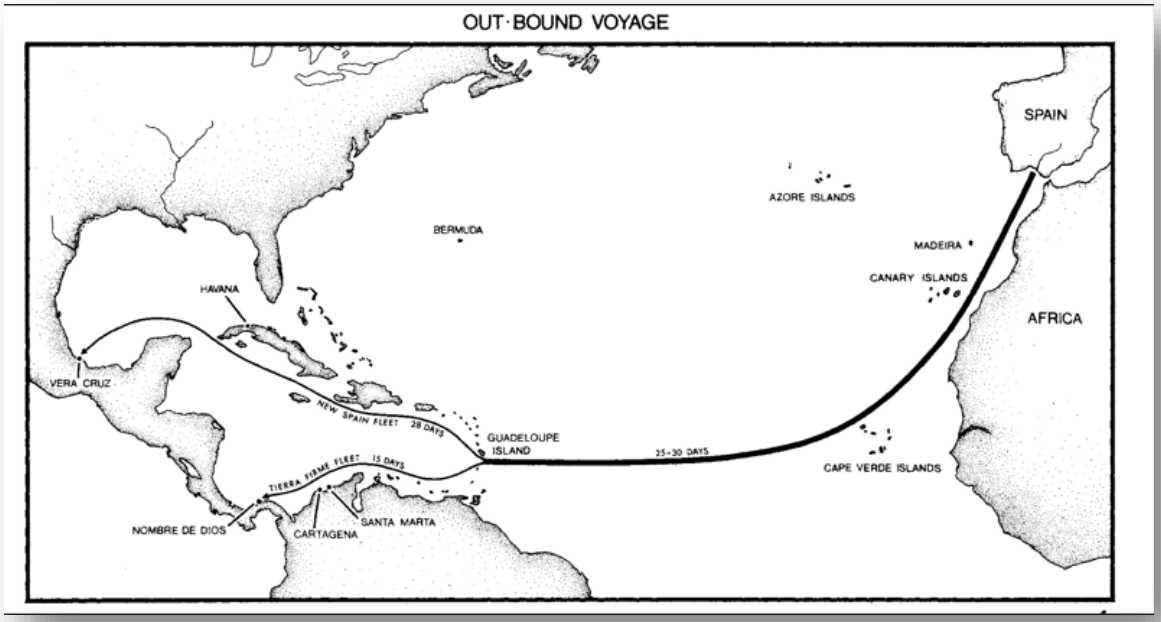
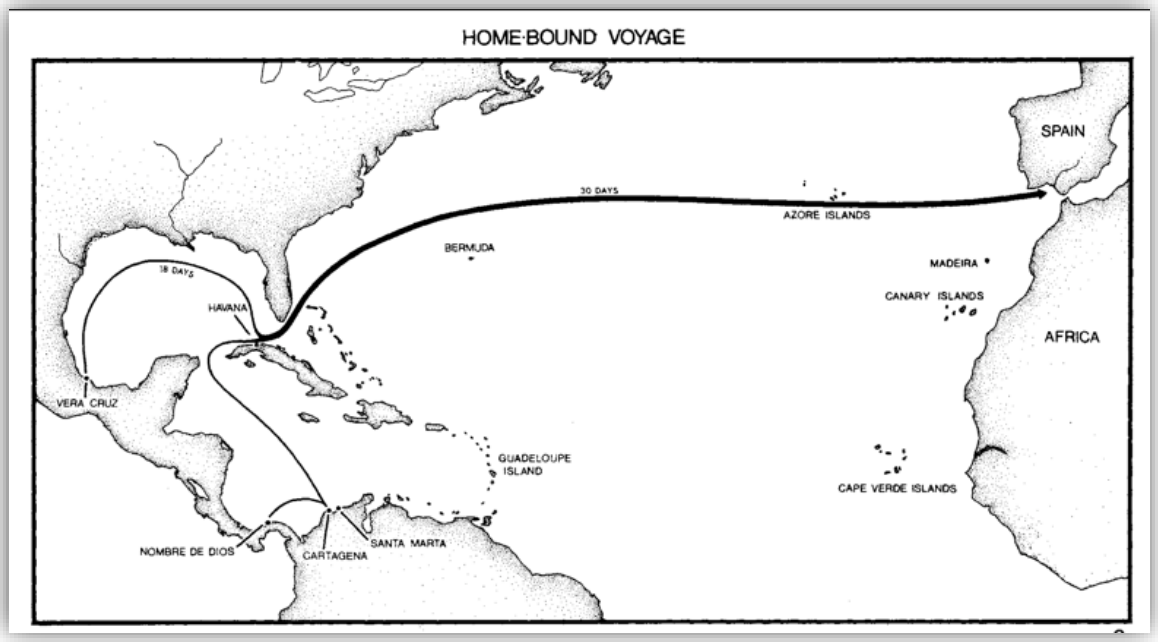
6 *See* **CER-2 [Hebb]**, ¶ 35.

7 *See* **CER-2 [Hebb]**, ¶ 37, Figures 2-3.

8 *See* **CER-2 [Hebb]**, ¶ 40, Figures 2-3.

Figure 1: Maps of Routes of Spanish Fleets





17. Once the *Tierra Firme flota* arrived in Cartagena de Indias, a trade "fair" or market would be organized and held in Portobello for several weeks or months.[9] This trade

[9] *See* **CER-2 [Hebb]**, ¶¶ 39-40.

fair involved the exchange of European merchandise brought by the *Terra Firme flota* for the silver, gold, emeralds, opals, diamonds, and other precious materials mined from South America.[10] There was also some trade between the Pacific ports extending from Acapulco (present-day Mexico) to Arica (present-day Chile), and thus some of the goods from this trade, like Chinese porcelain, would be available at the fair and put on the galleons.[11]

18. In March 1706, the San José led the *Tierra Firme flota* that departed from Spain.[12] The San José and her sister ship, the San Joaquín, were built in the Biscayan shipyard near San Sebastián, Spain, and were launched in 1698.[13]

19. On 5 January 1708, the San José arrived in Cartagena after almost ten years with no fair.[14] Here, it offloaded its European cargo and was loaded with treasure and goods from South America. During the period from 1690 to 1730, gold production had increased dramatically, and gold made up a much greater percentage of the precious metals brought to Portobello.[15] Accordingly, records indicate that 43% of the registered private treasure entering Panama for the 1708 fair was gold in bars and doubloons, and contemporary accounts suggest that a majority of the precious metals put on the galleons was in gold.[16]

20. In addition to treasure, the lead ships of the fleet were also designed to act as military ships, armed with cannons and other artillery to protect their precious cargo.

21. As it happened, the San José was well-armed for good reason. The English, led by Commodore Charles Wager, who was in charge of the Royal Navy squadron in the Caribbean, had orders to prevent the flow of bullion from reaching the Bourbon (French) powers. He captained the ship Expedition.[17] His goal was to capture the

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10 *See* **CER-2 [Hebb]**, ¶¶ 39-40.

11 *See* **CER-2 [Hebb]**, ¶ 39.

12 *See* **CER-2 [Hebb]**, ¶ 45.

13 *See* **CER-2 [Hebb]**, ¶ 76.

14 *See* **CER-2 [Hebb]**, ¶ 61.

15 *See* **CER-2 [Hebb]**, ¶ 34.

16 *See* **CER-2 [Hebb]**, ¶ 157.

17 *See* **CER-2 [Hebb]**, ¶ 77.

galleons and take the wealth loaded on them as prize—*i.e.*, to disable them enough to board them and take them over, not to destroy or sink them.[18] He knew of the great wealth that the *Tierra Firme flota* was being loaded with, where it was heading, and even that her two lead ships, the San José and San Joaquín, carried the majority of her treasure.[19] Wager, armed with good intelligence, carefully positioned his ships to block the Boca Chica entrance to Cartagena's harbor and take their treasure.[20] Although the commander of the *Terra Firme flota*, Count Casa Alegre, knew of the threat of the British, he overrode objections and ordered the *flota* to prepare to sail.[21] The fleet—with the San José leading seven armed vessels and eight merchant vessels—set sail to Cartagena.[22]

22. The two powers met about a half an hour before sundown on 8 June 1708.[23] Forming their battle lines, Wager's Expedition took on the San José. The Expedition delivered six full broadsides—nearly simultaneous firing of the guns from one side of a warship—into the San José.[24] Shortly after the last shot, eyewitness accounts report that there was a brilliant flash of light from the San José and the ship "*blew up and Sunke Instantly*."[25] Splintered wood and whole planks were thrown aboard the Expedition, which was within a pistol-shot's distance from the San José as the ship was catastrophically destroyed.[26] The force of the pressure build-up in the hull of the San José was so great that she pushed out a wave as her sides blew out.[27] Those aboard the Expedition reported feeling the intense heat from the San José's combustion.[28] When darkness returned almost instantly, the San José had disappeared with all of her treasure and almost all her crew—only about a dozen and a half survived, and they had all been

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18 *See* **CER-2 [Hebb]**, ¶ 81.

19 *See* **CER-2 [Hebb]**, ¶ 150.

20 *See* **CER-2 [Hebb]**, ¶ 92.

21 *See* **CER-2 [Hebb]**, ¶ 75.

22 *See* **CER-2 [Hebb]**, ¶ 75.

23 *See* **CER-2 [Hebb]**, ¶ 95.

24 *See* **CER-2 [Hebb]**, ¶ 96.

25 **Exhibit DH-39**, The National Archives, Admiralty 51/4386 ("*past five they began to Engage the Barue Bearing SE 4 Leags Dist the Dispute held about ¼ past 7 wch time the 1st Capt ship blew up and Sunke Instantly*"). *See also* **CER-2 [Hebb]**, ¶ 104.

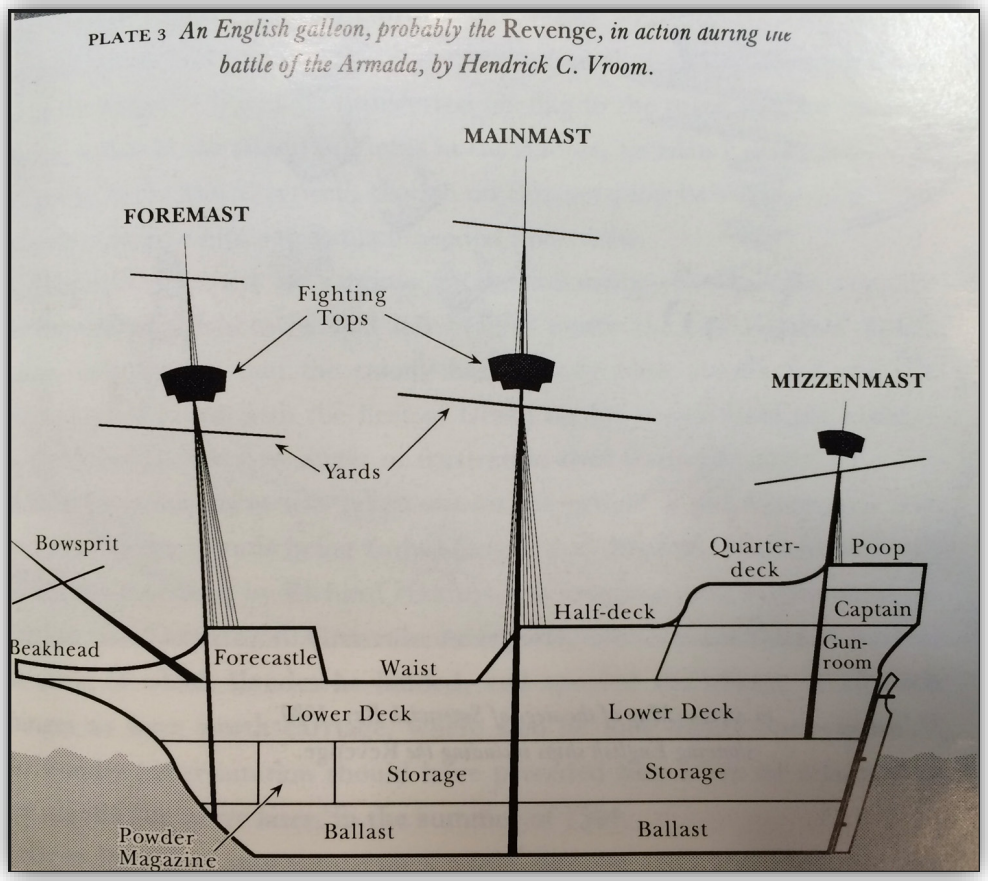
26 *See* **CER-2 [Hebb]**, ¶ 99.

27 *See* **CER-2 [Hebb]**, ¶ 100.

28 *See* **CER-2 [Hebb]**, ¶ 100.

high up at the time of the explosion and were found drifting on her timbers.[29] The Spanish Court of Inquiry later concluded that the San José's powder magazine, which was below the water line (*see* **Figure 2**), had ignited.[30]

Figure 2: Approximate Rendering of the San José Based on a Similar English Galleon[31]



23. Wager's Expedition then went after the Spanish Rear-Admiral, the Santa Cruz, which put up a stiff fight for seven hours, firing off 21 or 22 broadsides, before she surrendered in the morning.[32] To Wager's disappointment, he soon learned that most, if not all, of the treasure intended for the Santa Cruz was on the San José.[33] In the meantime, the San Joaquín was able to escape into Cartagena harbor (the captains of the HMS Portland

[29] *See* **CER-2 [Hebb]**, ¶ 101.

[30] *See* **CER-2 [Hebb]**, ¶ 102.

[31] *See* **CER-2 [Hebb]**, Figure 9.

[32] *See* **CER-2 [Hebb]**, ¶ 106.

[33] *See* **CER-2 [Hebb]**, ¶ 149.

and HMS Kingston were court-martialed by the British for letting her escape), where much, if not all, of her private treasure was removed.[34] Her remaining treasure eventually made it back to Spain two years later, in 1711, concealed on two French warships.[35] The San Joaquín was finally captured by the British on 7 August 1711, but to their disappointment, they learned that she had none of her treasure aboard her.[36] Another ship, Nieto's Urca, was deliberately beached by her crew so that they could unload her contents and burn her before she could be captured by the British.[37]

24. Although at the time there was a practice of attempting to salvage ships, the San José was lost in an area where the water was too deep to attempt any salvage operation.[38] Thus, the San José lay underwater and undiscovered, with no significant attempts to find or salvage her, for almost 300 years. While it was nowhere as advanced as today's technology, around the early 1980s, underwater search and recovery technology, using sonars and magnetometers, submarines, and robotic vehicles, made location and salvage of deep-water wrecks feasible.[39]

(b) Colombia's Legal Regime Governing The Discovery, Reporting And Salvage Of Shipwrecks

25. In 1980, the Colombian legal regime was structured to incentivize the search for and location of valuable treasures. The rules governing the definition and compensation for finding sunken treasure were encapsulated in Articles 700 and 701 of the Colombian Civil Code ("**Civil Code**") as follows:

> ***Article 700***. *The discovery of a treasure is a kind of invention or find.*
>
> *A treasure is a coin or jewels or other precious effects that, crafted by man, have been long buried or hidden, without memory or indication of its owner.*

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34 *See* **CER-2 [Hebb]**, ¶ 31.

35 *See* **CER-2 [Hebb]**, ¶ 117.

36 *See* **CER-2 [Hebb]**, ¶ 120.

37 *See* **CER-2 [Hebb]**, ¶ 112.

38 *See* **CER-2 [Hebb]**, ¶ 153.

39 *See* **CER-2 [Hebb]**, ¶ 153. *See also* **CER-1 [Morris]**, ¶¶ 17-20, 28-30.

> ***Article 701***. *The treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery.*
>
> *But the latter shall not be entitled to his share unless the discovery is fortuitous, or when the treasure has been sought with the permission of the owner of the land.*[40]

26. As explained by the Colombian Supreme Court when analyzing Articles 700 and 701 of the Civil Code, "*it is clear that if . . . a third party with* [the authorization from the owner of the property] *finds a treasure as a result of a search carried out with that specific and declared intent, . . .* [the third party] *will become its owner.*"[41]

27. It was in this legal context that SSA's Predecessor, GMC Inc. decided to apply for and was granted a license to search for the San José in Colombian waters.[42]

(c) SSA's Predecessor Is Formed To Search For The San José

28. In 1979, a group of mostly U.S. investors founded GMC Inc., a U.S. company incorporated in Delaware, to search for the San José.[43]

29. To identify the target area of the search, GMC Inc. retained a team of historians to conduct further research to determine the location of the San José and its lost treasure. These historians included:

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[40] **Exhibit C-1bis [EN]**, Colombian Civil Code (excerpts), 31 May 1873, arts. 700-701 (SSA's Unofficial Translation). In light of Colombia's complaint regarding the translation of this provision, SSA has introduced a modified translation with this submission.

[41] *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 148 (SSA's Unofficial Translation). Colombia appears to accept this conclusion as well based on its statements during the Hearing on Colombia's Preliminary Objections in response to Arbitrator Jagusch's question. *See* Hearing on PO Day 1, 101:14-21 ("***ARBITRATOR JAGUSCH****: If a resolution grants the right to search for shipwrecks, do you accept that that must include the San José, unless it said you can search for shipwrecks, but you can't search for the San José? I mean, that wouldn't make any sense, would it?* ***MR. VEGA-BARBOSA****: The proposition that if you're allowed to search for shipwrecks, and the Galeón San José is a shipwreck, is correct*.") (emphases added).

[42] *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980.

[43] *See* **Exhibit C-134**, Certificate of Incorporation of GMC Inc., 7 August 1979. *See also* **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980, PDF p. 1 ("[T]*he shareholders of* [GMC Inc.] *are the same shareholders of* [GMC]") (SSA's Unofficial Translation); SSA's Response, ¶ 22; Colombia's Reply, ¶¶ 24, 290.

a. Dr. Eugene (Gene) Lyon (now deceased), a historian and archivist on colonial-era Spanish Central America and the Indies.[44] Dr. Lyon had successfully helped locate the shipwreck of the Atocha, a Spanish galleon, and had been investigating the location of the San José for several years.[45] By the time GMC Inc.'s exploration efforts began, he had conducted extensive research on the San José at various archives in Spain.[46]

b. Commander John Cryer (now deceased), a naval historian and Commander in the U.S. Navy with a degree in Meteorology from the United States Navy Post Graduate School.[47]

c. Goin E. (Jack) Haskins (now deceased), an engineer, pilot, and historical shipwreck and salvage researcher.

30. After years of combined research, the team of experts working for SSA's Predecessors was able to narrow the most probable location of the San José to a reasonable search area.[48] Following a thorough examination of the records and analysis of maps made contemporaneous to the time of the shipwreck—including a review of contemporaneous accounts, maps, and the logbooks of the English ships involved in the battle[49]—SSA's Predecessors' historians were able to establish that multiple sources reported sighting the San José on the island of Little Baru, present-day Isla Rosario, two hours before she sank and half an hour before the British engaged the Spanish

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44 *See* **Exhibit C-56**, John Noble Wilford*, Translated Documents Capture Ambience and Aroma of The Nina,* THE NEW YORK TIMES, 14 October 1986, PDF pp. 2-3.

45 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981, PDF p. 1 ("*This will advise that the undersigned has performed research, over several years, in the Archives of the Indies in Seville, Spain, on the sinking, location, and cargo of the San Joseph, 1037-ton Capitana of the Spanish guard fleet of 1708, lost in a naval battle off Cartagena in present-day Colombia*.") (underline in original); **Exhibit C-56**, John Noble Wilford*, Translated Documents Capture Ambience and Aroma of The Nina,* THE NEW YORK TIMES, 14 October 1986.

46 *See* **Exhibit C-7**, Letter from Dr. Eugene Lyon, 21 September 1981, PDF p. 1 (noting Dr. Lyon had analyzed "*the totality of the outbound cargoes from Spain to the Indies in 1706*").

47 *See* **CWS-1 [Doty]**, ¶ 15.

48 *See* **CWS-1 [Doty]**, ¶ 15.

49 *See* **Exhibit C-137**, Letter from Mr. Haskins to Mr. Spicka, 19 March 1981 (referring to the logbook of the Kingston and accounts from the Spanish side, and concluding that "[t]*he basis for this belief, from the standpoint of research into the English side of the battle, stems from the Ship's Logbooks which are kept at the Public Records Office in London . . . that* [sic] *fact, coupled with a recent chart I uncovered, which was made* [in] *about 1730.*").

fleet.[50] The two sources had, fortunately, recorded the distance to the ship and the bearing.[51] The historians had also established the wind direction and the positions of the San José and Expedition ships, as well as the current direction from contemporaneous logs of the British ships.[52] With all this information, the historians were able to estimate the likely movement and final position of the San José when it sank.[53] Indeed, the historians' analysis was remarkably precise as they estimated the coordinates[54] merely 5 miles from the coordinates ultimately reported by SSA[55] and 3 miles from where Colombia reportedly found the shipwreck in 2015.[56]

31. This analysis allowed GMC to apply for a permit to search an area where the San José shipwreck likely lay.

B. DIMAR Authorized SSA's Predecessor To Search For The San José

32. On 22 October 1979, GMC Inc. requested an underwater exploration permit from Colombia's General Directorate of the Maritime and Port Authority (*Dirección General Marítima y Portuaria* or "**DIMAR**") to search for shipwrecks within the Colombian continental shelf.[57] It is undisputed that DIMAR had the authority to grant such exploration permits, confirm reported findings, and enter into salvage contracts.[58]

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50 *See* **Exhibit C-139**, Letter from Mr. Haskins to Mr. Maloney, 13 October 1981, PDF p. 2.

51 *See* **Exhibit C-139**, Letter from Mr. Haskins to Mr. Maloney, 13 October 1981, PDF p. 2.

52 *See* **Exhibit C-139**, Letter from Mr. Haskins to Mr. Maloney, 13 October 1981, PDF p. 2.

53 *See* **Exhibit C-139**, Letter from Mr. Haskins to Mr. Maloney, 13 October 1981, PDF pp. 2, 4.

54 *See* **Exhibit C-139**, Letter from Mr. Haskins to Mr. Maloney, 13 October 1981, PDF p. 4 ("*76º 02' 23" W and 10º 15' 30" N*").

55 *See infra* ¶ 73. The 1982 Report provided "[t]*he main targets, in bulk and interest, are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that are located in the immediate vicinity of 76º 00' 20" W 10º 10' 19" N.*" **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 13 (SSA's Unofficial Translation).

56 *See infra* ¶ 247. Colombia reportedly found the shipwreck at 76º 00' 20" W 10º 13' 33" N.

57 *See* **Exhibit R-2**, Exploration Permit Request from Glocca Morra Company Inc. to DIMAR, 22 October 1979. *See also* **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, PDF p. 1 ("*WHEREAS: Dr. ANTONIO JOSÉ GUTIERREZ BONILLA, in representation of the company GLOCCA MORRA COMPANY INC. requests permission for underwater exploration of the Colombian Continental Shelf in the waters of the Caribbean with the objective to establish the existence of wrecks, treasures or any other element of historical, scientific or commercial value in the areas hereafter determined and indicated on the map enclosed with the application.*") (SSA's Unofficial Translation). *See also* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, art. 1 (establishing the coordinates in which GMC Inc. was authorized to search for the San José).

58 *See* Colombia's Preliminary Objections, ¶¶ 15-22.

33. After satisfying itself that GMC Inc. had provided sufficient "*documentary proof*" and "*information on the technical system to be employed in the search for the sunken wrecks which are the object of the Exploration Permit sought*," on 29 January 1980, DIMAR issued Resolution No. 0048 ("**Resolution No. 0048**") granting GMC Inc.'s requested exploration permit to search for the San José.[59]

34. Resolution No. 0048 makes clear that DIMAR was issuing an exploration permit to GMC Inc. for the purpose of finding the San José (contrary to Colombia's assertions in the Preliminary Objections phase).[60] Specifically, DIMAR noted that while it had previously authorized other companies to search for the San José shipwreck in different coordinates, those resolutions had elapsed and DIMAR had refused to extend them, thus "*exhaust*[ing]" the "*official channels*" for the prior searchers of the San José shipwreck.[61] That is why DIMAR could now award this permit to GMC Inc.

35. It is undisputed that at the time it awarded the permit, DIMAR understood that GMC Inc. would be entitled to 50% of its discovery.[62] Moreover, as DIMAR later confirmed, GMC Inc. would hold a preferential status to negotiate terms of a salvage contract as long as GMC Inc. duly reported its find.[63]

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59 *See* **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, art. 1 (SSA's Unofficial Translation).

60 *See* Colombia's Preliminary Objections, ¶¶ 2, 4, 21-33.

61 **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, PDF pp. 2-3 (Reynolds Aluminum Europe S.A. was granted a five-year term in order to make explorations in search of the San José and later assigned its rights to the Panamanian company Friendship S.A. The terms expired without them reporting any findings. The resolution provided in full: "*By resolution No. 173 of 1971,* [DIMAR] *recognized the company REYNOLDS ALUMINIUM EUROPE, S.A.*, *as claimstaker* ***for the wreck called Capitana San José*** *. . . By Resolution No. 016 dated January 24, 1974,* [DIMAR] *authorized the company FRIENDSHIP S.A. to carry out underwater exploration* ***to search for the above-mentioned wreck*** *for a term of five (5) years which have now elapsed. The company FRIENDSHIP S.A. has asked* [DIMAR] *to extend the above-cited exploration term which was denied . . . this way the official channels are exhausted. Upon preliminary study of the petition by the company GLOCCA MORRA COMPANY INC.,* [DIMAR] *demanded that documentary proof be brought to clarify the legal interest of the petitioner as well as information on the technical system to be employed* ***in the search for the sunken wrecks which are the object of the Exploration Permit sought****, and said proof has been submitted to our satisfaction*.") (emphases added) (SSA's Unofficial Translation).

62 *See* **Exhibit C-1bis [EN]**, Colombian Civil Code (excerpts), 31 May 1873, art. 701 ("*The treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery. But the latter shall not be entitled to his share unless the discovery is fortuitous, or when the treasure has been sought with the permission of the owner of the land*.") (SSA's Unofficial Translation). *See also* **Exhibit C-15**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982.

63 **Exhibit C-3 [EN]**, DIMAR Letter No. 00854, 20 March 1980 ("[I]*n order to enter into contract with the Nation, for the salvage of shipwrecked goods, the solicitor must have obtained the corresponding exploration permit, filed a claim of the purported find, and then, by preferential manner, begin to negotiate the terms or the respective contract in accordance to the laws.*") (SSA's Unofficial Translation). This was later

36. Resolution No. 0048 established that GMC Inc. would conduct all exploration work "*under **supervision** of*" DIMAR[64] in an area of approximately 22 by 15 nautical miles.[65] In exchange, GMC Inc. agreed to:[66]

a. Comply with the resolution and applicable Colombian law, including Decree No. 2349 of 1971;

b. "[I]*mmediately report to* [DIMAR] *all sunken wrecks found and their identification in order to safeguard the existing rights of legitimately recognized declarants, indicating the geographic coordinates of each wreck*";

c. Make an application for the ship GMC Inc. intended to use for exploration;

d. "*Supply transportation, per diems, lodging and board*" for the Colombian officials who would be supervising the exploration activities; and

e. Indemnify Colombia and any other private parties for any damage caused by the exploration activities.

37. Contrary to Colombia's objections,[67] and as the Tribunal rightly determined in its Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the United-States Colombia TPA, dated 16 February 2024 ("**Decision on PO**"), nothing in Resolution No. 0048 (or any law or regulation cited within) required GMC Inc. to notify

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recognized in DIMAR Resolution No. 0149, which stated: "*For discoveries of treasures or antiquities, the concessionaire shall have the privilege of contracting with the State for their exploitation. This privilege will expire six (6) months after the end of the exploration period, . . . except when reason that has providence the contracting is attributable to the State*." **Exhibit C-11 [EN]**, DIMAR Resolution No. 0149, 12 March 1982, art. 3 (SSA's Unofficial Translation).

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

65 **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, arts. 1 ("*The company GLOCCA MORRA COMPANY INC. is authorized to do underwater exploration in the areas hereafter set forth: . . .*"), 5 ("*The present authorization is effective for two (2) years*.") (SSA's Unofficial Translation).

66 *See* **Exhibit C-2 [EN]**, DIMAR Resolution No. 0048, 29 January 1980, art. 3 (SSA's Unofficial Translation).

67 *See* Hearing on PO Day 2, 393:6-10 ("*Second, we say the assignment of exploration rights by DIMAR is made intuito personae. This means in a scenario where Resolution No. 48 is still in force, the transfer of exploration rights would have still required DIMAR's authorization*.").

or seek permission from DIMAR for the intra-company assignment of rights and obligations under the permit.[68]

(a) SSA's Predecessors Search For The San José

38. With Resolution No. 0048 in hand, GMC Inc. conducted several searches in the authorized area, using the available state-of-the-art equipment, manned, and guided by a team of experts.[69] Colombian Navy observers were on board the vessels at all times and updated DIMAR on the progress of SSA's Predecessors' operations periodically.[70]

39. As shown below, between 1980 and 1981, SSA's Predecessors conducted three phases of exploration. The first surveyed the search area awarded by Resolution No. 0048 and identified targets for future study ("**Phase One**") (**Section II.B(1)**), the second was used to gather additional data on the targets of interest ("**Phase Two**") (**Section II.B(2)**), and a third phase using a manned submarine when it finally located the target area containing at least a part of the shipwreck of the San José ("**Phase Three**") (**Section II.B(3)**).

(1) Phase One: June To September 1980

40. From June to September 1980, GMC Inc. searched for the San José with the Morning Watch,[71] a surface vessel that towed a side sonar through the specified search area.[72]

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68 *See* Decision on PO, ¶ 206.

69 *See* **CWS-2 [Swann]**, ¶¶ 24-26; **CWS-1 [Doty]**, ¶¶ 19-32; **CER-1 [Morris]**, ¶¶ 27, 37-52.

70 *See* **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, preamble, art. 3(d); **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980; **CWS-2 [Swann]**, ¶ 27; **CWS-1 [Doty]**, ¶ 18, Figure 3.

71 *See* **Exhibit C-52**, Resolution No. 517, 8 July 1980, PDF p 1.

72 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 2.

Figure 3: Morning Watch Vessel

Figure 4: Personnel On Board the Morning Watch Lowering a Side Scan Sonar

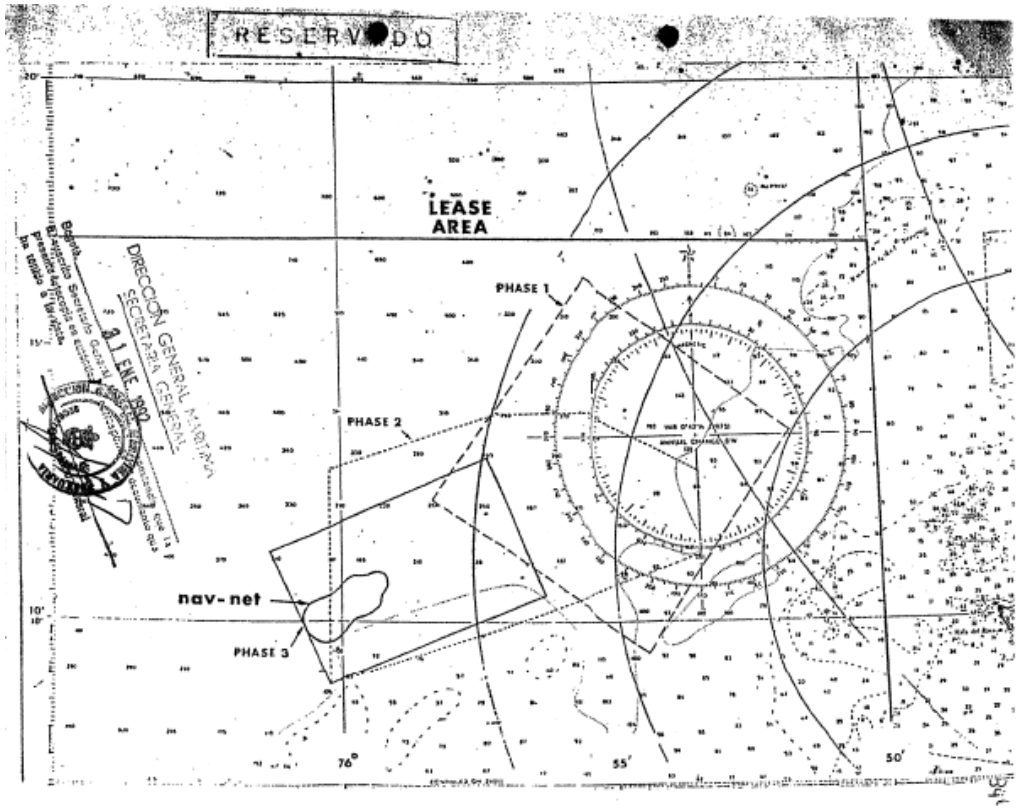
41. As Mr. Morris explains:

> *The side scan sonar is a device that uses transmitted acoustic pulses, aimed underneath and to the side of a survey vessel to generate high*

> *resolution acoustic imagery of the seafloor. . . . Since most of the seafloor is relatively benign, consisting primarily of sand and mud, any objects lying on the seafloor can be easily distinguished from the seafloor because they lie on top of it and protrude upwards into the water column casting shadows when imaged from shallow angles. In addition, different materials reflect different amounts of acoustic energy. Shipwrecks and other manmade objects tend to show a difference in acoustic reflectivity because they are made of different materials than the surrounding seafloor.*[73]

42. The side sonar towed to the Morning Watch surveyed a wide subset of the area GMC Inc. had been authorized to search in order to locate and map potential targets within the licensed area.[74] The areas surveyed during the expedition during Phases One and Two are included in the below figure attached to the 1982 Report:

Figure 5: Search Area During Phases One, Two, and Three[75]



[73] **CER-1 [Morris]**, ¶ 18.

[74] *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 2.

[75] *See* **Exhibit R-4**, Confidential Report on Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia, 26 February 1982, PDF p. 12.

43. GMC Inc.'s team of experts studied the survey results to produce a list of several hundred sonar targets. In particular, the team studied the geology of the targets to identify "*hard bottom*" areas, such as reefs or outcrops, to remove them from the target list or award them a lower priority.[76] The target list was then classified and organized into approximately 50 prime targets for future investigation.[77]

44. That same year, in 1980, the founders of GMC Inc. incorporated a Cayman Islands company, GMC, to which GMC Inc. assigned its interests under Resolution No. 0048.[78] To continue its exploratory work in Colombian waters, GMC requested, and received, DIMAR's "*authoriz*[ation] *to perform the* ***exploratory*** *work* [that DIMAR had] *approved for*" GMC Inc.[79] As explained by Claimant,[80] and found by this Tribunal,[81] GMC Inc. sought DIMAR's approval of the assignment because GMC would be required to conduct exploration in Colombian waters.[82]

(2) Phase Two: October 1980 To August 1981

45. From October 1980 to August 1981, GMC initiated a second exploration phase. During Phase Two, DIMAR expanded the search coordinates.[83] GMC commissioned a larger

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76 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 2-3 (SSA's Unofficial Translation).

77 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 2-3.

78 *See* **Exhibit C-135**, Assignment Agreement between GMC Inc. and GMC, 23 July 1980. *See also* **Exhibit C-4**, Memorandum of Association of GMC, 21 May 1980; **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980.

79 *See* **Exhibit C-5 [EN]**, Resolution No. 753, 13 October 1980, PDF p. 1 (emphasis added) (SSA's Unofficial Translation).

80 *See* SSA's Response, ¶ 201.

81 *See* Decision on PO, ¶¶ 206-211.

82 *See* **Exhibit R-3**, Request AF 01196877 from Glocca Morra Company Inc. to DIMAR, 9 September 1980, PDF p. 1 (in seeking approval of the assignment from GMC Inc. to GMC, GMC Inc. reassured DIMAR that "[GMC] . . . *is a company sufficiently capable to continue with seriousness the underwater exploration*."); **Exhibit C-5 [EN]**, Resolution No. 753, 13 October 1980, PDF p. 1 ("*The petitioner also* ***requests that the assignee be authorized to perform the exploratory work*** *approved for the assignor company, as well as that he be recognized as the agent of that company. . . ARTICLE 2. TO AUTHORIZE the company 'GLOCCA MORRA COMPANY'* ***to perform the underwater exploration work*** *aimed at locating shipwrecks in Colombian jurisdictional waters of the Atlantic Ocean*") (emphases added) (SSA's Unofficial Translation).

83 *See* **Exhibit C-6**, DIMAR Resolution No. 0066, 1 February 1981, PDF p. 2. Moreover, by January 1982, the authorization granted by Resolution No. 0048 was set to expire. To continue explorations, DIMAR extended the validity of Resolution No. 0048 twice, through July 1982. *See* **Exhibit C-8**, DIMAR Resolution No. 0025, 29 January 1982; **Exhibit C-12**, DIMAR Resolution No. 249, 22 April 1982. *See also* Colombia's Preliminary Objections, ¶ 24.

ship, the State Progress, to determine if any of the targets identified by the Morning Watch during Phase One could be sunken ships and to search in additional areas[84] to discover any targets that had not been identified in Phase One.[85]

46. The State Progress used a lateral sonar, subsoil profiler, and a Tethered Remotely Operated Vehicle for Exploration and Collection ("**TREC**") with a 1,550 meter long cable.[86] The TREC was an unmanned, remote controlled vehicle equipped with television and photo cameras, as well as a specialized sonar for continuous scanning, a small sound manipulator, and a basket for the recovery of small objects.[87] As Mr. Morris explains, the TREC was a type of early ROV, which were just being developed at that time and which could descend to greater depths than humans.[88]

Figure 6: GMC's Staff and Contractors Operating TREC Controls[89]

[84] During Phase Two, the sonar search area was extended to the west and south of the original area, and several new targets of interest were identified. *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 3.

[85] *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 3.

[86] See **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 9.

[87] *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 3-4.

[88] *See* **CER-1 [Morris]**, ¶¶ 27, 30.

[89] *See* **CWS-1 [Doty]**, Figure 5.

47. The equipment onboard the State Progress also included a magnetometer, an instrument that detects changes in the Earth's magnetic field. Magnetometers are helpful in shipwreck searches because they can detect the generally "*significant amounts of iron*" that would be found on shipwrecks, as iron would be used for "*anchors, cannons, shot, fasteners, and various mechanical hardware necessary to make a ship function*."[90]

48. Members of GMC's crew included Roy Doty, a fact witness in this Arbitration, and former U.S. Navy recovery experts, including Michael (Mike) Donovan, a Master Chief Petty Officer in the U.S. Navy.[91] The crew worked alongside the historians and other staff.

49. Using its lateral sonar, GMC identified a number of potential targets for further investigation and extended the search area to the west and south of the area originally surveyed during Phase One.[92] GMC then lowered the TREC to the ocean floor a total of approximately 25 times to gather additional data on targets of interest.[93] During these submersions, "*areas containing man-made or surface-generated objects were found*."[94] In particular, the TREC located three to six areas with wood planks or other foreign objects that were spread over a larger area of approximately two square nautical miles. As GMC later reported to DIMAR:

> *Of great interest during that phase were several widely spread areas characterized by the presence of what appeared to be debris consisting of wood and remains or objects that do not seem to have a natural origin on the seafloor. These "piles of wood" were examined and samples were taken by means of the TREC remotely operated vehicle (robot).*[95]

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90 **CER-1 [Morris]**, ¶ 19.

91 The rank of Master Chief Petty Officer is the highest achievable enlisted rank in the U.S. Navy.

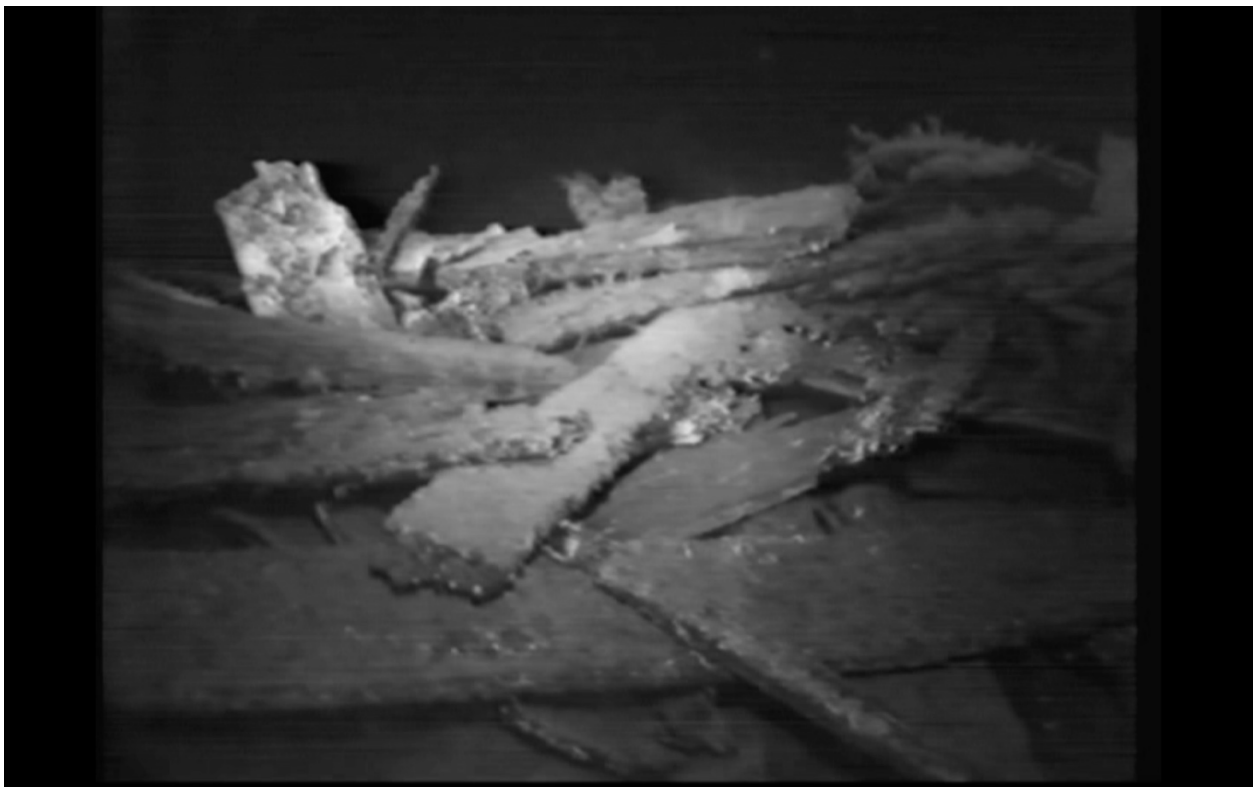
92 *See supra* **Figure 5**.

93 *See* **Exhibit C-10**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, p. 3.

94 **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 4 (SSA's Unofficial Translation).

95 **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 9 (SSA's Unofficial Translation).

Figure 7: Timber Pile, Imaged During Phase Two[96]



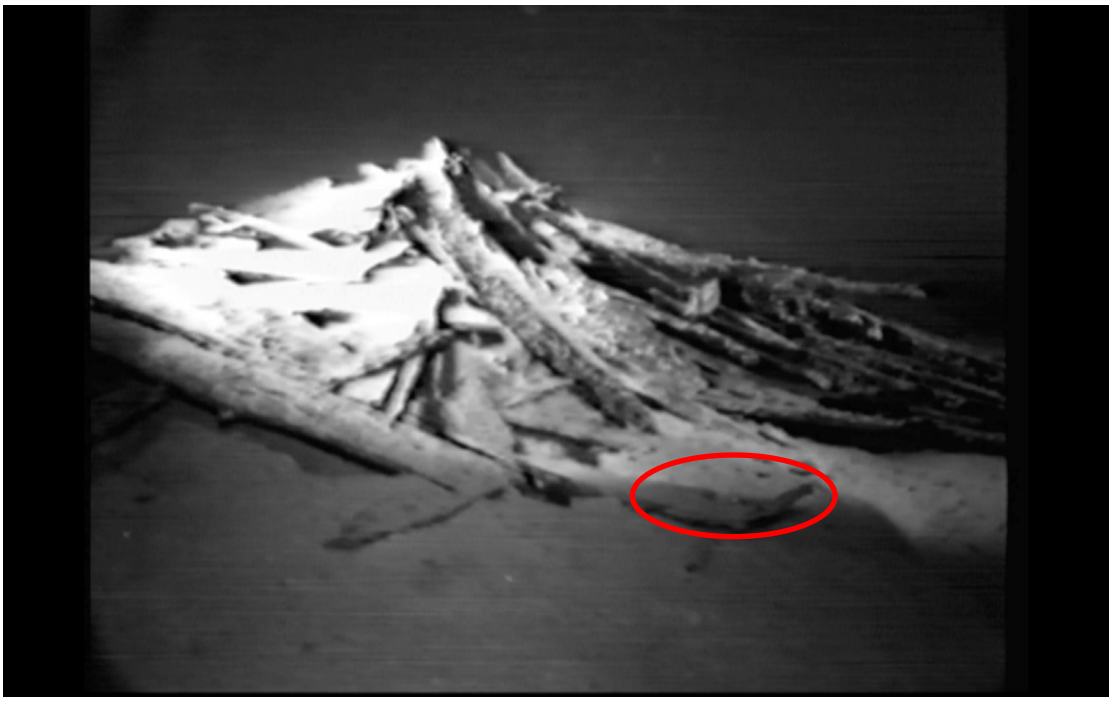
50. As Mr. Morris explains, the wood piles have distinct features indicating they were man made, including appearances of "*wooden 'trunnel' fasteners holes and fasteners protruding from them*" which are "*consistent with vessel construction techniques of the 18th century*."[97]

[96] *See* **CER-1 [Morris]**, Figure 1. *See also* **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980, minute 17:38.

[97] **CER-1 [Morris]**, ¶ 41.

Figure 8: Timber With a Probable Fastener Protruding From It[98]

Figure 9: Timber With Probable Fastener (Trunnel) Holes Visible[99]



[98] *See* **CER-1 [Morris]**, Figure 2. *See also* **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980, minute 59:41.

[99] *See* **CER-1 [Morris]**, Figure 3. *See also* **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980, minute 01:17:13.

51. In addition, the crew "*discovered a cannon in the vicinity of* [the] *piles of wooden planks*" where they could see the "*proximal end of the cannon . . . with the body partially buried in sand . . . at a depth of approximately 715 feet*."[100] Mr. Doty recalls "*looking down the cannon's muzzle.*"[101] Naturally, the discovery "*generated a lot of excitement with the survey team*."[102] The magnetometer onboard also "*respond*[ed] *to a hard iron signature*."[103]

52. In addition to the sonar, magnetometer and visual observations, the crew did some investigatory diving. In particular, Mr. Doty dove near the shore along with historian Mr. Haskins and found a ballast pile believed to be a remnant of Nieto's Urca that the Spanish had sunk near the shore following the battle.[104] This helped them "*confirm the battle lines of the multiple ships involved when the San José was sunk.*"[105]

53. Because the TREC's range and object recovery capabilities were limited, Phase Two concluded with a final sonar search and plans to initiate a third phase of the project.[106]

54. In the meantime, SSA reached out to prospective experts to begin planning the salvage of the shipwreck that the company knew it was close to confirming. For example, SSA received an opinion from International Submarine Engineering Ltd., which noted that, while challenging, it was possible to salvage the shipwreck and that "*in light of how long it takes to do the research and to finance a project of this type once a capability to undertake a project of this type, Sea Search is clearly at the forefront*."[107]

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[100] **CWS-1 [Doty]**, ¶ 26. As Mr. Doty notes, his recollection is of a different sighting of a cannon than that presented with **Exhibit C-104**, Video Recording by TREC during Phase Two, 1980. *See* **CWS-1 [Doty]**, n. 5.

[101] **CWS-1 [Doty]**, ¶ 26.

[102] **CWS-1 [Doty]**, ¶ 26.

[103] **CWS-1 [Doty]**, ¶ 26.

[104] *See* **CWS-1 [Doty]**, ¶ 24. *See supra* ¶ 23.

[105] **CWS-1 [Doty]**, ¶ 24.

[106] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 4 (SSA's Unofficial Translation).

[107] **Exhibit C-138**, Letter from International Submarine Engineering Ltd. to Mr. Stearns, 9 September 1981, PDF p. 1.

(3) Phase Three: SSA's Predecessor Confirms The Discovery Of The San José In December 1981

55. A third phase of exploration took place between October 1981 and February 1982.[108] Given the limited recovery capabilities of the TREC, GMC commissioned a manned submarine, the Auguste Piccard, and a support surface ship, the State Wave, to conduct further investigation of its initial findings.[109] The manned submarine had sophisticated equipment, including a lateral sonar, subsoil profiler, a magnetometer, underwater television, a Continuous Transmission Frequency Modulation sonar, as well as windows for visual observation.[110] At the time, the Auguste Piccard was considered a highly sophisticated private submarine.[111]

Figure 10: The Auguste Piccard's Control Room[112]

[108] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 5 (SSA's Unofficial Translation).

[109] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 2-4 (SSA's Unofficial Translation).

[110] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 5 (SSA's Unofficial Translation).

[111] *See* **CWS-2 [Swann]**, ¶ 23.

[112] *See* **CWS-2 [Swann]**, Figure 4.

56. The State Wave, pictured below, was equipped with reconnaissance equipment but was used primarily for towing the Auguste Piccard, deploying equipment, and surface navigation and support.[113]

Figure 11: The State Wave Towing the Auguste Piccard[114]

57. The crew of the Auguste Piccard submarine included several scientific and operations personnel, including:

a. Captain John Swann, a Master Mariner with over two decades of naval experience with the British Merchant Service, who piloted the submarine;[115]

b. Michael Costin, an experienced oceanographer who, among other things, would set up and lay out the surface and subsurface navigation grid for positioning; and

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113 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 5 (SSA's Unofficial Translation).

114 *See* **CWS-2 [Swann]**, Figure 1.

115 *See* **CWS-2 [Swann]**, ¶¶ 7-12. *See also* **Exhibit C-109**, Photograph of Auguste Piccard Crew, circa 1981-1982 (including Captain Swann).

c. Helmut Lanziner, an oceanographer and pioneer in the development of electronic charting technology, who was later honored as a Member of the Order of Canada for his work in this field.[116]

58. The search team continued to be assisted by the historians, Dr. Lyon, Commander John Cryer, and Mr. Haskins.[117]

59. Throughout this process, as with all prior expeditions,[118] Colombian Navy observers were on board the Auguste Piccard submarine and its support ship, the State Wave, at all times.[119] In addition, the Auguste Piccard submarine was shadowed by Colombian Navy submarines.[120] As a result, Colombia knew the location of the Auguste Piccard submarine and its targets at all times.

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[116] **Exhibit C-78**, Mr. Helmut H. Lanziner, Order of Canada (Awarded on 17 November 2005; Invested on 15 December 2006), 17 November 2005, *available at* https://www.gg.ca/en/honours/recipients/146-15651 ("*A pioneer in the development of electronic charting technology, Helmut Lanziner has worked to enhance maritime navigational safety. Former chairman of Xenex Innovations and founder and former president of Offshore Systems International Limited, he has more than 25 years of experience in research and development. He has served as a Canadian delegate to many organizations, including the International Maritime Organization. The recipient of Transport Canada's 2005 Marine Safety Award, he continues to advance technological innovations to support both commercial and leisure mariners*."); **CWS-2 [Swann]**, ¶¶ 13-15.

[117] *See supra* ¶ 29.

[118] *See supra* ¶ 38.

[119] *See, e.g.*, **Exhibit C-2**, DIMAR Resolution No. 0048, 29 January 1980, preamble, art. 3(d); **Exhibit C-52**, DIMAR Resolution No. 517, 8 July 1980.

[120] *See* **CWS-2 [Swann]**, ¶¶ 28-29.

Figure 12: Auguste Piccard's Crew and a Colombian Navy Representative in Grey Coveralls at the Top Right[121]

60. Operational dives with the Auguste Piccard took place between mid-November 1981 and early February 1982 on almost a daily basis.[122] During these expeditions, side scan sonars, sub-bottom profilers, and magnetometer readings were operated continuously.[123] Captain Swann, the captain of the Auguste Piccard submarine, described how these test dives rigorously covered the target search areas:

> *We performed test dives almost on a daily basis. Our dives were anywhere between less than an hour to 10 hours or more. We were searching along pre-planned survey lines, at increments of 100 metres. To my recollection, those survey lines subdivided a total search area of approximately five nautical miles square. The side scan sonar was set at a 200-metre swathe, which meant that on every return survey line we got 100% coverage of the previous survey lines. In other words, we got double coverage of each search line.*[124]

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121 *See* **CWS-2 [Swann]**, Figure 10; **Exhibit C-109**, Photograph of Auguste Piccard Crew, circa 1981-1982.

122 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 5 (SSA's Unofficial Translation); **CWS-2 [Swann]**, ¶¶ 24-25, 32, 36, 39, 47.

123 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982 (SSA's Unofficial Translation), PDF p. 8.

124 **CWS-2 [Swann]**, ¶ 25.

61. While the Auguste Piccard and its crew analyzed the targets of interest, the State Wave kept close to the submersion areas and logged the location of the operations.[125] To do so, it carried a "*master station*," while two transponders were stationed on land—one at a hotel in Cartagena (the "Hotel" location) and one on a small island north of the Rosario Islands (the "Island" location).[126] As Mr. Morris explains, a mobile receiver was mounted on the ship that would receive the signals from these two shore-based stations and measure the transmission time from each one.[127] After correcting for atmospheric distortions, the ranges from the shore-based stations could then be mathematically computed, which allowed the crew to triangulate the position of the ship.[128] This position was then recorded on a physical paper map with a scale of 1:80,000.[129] While this methodology allowed for the precise determination of a location, the latitude and longitudinal coordinates it produced were necessarily relative to the position of the shore-based Hotel and Island stations.[130] In other words, to be able to go back to the same location, one needed to know and set up the shore-based stations Hotel and Island in precisely the same locations.[131]

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125 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 6 ("*After the PICCARD submerged, the STATE WAVE occupied the north-south patrol lines generally north and east of the PICCARD area of operation. Keeping the station or patrol lines at this distance ranged from about 9.5 to 12 miles from the western tip of the Island of Rosario. The STATE WAVE kept in these lines at a distance normally within 1 to 2 miles from the PICCARD, which was within the range of the PICCARD's UQC submarine communication system. The STATE WAVE kept to the north and east of the submersion areas because that is the normal direction of the surface drift in the area*.") (SSA's Unofficial Translation).

126 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 6-7 (SSA's Unofficial Translation). *See also* **CER-1 [Morris]**, ¶ 34.

127 *See* **CER-1 [Morris]**, ¶¶ 32-34. *See also* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, pp. 6-7 (SSA's Unofficial Translation).

128 *See* **CER-1 [Morris]**, ¶¶ 32-33.

129 *See* **CER-1 [Morris]**, ¶ 34.

130 *See* **CER-1 [Morris]**, ¶ 34.

131 *See* **CER-1 [Morris]**, ¶ 34.

62. On 10 December 1981, the Auguste Piccard found a highly promising target in the area that GMC's historians and archaeologists had indicated would most likely contain the shipwreck.[132] Captain Swann recalls the moment they located the target:

> ***As the Auguste Piccard passed through the area of highest probability identified by the Historians, we recorded a strong sonar figure of an anomaly****. . . . On hitting this target, Helmut marked the location and insisted that we continue along the search lines, going back and forth over the grid area so as to gain as much data as possible about the surroundings and ongoing grid area. . . . The seabed was reasonably smooth, but uneven like sand dunes.* ***Further down the slope, we located a debris field of what the team identified as being worked timber****. . . .* ***When we made a turn to the secondary search grid from the primary search grid, we recovered big hits on the magnetometer—to the excitement of the crew and everyone on board.*** *. . . I was busy piloting the Piccard, but* ***I remember that there was an air of real excitement on board. This did not go unnoticed by the Colombian Navy observer on board the Piccard****, who, I understand notified the Colombian government of our discovery.*[133]

63. Further investigation through sonar, magnetometers, visual observations, and carbon dating, among other investigations, indicated that the finding was a shipwreck closely corresponding to the size, shape, and age of the San José.[134]

64. First, sonar readings indicated a wooden wreck of the approximate dimensions of the San José. An "*acoustic shadow*"[135] of the target revealed an image approximating the San José, as shown below.[136]

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[132] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 10-11 (SSA's Unofficial Translation); **CWS-2 [Swann]**, ¶¶ 32-34.

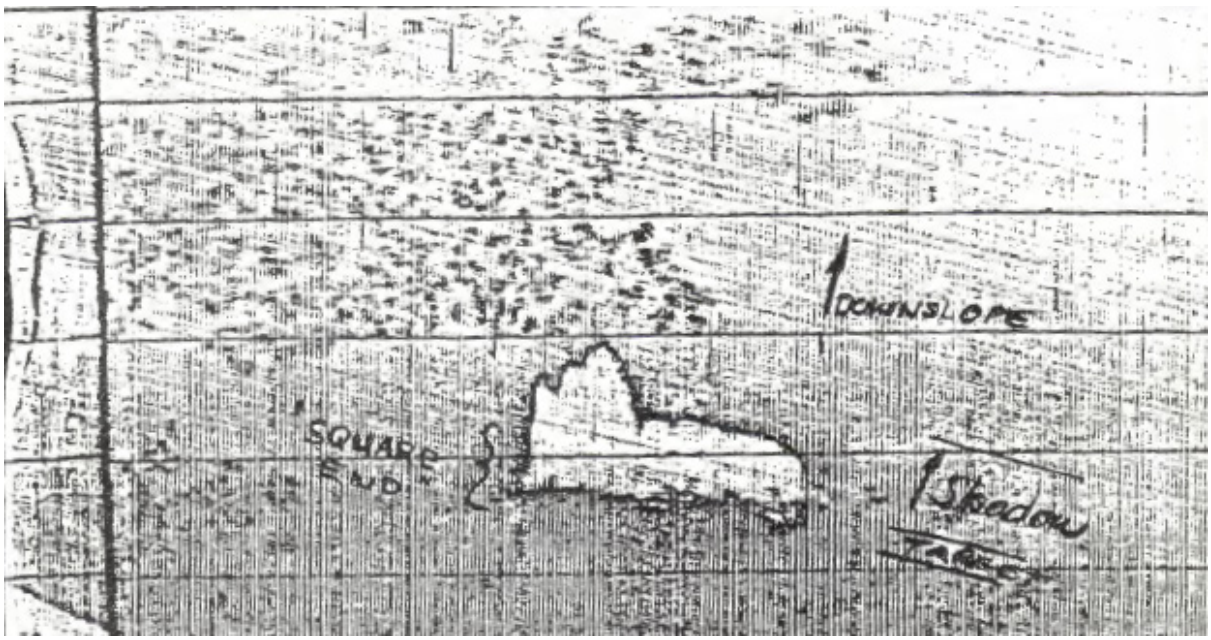
[133] **CWS-2 [Swann]**, ¶¶ 33-34, 36, 38 (emphases added).

[134] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 11 (SSA's Unofficial Translation).

[135] A shadow cast by an object blocking sound waves.

[136] *See* **Exhibit C-106**, Sonar Reading of Discovery, 10 December 1981 (here, the white section of the reading is the acoustic shadow, as the sonar could not see through the wreck). *See also* **Exhibit C-141**, Mr. Costin, Auguste Piccard – Data, Measurements and Observations, December 1981 – January 1982, PDF p. 5 ("*The PICCARD was operated closer to the bottom and passed the target along a line nearly* [] *to the target and to the bottom contours. The relative height of the target above the bottom is indicated by the length and the white area (acoustic shadow) which appears roughly downslope. Measured maximum elevation of the target is about 18 feet. Average elevation is about 8 feet*.").

Figure 13: Sonar Reading of Discovery Depicting the Acoustic Shadow[137]



65. Second, magnetometer readings showed a spike in ferromagnetic material—associated with shipwrecks—at the target.[138] According to Mr. Costin, the oceanographer, "[t]*his type of anomaly was not observed elsewhere in the survey area*."[139] Mr. Morris notes that the magnetic signature, reproduced below, "*is indicative of multiple ferrous objects at that location such as iron cannons, shot, and anchors*," which is "*consistent with a shipwreck site dating from the early 18th century*."[140]

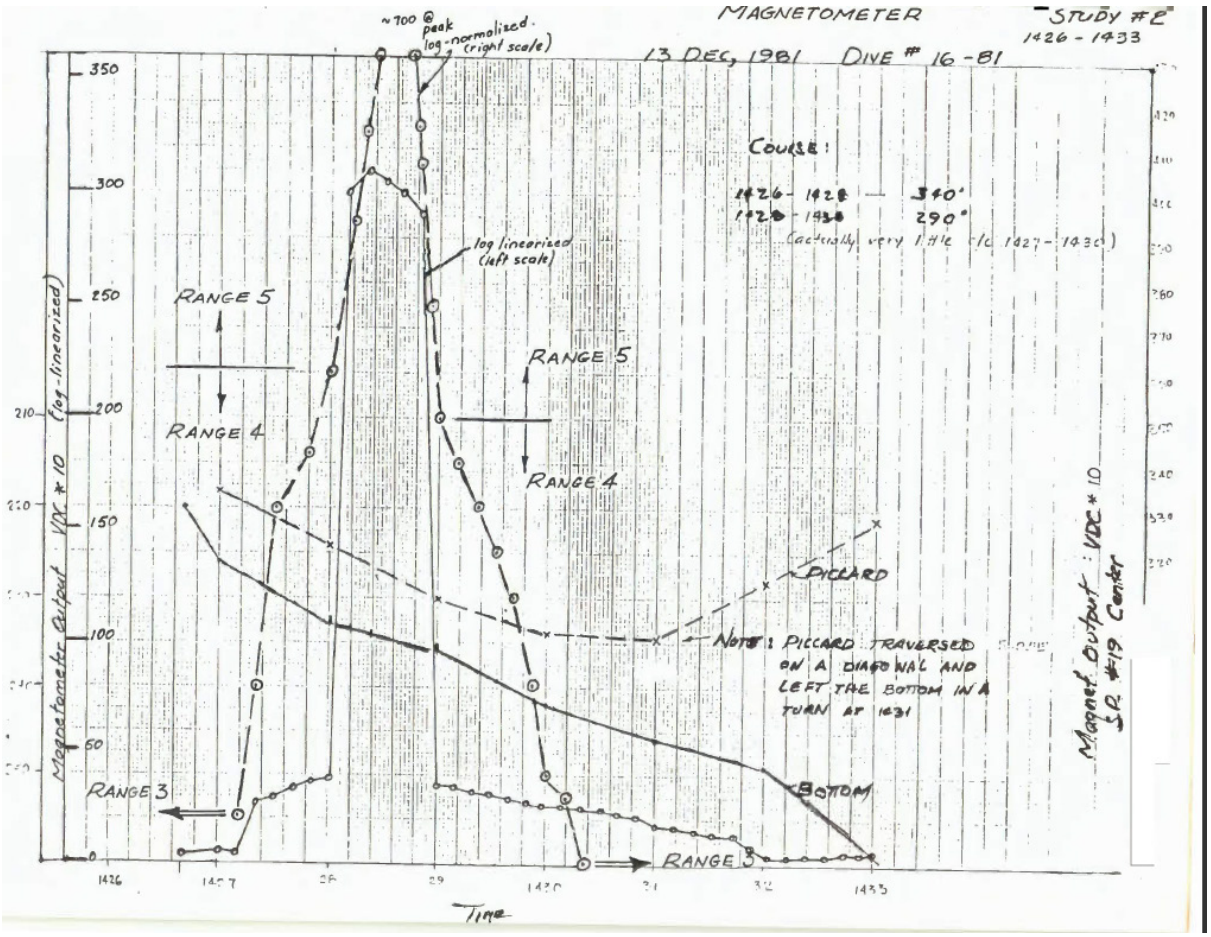
[137] *See* **Exhibit C-106**, Sonar Reading of Discovery, 10 December 1981. *See also* **CWS-2 [Swann]**, Figure 16.

[138] *See* **Exhibit C-107**, Magnetometer Graph of Discovery, 13 December 1981.

[139] **Exhibit C-141**, Mr. Costin, Auguste Piccard – Data, Measurements and Observations, December 1981 – January 1982, PDF p. 19.

[140] **CER-1 [Morris]**, ¶ 47.

Figure 14: Magnetometer Reading of Discovery[141]



66. Third, the crew of the Auguste Piccard submarine visually inspected the target, which allowed them to see the shape of the ship and identify pieces of its debris and ballast stones.[142] The nature and spread of the debris was consistent with a ship that had sunk following extensive damage, as observations of the "*woodpiles occurred in a widespread zone that could cover an area a mile long by tens or hundreds of meters wide*."[143] Mr. Costin recalled the moment he saw the target: "***saw target on TV!*** . . . ***It is a wreck – It's a wooden ship. It's old – we have good visual observation*** . . . ***I feel***

[141] *See* **Exhibit C-107**, Magnetometer Graph of Discovery, 13 December 1981. *See also* **CWS-2 [Swann]**, Figure 18.

[142] *See* **Exhibit C-108**, Drawing of Debris and Ballast Stones in Area of Discovery, December 1981.

[143] **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 9 (SSA's Unofficial Translation).

we have been the first to <u>see</u> the San José for over 270(+) years."[144] Mr. Costin further described the features of the main target as follows:

> *The major target features are: smooth sediment covered surface on top; vertical or steep face on the downslope edge; overhand with rubble, smooth stones and other shapes which are not readily explained in terms of natural phenomena.*[145]

67. <u>Fourth</u>, analysis of wood samples that were lodged in the hull of the Auguste Piccard submarine during Phase Three of the explorations, pictured below, were sent for radiocarbon analysis.[146]

<u>Figure 15: Sample of Wood Held by Commander Cryer</u>[147]

[144] **Exhibit C-140**, Mr. Costin, Handwritten Notes Aboard Auguste Piccard, December 1981 (underline in original; bold emphasis added). Mr. Costin further recalled that he would "*never forget this afternoon*."

[145] **Exhibit C-141**, Mr. Costin, Auguste Piccard – Data, Measurements and Observations, December 1981 – January 1982, PDF p. 22. *See also* **CWS-2 [Swann]**, Figure 21.

[146] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 11 (SSA's Unofficial Translation). No other samples were taken during Phase Three of the explorations, as the Auguste Piccard was not equipped with a manipulator. *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 11 (SSA's Unofficial Translation).

[147] *See* **CWS-2 [Swann]**, Figure 21.

68. Dr. Lyon forwarded these pieces of wood to be radiocarbon dated by Beta Analytics, a third-party carbon dating laboratory.[148] The laboratory estimated that the wood's date was likely 300 years old, dating it back to "*1585 A.D., with a one sigma error term of 50 years*"[149] which, according to Dr. Lyon, "*point*[ed] *to a colonial dating for the wood and any ship that might have been built from it*."[150] This report was submitted to the Colombian Government when SSA's Predecessor reported the find.[151]

69. An independent marine archeologist, Mr. R. Duncan Mathewson, also received the wood samples from Dr. Lyon.[152] Mr. Mathewson's initial opinion upon receiving the samples was that the type of wood—oak—was consistent with the wood that would have been used to build the San José.[153] According to Mr. Mathewson, the oak sample "*appeared quite similar to the white oak recovered from the 1622 vessel Santa Margarita, built in Vizcaya* [in] *about 1620*" and noted that "[t]*he San Joseph* [*i.e.*, the San José] *was also built in Vizcaya*."[154]

70. News of the exciting discovery spread quickly, including among Colombian authorities. In January 1982, while the State Wave was dry docked for some repairs, Julio César Turbay Ayala, the then-Colombian President, visited the crew.[155] He asked the Captain of the Auguste Piccard, Captain Swann, "*where is my treasure*?", to which Captain

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148 *See* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, PDF p. 1 ("*I caused pieces of this wood . . . to be radiocarbon dated by Beta Analytic Inc. of Miami*."); **Exhibit C-103**, Beta Analytic Testing Laboratory, Homepage, 14 September 2023 (last accessed), *available at* https://www.radiocarbon.com/.

149 **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 23 (SSA's Unofficial Translation).

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

151 *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 23-24.

152 *See* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, PDF p. 1.

153 *See* **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, PDF p. 1.

154 **Exhibit C-9**, Letter from Dr. Eugene Lyon to The Stearns Company, 11 February 1982, PDF p. 1 ("*The two major wood pieces were then submitted to R. Duncan Mathewson, marine archaeologist for examination and forwarding to a Federal Forestry laboratory for identification and analysis. Mathewson's initial opinion was that the one sample appeared to be red cedar and the other white oak.* ***The oak sample, he stated, appeared quite similar to the white oak recovered from the 1622 vessel Santa Margarita, built in Vizcaya*** **[in]** ***about 1620. The San Joseph was also built in Vizcaya***.") (emphasis added).

155 *See* **CWS-2 [Swann]**, ¶ 49.

Swann responded, that the crew had "*found it, and that it remained out there in the ocean*."[156]

Figure 16: Colombian Special Forces Visiting the Auguste Piccard During President Turbay Ayala's Visit[157]

(b) SSA's Predecessor Reported The Discovery Of The San José

71. In or around March 1982, once the State Wave was back in operation, the crew conducted additional test dives.[158] However, Colombian authorities began to pressure SSA's Predecessor to formally disclose its findings.[159] At the time, Colombian Navy Officials believed that SSA's Predecessor had found the San José.[160] As a result, SSA's Predecessor suspended its exploratory work and began preparing a report to submit to DIMAR.

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156 **CWS-2 [Swann]**, ¶ 49.

157 *See* **CWS-2 [Swann]**, Figure 23.

158 *See* **CWS-2 [Swann]**, ¶ 50.

159 *See* **CWS-2 [Swann]**, ¶ 51.

160 *See* **CWS-2 [Swann]**, ¶ 51.

72. On 18 March 1982, after a two-year search costing over six millions U.S. dollars (values as of the date it was spent),[161] GMC reported its discovery in its "*Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia*" (the "**1982 Report**").[162] GMC stated that it was submitting the 1982 Report pursuant to Resolution No. 0048,[163] which, as noted above, DIMAR had issued for the express purpose of finding the San José.[164]

73. In the 1982 Report, GMC detailed its search methodology and findings. GMC reported the area of its discovery as follows ("**Discovery Area**"):

> *As indicated in Figure 9, there are several large and small targets of unknown composition in an area of just one mile per half mile.* ***The main targets, in bulk and interest, are slightly west of the 76th meridian and are just centered around the target "A" and its surrounding areas that are located in the immediate vicinity of 76° degrees 00' 20" W, 10° degrees 10' 19" N.***[165]

74. The terms in which the 1982 Report described the Discovery Area are important because DIMAR and later Colombian Courts recognized Claimant's rights by express

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[161] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 11 (SSA's Unofficial Translation). Note that while the 1982 Report was dated 26 February 1982, it was submitted to Colombia on 18 March 1982. *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 3 ("*On March 18, 1982, the* Glocca Morra Company *reported 'the finding of treasures pertaining to shipwrecks, indicating their location and asking to be considered as owner of all the privileges granted it by the laws in effect, including its preferential right to contract with the Colombian government for salvage of the recoverable treasures,' . . . for which it annexed the 'Confidential Report on Underwater Exploration'*") (SSA's Unofficial Translation)

[162] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982 (SSA's Unofficial Translation). The 1982 Report was later corroborated by the Colombian National Navy on two separate occasions: on 31 October 1983 and 29 September 1988. *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983; **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988.

[163] *See* **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 2 ("***By Resolution No. 0048*** *of January 29, 1980, the General Director of the Maritime Authorities and Ports of the NAVAL Department in Colombia granted the Company Glocca Morra, Inc., a Delaware corporation in the US, a license to conduct submarine exploration and investigation in an area of the Colombian coast*.") (SSA's Unofficial Translation).

[164] *See supra* ¶¶ 33-34.

[165] **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF pp. 12-13 (emphases added) (SSA's Unofficial Translation).

reference to the 1982 Report.[166] Notably, the 1982 Report does not describe the location of its discovery as a pinpoint but as an area consisting of certain "*main targets*" that were "*centered around the target 'A' and its surrounding areas*," that in turn were located within the "*immediate vicinity*" of specific coordinates.[167]

75. The 1982 Report thus proposed, as a next step, "*to carry out the identification and rescue of the shipwrecks as soon as you reach an agreement with the Maritime and Port Director General, so as to start such an operation* ***in the vicinity of Target 'A'.*** "[168]

76. It is important to recognize that the coordinates reported by SSA's Predecessor in the 1982 Report were reported with the context of and in reliance on the technology used by SSA's Predecessor's team at that time, as was fully disclosed to the Colombian authorities. First, the coordinates were plotted on a physical paper map, which is different from the GPS coordinates system used currently.[169] Second, the coordinates were dependent on and relative to the location of the shore-based stations Hotel and Island.[170]

77. As such, the coordinates reported in the 1982 Report, if translated to the modern GPS system, would include an inherent margin of error in light of the technology available and methods used to locate the target at that time. Colombia was aware of this, as the law in force at the time SSA discovered the wreck contemplated the possibility of a "*margin*[] *of error*"[171] in recognition of the limited technology available at the time.[172]

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166 *See infra* ¶¶ 164-165, 176-177, 205-207.

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

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

169 *See* **CER-1 [Morris]**, ¶ 34.

170 *See* **CER-1 [Morris]**, ¶¶ 33-34.

171 **Exhibit C-35 [EN]**, Letter from SSA to the Minister of Culture, 20 May 2015, PDF pp. 9-12 (SSA's Unofficial Translation).

172 **Exhibit C-35 [EN]**, Letter from SSA to the Minister of Culture, 20 May 2015, PDF p. 10 ("*This authorization to report the 'presumed' location of the discovery, with the consequent acceptance of margins of error in such reporting, is due to the fact that in 1968, when this decree was issued, there were no methods of measurement that could accurately determine the location of a shipwreck.*") (SSA's Unofficial Translation).

78. As Colombia acknowledges, DIMAR's search authorization was set to expire by 29 April 1982—that is, shortly after the issuance of the 1982 Report.[173] In the light of GMC's report, however, on 22 April 1982, DIMAR extended the validity of Resolution No. 0048 by another three months to "*complete the exploratory period*."[174]

C. Colombia Rejects SSA's Predecessor's Attempts To Salvage The San José Shipwreck

(a) SSA's Predecessor Initiates Negotiations For A Salvage Contract

79. Following its discovery, SSA's Predecessors began to negotiate a salvage contract with Colombia.

80. On 12 March 1982, GMC sent a letter to DIMAR with potential terms for a salvage contract for the San José.[175] GMC noted that it and its parent company, SSA Cayman, a limited partnership based in the Cayman Islands, were writing following a meeting the day before at DIMAR's office regarding the "*recovery of the ship 'Capitana San José'*."[176] GMC then stated that it had "*located the Spanish Galleon 'San José' in the area authorized*" by Resolution No. 0048 and had raised an additional USD 5 million to salvage the shipwreck,[177] having already invested over USD 6 million in the search for the San José shipwreck.[178] Also, in accordance with its understanding of the legal

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[173] *See* **Exhibit C-12 [EN]**, DIMAR Resolution No. 249, 22 April 1982; Colombia's Preliminary Objections, ¶ 28 (SSA's Unofficial Translation).

[174] *See* **Exhibit C-12 [EN]**, DIMAR Resolution No. 249, 22 April 1982, PDF p. 1 (SSA's Unofficial Translation).

[175] *See* **Exhibit R-5 [EN]**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 ("[W]*e would like to bring to your attention and consideration the following aspects related to the recovery of the ship 'Captain San José'*.") (Colombia's Unofficial Translation). Thus, contrary to Colombia's statements (*see, e.g.*, Colombia's Preliminary Objections, ¶¶ 29-30), it was clear to both Parties that the discovery and recovery of the San José was at stake (as had been made clear by the originating DIMAR resolution granting exploration rights for the San José, Resolution No. 0048). *See supra* ¶¶ 33-34.

[176] **Exhibit R-5 [EN]**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 ("*As a result of the meeting carried out yesterday in your office, with the attendance of Mr. Vice Admiral Guillermo Uribe Pelaez 2nd Commander of the Navy, we wish to bring to your knowledge and consideration the following aspects related to the recovery of the ship 'Capitan San José'*") (Colombia's Unofficial Translation).

[177] **Exhibit R-5 [EN]**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 (Colombia's Unofficial Translation).

[178] *See* **Exhibit R-5 [EN]**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 1 ("*The company Glocca Morra is an official subsidiary of the company 'Sea Search Armada a Cayman Island Limited Partnership', which has supplied the economic, technical, equipment and personal resources to the Cayman Island Limited Partnership, as well as the Submarine 'Auguste Picard'* [sic], *means with which we have located the Spanish Galleon 'San José' in an the area authorized in the aforementioned license; to this*

regime at the time, GMC proposed "*accept*[ing] *the proposal of the Commander of the National Navy to distribute whatever is salvaged in equal parts*."[179] This proposal was indeed consistent with GMC's understanding of Colombian law at the time pursuant to which GMC, as "*the discoverer*[,] *was entitled to one-half* [of the treasure] *and owner* [Colombia] *the other half, in light of Articles 701 and 703*."[180]

81. In early May 1982, Captain Swann and Warren Stearns met with a committee representing the Colombian government in Bogotá.[181] Captain Swann recalls that the Government and Mr. Stearns were negotiating the terms for the salvage of the San José shipwreck.[182]

82. However, shortly thereafter, GMC's crew received instructions from Mr. Stearns to demobilize the operations immediately, an apparent signal that discussions had soured.[183] At the end of May or early June 1982, as GMC's crew surfaced from releasing transponders from the seabed, they were accosted by the Colombian Department of Security ("**DAS**").[184] The Colombian Navy, however, sheltered GMC's crew from DAS's arrest attempt, and allowed them to return to the U.S. on 8 June 1982.[185]

(b) DIMAR Recognizes SSA's Predecessor's Discovery

83. On 3 June 1982, DIMAR issued Resolution No. 0354 recognizing GMC "*as claimant of the treasures or shipwrecked goods referred to in the*" 1982 Report ("**Resolution No. 0354**").[186] Resolution No. 0354's preamble provided that:

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date more than US$6,000,000 have been invested in this search operation and we have an additional US$5,000,000 to advance the salvage operations.") (SSA's Unofficial Translation).

179 **Exhibit R-5 [EN]**, Communication from Glocca Morra Company to DIMAR, 12 March 1982, PDF p. 2 (SSA's Unofficial Translation).

180 **Exhibit C-15 [EN]**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, PDF p. 2 (SSA's Unofficial Translation).

181 *See* **CWS-2 [Swann]**, ¶ 53.

182 *See* **CWS-2 [Swann]**, ¶ 53.

183 *See* **CWS-2 [Swann]**, ¶ 54.

184 *See* **CWS-2 [Swann]**, ¶¶ 56-58.

185 *See* **CWS-2 [Swann]**, ¶¶ 61-63.

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

> *The company* [GMC] *making the announcement has undertaken exploration in various areas of the Caribbean Sea by means of several permits of this Department and has verified the said discovery by means of technical proofs, which are included in the* [1982 Report, page 13]*, which is located in this Department, and which is made an integral part of this Resolution.*[187]

84. Accordingly, DIMAR resolved to:

> *Acknowledge the Glocca Morra Company, established in accordance with the laws of the Cayman Islands (British West Antilles)* ***as claimant of the treasures or shipwrecked goods in the coordinates referred to*** *in the* [1982 Report, page 13].[188]

85. Resolution No. 0354 thereby fully "*integrat*[ed]" the 1982 Report and gave GMC rights to the Discovery Area as reported by the 1982 Report.[189] Moreover, like the other DIMAR resolutions before it, Resolution No. 0354 incorporated by reference the originating permit, Resolution No. 0048, which made clear that DIMAR issued an exploration permit to GMC, Inc. to find the San José.[190]

86. Resolution No. 0354 prompted further salvage discussions between GMC and the Colombian authorities. On 18 July 1982, the Colombian Navy sent a letter to the Legal Advisor to the President of Colombia concluding that GMC was entitled to 50% of the shipwrecked goods.[191]

87. However, other branches of the Colombian Government appeared to have reservations about giving SSA's Predecessors the full 50% that it was entitled to under the law.

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

188 **Exhibit C-13 [EN]**, DIMAR Resolution No. 0354, 3 June 1982, art. 1 (SSA's Unofficial Translation). *See also* Colombia's Preliminary Objections, ¶ 32 (emphasis added). Page 13 of the 1982 Report described the Discovery Area as follows: "*The main targets, in bulk and interest are slightly west of the 76th meridian and are just centered around the target "A" and* ***its surrounding areas that are located in the immediate vicinity*** *of 76 degrees 00'20"W, 10 degrees 10'19"N.*"

189 *See also* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, preamble (stating that the 1982 Report forms "*an integral part*" of Resolution No. 0354).

190 **Exhibit C-13 [EN]**, DIMAR Resolution No. 0354, 3 June 1982, preamble ("*The company making the announcement has undertaken explorations in various areas of the Caribbean Sea by means of several permits of this Department and has verified said discovery by means of technical proofs, which are included in the* [1982 Report]") (SSA's Unofficial Translation).

191 **Exhibit C-15 [EN]**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, PDF p. 2 ("*Article 3 states with respect to the discovery of treasures or antiquities that the concessionaire will have the privilege of contracting with the State for the exploration thereof, and paragraph 2 establishes that the company must enter into a contract with the State for the exploration, recognizing that the State will have a percentage of no less than 50%, with the privilege for the State to reserve the historical objects.*") (SSA's Unofficial Translation).

Specifically, on 19 January 1983, the Colombian Minister of Mines and Energy sent a memorandum to the Office of the President with "*guidelines which may serve as a basis for the drafting of a legal and economic system to be applied to the recovery of shipwrecks and* ***particularly the 'San Jose'***."[192] He further noted that he had "*attach*[ed] *several graphs which might serve as a base for an increasing participation on the part of the Nation*" which was currently "[a]*rbitrarily*" set to a "*maximum limit of 75% for the Nation and 25% for the contractors, but this is clearly subject to modification*."[193]

88. Similarly, later that year, the Committee on Shipwrecked Goods, an advisory body to the President of Colombia, met and noted, among other things, that "[i]*t is essential to recognize that those who have explored areas in search of nautical entities with the authorization of DIMAR could have an acquired right for the recovery of the property or treasure that they denounce within the area assigned to them.*"[194] During this meeting, the Committee also contemplated "*the risk of the courts eventually recognizing their rights*" and determined that "*the cost of compensating them must be quantified*."[195]

(c) GMC Assigns Its Rights To SSA Cayman

89. In the meantime, in 1983, GMC transferred all its rights to its parent company, SSA Cayman. SSA Cayman's limited partners included Armada Partners (a U.S. company),[196] San Joseph Partners (a U.S. company),[197] Royal Capitana Partners (a Cayman Islands company),[198] and Sea Search Joint Venture (a Cayman Islands company),[199] while its managing partner was Armada Company (a Cayman Islands

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192 **Exhibit C-143 [EN]**, Memorandum from Colombian Minister of Mines & Energy to the Office of the President, 19 January 1983 (emphasis added) (SSA's Unofficial Translation).

193 **Exhibit C-143 [EN]**, Memorandum from Colombian Minister of Mines & Energy to the Office of the President, 19 January 1983 (SSA's Unofficial Translation).

194 **Exhibit C-145 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 29 June 1983, PDF p. 2 (SSA's Unofficial Translation).

195 **Exhibit C-145 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 29 June 1983, PDF p. 2 (SSA's Unofficial Translation).

196 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6(a).

197 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6(a).

198 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6(a).

199 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6(b).

company)[200] (together "**SSA Partners**").[201] Through its Partners, SSA Cayman now held investments made by a number of U.S. investors.[202] SSA Cayman also had a management contract with Portobello Partners Inc. (another U.S. company) to run its day-to-day operations.[203]

90. GMC requested that DIMAR recognize the transfer of its rights to SSA Cayman and "*authorize the assignee* [SSA Cayman] *to conduct exploration work approved for the assignor*" in prior DIMAR resolutions.[204] DIMAR granted GMC's request on 24 March 1983 by issuing Resolution No. 204.[205] DIMAR specifically permitted SSA Cayman to continue its "*underwater exploration efforts*" and ordered that the Colombian Navy and the Atlantic Naval Command (a Colombian military unit) be notified of the same.[206] As with the prior DIMAR resolutions, Resolution No. 204 was aimed at enabling SSA Cayman to continue its underwater exploration activities in the licensed areas.[207]

(d) SSA's Predecessors Attempt To Accelerate Salvage Discussions

91. Despite prior assurances from Colombian authorities, no salvage contract had been concluded with SSA's Predecessors by mid-1983. Thus, on 22 July 1983, GMC and SSA Cayman wrote to the Secretary of the Presidency "*to request the present status of the contract for the salvage of the San Jose which at the time of our last meeting in January, we expected would be awarded to Glocca Morra/SSA as early as February or*

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200 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6(b).

201 *See* **Exhibit C-51**, Sea Search-Armada Amended Limited Partnership Agreement, 9 April 1983, art. 1.6.

202 *See, e.g.*, **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, PDF p. 1 ("*Sea Search Armada, owned and operated by several hundred American investors.*").

203 *See* **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988, PDF pp. 10, 26.

204 *See* **Exhibit C-17 [EN]**, DIMAR Resolution No. 204, 24 March 1983, preamble (SSA's Unofficial Translation).

205 *See* **Exhibit C-17**, DIMAR Resolution No. 204, 24 March 1983; Colombia's Preliminary Objections, ¶ 33.

206 *See* **Exhibit C-17 [EN]**, DIMAR Resolution No. 204, 24 March 1983, arts. 2, 7 (SSA's Unofficial Translation).

207 *See supra* ¶¶ 32-33, 78*;* **Exhibit C-17 [EN]**, DIMAR Resolution No. 204, 24 March 1983, pp. 1-2 ("*ARTICLE 1. To authorize the company GLOCCA MORRA COMPANY to assign all the privileges and obligations obtained by means of resolutions No. 0048 of January 29, 1980, 0066 of February 4, 1981, 0025 of January 29, 1982, 0249 of April 22, 1982, 0354 of June 3, 1982, and the other resolutions by which the previous ones have been successively extended until the date of this resolution, to the company SEA SEARCH ARMADA. ARTICLE 2. To authorize the company SEA SEARCH ARMADA to carry out underwater exploration tasks aimed at locating treasure or shipwrecks in Colombian jurisdictional waters of the Atlantic Ocean, in the areas described in article 1 of resolutions No. 0048 of January 29 of 1980 and 0066 of February 4, 1981.*") (SSA's Unofficial Translation).

March."[208] GMC and SSA Cayman noted that they were writing "*in part due to rumors circulating in the United States that the government* [of Colombia] *is considering awarding the contract to another party*."[209] As support, GMC/SSA Cayman provided a letter from a salvage contractor that SSA's Predecessors had independently contacted, Wharton Williams Aberdeen, who stated that they had "*been contacted by the Swedish group who have been discussing the San Jose Project with the Colombian Government*" and were "*unaware that we are working with you and called to ask if we would be prepared to work with them*."[210] When informed by the contractor that SSA Cayman had the rights to a salvage contract, "[the Swedish group's] *reply was, 'well, yes, they did, but the Colombian Government don't feel that they have sufficient substance.*"[211]

92. SSA's Predecessors noted that "[a]*t enormous risk and an expenditure of more than $9,000,000.00 U.S., our venture located the San Jose in the area where Glocca Morra/SSA holds the exclusive legal rights to search*" and "[i]*n accordance with the term of its license Glocca Morra/SSA filed* [the 1982 Report] *with the Colombian Navy disclosing the location of the wreck*."[212] That gave GMC/SSA Cayman "*the exclusive right to salvage the shipwreck*."[213] To dispel any misgivings about their purported "*substance*," SSA's Predecessors explained the preparation they had already undertaken for the salvage of the San José including:

a. The preparation of "*a detailed salvage plan which is ready for presentation to the Navy upon the award of the contract*."[214]

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208 **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 1.

209 **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 1.

210 **Exhibit C-147**, Telex from Mr. Aberdeen to Mr. Richards, 24 July 1983.

211 **Exhibit C-147**, Telex from Mr. Aberdeen to Mr. Richards, 24 July 1983.

212 **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 1.

213 **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 1.

214 **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 2.

b. Receipt of "*firm contract proposals from three major diving companies, namely: Oceaneering International, Inc., Subsea Systems, Inc., and Smit International, Inc. to execute the salvage plan*."[215]

c. Agreement by the National Geographic Society "*to document and thereby authenticate the entire salvage operation, both on the surface and at the bottom of the sea, through photographic means*" that could be "*released to the world press, radio, television, and will be the subject of numerous documentaries*."[216]

d. Retention of the auditing firm, Deloitte, Haskens & Sells "*to prepare a detailed salvage control and authentication procedure for the project*" which would be "*vital to the value and integrity of the treasure, both to Glocca Morra/SSA and to the nation, and is essential to the success of future museum displays both in Colombia and abroad*."[217]

93. GMC/SSA Cayman noted that the preparation for salvage "*since the location of the San Jose on December 10, 1981*" had cost over USD 1 million.[218] GMC/SSA Cayman accordingly urged the Colombian authorities to "*conclude their deliberations shortly*" such that "*a just and equitable salvage contract will be awarded to Glocca Morra/SSA in time to complete the salvage operations this calendar year*."[219]

(e) SSA's Predecessor Conducts Further Exploration Of The San José In 1983

94. In the meantime, in an effort to accelerate the execution of a salvage contract, SSA Cayman invested additional funds to attempt to relocate and identify the shipwreck as that of the San José. SSA Cayman did this by engaging Oceaneering International, Inc.

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[215] **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 2.

[216] **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 2. *See also* **Exhibit C-142**, Telex from Mr. Stearns to Mr. Leyva, 12 November 1982.

[217] **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 2.

[218] **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 2.

[219] **Exhibit C-146**, Letter from GMC and SSA Cayman to Legal Secretary of the Presidency of Colombia, 22 July 1983, PDF p. 3.

("**Oceaneering**"), a specialized subsea engineering firm, which led two expeditions to the Discovery Area, as detailed below. Representatives of SSA's Predecessors and Colombian Navy officials participated in both Oceaneering expeditions.

(1) Oceaneering's First Expedition In September 1983

95. In September 1983, SSA Cayman engaged Oceaneering to "*provide positioning to aid in the recovery*" of the reported target, using a microwave system and seabed transponders.[220] The expedition was focused on relocating the target and collecting video evidence and samples.[221] To that end, an Oceaneering vessel, the Heather Express, was fitted with special equipment, including a side scan sonar, surface positioning equipment (transponder),[222] underwater positioning equipment, and an ROV.[223] The vessel was also equipped with atmospheric diving suits for deep sea diving: the Wave Adaptive Semisubmersible Platform ("**WASP**") (or JIM) suit.[224] This enabled divers to move around the seafloor and pick up objects.[225]

96. The Heather Express conducted its expedition to the Discovery Area from 28 August 1983 to 18 September 1983.[226] The ship encountered a number of weather-related difficulties, reflecting the technological limitations of even the most sophisticated

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220 **Exhibit C-53**, Oceaneering International, Inc., Report of Positioning Offshore Colombia, August 19, 1983 – September 23, 1983, Reference No. 7872, 2 November 1983, PDF p. 3.

221 *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 2.

222 The transponders were located in the Pajarales Island in the Islands of Rosario and the Nautilus building in Cartagena. *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 2-4.

223 *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 2-4.

224 *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 4-5.

225 *See* **Exhibit C-23**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 4-5. Due to technological limitations, these suits were not used until the second Oceaneering expedition conducted a month later. *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 9.

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

equipment available at the time.[227] Nonetheless, after its month-long effort, Oceaneering reported that it had "[f]*ound the wreck*,"[228] "*survey*[ed] *the wreck with*" a ROV,[229] and ultimately that the "*target was successfully located*."[230]

97. As with all prior exploration efforts, Colombian Navy officials were on board Oceaneering's ship, the Heather Express, at all times and were in daily contact with their superiors at DIMAR.[231]

98. The inspectors, Mr. Carlos A. Prieto Avila and Mr. Lázaro del Castillo Olaya, filed an operation report with DIMAR, which leaves no doubt that they, their superiors, and the crew believed that they had found the San José.[232] As the Colombian inspectors noted, there was "[m]*uch optimism about a potential* ***reencounter with the San José***."[233] This

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227 *See* **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 7 ("*There are malfunctions in the satellite navigator. . . The 'Submersible Pinger' was programmed for its installation, taking a position using a bearing and distance to Rosario Island. The SIDE SCAN SONAR will be used, to perform a scan in an attempt at relocation*."), 8 ("*The company's representative is notified about the Navy's ratification, so that the operation can continue.* ***The people are very happy to hear this news, and they are eager to start using the world's most modern equipment for this type of activity***.") (emphasis added), 10 ("*The HEATHER EXPRESS continues making the movements necessary to verify the correct positioning of the beacons, so that it will be possible to start using the SIDE SCAN SONAR ('SSS') to locate the flagship San José*."), 11 (describing issues with the transponders), 14 ("*The crew has finished getting ready for the procedure for anchoring by the stern. Because of the time and the weather conditions, a decision is made to set the two stern anchors in the morning*.") (SSA's Unofficial Translation).

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

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

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

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

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

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

enthusiasm was apparently shared by Colombia, who sent a representative of the President of Colombia and a Rear-Admiral from Colombia's Atlantic Command to come on board the Heather Express to follow the operation.[234] Moreover, the officer noted that a scientific investigator on board took the view that "*the piece has the same construction of a piece of galleon located in Portovelo Panama which is contemporary to the San José.*"[235] This observation only further confirms that everyone onboard, including Colombia's own official, believed that the identification and confirmation process in which they were engaging was that of the San José. Indeed, the daily log report of the **Colombian Navy inspectors** is replete with references to the San José:[236]

a. "*The HEATHER EXPRESS continues making the movements necessary to verify the correct positioning of the beacons, so that it will be possible to start using the SIDE SCAN SONAR ('SSS') **to locate the flagship San José**.*"[237]

b. "*It is first explained to him that regardless of how it is measured, **the San José is within the 12 miles**.*"[238]

c. "*In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen, **indicating the proximity of the***

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

235 Colombia's Reply, ¶ 51.

236 *See* **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 10 ("*The HEATHER EXPRESS continues making the movements necessary to verify the correct positioning of the beacons, so that it will be possible to start using the SIDE SCAN SONAR ("SSS") to **locate the flagship San José.***"), 17 ("*It is first explained to him that **regardless of how it is measured, the San José is within the 12** **miles***"), 18 ("*In general, coral reefs and footprints from the submarine A. Piccard can be observed through the TV screen, **indicating the proximity of the San José**. . . . **At 18:30 contact is made again with the possible remains of the San José**, and the basket left behind by the S.S. A. Piccard in January or February of 1982 is found. . . . A decision is made to move the vessel so that a marker BEACON can be put on the **target (possible San José)**.*"), 21 ("*According to Mr. Costein, **this piece has the same construction as a piece of a galleon contemporaneous with the San José***") (emphases added) (SSA's Unofficial Translation).

237 **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 10 (emphasis added) (SSA's Unofficial Translation).

238 **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 17 (emphasis added) (SSA's Unofficial Translation).

***San José** . . . At 18:30 **contact is made again with the possible remains of the San José**, and the basket left behind by the S.S. A. Piccard in January or February of 1982 is found . . . **A decision is made to move the vessel so that a marker BEACON can be put on the target (possible San José)**.*"[239]

d. "*According to Mr. Cost*[]*in, this piece has the same construction as a piece of a galleon contemporaneous with the San José*."[240]

99. The Colombian Navy inspectors' log, moreover, corroborated a range of GMC's and SSA Cayman's findings, including that the crew of the Heather Express had found:

a. "*An object . . . that . . . simulates the appearance of a cannon*."[241]

b. "[A] *piece of wood*" of approximately 0.5 m by 10 m in size that seemed to have been "*violently*" separated, had a hole that could have been made for a "*screw or a nail*," and whose appearance "*concord*[ed]" with the wood samples retrieved by the Auguste Piccard in 1982 near the tracks left by the submarine, some of which are pictured below:

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239 **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 18 (emphases added) (SSA's Unofficial Translation).

240 **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF p. 21 (emphasis added) (SSA's Unofficial Translation).

241 **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 18, 20 (SSA's Unofficial Translation)..

Figure 17: Timber Pile, Imaged By Oceaneering[242]

Figure 18: Timber Pile Closeup, Imaged By Oceaneering[243]

[242] *See* **CER-1 [Morris]**, Figure 10. *See also* **Exhibit JM-3**, Video Recording on board Seaway Eagle during Oceaneering Expedition (II), 19-21 October 1983, minute 11:22.

[243] *See* **CER-1 [Morris]**, Figure 11. *See also* **Exhibit JM-3**, Video Recording on board Seaway Eagle during Oceaneering Expedition (II), 19-21 October 1983, minute 11:56.

c. A "*piece of ceramic*" that fell back to the ocean floor during attempted recovery.[244]

100. At the end of the expedition, given the weather-related technical difficulties encountered by the Heather Express, the Navy Officials recommended a second expedition with a dynamic positioning vessel to be able to use the WASP and JIM suits and conduct deep sea diving.[245]

(2) Oceaneering's Second Expedition In October 1983

101. Accordingly, a month later, from 11 to 25 October 1983, Oceaneering conducted a second visit to the site with another vessel called the Seaway Eagle.[246] Colombian Navy inspectors Mr. Roberto Spicker and Mr. Lázaro del Castillo Olaya (who was also aboard the Heather Express), were on board the Seaway Eagle at all times, and provided "*full report*[s]" to DIMAR officials over the phone on the progress of the operation,[247] as well as a detailed written report of the operations to the Rear-Admiral Director General of DIMAR on 31 October 1983.[248]

102. To be able to return to the same Discovery Area identified in the 1982 Report, Oceaneering had to adopt the same technology used by SSA's Predecessors in 1982. Specifically, Oceaneering placed two shore-based stations on land corresponding to the same locations (*i.e.*, the "Hotel" and "Island" station) as placed by SSA's Predecessors

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

245 *See* **Exhibit C-23 [EN]**, Report by the Inspector on board the Heather Express to the Admiral Maritime and Port Director, 29 September 1988, Annex A - Operation Minutes (dated 28 August 1982 through 9 September 1982), PDF pp. 6-7 (SSA's Unofficial Translation).

246 *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 1.

247 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 12 (SSA's Unofficial Translation). The Navy Officials on board the Seaway Eagle reported to DIMAR periodically. *See, e.g.*, **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF pp. 8, 10-15 (stating that they "*report to DIMAR: all without incident*"), 16 ("*We report to COFA and DIMAR: all without incident*."), 17 ("*Message sent to DIMAR-COFA: all without incident.*") (SSA's Unofficial Translation).

248 *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 1.

in 1982.[249] Notably, though Oceaneering had found precisely the same target at the same location as identified by SSA's Predecessors, the Navy Officials allocated that location different latitudinal and longitudinal coordinates, approximately 1.57 nautical miles from the target area coordinates reported by SSA's Predecessors in the 1982 Report.[250] This reflects the scale of error inherent in reporting geodetic coordinates (*i.e.*, in latitude and longitude) at that time.[251] While it was possible to go back to precisely the same location, the precise coordinates associated with that location could vary based on the manner in which the location was identified (*i.e.*, based on relative positioning of shore-based stations and markings on paper maps).

103. In terms of findings, the Colombian Navy Inspectors reported that the second Oceaneering expedition was also "*able to locate the remains of a shipwreck*."[252] Numerous references in the report confirm this:

a. On 12 October 1983, the Inspectors' contemporaneous daily logs refer to samples that were taken from the "*port side*" of the galleon, which contained "*coral with remains of metal (iron)*."[253]

b. On 18 October 1983, DIMAR issued a report on the samples taken during the first Oceaneering expedition and concluded that the wood sample had "*evidence of having been worked by man, since it shows a smoothed, well-formed structure*."[254] The sediment located in the area also showed traces of oxidization, indicating that it had been in contact

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249 *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF pp. 2-3. *See also supra* ¶ 61*;* **CER-1 [Morris]**, ¶¶ 34, 36, 51.

250 *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 4; **CER-1 [Morris]**, ¶ 51.

251 *See* **CER-1 [Morris]**, ¶ 51.

252 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 20 (SSA's Unofficial Translation).

253 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 8 (SSA's Unofficial Translation). *See also* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF pp. 8 ("*A third sample is taken, containing many more pieces of coral with remains of unidentifiable metal*."), 9 ("*We obtain some metal samples and clean them with salt water for examination*.") (SSA's Unofficial Translation).

254 **Exhibit C-148 [EN]**, DIMAR Report on the Analysis of Samples No. 432-DC10H/644, 18 October 1983, PDF p. 1 (referring to wood sample No. 15-9-43-3) (SSA's Unofficial Translation).

with a "*ferrous object*" (iron) as "*at these depths (200 meters) oxidization is not normally present*."[255]

c. On 19 and 20 October 1983, the Colombian Navy Inspectors reported that Oceaneering identified what "*appear*[ed] *to be a cannon*"[256] and "*three piles of wood*" that were "*manmade and recent*."[257]

d. On 23 October 1983, Oceaneering "*locate*[d] *what is possibly a cannon*" and unsuccessfully attempted to bring it to the surface: "[w]*e bring up what is possibly a cannon, but as it reached the surface it came loose from the shovel due to its weight*."[258]

e. On 24 October 1983, the Colombian Navy reported that the "*Naval Vessel Espartana receive*[d] *orders . . . to continue an operation other than patrol in the* ***San José area***" but that should assistance be required, it could be requested "*in the event strange* [vessels] *appear in the area.*"[259] The next day the search was suspended.[260]

104. Ultimately, the Colombian Navy Inspectors concluded that "*there may in fact be a shipwreck*" at the location reported by SSA's Predecessor but that "*it will be very difficult to locate any object that will allow for identification of the shipwreck*" given the equipment available at the time.[261] Thus, to conduct additional confirmatory work, the Navy Officials recommended DIMAR to authorize the use of saturation divers to

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255 **Exhibit C-148 [EN]**, DIMAR Report on the Analysis of Samples No. 432-DC10H/644, 18 October 1983 (SSA's Unofficial Translation).

256 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 13 (SSA's Unofficial Translation). *See also* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 15 ("*The vessel is repositioned by SE in order to try to locate an object that appears to be a cannon*.") (SSA's Unofficial Translation).

257 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 14 (SSA's Unofficial Translation).

258 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 15 (SSA's Unofficial Translation).

259 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 16 (emphasis added) (SSA's Unofficial Translation).

260 *See* **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 18.

261 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 4 (SSA's Unofficial Translation).

descend to the main target and conduct a "*more precise and detailed assessment* [and] . . . *obtain a sample*."[262] It is unclear whether the Colombian Navy or anyone else conducted this work as this was the last time SSA or its Predecessors were allowed access to the Discovery Area.

105. Following Oceaneering's confirmation of the San José shipwreck's location, SSA Cayman, SSA's predecessor, resumed negotiations with Colombian authorities for the salvage of the San José. On 8 November 1983, shortly after the second Oceaneering expedition had ended and the Colombian Navy Inspectors had submitted their report, the Committee on Shipwrecked Goods held a meeting in the President's General Secretary's office, where they declared that "[t]*he information provided to DIMAR by the SSA Company in development of the exploration permits that were granted to it seem to* ***indicate that the remains of the San José have been located***."[263] The Committee thereby determined that it was "*now necessary to decide on how to proceed*" with respect to "*1) The archaeological study of the shipwreck*" and "*2) The recovery of the shipwrecked goods or antiquities that are technically and economically salvageable*."[264] The Committee accordingly recommended taking a number of steps, including "[t]*raining Colombian archaeologists, historians and scientists to carry out the underwater salvage*," and set out the historical background of the San José shipwreck.[265] These records, like the reports made by the Colombian Navy, make clear that Colombian authorities were convinced that SSA Cayman had indeed found the San José shipwreck.

106. On 5 December 1983, General Afanador, SSA's legal representative in negotiations with the Colombian Government, reported that he had obtained from the President's office, "*provisions for the contract of salvage of sunken shipwreck material*" which "*basically contains that which was foreseen and with regard to the division it remains*

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262 **Exhibit C-149 [EN]**, Report by the Colombian Navy Inspectors on board the Seaway Eagle to the Admiral Maritime and Port Director, 31 October 1983, PDF p. 4 (SSA's Unofficial Translation).

263 **Exhibit C-150 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 004, 8 November 1983, PDF p. 2 (emphasis added) (SSA's Unofficial Translation).

264 **Exhibit C-150 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 004, 8 November 1983, PDF p. 2 (SSA's Unofficial Translation).

265 **Exhibit C-150 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 004, 8 November 1983, PDF pp. 2-6 (SSA's Unofficial Translation).

50% for Glocca Morra and 50% for Colombia."[266] Accordingly, on 19 December 1983, SSA Cayman applied for an extension to allow them to continue exploratory activities for six months.[267]

(f) Colombia Passes Laws To Limit Recovery For Shipwreck Discoverers

107. However, while Colombia was negotiating the salvage contract with SSA Cayman, it was also, behind SSA Cayman's back, attempting to change its law concerning shipwreck reporting and recovery to reduce the proceeds owed to declarants.[268]

108. On 22 December 1983, the Committee on Shipwrecked Goods decided not to respond to a request from SSA to extend the exploration permit which was due to expire in January 1984 until after a decree that it had been considering could be promulgated.[269]

109. This Presidential decree was issued on 12 January 1984 (Presidential Decree No. 12), which, together with a later decree issued in September 1984 (Presidential Decree No. 2324) (together, the "**1984 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;[270] and (ii) eliminated any preferential rights to a salvage contract to the declarants of a treasure.[271]

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266 **Exhibit C-151**, Telex from Mr. Afanador to The Stearns Company, 5 December 1983, PDF p. 1.

267 *See* **Exhibit C-152 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 006, 22 December 1983, PDF p. 1.

268 *See* Notice of Arbitration, ¶ 23; Colombia's Preliminary Objections, ¶¶ 34-47.

269 *See* **Exhibit C-152 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 006, 22 December 1983.

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

271 *See* **Exhibit R-6 [EN]**, Decree No. 12 of 1984, 10 January 1984, art. 5 ("*The granting of a permit or concession of exploration does not create a right or privilege of any kind to the concessionaire, in relation with the eventual salvage of the reported shipwrecked antiques.*") (Colombia's Unofficial Translation); **Exhibit C-18 [EN]**, Presidential Decree No. 2324, 18 September 1984, art. 193 ("*The Nation, previous initial evaluation of the finding, will decide the way to advance the historical and archaeological study of the site and to carry out the rescue or recovery. If it decides to hire, it will enter into a contract for the recovery of historical and archaeological goods. . .with the following exceptions that arise from the nature of the contract: there will be no place for bidding. . .*") (SSA's Unofficial Translation).

(g) Colombia Negotiates And Prepares For Salvage Of The San José

110. For the next several years, Colombian authorities advanced their plans to salvage the San José shipwreck, first by progressing negotiations for a salvage contract with SSA Cayman, and then with other potential operators. All the while, internal meeting minutes of the Commission on Shipwrecked Antiquities ("**Antiquities Commission**") patently reflect that the Colombian authorities understood SSA Cayman to have found the San José shipwreck. Not only is this belief express in a number of meeting minutes, but it was also what prompted Colombia to undertake extensive planning to salvage the San José shipwreck, whether with SSA Cayman or not.

111. Shortly after the passage of the first 1984 Decree, on 16 January 1984, the Committee on Shipwrecked Goods, created by the President of Colombia to address shipwrecked goods and the rights over them, held a meeting where they discussed, among other things, the recovery of the San José galleon.[272] First, the Committee created the Antiquities Commission to regulate issues related to shipwrecked goods and appointed as secretary to support the Director of DIMAR, General Gustavo Mejia.[273] Then, the Committee considered "*the envelope*" in DIMAR's possession "*containing the position reported by the Sea Search Armada Company of* ***the possible remains of the presumed wreck of a galleon***", which was "*carefully studied and analyzed by those attending the meeting*."[274] Having studied the location of the galleon submitted by SSA's Predecessors, the Committee considered SSA Cayman's request to extend its exploratory rights by six months and granted the company an extension of 60 days.[275] The Committee finally discussed "*the most appropriate system for the* ***salvage and recovery of the Galleon San José***" along with the creation of a "*naval museum*" in Cartagena to house recovered items and allow for their maintenance.[276] The Committee noted that its members would conduct and present a corresponding study for the salvage

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272 *See* **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF p. 1.

273 *See* **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF p. 1.

274 **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF p. 2 (emphasis added) (SSA's Unofficial Translation).

275 *See* **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF p. 2.

276 **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF pp. 2-3 (emphasis added) (SSA's Unofficial Translation).

and exhibition of items from the San José shipwreck at the next meeting.[277] Thus, the information provided by SSA's Predecessors to Colombian authorities gave them sufficient cause to not only extend SSA Cayman's exploration permit but also start taking concrete steps for the salvage and restoration of items from the San José shipwreck, specifically.

112. On 23 January 1984, the Antiquities Commission held another meeting where they discussed SSA Cayman's request to provide a presentation on the "*legal and technical aspects related to the recovery of the remains of the wreck declared by them*" and determined the guidelines that should apply to such presentation, including that SSA Cayman had to elect a Colombian national as their legal representative to liaise with the Commission going forward.[278]

113. On 2 February 1984, SSA Cayman wrote to DIMAR, offering its full cooperation to finalize the draft salvage contract SSA Cayman had provided almost a year ago, on 12 March 1982.[279] Later that month, DIMAR responded that it was considering the terms of "*a new contract*" and that the declaration of a shipwreck did not "*imply any right to recovery for the reporter.*"[280]

114. The Commission next met on 9 February 1984 where it noted that DIMAR had held meetings with SSA Cayman representatives during which the company "*expressed its interest in advancing*" the signing of the salvage contract "*for the recovery of the remains of the shipwreck declared by it, the exploratory stage of which it considered to be completely exhausted*."[281]

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277 *See* **Exhibit C-153 [EN]**, Committee on Shipwrecked Goods, Meeting Minutes No. 001, 16 January 1984, PDF pp. 2-3.

278 **Exhibit C-154 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 002 , 23 January 1984, PDF p. 1 (SSA's Unofficial Translation).

279 *See* **Exhibit R-7 [EN]**, Letter No. 2541 sent by SSA Cayman Island to DIMAR, 2 February 1984 ("*that* [DIMAR] *by means of Resolution No. 0354 of June 3, 1982, recognized* [Sea Search Armada] *as a reporter of treasures or nautical species within the coordinates referred to in the technical reports that supported this petition. . . . I would like to ratify the request . . . with the purpose of concluding the salvage contract*.") (SSA's Unofficial Translation). *See also supra* ¶ 80.

280 **Exhibit R-8 [EN]**, Letter 415 sent by DIMAR to SSA Cayman Islands, 13 February 1984 (Colombia's Unofficial Translation).

281 **Exhibit C-155 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 003, 9 February 1984, PDF p. 1 (SSA's Unofficial Translation).

115. In the meantime, SSA Cayman began preparing for the salvage of the shipwreck. For example, it reached out the National Geographic Society, who confirmed their interest in working with SSA Cayman on the salvage mission. The National Geographic Society understood that the salvage, while difficult given the technology available at the time, "*will produce the scientific results possible at this time*."[282] Accordingly, the National Geographic Society agreed to "*cooperate and assign a team, including an archaeologist to man a photographic robot and place cameras with the divers to record the wreck and its historical contents*" which would be "*made available to the Colombian Government for archival purposes following the salvage*."[283]

116. The Antiquities Commission, however, began taking steps to limit SSA Cayman's rights. On 6 March 1984, the Commission decided that it would not approve SSA Cayman's application to extend its exploratory permit, which was set to expire mid-March, if SSA submitted another application to extend.[284] It did not provide any reasoning for this decision. The Commission simply went on to discuss how they could expand the role of the Navy's Oceanographic and Hydrographic Research Center to better salvage, preserve and study the items recovered from historical shipwrecks.[285]

117. Later that month, on 21 March 1984, the Commission met again and decided that DIMAR should formally request that SSA "*deliver all the historical information in its possession, in relation to the San José Galleon as referenced . . . in paragraph f. of its manuscript titled 'Sea Search Armada Colombia Contract Issues*.'"[286] The Commission also discussed further work it was doing, such as hiring staff and raising funds, for the Oceanographic and Hydrographic Research Center.[287]

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[282] **Exhibit C-144**, Telex from National Geographic Magazine to SSA Cayman, 4 February 1983.

[283] **Exhibit C-144**, Telex from National Geographic Magazine to SSA Cayman, 4 February 1983.

[284] *See* **Exhibit C-156 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 004, 6 March 1984 PDF, p. 1. On the other hand, the Committee on Shipwrecked Goods continued its communication with Fathom Line, requesting that it submit "*very specific reasons about its interests in exploring the previously requested area*," suggesting that the Committee had reasons to doubt that the area Fathom Line wanted to explore was worth exploring.

[285] *See* **Exhibit C-156 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 004, 6 March 1984, PDF pp. 2-3.

[286] **Exhibit C-157 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 005, 21 March 1984, PDF p. 1 (SSA's Unofficial Translation).

[287] *See* **Exhibit C-157 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 005, 21 March 1984, PDF pp. 2-3.

118. In the subsequent months, the Antiquities Commission discussed a series of plans to strengthen Colombia's position to enter into a salvage contract with SSA Cayman.

a. On 4 April 1984, the Commission expressed "*concern*" about the lack of a domestic institutional effort behind the salvage of the San José.[288] The Committee members discussed the "*urgency*" to create an institution with legal status to act as the Colombian counterpart when the time to negotiate and execute a salvage contract came.[289] During that same meeting, the Committee members were asked to "*accelerate*" their presentation on the project.[290]

b. On 24 May 1984, the Antiquities Commission proposed that the Bank of the Republic be responsible for creating the legal entity that would act as Colombia's counterpart to a salvage contract and conducted a "*clause by clause*" analysis of the draft salvage contract.[291]

c. On 14 June 1984, the Antiquities Commission scheduled a meeting for the following day with the manager of the Bank of the Republic to discuss it becoming the "*umbrella organization*" in charge of all aspects related to the recovery of shipwrecked goods.[292]

119. The Antiquities Commission likewise began brainstorming how Colombia could tie the value of the recovered items to its national economy. On 15 June 1984, for example, the Commission raised the importance of "*linking*" the Bank of the Republic to the recovery activities and making it responsible for the custody and distribution of all

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288 **Exhibit C-158 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 006, 4 April 1984, PDF p. 1 ("*Concern was expressed again about the lack of the institutional aspect, the basic infrastructure of what has been called the 'umbrella organization.*") (SSA's Unofficial Translation).

289 **Exhibit C-158 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 006, 4 April 1984, PDF pp. 1-2 ("*There is a sense of urgency to create the 'Institution' with legal status so that it can act as the Colombian counterpart when a contract is created*.") (SSA's Unofficial Translation).

290 **Exhibit C-158 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 006, 4 April 1984, PDF pp. 1-2 ("*Those in charge of the study of this aspect were asked to accelerate the presentation of the corresponding project*.") (SSA's Unofficial Translation).

291 **Exhibit C-159 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 007, 24 May 1984, PDF p. 2 (SSA's Unofficial Translation).

292 **Exhibit C-160 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 008, 14 June 1984, PDF p. 1 (SSA's Unofficial Translation).

objects of value recovered from the San José.[293] The Commission also suggested storing artifacts with archeological value at the Foundation for the Conservation of Historical Monuments—a foundation of which the Bank of the Republic was a member.[294]

120. At the next Antiquities Commission meeting, on 17 June 1984, the "*draft contract was discussed again clause by clause and a definitive agreement was reached on the document*."[295] Virtually the same draft contract was presented to SSA Cayman the next month (contrary to Colombia's denial in the Preliminary Objections phase).[296]

121. On 23 August 1984, DIMAR Director and Antiquities Commission Secretary Mejia sent SSA Cayman a letter attaching the Draft Contract for the Salvage of Shipwrecked Antiques drafted by the Presidency ("**Draft Contract**").[297] The Draft Contract makes clear that Colombia understood from the beginning that: (i) GMC's discovery included not only historical goods, but goods of economic value;[298] (ii) there was to be an "*equitable distribution*" of the goods recovered;[299] and (iii) as a default, that equitable distribution meant an even 50-50 split between SSA Cayman and Colombia.[300] The Draft Contract included an "*alternative*" sliding scale option, under which SSA Cayman's share of recovery would decrease as the economic value of the goods

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293 **Exhibit C-161 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 009, 15 June 1984, PDF p. 1 ("*all aspects related to the custody, distribution, etc. of the objects of value that were recovered and that should be included in the distribution*.") (SSA's Unofficial Translation).

294 *See* **Exhibit C-161 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 009, 15 June 1984, PDF p. 1.

295 **Exhibit C-162 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 010, 17 June 1984, PDF p. 1 (SSA's Unofficial Translation).

296 *See* Colombia's Preliminary Objections, ¶ 51. Colombia is fully aware of the Draft Contract, not the least because it prepared and shared the draft with SSA Cayman, discussed the draft "*clause by clause*" during its internal meetings and because it was on the record of the Colombian litigation proceedings. *See supra* ¶ 118.

297 *See* **Exhibit C-54**, Letter No. 231000R from DIMAR to Fernando Leyva, 23 August 1984; **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984.

298 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 1, PDF p. 13 ("[T]*he object of this contract* [is] *to advance the activities conductive to the recovery* [and] *salvage of* ***all types of property of economic, historic, cultural, or scientific value*** *which is found within the zone cited in No. 4 above and which, for the purposes of this contract generally will be called 'The Goods*'.").

299 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 1, PDF p. 13 ("*It is likewise the purpose of this contract to accomplish an equitable distribution of species referred to in this clause.*").

300 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 9, PDF p. 18 ("*SHARES AND DELIVERY OF SPECIES: The rescued species once appraised will be distributed in proportions of 50% for the Contractor and 50% for the Nation. . .*") (emphasis in original).

increased.[301] The Draft Contract also recognized that the discovery could contain certain "*historic objects*," if the status of those objects was confirmed by experts.[302] Colombia would exclusively acquire these objects, but only "*subject to the judgment of* [] *experts*."[303] The Draft Contract, moreover, recognized that any recovery effort would require the coordinates to be determined with greater specificity, and accordingly stated that SSA Cayman's first obligation upon execution of the contract would be to present "*the exact location of the* [shipwreck]."[304]

122. In September 1984, SSA Cayman had multiple meetings with DIMAR where the parties made significant progress, such that most of the details of the salvage contract were agreed upon.[305] During these meetings, they agreed on operating committees, authority levels, performance bonds, and reimbursements of costs.[306] They even clarified that the table containing the percentages of participation of the State and the possible contractor start at 50%.[307] After these meetings, only two main topics remained to be agreed: (i) the "*parameters of various secondary target sites*", and (ii) the sliding scale that would be used to apportion the value of the salvaged treasure between Colombia and SSA Cayman.[308] The DIMAR representatives even expressed an interest in wrapping up

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301 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, alternative cl. 9.

302 *See* **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, alternative cl. 9, PDF p. 18 ("*The government notwithstanding shall have the right to be awarded exclusively all the historic objects it determines subject to the judgment of the experts*.").

303 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, alternative cl. 9, PDF p. 18.

304 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 2, PDF p. 13.

305 *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF pp. 1 ("*The contract appears to be significantly along the path to final completion . . . Sea Search-Armada presented its position on salvage area and various contractual matters such as operating committees, authority levels, insurance and performance bonds, reimbursement of costs, etc . . . September 21, meeting was held with Admiral Angel and DIMAR legal counsel where the Admiral reported back to Sea Search-Armada on the matters previously discussed. With the exception of not reducing some of the financial guarantees (insurance), the other contractual matters were accepted*."), 2 ("*The meetings have been held in a very constructive and open atmosphere. The DIMAR representatives have stated their schedule calls for starting the ocean salvage activities once the winter storm season passes . . . Towards that end they want to wrap up the contract fairly quickly because they recognize the length of time it will take to adequately plan the operation and mobilize the resources*.").

306 *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF p. 1.

307 *See* **Exhibit C-164 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 12, 6 September 1984, PDF p. 1.

308 *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF pp. 1-2.

negotiations quickly so they could commence the salvage activities in late April or early May of 1985.[309]

123. However, while progressing discussions with SSA Cayman, Colombian authorities were simultaneously approaching other contractors to salvage the San José. For example, shortly before sending SSA Cayman the draft contract, DIMAR noted that it had received a request by another American company, Taylor Diving & Salvage Co. Inc., "*to participate in the* ***recovery of the possible galleon 'San Jose'*** *in the manner established by*" the 1984 Decrees (*i.e.*, at a much lower participation rate for the contractor compared to the terms being negotiated with SSA Cayman).[310] These alternative terms would be far more favorable for Colombia than the terms under which it would have to contract with SSA Cayman.

124. Thus, on 19 October 1984, when the Antiquities Commission held a meeting where they discussed the salvage contract, it was determined that the Commission's agreed terms with SSA Cayman would be modified,[311] and the company would be given 15 days to confirm whether it agreed on such modified terms.[312] Later that month, on 31 October 1984, the Antiquities Commission set out additional details that needed to be communicated to and accepted by SSA Cayman to finalize the salvage contract.[313]

125. Accordingly, on 2 November 1984, DIMAR offered the new terms to SSA Cayman: a sliding scale that gave SSA Cayman as low as 20% and as high as 50% of the value of the salvaged goods from the San José shipwreck.[314] Also, in accordance with what was

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309 *See* **Exhibit C-55**, Letter from James Richards to SSA Cayman investors, 28 September 1984, PDF p. 2 (*"The DIMAR representatives have stated their schedule calls for starting the ocean salvage activities once the winter storm season passes. This is in late April or early May. Towards that end they want to wrap up the contract fairly quickly because they recognize the length of time it will take to adequately plan the operation and mobilize the resources."*).

310 **Exhibit C-163 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 011, 21 August 1984, PDF p. 1 (emphasis added) (SSA's Unofficial Translation). *See also* **Exhibit C-164 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 12, 6 September 1984, PDF p. 1 (SSA's Unofficial Translation).

311 *See* **Exhibit C-165 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 14, 19 October 1984, PDF p. 1.

312 *See* **Exhibit C-165 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 14, 19 October 1984, PDF p. 2.

313 *See* **Exhibit C-166 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 15, 31 October 1984, PDF p. 2.

314 *See* **Exhibit C-19 [EN]**, Letter No. 3315 from DIMAR to Sea Search Armada, 2 November 1984, PDF p. 3 ("*The percentages of participation of the Colombian Government and the company who will make the salvage*

agreed by the Antiquities Commission,[315] DIMAR asked SSA Cayman to accept its proposal within 15 business days.[316] Even though it was entitled to 50% of the salvaged value under the applicable law, on 9 November 1984, SSA Cayman indicated that it was prepared to agree to DIMAR's terms and asked DIMAR to send the final draft of the salvage contract.[317]

126. Colombian authorities took steps towards finalizing the salvage contract but ultimately did not provide an executed version to SSA Cayman. On 21 November 1984, the Antiquities Commission acknowledged SSA Cayman's acceptance of Colombia's terms "***for the recovery of the galleon which could be the vessel San José***" and decided to appoint a Navy Captain to oversee the "*administrative and coordination aspects with respect to the contract*."[318]

127. Then, on 12 December 1984, the Commission agreed to inform the President about SSA's acceptance of all the terms of the Draft Contract and resolved to send him a history of SSA's efforts "***in relation to the shipwrecked antiquity that is presumed to be the galleon 'SAN JOSÉ'***,"[319] as well as "*information about the* [other] *companies that have expressed their interest in contracting for the recovery of this vessel*."[320]

128. On 24 January 1985, the Antiquities Commission held another meeting and resolved to request the President to "*submit to the extraordinary sessions of the Congress* ***a bill authorizing the contracting for the recovery of the possible galleon 'SAN JOSÉ'***."[321]

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will obey the following table. Until 100 million dollars, 50% for the Nation and 50% for the contractor. Between 100 and 200 million dollars, 65% for the Nation and 35% for the contractor. Between 200 and 300 million dollars, 70% for the Nation and 30% for the contractor. Between 300 and 400 million dollars, 75% for the Nation and 25% for the contractor. Beyond 400 million dollars the participation will be constant at 80% for the Nation and 20% for the contractor.") (SSA's Unofficial Translation).

315 *See supra* ¶¶ 121, 124.

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

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

318 **Exhibit C-167 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 16, 21 November 1984, PDF pp. 2-3 (emphasis added) (SSA's Unofficial Translation).

319 **Exhibit C-168 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 17, 12 December 1984, PDF p. 1 (emphasis added) (SSA's Unofficial Translation).

320 **Exhibit C-168 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 17, 12 December 1984, PDF p. 1 (SSA's Unofficial Translation).

321 **Exhibit C-169 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 18, 24 January 1985, PDF p. 1 (emphasis added) (SSA's Unofficial Translation).

At the same meeting, the Commission decided to request further information from SSA, including financial references that SSA had enough cash to carry out the project it proposed and the technical team and equipment to do so.[322]

129. Accordingly, on 29 April 1985, SSA Cayman updated DIMAR with the technical and financial details of the recovery operations.[323] In this letter, SSA Cayman provided DIMAR with a "*general description of the type of equipment . . . the project anticipates will be required to complete the sea operation segment of the recovery operations.*"[324] This list included detailed notes on the several types of vessels, on-board and on-deck equipment, saturation diving equipment, and sub-sea equipment required for the recovery. SSA Cayman also shared with DIMAR that they had "*been in discussions with the leading experts in undersea operations, sunken species artifact recovery and preservation, historical analysis and other related fields.*"[325] While some of commitments from these experts had expired due to "*the delays in obtaining a salvage contract*," the "*groundwork ha*[d] *already been laid and Sea Search-Armada* [was] *viewed by these experts as the party with the clearly established legal rights to salvage the site.*"[326]

130. On 3 May 1985, the Antiquities Commission met again and discussed making some modifications to the proposed bill on the salvage of the San José shipwreck and decided to request SSA for further financial information.[327]

131. Accordingly, on 10 June 1985, SSA submitted a 10-page letter to DIMAR containing legal, financial, and technical information on SSA's capabilities.[328] SSA shared, for example, that they had over 150 investors collectively worth over USD 500 million and

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322 *See* **Exhibit C-169 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 18, 24 January 1985, PDF p. 1.

323 *See* **Exhibit C-170**, Letter from SSA Cayman to DIMAR, 29 April 1985, PDF pp. 2-5.

324 **Exhibit C-170**, Letter from SSA Cayman to DIMAR, 29 April 1985, PDF p. 4.

325 **Exhibit C-170**, Letter from SSA Cayman to DIMAR, 29 April 1985, PDF pp. 2-3.

326 **Exhibit C-170**, Letter from SSA Cayman to DIMAR, 29 April 1985, PDF p. 3.

327 *See* **Exhibit C-171 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 19, 3 May 1985, PDF p. 1. *See also* **Exhibit C-174 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 20, 29 July 1985, PDF p. 2 (resolving to ask SSA Cayman for documents regarding its constitution. It is unclear if this request was made).

328 *See* **Exhibit C-172 [EN]**, Letter from SSA Cayman to DIMAR, 10 June 1985.

who had pooled USD 10 million for the salvage contract.[329] In addition to financial information, SSA shared information on the historical research it had conducted, its preservation and conservation experts, archeologists, photographers, and the technological equipment it would use during the salvage.[330]

(h) Colombia Attempts To Salvage The San José With Other Operators

132. Despite receiving the information it had requested, Colombian authorities began to stall the negotiations process with SSA Cayman, while taking steps to salvage the San José independently of SSA Cayman. By the late 1980s, Colombia began courting various other vendors to identify and salvage the San José shipwreck. Again, the discussions as well as the fact that Colombia was expending considerable resources to find a salvage operator indicate that it believed SSA Cayman had indeed found the San José shipwreck.

133. On 6 November 1985, the Antiquities Commission decided to deny SSA Cayman's request to be recognized as the declarant of some secondary targets of interest that had been identified by SSA's Predecessors in Phases One and Two.[331]

134. At the same meeting, the Antiquities Commission also discussed contracting with different parties for the identification and salvage of the San José shipwreck. The Commission noted that DIMAR had sent a letter to National Geographic "*expressing the Government's interest in knowing if the Galleon that is the object of declaration is in reality the San José*" and thereby asking the company whether it could "*advance the work of identification*."[332] Notably, the Commission "*recommended*" contacting National Geographic "*telephonically*," evidently worried about leaving a paper trail.[333] The Commission also discussed how they would proceed if National Geographic was not prepared to work with them, and recommended contacting Occidental Colombia

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329 *See* **Exhibit C-172 [EN]**, Letter from SSA Cayman to DIMAR, 10 June 1985.

330 *See* **Exhibit C-172 [EN]**, Letter from SSA Cayman to DIMAR, 10 June 1985, PDF pp. 5-9.

331 *See* **Exhibit C-175 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 21, 6 November 1985, PDF p. 1. *See also* **Exhibit C-173 [EN]**, SSA Cayman's Application to DIMAR for Recognition of Additional Targets, 16 July 1985, PDF p. 3 (SSA Cayman wanted to be found as the declarant based on other anomalies they located. These coordinates were not related to the discovery of the San José).

332 **Exhibit C-175 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 21, 6 November 1985, PDF p. 1 (SSA's Unofficial Translation).

333 **Exhibit C-175 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 21, 6 November 1985, PDF p. 1 (SSA's Unofficial Translation).

Inc. for the "*requested identification*" in relation to "*the project of recovering the San José Galleon.*"[334]

135. On 4 December 1985, National Geographic told DIMAR that its affiliate could take a submarine down to the wreck to work on identifying the San José.[335] Again, the Antiquities Commission recommended that further communications with National Geographic regarding the identification work be conducted "*telephonically*."[336]

136. At that same meeting in December 1985, the Antiquities Commission also discussed the Bank of the Republic's role in the salvage plan. Specifically, the Commission discussed creating an "*entity chaired by the Bank of the Republic*" to manage all administrative aspects related to the recovery of antiques and shipwrecked goods.[337] Given the "*urgency*" of creating this administrative entity, the Commission recommended that the initial steps be taken immediately, including creating a Procedure Manual for the recovery of shipwrecked antiquities and goods.[338] The Commission also proposed calling the Manager of the Bank "*telephonically*" to request the Bank's support in the creation of the infrastructure to salvage the shipwrecked

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334 **Exhibit C-175 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 21, 6 November 1985, PDF p. 1 ("*In case of a negative response, it was recommended to contact the company Occidental Colombia INC. to advance the requested identification. In addition, the possibility of the company in question joining the project of recovering the San Jose Galleon—if the Government decided to advance it.*") (SSA's Unofficial Translation).

335 *See* **Exhibit C-176 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 22, 4 December 1985, PDF p. 1 ("*Doctor WILBUR E. GARRET sent a note to* [DIMAR]*, in which he points out the possibility that an individual submarine operated by one of the associates of the National Geographic Magazine on the West Coast of the United States, advance the identification work of the San José galleon*.") (SSA's Unofficial Translation).

336 **Exhibit C-176 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 22, 4 December 1985, PDF p. 1 ("[I]*t was recommended to contact Doctor GARRET via telephone to clarify whether they would be interested in carrying out the identification work in the terms initially established by the Commission or those in the referenced letter*.") (SSA's Unofficial Translation).

337 **Exhibit C-176 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 22, 4 December 1985, PDF p. 2 (SSA's Unofficial Translation).

338 **Exhibit C-176 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 22, 4 December 1985, PDF p. 2 ("*Given the urgency of the creation of the administrative entity for the recovery of underwater treasure . . . caused by the imminent approval of the 'Bill for the Recovery of Antiquities and Shipwrecked Goods,' the Commission recommended moving forward with the initial steps in the realization of the project. In this regard, it was pointed out, as a first step, to proceed to prepare the Procedure Manual for the recovery of shipwrecked antiquities and goods*.") (SSA's Unofficial Translation).

gppds.[339] Again, the Commission's recommendation to move its communications to the telephone suggest it wanted to both act quickly and reduce its paper trail.

137. Then, on 3 April 1986, the Antiquities Commission explored the possibility collaborating with the Cartagena Oceanographic Hydrographic Research Center ("**Research Center**") to identify the San José.[340] The Antiquities Commission requested that DIMAR submit a study analyzing how feasible it was to carry out this project using the Research Center prior to the next meeting.[341]

138. Ten months later, during a 4 February 1987 meeting, the Antiquities Commission summarized all efforts that were being undertaken to salvage the "*possible remains of the San José galleon*."[342] One such effort was contacting experts from the University of Texas and the University of Carolina, both of whom stated that identification of the San José was feasible using the Navy's oceanographic vessels and rented equipment.[343] At the same meeting, the Commission noted that Mike Costin, the oceanographer hired by SSA's Predecessors, had requested a meeting with the Colombian authorities.[344]

139. That same month, on 18 February 1987, the Committee on Shipwrecked Goods (which, as explained above, appears to be the organization that preceded the Antiquities Commission but whose membership overlapped with the Commission) reported that there were rumors in the U.S. that SSA Cayman had secured a salvage contract for the

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339 **Exhibit C-176 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 22, 4 December 1985, PDF pp. 2-3 (SSA's Unofficial Translation).

340 *See* **Exhibit C-177 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 24, 3 April 1986, PDF p. 1 ("*The possibility of identifying the 'San José' with the means available to the oceanographic vessels of the Cartagena Oceanographic and Hydrographic Research Center was presented.*") (SSA's Unofficial Translation).

341 *See* **Exhibit C-177 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 24, 3 April 1986, PDF p. 1.

342 **Exhibit C-178 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 025, 4 February 1987, PDF p. 1 ("*Doctor Mauricio Obregon gave a summary account of the activities carried out by the previous committee and the current status of the efforts being carried out for the recovery of the possible remains of the 'SAN JOSE' GALLEON.*") (SSA's Unofficial Translation).

343 *See* **Exhibit C-178 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 025, 4 February 1987, PDF p. 1 ("*Doctor Obregon stated that he had recent contact with the experts George Bass from the University of Texas and Dr. WATTS from the University of Carolina who told him that the identification of the SAN JOSE Galleon was feasible with contracted equipment (basically a small manned submarine) and using the Navy oceanographic vessels. The approximate costs of these works would be in the order of US$ 250 thousand.*") (SSA's Unofficial Translation).

344 *See* **Exhibit C-178 [EN]**, Commission on Shipwrecked Antiquities, Meeting Minutes No. 025, 4 February 1987, PDF pp. 2-3.

San José shipwreck.[345] In response, the President of Colombia demanded that negotiations for such a salvage contract would only take place "*Government to Government.*"[346] With this decision, Colombia effectively decided it would not enter into a salvage contract with SSA Cayman.

140. Colombia nonetheless progressed identification and salvage work with other firms. On 9 March 1987, the Antiquities Commission reported that a National Geographic representative had stated that the San José Galleon was not in the position reported, but that such "*opinion was considered of little value because it did not come from an expert on the subject*."[347] Indeed, it is unclear precisely how National Geographic arrived at this conclusion as it does not appear to have conducted any onsite investigation.[348]

141. Then, on 22 April 1987, the Commission noted that National Geographic told the Commission that the side scan sonar images do not clearly demonstrate the existence of the San José, but that they could use an ROV to at least determine if the ship was from the relevant time period.[349]

142. At that same meeting, the Antiquities Commission discussed a conversation with Mike Costin, in which he stated "***with certainty*** *that the vessel declared was* ***from the era of the San José galleon***" and also expressed his desire to work for Colombia in the salvage

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345 *See* **Exhibit C-179 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 26, 18 February 1987, PDF p. 1 ("*Admiral GUSTAVO ANGEL informed the President about the rumors that have arisen in the city of Washington in relation to the alleged recovery by U.S. citizens of treasures from the SAN JOSE Galleon.*") (SSA's Unofficial Translation).

346 **Exhibit C-179 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 26, 18 February 1987, PDF pp. 2-3 ("*The President issues the following orders and criteria: a) The negotiation for salvage must be carried out from Government to Government; b) Countries that have technology required for salvage efforts should be investigated and we should explore whether they have an interest in this matter; c) In the event that teams are brought to the country to identify the Galleon, a large area where other antiquities may exist should be explored, if possible; d) The search for a solution of the identification problem should be accelerated, burning the lower cost stages for the country*") (SSA's Unofficial Translation).

347 **Exhibit C-180 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 027, 9 March 1987, PDF p. 1 (SSA's Unofficial Translation).

348 *See* **Exhibit C-180 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 027, 9 March 1987, PDF p. 1. Due to unavoidable last-minute conflicts, the National Geographic representative was unable to go to Colombia. *See* **Exhibit C-181 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 28, 22 April 1987, PDF pp. 1-2.

349 *See* **Exhibit C-181 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 28, 22 April 1987, PDF pp. 1-2 ("*a) The side scan sonar plots do not clearly demonstrate the existence of the vessel; b) Identification can be achieved with a remotely controlled underwater vehicle (ROV) to at least determine if the ship was of the time or not.*") (SSA's Unofficial Translation).

project.[350] Notably, this is also the opinion of Mr. Morris from his review of the evidence available over 40 years later.[351]

143. Based on the available information, the Commission decided to secure a government-to-government salvage contract for the San José. At that same meeting in April, the Antiquities Commission discussed the note they planned to share with the Ambassadors of other countries with the capacity to carry out the salvage work.[352] The Commission also discussed a memorandum from the Ministry of Mines and Energy on the companies that would have the ability to salvage the San José.[353]

144. At its next meeting on 20 May 1987, the Antiquities Commission continued to progress their efforts to procure a salvage contract. The Commission noted that the Research Center's geological analysis of the seabed samples obtained from "*the area **where the San José galleon was reported***" had not turned up any clear signs of the remains.[354] This was to be expected given the difficulty in obtaining samples during the expeditions.[355] Moreover, it was unclear what sort of geological analysis the Research Center had conducted. Nonetheless, the Commission appeared committed to recovering the shipwreck, as its members discussed conversations with other vendors on how to progress the work quickly.[356]

(i) Colombia Seeks A Salvage Contract With Other Governments

145. By the end of the 1980s Colombia made a number of efforts to attempt to secure a salvage contract with a foreign government, including the U.S., Sweden, Brazil, the

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350 **Exhibit C-181 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 28, 22 April 1987, PDF p. 2 (emphases added) (SSA's Unofficial Translation).

351 *See* **CER-1 [Morris]**, ¶ 52 ("*The presence of these features is consistent with and indicates that SSA had found a portion of a shipwreck from the time period they were looking for.*")

352 *See* **Exhibit C-181 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 28, 22 April 1987, PDF p. 2.

353 *See* **Exhibit C-181 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 28, 22 April 1987, PDF p. 2 ("*A memorandum from the Ministry of Mines and Energy regarding the Companies that have offshore drilling services and that could eventually work on the recovery of the possible San José Galleon was delivered.*") (SSA's Unofficial Translation).

354 **Exhibit C-182 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 029, 20 May 1987, PDF p. 1 (emphasis added) (SSA's Unofficial Translation).

355 *See supra* ¶¶ 96, 99-100.

356 *See* **Exhibit C-182 [EN]**, Committee on Shipwrecked Antiquities, Meeting Minutes No. 029, 20 May 1987, PDF p. 2 ("*If Colombia wishes to quickly advance identification work, it could use the ship 'SEAWARD JOHNSON' that is in the region.*") (SSA's Unofficial Translation).

United Kingdom, France, Italy, Norway, and Japan.[357] Again, Colombia's attempts to contract with other States confirm that Colombia recognized SSA's Predecessor's claim to have found the San José,[358] and SSA's Predecessor's rights to any salvaged treasure from the Discovery Area.[359]

146. On 15 July 1987, Colombia's Foreign Ministry reached out to the U.S. Embassy in Bogotá expressing its interest in "*contracting the search, identification and the eventual underwater salvage of the Spanish colonial shipwreck, the galleon 'San José.'*"[360] The purpose of the proposed contract would be to "*search for and recover the Spanish treasureship* [sic] *'San José'.*"[361] Notably, Colombia did not ask the U.S. to look anew for the San José, but rather to prepare a salvage operation. Specifically, Colombia asked the U.S. for a proposal for the: "(*A) identification; (B) historical and archaeological studies of the shipwreck location; (C) eventual recuperation or salvage of ship; (D) conservation of recovered valuables.*"[362]

147. It is important to note here that "*identification*" does not refer to (or mean the same thing as) a new search for the San José; rather it refers to the identification and cataloguing of the items found aboard the shipwreck. This is consistent with Colombia's own definition of the term in the Draft Contract for the salvage of the San José that Colombia had sent to SSA's Predecessor, where Colombia defined

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357 *See* **Exhibit C-183 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 001, 4 February 1988, PDF pp. 4-15.

358 *See* SSA's Response, ¶ 66; **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF p. 1 ("*the U.S. firm sea Search Armada . . . claims to have already spent 12 million dollars on search and to have found the San Jose under a contract with the GOC.*"); **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 2 ("*The coordinates identifying the area shall be set out in the Contract. The identification shall start in the first place within the coordinates declared by Sea Search Armada. The Swedish operator shall use the most precise means to determine the coordinates declared by SSA in such a manner that there is no doubt whatsoever that it is the same precise place.*") (SSA's Unofficial Translation).

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

360 *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, ¶ 2 (informal translation of Colombia's note by the U.S. Embassy).

361 *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF pp. 1, 4.

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

"[i]*dentification and* [i]*nventory*" as "*consist*[ing of] *the mechanical and physical labor to separate the species from the material or substances which might adhere to it, its classification and count.*"[363] This is also consistent with the Antiquities Committee's internal discussions where it reached out to National Geographic and other potential vendors to conduct "*identification work*" for the purpose of "*knowing if the actual Galleon that was the object of declaration is in reality the San José*."[364]

148. In its proposal to the U.S., Colombia indicated that "*the wreck* [of the San José] *may be located near the Rosario Islands in the Colombian territorial waters of the Caribbean Sea at an approximate depth of 250 meters.*"[365] This was precisely where SSA's Predecessor had searched and later declared the location of portions of the shipwreck.[366] Moreover, the Colombian Government specifically noted that SSA's Predecessor would have a right of recovery over any "*wreck valuables in the area to be identified later*" as it had "*concessionaire rights*" under, *inter alia*, Resolution No. 0354.[367] This provision only makes sense if Colombia believed that SSA's Predecessor had actually located the San José in the Discovery Area.

149. Upon receiving this solicitation, the U.S. Embassy noted that "*the U.S. firm sea Search Armada . . . claims to have already spent 12 million dollars on search and to have found the San Jose under a contract with the GOC.*"[368] In view of SSA Cayman's concerns,

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

364 *See supra* ¶ 134.

365 **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF ¶ 2.

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

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

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

the U.S. Embassy proposed asking Colombia about the status of SSA Cayman's legal rights and of the possibility for SSA Cayman to be a bidder for the contract.[369]

150. On 4 February 1988, the Antiquities Commission noted that the President had sent letters to Italy, Netherlands and France to progress discussions of a Government-to-Government contract to salvage the San José.[370] The Antiquities Commission ultimately decided to create a form for all government bidders to clarify aspects of their proposals.[371] In that same February 1988 meeting, the President decided that Ecopetrol would be the company in charge of Colombia's portion of the project due to its experience, as well as technical and administrative capabilities.[372]

151. The Antiquities Commission also discussed at length SSA Cayman's proposal (which was submitted under the name of Institute of the Americas on 13 November 1987 by the U.S. Embassy), noting that, among other things, the U.S. Government supported SSA Cayman's proposal, and that the proposal intended to leverage SSA Cayman's knowledge of the shipwreck it had already discovered and had devised a technical plan to salvage the wreck.[373]

152. At the subsequent Antiquities Commission meeting on 15 February 1988, a letter prepared for SSA Cayman was read. The Committee, however, decided not to send the

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369 *See* **Exhibit C-57**, Cable from the U.S. Embassy in Colombia to the U.S. State Department, 9 July 1987, PDF pp. 5-6.

370 *See* **Exhibit C-183 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 001, 4 February 1988, PDF p. 1 ("*The committee is informed that the President decided to send letters to the governments of the Netherlands and Italy to specify their offers and asking whether these governments would be willing to sign a government-to-government agreements. The Foreign Ministry notes are read, in which they request a response by 11 February 1988.*") (SSA's Unofficial Translation). Claimant notes that while the minutes are identified as being from the Advisory Committee on Shipwrecked Antiquities, no such Committee was created (as far as Claimant is aware). Furthermore, the members participating in these meetings are almost identical to the Antiquities Commission's members. Hence, Claimant understands the Advisory Committee on Shipwrecked Antiquities and the Antiquities Commission are one and the same.

371 *See* **Exhibit C-183 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 001, 4 February 1988, PDF p. 2 ("*On the recommendation of Ecopetrol experts, it was agreed to send a note to the French government to specify its offer an to prepare a questionnaire or form for all bidding governments to clarify some aspects of their offers.*") (SSA's Unofficial Translation).

372 *See* **Exhibit C-183 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 001, 4 February 1988, PDF p. 1.

373 *See* **Exhibit C-183 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 001, 4 February 1988, PDF pp. 9-10.

letter to SSA Cayman.[374] The contents of that letter are unknown. The Committee also discussed SSA Cayman's salvage proposal but, again, the details of those discussions are unknown.

153. On 2 March 1988, the Antiquities Commission announced that it would not sign a contract with the U.S. because their proposal foreclosed the possibility of a government-to-government contract.[375] Then, on 8 March 1988, the members of the Council for Awarding Contracts on Antiquities and Shipwrecked Goods held a meeting to discuss the submitted proposals.[376] As a first order of business, they determined that Ecopetrol would oversee the execution of the salvage contract on behalf of the Colombian Government.[377] They elaborated on the decision to not continue negotiations with the U.S., Denmark, or the Netherlands since their "*offers express having constitutional and legal limitations when entering Government-to-Government contracts, a non-modifiable condition of the negation*."[378] Colombia instead decided to continue negotiations with Italy, France, and Sweden.[379]

154. Ultimately, Colombian authorities appear to have progressed negotiations furthest with the Swedish Government. On 17 July 1988, Colombia entered into a MoU with the Swedish Government for "*the identification and salvage of the San José*."[380] The

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374 *See generally* **Exhibit C-184 [EN[**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 2, 15 February 1988, PDF pp. 1-2.

375 *See generally* **Exhibit C-185 [EN]**, Advisory Committee on Shipwrecked Antiquities, Meeting Minutes No. 3, 2 March 1988, PDF p. 1.

376 Claimant is unable to identify at this time under what legal framework the Council for Awarding Contracts on Antiquities and Shipwrecked Goods was created. It seems clear that it was and advisory council to the President and that it included some, but not all, of the members of the Antiquities Commission. *See generally* **Exhibit C-186 [EN]**, Council for Awarding Contracts on Antiquities and Shipwrecked Goods, Meeting Minutes No. 001, 8 March 1988, PDF pp. 1-2.

377 *See generally* **Exhibit C-186 [EN]**, Council for Awarding Contracts on Antiquities and Shipwrecked Goods, Meeting Minutes No. 001, 8 March 1988, PDF pp. 1-2.

378 **Exhibit C-186 [EN]**, Council for Awarding Contracts on Antiquities and Shipwrecked Goods, Meeting Minutes No. 001, 8 March 1988, PDF p. 3 (SSA's Unofficial Translation).

379 *See generally* **Exhibit C-186 [EN]**, Council for Awarding Contracts on Antiquities and Shipwrecked Goods, Meeting Minutes No. 001, 8 March 1988, PDF p. 3 (SSA's Unofficial Translation).

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

Swedish government was to receive a share of the net value of the recovered goods and credit for operational costs.[381]

155. The MoU itself confirms that Colombia believed that SSA Cayman's Predecessors had located the San José. SSA was to be entitled to 5% of the gross value of the goods, under its "*rights of the claimant*" "*if the shipwrecked goods* [were] *found within the reported area*."[382] The negotiators then agreed to "*designate an area of 100 square nautical miles for the identification and salvage of the San José*," with the "***identification*** [to] ***start in the first place within the coordinates declared by Sea Search Armada***."[383] The Swedish operator was to "*use the most precise means to determine the coordinates declared by SSA in such a manner that there is no doubt whatsoever that it is the same precise place*" including, if necessary, the use of "*international organizations for testing whether or not the shipwrecked goods are found in the declared coordinates*."[384] The MoU makes clear the following:

a. Colombia wanted its salvage partner to find the precise Discovery Area as reported by SSA's Predecessor. If the Colombian Government did not believe that SSA's Predecessor had located the San José in its search area, this exercise would have been pointless.

b. Colombia understood that the wreck of the San José would be spread over an area in the vicinity of the coordinates reported by SSA, rather than located at a pinpoint. That is why Colombia recognized that SSA's Predecessors reported and would be entitled to proceeds from the "*reported area*" rather than pinpoint coordinates, were the Swedish contractor to find the San José shipwreck in that area.

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381 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 1 (SSA's Unofficial Translation).

382 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, art. 1 (SSA's Unofficial Translation).

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

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

c. The 100 square nautical miles area—equivalent to a circle with a radius of approximately 5.6 nautical miles[385]—within which Colombia wanted the Swedish contractor to conduct its "*identification and salvage*" exercise reflected Colombia's contemporaneous assessment of the size of the debris field resulting from the San José shipwreck. Notably, Colombia did not ask the Swedish operator to search for the San José shipwreck within this area, but to identify and salvage the shipwreck in this area. Thus, were the Swedish operator able to identify that the San José shipwreck existed within this 100 square nautical miles area, it would have confirmed that the shipwreck was within the "*reported area*" thus entitling SSA Cayman to the contemplated 5% fee.

156. Contemporaneous press reports indicate that this salvage deal fell apart after accusations of corruption and corporate piracy were levelled against both Colombian and Swedish Government officials involved in the scheme.[386]

D. Litigation In Colombia Confirms SSA's Rights To San José Shipwreck

157. In the late 1980s, SSA Cayman instituted a change of leadership. In 1987, by unanimous vote, the company's partners elected a U.S. citizen, Jack Harbeston,[387] as the Managing Director of SSA Cayman. Upon Mr. Harbeston's election, SSA Cayman terminated its management contract with Portobello Partners Inc. and entered into a management contract with IOTA Partners (another U.S. firm).[388] As Managing Director of SSA Cayman, Mr. Harbeston authorized the company to pursue litigation against Colombia to enforce its rights over the San José shipwreck, as discussed further below.

(a) SSA Cayman Initiates Litigation Before Colombian Courts To Confirm Its Rights

158. After years of good faith attempts by SSA Cayman to negotiate with Colombia, the company's new leadership, led by Jack Harbeston, decided to initiate legal actions to

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385 The formula used to calculate the radius of a circle is: $r = \sqrt{(Area / \pi)}$.

386 *See* Notice of Arbitration, ¶ 25. *See* **Exhibit C-21**, Michael Molinski, *Battle for Spanish Treasure Ship*, UNITED PRESS INTERNATIONAL, 3 August 1988; **Exhibit C-22**, *The Retrieval of the Galleon San Jose – A Scandal Is Foreseen Among High Officials,* EL SIGLO, 24 August 1988.

387 *See* **Exhibit C-90**, Jack Harbeston's Passport, 20 April 2016 (date of issue).

388 *See* **Exhibit C-58**, Sea Search-Armada and IOTA Partners Venture Management Agreement, 13 May 1988; **Exhibit C-60**, Armada Company, Board of Directors Meeting Minutes, 15 December 1988.

protect SSA Cayman's interests against Colombia's attempts to deprive SSA Cayman of its rights.[389] The Parties agree that SSA Cayman's legal actions were directed towards obtaining declaratory relief, as SSA's Predecessor was not requesting any new or additional rights from the Colombian courts.[390]

159. On 13 January 1989, SSA Cayman filed a lawsuit ("**Civil Court Action**") before the 10th Civil Court of the Circuit of Barranquilla ("**Civil Court**"), asking the court to confirm that under Colombian law:

a. As GMC had been recognized by DIMAR's Resolution No. 0354 as the reporter of treasure, Colombia had no rights over any of the treasure found in Colombia's continental platform or in its exclusive economic zone, within the coordinates and surrounding areas referred to in the 1982 Report;[391]

b. 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%;[392] and

c. SSA Cayman had a right to salvage the shipwrecked goods and to enter into a salvage contract with Colombia on a preferential basis.[393]

160. On 16 February 1989, the Colombian Attorney General responded to SSA Cayman's Civil Court Action and made a number of jurisdictional and venue-related objections. The Colombian Attorney General did not dispute the validity of DIMAR's resolutions

389 *See* SSA's Response, ¶ 67; Colombia's Reply, ¶¶ 72-74.

390 *See* SSA's Response, ¶ 67; Colombia's Reply, ¶ 72.

391 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF pp. 1-2 (First and Second).

392 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF p. 2 (Third).

393 *See* **Exhibit C-61**, SSA Cayman Complaint Filed Before 10th Civil Court of the Circuit of Barranquilla, 13 January 1989, PDF p. 3 (Fourth and Fifth).

or their effect.[394] DIMAR and the Office of the President of Colombia also intervened in the proceedings on Colombia's behalf.[395]

161. DIMAR argued that, pursuant to its 1984 Decrees,[396] it could only recognize declarants of "*shipwreck antiquities*" not treasure, which therefore only authorized the declarant, like SSA Cayman here, to a 5% finder's fee.[397] This position, of course, directly contradicted DIMAR's own internal contemporaneous memoranda,[398] DIMAR's Resolution No. 0354, which specifically recognized GMC as a "*claimant*" of "*treasure or shipwrecked goods*,"[399] and Colombia's position while negotiating a potential salvage contract with SSA Cayman that began from the basis that the declarant was authorized to recover 50% of its discovery.[400] Unsurprisingly, Colombian courts rejected DIMAR's position.

162. On 6 July 1992, the Civil Court dismissed various jurisdictional objections and excluded DIMAR from the case, finding that the Colombian Attorney General's Office was the appropriate representative of Colombia in the matter.[401] On 11 November 1992, the President of Colombia replaced the Colombian Attorney General's Office as the

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394 *See* **Exhibit C-62**, Colombia's Response To SSA Cayman's Civil Court Action, 16 February 1989, p. 3. *See also* **Exhibit C-63**, Colombia's Preliminary Objections To SSA Cayman's Civil Court Action, 16 February 1989.

395 *See, e.g.*, **Exhibit C-64**, DIMAR's Challenge Of Decision to Admit SSA Cayman's Civil Court Action, 3 March 1989; **Exhibit C-65**, DIMAR's Response To SSA Cayman's Civil Court Action, 29 March 1989; **Exhibit C-66**, DIMAR's Nullity Claim Against SSA Cayman's Civil Court Action, 22 April 1989.

396 *See supra* ¶ 109.

397 *See* **Exhibit C-67 [EN]**, Colombia's Response To SSA Cayman's Re-Submitted Civil Court Action, 5 June 1990, PDF p. 2 (SSA's Unofficial Translation).

398 *See supra* ¶¶ 35, 80, 86 . *See also* Notice of Arbitration, ¶ 20; **Exhibit C-15**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, p. 2.

399 See *supra* ¶¶ 83-84; **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1.

400 *See supra* ¶¶ 106, 122.

401 *See* **Exhibit C-70 [EN]**, 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Jurisdictional Objections, 6 July 1992, PDF p. 4 ("*1.) Declare not proven the preliminary objections of 'Lack of Jurisdiction', 'Lack of Competence', 'Formal Inefficiency due to Lack of Procedural Requirements', 'Improper Accumulation of Claims' and 'Non-existence and Improper Representation of the Plaintiff. 2.) Declare partially applicable the preliminary exception of 'improper representation of the defendant', with respect to the Judicial Representation of the 'Nation', and therefore, exclude from the process the special attorney of* [DIMAR]."") (SSA's Unofficial Translation).

representative of Colombia[402] and fully adopted DIMAR's arguments for the remainder of the proceedings.

163. It is worth noting that Colombia's conduct during these proceedings drew sharp rebuke from its own courts. Not only did the Civil Court reject Colombia's attempts to have three different agencies represent it in the proceedings, but it also later imposed sanctions on the State for failing to comply with procedural requirements. Specifically, on 27 April 1993, the President of Colombia failed to appear at a mandatory conciliation hearing that the Civil Court had already postponed due to the President's failure to appear in the original hearing.[403] The Civil Court did not find the reasons provided by the President to be satisfactory and therefore felt sanctions were appropriate.[404]

164. On 6 July 1994, the Civil Court ruled in favor of SSA's Predecessor ("**Civil Court Decision**"), holding as follows:

> [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.*[405]

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402 *See* **Exhibit C-71 [EN]**, 10th Civil Court Of The Circuit Of Barranquilla, Judgment Regarding Representation of Colombia, 11 November 1992, PDF p. 3 ("*1.) Admit the direct intervention of the* [President] . . . *in the present proceedings*") (SSA's Unofficial Translation).

403 *See* **Exhibit C-72**, 10th Civil Court of the Circuit of Barranquilla, Judgment Regarding President Of Colombia's Failure to Appear In Conciliation Hearing, 12 August 1993, PDF p. 1.

404 *See* **Exhibit C-72 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment Regarding President Of Colombia's Failure to Appear In Conciliation Hearing, 12 August 1993, PDF p. 6 ("*Consequently, the defendant should suffer the corresponding procedural sanctions for its failure to attend the aforementioned hearing*") (SSA's Unofficial Translation).

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

165. Thus, reflecting the language of the 1982 Report,[406] the Civil Court confirmed that SSA Cayman's rights were over discoveries in an area surrounding the identified coordinates.[407]

166. In parallel with the Civil Court Action, on June 1993, SSA Cayman's counsel filed an action before the Constitutional Court (the final appellate court for matters involving interpretation of the Colombian Constitution) to invalidate certain provisions of the 1984 Decrees that sought to reduce a declarant's stake from 50% to 5% of the declared treasure ("**Constitutional Court Action**").[408] SSA Cayman sought, *inter alia*, to preclude Colombia from relying on the retroactive application of the 1984 Decrees in the Civil Court Action. SSA Cayman was successful. On 10 March 1994, the Constitutional Court declared the relevant articles of Presidential Decree No. 2324 unconstitutional and without effect, invalidating Colombia's attempt to radically alter the apportionment regime from 50/50 to 95/5.[409]

(b) The 1994 Columbus Report

167. On 8 July 1994—two days after losing the Civil Court Action—Colombia issued a press release announcing that it had commissioned a report ("**Columbus Report**") that apparently "*scientifically*" showed that the San José was not in the area reported by GMC.[410]

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406 *See supra* ¶¶ 73-75.

407 The Civil Court also dismissed SSA Cayman's request to be declared the owner of 100% of the treasure should it be found in Colombia's continental platform or in Colombia's exclusive economic zone holding that Colombia's territory under the Constitution included its continental platform and exclusive economic zone, even if its rights were limited (*see* **Exhibit C-25**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF pp. 30-32). Similarly, the Civil Court had previously held that SSA Cayman's alleged preferential rights to salvage could not be adjudicated by a Civil Court as they were administrative rights by nature. SSA Cayman therefore withdrew this claim. *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 27.

408 *See supra* ¶ 109.

409 *See* **Exhibit C-24**, Colombian Constitutional Court, Case File No. D-379, Judgment No. C-102/94, 10 March 1994, PDF p. 17 ("*Declare INAPPLICABLE in their entirety the articles 188 and 191 of Decree 2324 of 1984, for exceeding the material limit set forth in the law of legislative authorization (19 of 1983)*") (SSA's Unofficial Translation).

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

168. In its Preliminary Objections submissions, SSA demonstrated that the Columbus Report has little probative value because, among other reasons:

a. It was issued amid legal proceedings, yet SSA Cayman's representatives were not invited to observe the survey or allowed to review the report's assumptions, methodology or findings;[411]

b. Colombia refused to rely on the Columbus Report in any subsequent legal proceedings;[412]

c. Neither the Columbus Report nor the underlying contract with Columbus mentions GMC or SSA Cayman's search or findings, or indeed the 1982 Report;[413]

d. The Columbus Report does not indicate which coordinates were searched and only says that the Colombian Government provided certain (unspecified) coordinates to Columbus;[414]

e. The Columbus Report discusses analysis of a wood sample but does not describe the provenance of said sample,[415] and does not explain why its purported analysis contradicted the contemporaneous carbon dating

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411 *See* SSA's Response, ¶ 79; *See* **Exhibit R-12**, Columbus Exploration, Final report regarding the oceanographic study, 4 August 1994.

412 *See* SSA's Response, ¶ 79. *See also See* Colombia's Preliminary Objections, ¶¶ 59-62, 110, 154, 157-60, 177-78, 186, 225; *see generally* Colombia's Reply.

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

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

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

analysis that had been submitted to Colombia as part of the 1982 Report, which was fully incorporated into Resolution No. 0354;[416]

f. The Columbus Report claims that Columbus analyzed with a side scan sonar not just the (unidentified) coordinates but also "*an area hundreds of times greater*" than those coordinates so that "*there were no errors regarding the coverage of the areas of the coordinates*,"[417] yet 22 years later, in 2015, Colombia claimed to have found the San José shipwreck within the Discovery Area—just over three nautical miles from the coordinates listed in the 1982 Report;[418] and

g. A Colombian naval officer was aboard every SSA ship that searched for and found the San José,[419] and thus Colombia had contemporaneous access to and presumably reviewed all sonar readings, scientific surveys, and analyses of wood samples shared with it, including with the 1982 Report, yet the Columbus Report makes no attempt to reconcile these contradictory results.[420]

169. Indeed, the credibility of the so-called experts who led this mission is seriously in doubt. The founder and director of Columbus, Thomas G. Thompson, has been imprisoned in

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

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

418 *See* SSA's Response, ¶¶ 82, 121-22; *See* **Exhibit C-94 [EN]**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, PDF p. 4, *available at* https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobiernocolombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de dolares/ ("*The distance between the two points is around 3.24 nautical miles*.") (SSA's Unofficial Translation).

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

420 *See* SSA's Response, ¶ 82(d).

the United States since 2015 for refusing to disclose the location of missing gold coins from another historic shipwreck.[421]

170. Even setting aside its credibility issues, as Mr. Morris notes, the expedition underlying the Columbus Report was not done at the location reported by the 1982 Report (and later verified by the Colombian Navy).[422] Not only did the Columbus Report fail to find the landmarks found in the area reported by the 1982 Report but also the depth reported by that Report did not match that of the Discovery Area.[423]

171. SSA Cayman thus wrote to the Colombian President, pointing out that the Columbus Report directly contradicted the Colombian Navy's contemporaneous reports from its supervision of GMC/SSA Cayman's exploration efforts, which certified the existence of a finding, describing its condition in detail and the areas reported.[424] Colombia did not respond.

172. Remarkably, Colombia made no attempt at all to rehabilitate the Columbus Report in the Preliminary Objections phase.[425]

(c) SSA's Predecessor Seeks And Obtains An Injunction Order

173. Given Colombia's extrajudicial conduct, including commissioning the Columbus Report and issuing the Columbus Press Release, on 10 August 1994, SSA Cayman sought to protect its rights to the treasure in the Discovery Area, as recognized by the Civil Court Decision, by requesting an injunction to protect "*the movable property of*

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

422 *See* **CER-1 [Morris]**, ¶¶ 53-54.

423 *See* **CER-1 [Morris]**, ¶¶ 53-54.

424 *See* **Exhibit C-73**, Letter from SSA Cayman to the President of Colombia, 1 August 1994, p. 2.

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

economic, historical, cultural and scientific value that has the quality of treasures" in the Discovery Area.[426]

174. The Colombian Attorney General's Office opposed SSA Cayman's request arguing that (i) any injunction would be tantamount to ordering the salvage of the wreck, which could not be done without a salvage contract;[427] (ii) SSA Cayman had failed to specify the coordinates of the shipwreck in its application and instead only referred to the 1982 Report;[428] and (iii) the injunction would be too onerous for Colombia as it would impose technical operations for the supervision of the recovery and preservation of shipwrecks, which Colombia did not at the time possess.[429]

175. SSA Cayman, in response, noted that (i) it was not seeking to salvage the treasure at the time; rather, it was only a standard protective measure of its existing rights to the treasure at the Discovery Area; (ii) its injunction application correctly referred to the Discovery Area in the 1982 Report precisely because SSA Cayman's rights, as confirmed by the Civil Court Decision, relate to the entirety of the Discovery Area; and (iii) any items recovered would not be delivered to SSA Cayman (or to the Colombian Government for that matter) but instead would be placed under the custody of a Court appointed official for their preservation.[430] As SSA Cayman explained, "*the objective of this precautionary measure . . . is to ensure for the complaint* [sic] *company that the goods in dispute are preserved until the conclusion of the proceedings*," in light of the fact that *"irregular acts were carried out and widely publicized by the previous Government, which inevitably give rise to concerns about such conservation*."[431]

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426 **Exhibit C-74 [EN]**, SSA Cayman Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 10 August 1994 (SSA's Unofficial Translation). *See also* **Exhibit C-75**, SSA Cayman Reply In Support Of Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 13 September 1994.

427 *See* **Exhibit C-188 [EN]**, Colombia's Response to SSA Cayman's Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 9 September 1994, PDF pp. 1-2

428 *See* **Exhibit C-188 [EN]**, Colombia's Response to SSA Cayman's Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 9 September 1994, PDF pp. 2-3

429 *See* **Exhibit C-188 [EN]**, Colombia's Response to SSA Cayman's Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 9 September 1994, PDF pp. 3-4.

430 *See* **Exhibit C-75**, SSA Cayman Reply In Support Of Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 13 September 1994, PDF pp. 1-3.

431 **Exhibit C-75 [EN]**, SSA Cayman Reply In Support Of Injunction Application Before 10th Civil Court of the Circuit of Barranquilla, 13 September 1994, PDF p. 3 (SSA's Unofficial Translation).

176. On 12 October 1994, the Civil Court granted SSA Cayman's request and issued an injunctive measure covering the Discovery Area (as "*the site identified in the indicated coordinates* [in the 1982 Report] *or in their 'vicinity'*") ("**Injunction Order**").[432] The Civil Court rejected Colombia's feigned concerns that a foreign company's access to and rights over assets in Colombian waters would breach its sovereignty or harm national interests:

> ***A seizure order issued by a judicial chamber that is an integral part of the Colombian Nation, issued in accordance with the procedural rules in force in our country, cannot be considered a violation of National Sovereignty, but rather a manifestation of that sovereign power*** *that the Nation confers to its jurisdictional bodies, even if such measure materializes with the technological assistance of foreigners, which is necessary if the corresponding technical means do not exist in Colombia, and in this regard, there is no objection from the attorney of the Nation, which together with this document attaches a report from a foreign company hired by our National Government to make a report on the area that is the object of the proceedings.*[433]

177. The Civil Court thus reiterated its recognition of SSA Cayman's rights by issuing the injunction over the Discovery Area.[434] Specifically, the Civil Court ordered:

> [T]*he seizure of the goods that have the nature of treasure, that are rescued or removed from* ***the area determined by the coordinates indicated in the "Confidential Report on underwater exploration"*** *in the Caribbean Sea of Colombia presented by the company Glocca Morra Company, dated February 26, 1982, which is an integral part of resolution number 0354 of June 3, 1982, of the General Maritime and Port Administration of Colombia.*
>
> *To commission the assigned Civil Judge of the Circuit of the city of Cartagena, to carry out the injunctive measure and to authorize them to appoint the trustee, to indicate the bond to be provided, and their provisional fees.*[435]

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[432] **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 3. (SSA's Unofficial Translation).

[433] **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 3. (emphasis added) (SSA's Unofficial Translation).

[434] *See supra* ¶ 73.

[435] **Exhibit C-26 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 12 October 1994, PDF p. 5. (emphasis added) (SSA's Unofficial Translation).

178. Accordingly, the Civil Court recognized and protected SSA Cayman's rights to the Discovery Area.

(d) SSA's Predecessor Wins Appeals In 1997

179. Colombia subsequently appealed the Civil Court Decision and the Injunction Order, both unsuccessfully.

180. On 26 August 1994, the President of Colombia appealed the Civil Court Decision, arguing, *inter alia*, that:

a. The Civil Court should have not granted any rights to SSA Cayman given the uncertainty of the coordinates.[436]

b. SSA's Predecessors had only mere expectations and not actual rights. Specifically, Colombia argued that until "*the shipwrecked good is located and rescued*, [SSA Cayman's] *potential rights will be abstract and even unrealistic, given the physical, material and legal impossibility to enforce them according to the laws*."[437]

c. The Civil Court erred by not applying the laws that excluded certain shipwrecked goods from the notion of "*treasure.*"[438]

181. In addition, on 19 October 1994, the President of Colombia appealed the Injunction Order. The President claimed, *inter alia*, that the Civil Court should not have granted the Injunction Order requested by SSA's Predecessor because there was no certainty as to: (i) the exact location of the goods that SSA's Predecessors had reported; nor (ii) the exact items that form part of the discovery.[439]

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436 *See* **Exhibit C-187 [EN]**, Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 6 July 1994, 26 August 1994, PDF pp. 21-22. *See also* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, p. 28.

437 **Exhibit C-187 [EN]**, Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 6 July 1994, 26 August 1994, PDF p. 9 (SSA's Unofficial Translation).

438 **Exhibit C-187 [EN]**, Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 6 July 1994, 26 August 1994, PDF p. 24 (SSA's Unofficial Translation). *See also* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, p. 28.

439 *See* **Exhibit C-189 [EN]**, Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 12 October 1994, 19 October 1994, PDF p. 2. The President also reiterated the argument that by granting the Injunction Order, the Civil Court effectively revived SSA's Predecessor's claim to be granted a salvage contract, which had already been rejected by the Civil Court Decision. *See* **Exhibit C-189 [EN]**,

182. Two days later, on 21 October 1994, the Colombian Attorney General also appealed the Injunction Order by reiterating the arguments already made to the Civil Court in opposition to the Injunction Order.[440]

183. On 7 March 1997, the Superior Court of the Judicial District of Barranquilla ("**Superior Court**") rejected the President's and Attorney General's arguments and affirmed the Civil Court Decision and the Injunction Order in full ("**Superior Court Decision**").[441] Specifically, the Superior Court rejected Colombia's arguments that SSA Cayman had no actual rights but only mere expectations. The Superior Court found that SSA's Predecessor's rights vested with the discovery of the shipwreck, and that physical possession or salvage of the shipwreck was not needed.[442] The Superior Court also clarified that lacking the material possession of the assets or "*not having apprehended them physically, materially*," does not deprive SSA's Predecessors of their right, if it was found (as it was), that SSA's Predecessor had been recognized as a reporter of a treasure.[443] Furthermore, the Superior Court expressly recognized that "[t]*his right was acquired by* [SSA Cayman] *in full compliance with the sovereignty and laws of the Republic*."[444] The Court went on to note that SSA's Predecessors' exploration efforts created a high degree of certainty in relation to their rights:

> [T]*he effort of almost two years of exploration to determine the exact location of the shipwreck, with the personnel and appropriate technical and scientific means,* ***gives*** **[SSA Cayman]** ***certainty concerning the***

Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 12 October 1994, 19 October 1994, PDF p. 4.

440 **Exhibit C-189 [EN]**, Colombia's Appeal to the 10th Civil Court of the Circuit of Barranquilla, Judgment dated 12 October 1994, 19 October 1994, PDF p. 2-3 (arguing that (i) the Injunction Order contravened Civil Code Article 76's mandate to determine the area where the goods to be seized are found; (ii) SSA Cayman's application only referenced the information provided by the 1982 Report and not any exact coordinates; and (iii) the Injunction Order violated due process and equal treatment of the parties).

441 *See* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, p. 64 ("*2.) To confirm the entirety the order dated October twelfth (12th), nineteen ninety-four (1994) . . . 3.) To confirm the entirety of the judgment dated July sixth (6th), nineteen ninety-four (1994)*") (SSA's Unofficial Translation).

442 *See* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 35 ("*the discovery of a treasure, if it is fortuitous OR HAS BEEN SEARCHED WITH CONSENT OF THE OWNER, confers to the discoverer the property rights over half of the assets."*) (emphasis in original) (SSA's Unofficial Translation).

443 *See* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 35 (SSA's Unofficial Translation).

444 *See* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 36 (SSA's Unofficial Translation).

> ***discovery, the finding. Added to this certainty is the fact that the tasks of re-locating and confirming the location of the shipwreck and even extracting wood samples was undertaken with authorization from DIMAR and with the presence of Colombian sailors.***[445]

184. In arriving at its conclusion, the Superior Court also noted that as SSA's Predecessor's rights had vested in 1982, SSA Cayman could not be subjected to laws and decrees that were enacted after that time that would reduce or otherwise extinguish SSA Cayman's acquired rights. Specifically, the Superior Court held that "*there are not applicable in this particular proceeding, the decrees and laws issued after the events that gave rise to the plaintiff's rights*."[446]

185. As for the Injunction Order, the Superior Court also confirmed it in its entirety, rejecting Colombia's arguments. The Superior Court held that:

a. The location of the shipwreck could be determined by experts based on the 1982 Report, therefore there was no impediment for the protective measure to be granted.[447] The fact that specific items could not be identified in advance of the granting of the Injunction Order or even in advance of the enforcement of the Injunction Order was irrelevant.[448]

b. While SSA's Predecessor would need the State's collaboration to salvage the goods, that requirement in itself did not preclude the Injunction Order, but merely meant that SSA's Predecessor would need the State to enforce the Injunction Order.[449]

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445 **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 36 (emphasis added) (SSA's Unofficial Translation).

446 **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 46 (SSA's Unofficial Translation).

447 *See* **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 61.

448 *See* **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 60.

449 *See* **Exhibit C-27**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 62.

186. Thus, the Superior Court Decision rejected Colombia's arguments and affirmed the Civil Court Decision and the Injunction Order in full.[450]

187. Moreover, the Superior Court, like the Civil Court below it, admonished Colombia for its abusive conduct during the proceedings in which Government officials had made veiled threats against the judges presiding over the matter should the court find in SSA's favor.[451] The Superior Court noted (in relevant part):

> *The veiled threats to which the Representative of the Public Prosecutor's Office resorts to in his brief cannot be overlooked . . .*
>
> *The quotation of these two lines*[452] *is therefore unfortunate, not at all serious and very close to disrespect, more in line with a politician seeking reelection.*
>
> *And the announcement to report "the irregular matter to the competent authorities in disciplinary matters" can only be received as a veiled threat, an undue pressure aimed at restricting the independence of the Administration of Justice (Art. 228 C.N., especially coming from a representative of the Public Prosecutor's Office.)*
>
> *Therefore, it is necessary to remind the attorney representing the Public Prosecutor's Office in these proceedings that he is also obliged to comply with the duties set forth in Article 71 of the Code of Criminal Procedure, especially those set forth in numeral 3, and that the use of means other than persuasion to influence the minds of officials and the use of threats against officials or collaborators constitute an offenses [sic] against the proper administration of justice (Article 51 Decree 196/71).*[453]

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450 *See* **Exhibit C-27 [EN]**, Superior Court of the Judicial District of Barranquilla, Case File No. 20.166, Judgment, 7 March 1997, PDF p. 64 ("*2.) To confirm the entirety the order dated October twelfth (12th), nineteen ninety-four (1994) . . . 3.) To confirm the entirety of the judgment dated July sixth (6th), nineteen ninety-four (1994)*") (SSA's Unofficial Translation).

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

452 Referring to **Exhibit C-76 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995, PDF pp. 7-8 ("[T]*he transcription* [by Colombia's counsel] *of two lines by a literary figure whose name is not of interest and is not remembered now: 'There is light in the* poterna *and a guardian in the estate'. Poterna is a door, a secondary gate that allows access to a fortification, or a building. If light is shine on it, it is to avoid that, taking advantage of the darkness, people with bad intentions can enter, of course, with malevolent purposes. And the guardian of an estate complements the light of the gate, because his task, his work, is to reject the presence of strangers, of invaders.*") (SSA's Unofficial Translation).

453 **Exhibit C-76 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgement, 23 June 1995, PDF pp. 7-8 (SSA's Unofficial Translation).

188. In view of Colombia's egregious conduct in the domestic proceedings, members of the U.S. Congress wrote to the U.S. Department of State to express concern about the treatment of SSA Cayman, given its U.S. investors:

> ***Attorneys representing the Government of Colombia and the Public Ministry in the appeal pending before the Superior Court for Barranquilla have made open, public direct threats against the Court and Judges in Court documents should they rule in favor of Sea Search Armada.***
>
> *These developments raise very serious questions concerning the actions of the Government of Colombia relative to the rights of American citizen investors, without mentioning the possible impact upon future American investment in Colombia . . .*
>
> *In light of these very disturbing developments, we request that the Department of State, without equivocation, intercede with the Government of Colombia in order to protect the rights of American citizens and protest the use of inappropriate political pressure and threats by the Government of Colombia against the Judges assigned to appeal of this lawsuit.*[454]

(e) The Colombian Supreme Court Upholds SSA's Predecessors' Rights

189. Both Colombia and SSA Cayman appealed the Superior Court Decision.

190. On 15 February 2000, SSA Cayman appealed on one issue only: the Court's finding that the treasure should be equally divided between SSA Cayman and Colombia if it was to be found in Colombia's continental shelf or exclusive economic zone.[455] According to SSA Cayman, Colombia's rights to goods found in these areas was limited and thus Colombia should not be entitled to 50% of those goods.

191. Colombia, on the other hand, challenged almost the entirety of the Superior Court decision. In fact, Colombian authorities filed two separate challenges: one by the Colombian Attorney General and the other by the State itself.

192. On 18 March 2020, the Colombian Attorney General challenged the Superior Court Decision on a number of issues including that GMC did not show that it had legally

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[454] **Exhibit C-77**, Letter from the House of Representatives, Congress of the United States, 19 July 1995, PDF pp. 1-2 (emphasis added).

[455] *See* **Exhibit C-190 [EN]**, SSA Cayman's Appeal to the Supreme Court, 15 February 2000, PDF p. 32.

assigned to SSA Cayman the rights to explore, discover and ultimately be recognized as the discover of the treasure.[456]

193. Ten days later, on 28 March 2000, the State of Colombia itself also filed a challenge against the Superior Court Decision to the Supreme Court.[457] Colombia challenged the Superior Court Decision on almost identical grounds to those already filed by the Colombian Attorney General,[458] and made the following additional arguments:

a. SSA's Predecessors did not have "*acquired rights*" because the act of the discovery did not in itself grant SSA's Predecessors any right, and it would have been only with the execution of an administrative contract for the salvage of the shipwreck that those rights would have vested.[459]

b. The Superior Court erred in finding that the goods were to be considered "*treasure*" because it failed to apply the laws and regulations that provide that culturally significant goods are subject to special protections and therefore are property of the Sate as part of cultural patrimony. Colombia also stated that "*if those goods are found or rescued, they cannot be owned by the possessor or discoverer; they must be placed at the disposal of* [Colombia]."[460]

194. On 5 July 2007, almost two decades after SSA Cayman had initiated the court proceedings, the Supreme Court rendered its decision in the matter ("**2007 Supreme Court Decision**"). The Supreme Court denied SSA Cayman's challenge[461] and denied all but one of Colombia's challenges.

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456 *See* **Exhibit C-192 [EN]**, Colombian Attorney General's Appeal to the Supreme Court, 18 May 2000, PDF p. 30.

457 *See* **Exhibit C-191 [EN]**, Colombia's Appeal to the Supreme Court, 28 March 2000, PDF p. 25.

458 *See* **Exhibit C-191 [EN]**, Colombia's Appeal to the Supreme Court, 28 March 2000, PDF p. 25.

459 **Exhibit C-191 [EN]**, Colombia's Appeal to the Supreme Court, 28 March 2000, PDF p. 35 ("[B]*ecause it is the administrative contract that would determine whether it would get a share, a percentage, or not*.") (SSA's Unofficial Translation).

460 **Exhibit C-191 [EN]**, Colombia's Appeal to the Supreme Court, 28 March 2000, PDF p. 23 (SSA's Unofficial Translation).

461 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 209 ("*6. In light of the above considerations,* [SSA Cayman's challenge] *is dismissed.*") (SSA's Unofficial Translation).

195. First, the Supreme Court found that GMC had validly assigned its rights to explore, discover, and partake in the declared treasure to SSA Cayman, and that DIMAR did not need to authorize the transfer of rights that had vested in the declarant unless the transferee intended to conduct underwater exploration.[462] The Supreme Court in fact clarified that Colombia's argument was fundamentally flawed as Colombia was trying to apply laws meant for the assignment of credits to an assignment of property rights.[463]

196. Second, the Supreme Court affirmed that the act of discovery vests the declarant with rights in the declared property, and no further action or contract was needed.[464] Specifically, the Supreme Court held that:

> *It is clear, therefore, that* ***the right to a treasure is acquired by its discovery****, lato sensu,* ***and not by its material or physical apprehension***

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

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

464 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 184 ("[I]*f the legislator allows the search for treasures on someone else's property and, in the case of those located at the bottom of the sea, makes their rescue subject to the prior execution of a contract . . . it is obvious that the right of ownership over the treasure, both for it and for the owner, surfaces from the moment of discovery*.") (SSA's Unofficial Translation).

(corpus), ***a concept that also includes reporting its location****, applicable to discoveries that occur on land or property owned by others.*[465]

197. The Supreme Court thus concluded that GMC's rights had vested in the shipwreck with Resolution No. 0354,[466] which had been validly assigned to SSA Cayman.[467]

198. The Supreme Court's clear ruling on this point (upholding the same ruling by the Superior Court) negates Colombia's assertions during the Hearing on Preliminary Objections that Articles 700 and 701 of the Civil Code[468] required SSA's Predecessors to report "*the discovery of a particular treasure*"[469] and to request the recognition of rights "*over a particular treasure.*"[470]

199. Respondent's position finds no support in the Civil Code and was rejected by the Supreme Court. The Civil Code is clear that the only requirements imposed by the law are: (i) to have prior authorization from the owner of the property (*i.e.*, Colombia in this case), which SSA's Predecessor had; and (ii) to report a find, which SSA's Predecessor did.[471] This reading was also supported by the Supreme Court that required nothing further than discovery to trigger ownership rights under the Civil Code.[472] Moreover, as the Supreme Court noted one of the characteristics of "*treasure*" is that "*they must have*

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465 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 157 (emphases added) (SSA's Unofficial Translation).

466 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 182 ("*Deriving the right of ownership claimed by the plaintiff, from the very fact of the discovery of the assets that are the subject of this judicial controversy, insofar as they of course correspond to a treasure, a circumstance guaranteed in the legal sphere with the recognition that in this sense was made by the General Maritime and Port Directorate, according to Resolution 0354 of June 3, 1982, to the* Glocca Morra Company.") (SSA's Unofficial Translation). This is further confirmed now by Justice Ortíz who succinctly explains that "*Resolution No. 0354 recognizes and, by that fact, produces rights to GMC, while the latter acquires its rights by complying with Colombian regulations and by virtue of the application of the rules of the Civil Code. The DIMAR recognizes* [GMC's] *status* [as] *declarant and in doing so allows it to claim the rights established in the regulations in force*." **CER-5 [Ortíz]**, ¶ 68.

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

468 *See* Hearing on PO Day 1, 107:25-108:4. Respondent argued that the use of the word "*the*" in Article 701 of the Civil Code "*is decisive as it illustrates that the conferral of rights under Article 700 and 701 is premised on two grounds. First, the discovery of a treasure. And, second, on the treasure being found on another's land*."

469 Hearing on PO Day 1, 108:25.

470 Hearing on PO Day 1, 109:3.

471 *See supra* ¶¶ 25-26.

472 *See supra* ¶ 196.

been 'buried since time immemorial.'"[473] Something that is almost lost to time, by its very nature, cannot be identified with the level of particularity Respondent purports to require in this proceeding, without its physical recovery and identification. Accordingly, the Supreme Court was clear that "*physical apprehension*" of the treasure was not required to secure rights to it.[474]

200. This reading is supported by Justice Ortíz, who explains that "*the Supreme Court of Justice made it clear that the ownership of the treasure is not acquired by the physical apprehension of the property (i.e. by extraction), but by its* ***discovery***."[475] Furthermore, she clarifies that "*the right to the treasure generates property only with the discovery,* [which is to be] *understood as the report of the find*[.]"[476] Following the Supreme Court's guidance she concludes that the "*report confers the property rights to the discoverer.*"[477]

201. Third, the only challenge by Colombia that the Supreme Court partially upheld was in relation to its argument that the Civil and Superior Courts had failed to consider laws of cultural patrimony when determining what portion of the discovery belonged to SSA Cayman. The Supreme Court conducted an extensive analysis of the term "*treasure*" under Colombian law and held that, as reported, the shipwreck could constitute "*treasure*" within the meaning of Articles 700 and 701 of the Civil Code[478] because it was:

a. Manmade, and more specifically that "*it must be movable things that have a value and are the product of human work or task, that is, that*

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473 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 97 (SSA's Unofficial Translation).

474 *See supra* ¶ 196.

475 **CER-5 [Ortíz]**, ¶ 91 (emphasis in original).

476 **CER-5 [Ortíz]**, ¶ 63.

477 **CER-5 [Ortíz]**, ¶ 92.

478 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 211. *See also* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 234 (recounting the Superior Court's decision to confirm the applicability of art. 701 of the Civil Code, which the Supreme Court did not reverse).

having been forged by man, have some economic significance in themselves considered, well, precious";[479]

b. Buried or lost for a long time;[480] and

c. The owner was not known or could not be found at the time of the discovery.[481] On this point, the Supreme Court clarified that it is expected that a treasure must have had an owner at some point in time (being manmade) but that the "*discovery of a treasure is an example of ownership over a good that, having once had an owner, the information on the owner has been lost.*"[482] Citing distinguished legal scholars the Supreme Court expanded and clarified that "***even an ancient find of which the original owner is known, but the current heir is unknown, is to be considered a treasure.***"[483] Thus, in assessing the third factor, the Supreme Court rejected Colombia's arguments that it was known, at the time of the discovery, that the shipwreck was owned by Colombia or, in the alternative, by Spain.[484] More so, the Supreme Court made clear that

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479 *See* **Exhibit C-28**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, p. 89. *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 91 ("*It is also important to highlight that the goods that constitute a treasure, as a matter of principle, must be the product of a human work, that is sons of man, that is, that their hand is reflected in them, in one way or another, as a bonus*.") (SSA's Unofficial Translation).

480 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 97 ("*Secondly, those assets, thus understood, must have been buried or hidden for a long time. In the words of Don Andrés Bello, they must have been 'buried since time immemorial and found . . . without the help of magic.'*") (SSA's Unofficial Translation).

481 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 107 ("*Thirdly, in order to properly speak of a treasure,* it is essential that there be no memory or trace of its owner.") (SSA's Unofficial Translation).

482 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 108 (SSA's Unofficial Translation).

483 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 109 (emphasis in original) (SSA's Unofficial Translation).

484 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 169 ("*To affirm that by virtue of eminent domain, all the precious effects buried or hidden prior to the independence process, in the then Viceroyalty of New Granada, belong to the Colombian Nation would imply affirming that, in Colombia, by itself, there cannot be treasures that have been 'deposited' before independence, which conflicts with praxis, with legal reality*."), 170-71 ("*To the foregoing, it is added that this particular accusation has as its starting point that the assets discovered were the property of the Spanish Crown, a fact that was neither affirmed by the Court, nor does it appear accredited in the process. And this is of paramount importance because if the charges in cassation—not in the judgment carried out by the first and second degree judges—are outlined by direct means, then it is not possible to disagree with the vision that the judge had about the facts . . . In any case, it should be noted that the appeal*

under Colombian law "[i]*t is unquestionable that proof of ownership of the found objects rests with the party who invokes it,* ***and that in case of doubt, such objects must be considered to be treasure***."[485]

202. The Supreme Court then distinguished the concept of "*treasure*" (which should be apportioned on a 50/50 basis) from objects of "*cultural heritage*," to which the 50/50 apportionment scheme under Articles 700 and 701 of the Civil Code did not apply. The Supreme Court agreed with the Constitutional Court's decision that "*not every sunken good is part of the national heritage, because it must be of historical or archaeological value to justify its incorporation into said heritage.*"[486]

203. The Supreme Court refrained from stating how much of SSA Cayman's discovery was treasure because "[t]*he extraction or exhumation of the declared goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus their characteristics, features, or individual traits are not fully known.*"[487]

204. Thus, the Supreme Court upheld most of the Civil Court Decision, only modifying it in respect of the Supreme Court's recognition of items of cultural heritage as a category of goods separate from treasure. This is made clear by the Supreme Court's *dispositif*:

a. First, the Supreme Court decided to accord "*full and unequivocal protection to the national cultural, historical, artistic, and archaeological heritage, including underwater heritage," which are excluded objects with these characteristics from "the declaration of ownership*."[488]

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does not explain why the aforementioned assets were really and effectively owned by the Spanish Crown, because although such a statement is made in it, no support was offered to it, leaving it deprived of all support.") (SSA's Unofficial Translation).

485 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 110 (emphasis in original) (SSA's Unofficial Translation).

486 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 230 (SSA's Unofficial Translation).

487 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 223 (SSA's Unofficial Translation).

488 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 234 (which reads in full: "***FIRST: TO PROVIDE*** *full and unequivocal protection to the national cultural, historical, artistic, and archaeological heritage, including underwater heritage. For that reason, it expressly excludes each of the goods that are or may be 'movable monuments,' according to the description and reference set forth in Article 7 of Law 163 of 1959, from the declaration of*

b. Second, the Supreme Court modified the Civil Court's Decision,[489] only with "*the understanding that the property recognized therein, in equal parts, for the Nation and the plaintiff, refers solely and exclusively to goods 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*."[490]

c. Third, the Supreme Court upheld the remainder of the Civil Court Decision.[491]

205. Colombia claims that the 2007 Supreme Court Decision limited SSA Cayman's rights to a single set of coordinates.[492] Colombia argues that the Supreme Court's statement

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ownership set forth in the second item of the operative part of the trial court judgment, rendered in such trial by the Tenth Civil Court of the Circuit of Barranquilla on July 6, 1994. Such goods are subject to and governed by the protective system established therein, as well as by the constitutional and legal provisions that have subsequently been issued with the same specific purpose, which have granted broad, general protections.") (emphasis in original) (SSA's Unofficial Translation).

489 *See* **Exhibit C-25 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 33. ("D*eclare that 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*") (SSA's Unofficial Translation).

490 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 234-35 (which reads in full: "***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 goods 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 to in the 'Confidential Report on Underwater Exploration conducted by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982,' Page 13 No. 49195 Berlitz Translation Service,' which does not include other spaces, zones, or areas*.") (emphases in original) (SSA's Unofficial Translation).

491 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 235 ("***THIRD:*** *Notwithstanding the determinations adopted in the two previous points,* ***CONFIRM*** *the rest and pertinent, the aforementioned judgment of first instance.*") (emphases in original) (SSA's Unofficial Translation).

492 *See* Colombia's Preliminary Objections, ¶ 156 ("*As can be seen, pursuant to operative paragraph 2 of the 2007 CSJ Decision, any property rights of Glocca Morry Company, as a recognized reporter, were conditioned on compliance by the relevant assets with two cumulative criteria:* first*, on the assets being in the area of '*the coordinates referred to in the 'Confidential Report on Underwater Exploration', 'without including, therefore, different spaces, zones or areas'*; and* second*, on the assets still being susceptible '*of being qualified juridically as a treasure' *pursuant to the applicable law*.").

that SSA Cayman has rights to the "*assets . . . only referred to those located within the specific coordinates recognized in the Confidential Report, 'without including, therefore, different spaces, zones or areas'*" somehow shrinks SSA Cayman's rights from the area it reported to pinpoint coordinates.[493] That is incorrect. As the Supreme Court made clear, it only modified the lower court's decision to clarify that cultural patrimony goods cannot be privately claimed. The Supreme Court expressly upheld the remainder of the Civil Court Decision. This included the Civil Court's declaration that SSA Cayman was entitled to rights in the Discovery Area, as the Supreme Court, like the lower courts, defined SSA Cayman's rights with reference to the area identified in the 1982 Report.[494]

206. The Supreme Court's exclusion of "*other spaces, zones, or areas*"[495] thus cannot be read to exclude, as Colombia argues, spaces and areas that the 1982 Report itself included. Indeed, doing so would put Resolution No. 0354, which fully integrated the 1982 Report, at odds with itself.[496] This reading is confirmed by Justice Ortíz, who explains that "*DIMAR decided to 'recognize' GMC as the reporter of treasures or shipwrecked species in the area referred to in the 1982 Report*."[497] Moreover, Colombian law at the time SSA's rights vested recognized that even if a reporter had reported pinpoint coordinates (which was not the case here), then even those coordinates would be subject to a reasonable margin of error. As Justice Ortíz explains, "*DIMAR's recognition was in accordance with Article 112 of Decree 2349 of 1971, which empowered DIMAR to issue a regulation to determine how to register the declarations of findings* ***in relation to the geographic coordinates that determine the position of each find and the margins of error that may be accepted***."[498] Justice Ortíz goes on to conclude that:

> *The applicable law at the time GMC was recognized as a reporter of treasure did not strictly limit* [the rights] *to the coordinates reported, but these had to extend to an acceptable margin of error. Although there is*

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493 Colombia's Preliminary Objections, ¶ 66.

494 *See supra* ¶¶ 164-165, 176-177.

495 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 235 (SSA's Unofficial Translation).

496 *See supra* ¶¶ 83-85.

497 **CER-5 [Ortíz]**, ¶ 55.

498 **CER-5 [Ortíz]**, ¶ 56 (emphasis in original).

> *no specific legal or jurisprudential definition of what is meant by 'acceptable margins of error', it is essential to emphasize that the application of this margin must be reasonable. Thus, this notion cannot be restricted in such a way as to limit the coordinates to an exact pinpoint, since the text of Decree 2349 of 1971 is clear in not imposing such a limitation but in recognizing margins of acceptability.*[499]

207. Accordingly, the 2007 Supreme Court Decision upheld SSA Cayman's rights to the entirety of the Discovery Area and dismissed Colombia's objections that it continues to raise until today, including that the assignment of rights between SSA's Predecessors was defective and needed DIMAR authorization, or that SSA Cayman did not have vested, acquired rights to the treasure its Predecessors found.

E. SSA Attempts To Enforce Its Rights To San José Shipwreck

208. Following its victory before the Supreme Court, SSA Cayman transferred its rights to SSA, which SSA then sought to enforce, first through discussions with Colombia and then litigation before foreign courts.

(a) SSA Acquires Its Investment In Colombia

209. On 18 November 2008, SSA acquired substantially all of SSA Cayman's assets and liabilities pursuant to an Asset Purchase Agreement ("**APA**").[500] It is undisputed that both SSA and SSA's Predecessors represented and maintained the interests of the same underlying U.S. investors who had originally invested in the exploration and reporting of the San José shipwreck.[501] The assets transferred under the APA include the rights vested under, *inter alia*, the following DIMAR resolutions:

a. 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

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499 **CER-5 [Ortíz]**, ¶ 56.

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

501 *See* SSA's Response, ¶¶ 166-71 (explaining that the U.S. founders who created GMC Inc. and further U.S. investors in GMC Inc., GMC and SSA Cayman, all had their investments reflected via partnership interests in SSA Cayman and ultimately became Economic Interest Holders in SSA, whom SSA must compensate in accordance with their investments pursuant to the APA).

b. 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. In consideration for the assets, SSA undertook to "*assume and thereafter . . . pay, perform and discharge in accordance with their terms, as and when due, the Assumed Liabilities*" of SSA Cayman.[502] This included payment and performance obligations, including payments to various vendors involved in the search and identification of the San José,[503] as well as the obligation to distribute all proceeds obtained to the Economic Interest Holders, which were all previously Partners of SSA Cayman, in portions equivalent to their rights of recovery under the SSA Cayman Partnership Agreement.[504] Thus, in 2008, SSA became the owner of rights to the discovered treasure that had previously belonged to SSA's Predecessors.

211. While Colombia initially complained about whether the transaction had occurred,[505] Colombia has since acknowledged that SSA acquired the investment, as Colombia has noted that "*SSA Cayman's rights were successfully transferred to Sea Search Armada, LLC*" which "*implies that they were transferred through the 2008 APA*."[506]

(b) SSA Seeks To Salvage The San José

212. Immediately after the Supreme Court Decision, on 15 August 2007, SSA's Predecessor reached out to the then-President of Colombia in the hopes of progressing the salvage

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

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

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

505 Colombia's Reply, ¶ 207. In its original submission, Colombia had asserted that "[n]*o evidence is provided that the conditions were satisfied, that the promised transaction closed or that a price was paid*." Colombia's Preliminary Objections, ¶¶ 139, n. 113 (citing the language in the preamble of the APA that the agreement was based "

506 Colombia's Response to Spain's Application to Intervene, fn 15. *See also* Decision on PO, ¶ 200.

of the San José shipwreck pursuant to the 2007 Supreme Court Decision.[507] This initiated discussions with Colombian authorities for the next two years.

213. On 2 March 2009, following the execution of the APA, SSA wrote to Colombia reprising its Predecessors' request to salvage the treasure, fearing that the shipwreck was at risk of being ransacked.[508] SSA reiterated this concern in a letter dated 14 April 2009, noting that Colombia's attitude indicated that the Government would prefer the treasure be lost to all rather than allow SSA access to the location.[509]

214. Colombia, however, rejected SSA's requests. For example, on 27 April 2010, the Legal Secretary to the President of Colombia wrote to SSA claiming that the 2007 Supreme Court Decision did not compel the Colombian Government to take any specific action, salvage or otherwise, and that SSA was prohibited from visiting its property without prior approval of the Colombian Government. The letter threatened SSA with retaliation by "*the National Armed Forces*" if SSA attempted to salvage the shipwreck itself.[510]

215. Given Colombia's unwillingness to collaborate and now in light of its threats of violence, SSA responded on 9 December 2010 that it would have to resort to foreign courts to enforce its rights.[511]

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

508 *See* **Exhibit C-111**, Letter from SSA to the President of Colombia, 2 March 2009, p. 1. These fears were not academic. Evidence has since surfaced that the site has been tampered with, if not looted, leading to a criminal complaint filed by a citizen ombudsman against the Government of Colombia. *See* **Exhibit C-120**, S. Durwin, *Las nuevas imágenes del galeón San José revelan la posible manipulación de los restos arqueológicos*, EL DEBATE, 8 June 2022, *available at* https://www.eldebate.com/historia/20220608/nuevas-imagenes-galeon-san-jose-revelan-posible-manipulacion-restos-arqueologicos.html#; **Exhibit C-123**, *Expresidente Juan Manuel Santos será investigado por intrusión y presunto saqueo arqueológico al galeón San José*, SEMANA, 19 March 2024, *available at* https://www.semana.com/nacion/articulo/atencion-expresidente-juan-manuel-santos-sera-investigado-por-intrusion-y-presunto-saqueo-arqueologico-al-galeon-san-jose/202448/; **Exhibit C-121**, Interview of Captain Germán Escobar, BLURADIO COLOMBIA, 23 February 2024, minute 1:10-1:20; **Exhibit C-122**, Transcript of Interview of Captain Germán Escobar, BLURADIO COLOMBIA (excerpts), 23 February 2024 ("*We are carrying out methodologies, we are in training, so that, in the month of May or June, we are going to go to the sea to carry out all the campaigns. First training. It involves getting together all the research modules. . . . and beginning to do the practice exercises in an already-identified site to be able to, in the month of June, July, or August, in that period, carry out the expedition already on the site*.").

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

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

511 *See* **Exhibit C-194 [EN]**, Letter from SSA to the President of Colombia, 9 December 2010.

(c) SSA Commences Legal Proceedings Outside Of Colombia To Protect The Rights Recognized By The Colombia Courts

216. Given Colombia's refusal to comply with the 2007 Supreme Court Decision, SSA initiated litigation proceedings to enforce its rights before: *(i)* the U.S. courts, and *(ii)* the IACHR. SSA ultimately discontinued both of those proceedings at Colombia's request as a condition for renewing discussions and moving forward with the possible salvage of the San José.

(1) SSA Initiates U.S. Litigation

217. On 7 December 2010, SSA filed a complaint against Colombia in the U.S. District Court for the District of Columbia ("**U.S. Litigation**").[512] SSA alleged that:

a. Colombia had breached the salvage contract it was negotiating with SSA;[513] or

b. Colombia had committed conversion by refusing to allow SSA to initiate salvage operations;[514] and

c. The U.S. court should enforce the 2007 Supreme Court Decision as a foreign judgment.[515]

218. Colombia did not challenge SSA's authority to bring these claims or its ownership of the underlying rights. Rather, it disputed the U.S. Court's jurisdiction over the matter.

219. The U.S. Federal Court ultimately rejected SSA's claims, finding it had no jurisdiction. The Court found that SSA's breach of contract and conversion claims were time barred under U.S. law, and that it could only enforce foreign money judgments, not declaratory judgments like the 2007 Supreme Court Decision.[516] Specifically, the U.S. Court held

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

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

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

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

516 *See* **Exhibit R-19**, United States District Court for the District of Columbia, Civil Action No. 10-2083 (JEB)–2083, Memorandum Opinion, 24 October 2011.

that the 2007 Supreme Court Decision did not qualify as a money judgment under the applicable U.S. statute because Colombia's Supreme Court had merely determined what percentage of recovered San José treasure SSA owned, rather than calculating a specific "*sum of money*." The United States Court of Appeals for the District of Columbia Circuit confirmed the U.S. Court decision after SSA appealed. Given this, on 23 April 2013, SSA filed a new civil action against Colombia before the U.S. Court due to Colombia's tortious interference with SSA's rights to contract. As explained below, SSA withdrew these claims at Colombia's request in order to resume discussions that would lead to the salvage of the San José.

(2) SSA Files The IACHR Petition

220. As the U.S. Litigation progressed, Colombia's attitude towards SSA grew increasingly hostile. While Colombia had earlier confirmed that it would abide by the 2007 Supreme Court Decision,[517] on 26 November 2012 Colombia informed SSA in a letter that Colombia would now wait for the results of the U.S. Litigation before "*adopting the decisions that may be required.*"[518] Based on Colombia's change in attitude, SSA filed a petition before the IACHR.[519]

221. In its IACHR petition, SSA claimed violations of its rights to property[520] and judicial protection[521] under the Inter-American Convention on Human Rights. As in the U.S.

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

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

[519] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 38-39.

[520] *See* **Exhibit CLA-4**, American Convention on Human Rights, 22 November 1969, art. 21(1) and (2) ("*1. Every person has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the social interest. 2. No person may be deprived of his property, except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.*").

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

Litigation, SSA did not complain about the existence of its rights, but rather that Colombia was preventing it from accessing its property.[522]

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

222. On 22 December 2014, in response to a letter from SSA inviting Colombia to reinitiate discussions,[523] the Minister of Culture confirmed Colombia's intent to negotiate a mutually beneficial resolution, but stated that it would only do so if SSA withdrew its lawsuits:

> *In this regard, I would like to reiterate the position established for several years by the Colombian Government is that* ***there is no possibility of dialogue until the judicial actions of any kind are definitively terminated.*** *Therefore, it is not sufficient to request the suspension of any proceedings, as stated in the annexes to your communication, but rather that* ***such proceedings must be terminated****.*[524]

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[522] *See* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶¶ 24, ("[T]*he rights of the Republic of Colombia over the shipwreck and those of SSA, its co-owner, were fully determined and protected, with the force of res judicata, by the highest body of its ordinary jurisdiction*."), 26 ("*It must be kept in mind that the proceedings before the civil jurisdiction of Colombia, in which SSA's dominion over half of the treasures was declared, was a pure declaratory proceeding, which are those in which only legal certainty is sought regarding the right claimed*."), 27 ("*Therefore, the Supreme Court's ruling imposed on SSA the obligation, correlative to the declared right of ownership, to allow, or at least not hinder, the exercise by SSA of the powers or faculties inherent to such ownership*.") (SSA's Unofficial Translation).

[523] *See* **Exhibit C-32 [EN]**, Letter from the Minister of Culture to SSA, 22 December 2014 (noting that Colombia had received a letter "*stat*[ing] *the willingness of the firm Sea Search Armada to initiate dialog 'to attempt a negotiated solution to the application of the Supreme Court judgment of July 5, 2007. . .*'") (SSA's Unofficial Translation).

[524] **Exhibit C-32 [EN]**, Letter from the Minister of Culture to SSA, 22 December 2014 (emphases added) (SSA's Unofficial Translation). *See also* **Exhibit R-21**, Sea Search Armada, LLC's Petition against Colombia before the IACHR, 15 April 2013, ¶ 38 (referring to Colombia's communication that it would wait for the results of the U.S. Litigation before proceeding to negotiate a resolution with SSA).

223. Hoping to find an amicable way to enforce the 2007 Supreme Court Decision, SSA took Colombia at its word[525] and withdrew both the U.S. Litigation[526] and the IACHR petition.

224. In its Preliminary Objections, Colombia erroneously claimed that SSA's claims in the U.S. and IACHR Proceedings somehow served as an acknowledgment that SSA's rights had already been expropriated. As SSA has explained, Colombia's position misconstrues the nature of the claims made in the U.S. and IACHR Proceedings, which stemmed from Colombia's refusal to act in accordance with the 2007 Supreme Court Decision, whereas this current Arbitration arises from Colombia's complete evisceration of SSA's rights.[527] The Tribunal thus rightly did not accept Colombia's claims in this respect.[528]

F. Colombia Relaunches Attempts To Find And Salvage The San José

225. Though SSA had terminated the U.S. and IACHR Proceedings in good faith, expecting to come to a negotiated resolution with Colombia to be able to access its rights, Colombia went behind SSA's back and contracted with another operator to rediscover the San José shipwreck. Colombia's actions in this respect, along with information that has been leaked in the public domain regarding the location of the shipwreck, only further confirm that SSA's Predecessors had indeed located the San José shipwreck in 1981.

(a) SSA And Colombia Engage In Discussions To Recover The San José Shipwreck, While Colombia Furtively Engages MAC

226. On 14 May 2015, following SSA's termination of the U.S. and IACHR proceedings, the President of Colombia informed SSA that, while in the past it had not been possible

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525 *See* **Exhibit C-33 [EN]**, Letter from SSA to the Minister of Culture, 19 January 2015 ("*As it is about putting an end to a quarter of a century of judicial procedures and through dialogue agree on the application or realization of the decision that resolved the dispute. . .Sea Search Armada agrees to withdraw from the processes that are in progress before the Court of the District of Columbia and the Inter-American Commission on Human Rights, so that according to your position, with the termination of these proceedings, the aforementioned dialogues begin*.") (SSA's Unofficial Translation); **Exhibit C-34**, Letter from SSA to the President of Colombia, 20 January 2015, PDF p. 1.

526 *See* **Exhibit C-80**, SSA Withdrawal Of Its Motion To Alter Or Amend The Court's Judgment, 20 February 2015.

527 *See* Colombia's Preliminary Objections, ¶¶ 79, 162-69.

528 As explained *infra* ¶¶ 291-292, the Tribunal found that SSA had rights as of 2019 given that the Colombian courts recognized such rights by reinstating the Injunction Order at that time. *See* Decision on PO, ¶ 273.

to negotiate with SSA due to ongoing legal proceedings, "[i]*n the new circumstances*" Colombia wished to "*reopen direct dialogue*," which would be led by the Minister of Culture.[529] Colombia invited SSA to a meeting to be held on 19 May 2015 to discuss the matter further.[530]

227. A few days later, on 19 May 2015, the Minister of Culture met with SSA representatives.[531] At the meeting, the Minister of Culture informed SSA that the Government would only continue to negotiate if it was able to confirm that the shipwreck was located at the **pinpoint coordinates** listed in the 1982 Report.[532] SSA pointed out that this was inconsistent with the 1982 Report—the source of SSA's rights under Resolution No. 0354, as confirmed by the 2007 Supreme Court Decision—which had "*clearly established that the shipwreck was not in the coordinates* [] *indicated, but in its immediate vicinity*."[533] Indeed, the 1982 Report expressly declared that GMC had made its find at: "*target 'A' and its surrounding areas that are located in the immediate vicinity of 76º 00' 20" W 10º 10' 19" N.*"[534]

228. The following day, on 20 May 2015, SSA followed up with a detailed analysis of the 2007 Supreme Court Decision, explaining that:

a. The coordinates provided in the 1982 Report were reference points to locate the shipwreck in their "*immediate vicinity*";[535]

b. SSA was not required to provide precise coordinates under the law in force at the time it discovered the wreck which, instead, contemplated the possibility of a "*margin of error*"[536] in recognition of the limited

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

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

531 *See* **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015 ("*According to what was said yesterday at your office*").

532 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 3.

533 **Exhibit R–25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 3.

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

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

536 **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, pp. 9-12.

technology available at the time SSA discovered the San José shipwreck;[537] and

c. The 2007 Supreme Court Decision confirmed SSA's rights to the "*immediate vicinity*" or "*surrounding areas*" of the reported coordinates.[538]

229. While it was attempting to artificially limit SSA's rights to pinpoint coordinates, on 26 May 2015, Colombia entered into a contract with another foreign company, MAC, to conduct an oceanographic survey to supposedly confirm the location of the San José.[539] If MAC discovered the San José, it would be entitled to "*20% of the value of the assets that do not constitute heritage*."[540]

230. The day after executing the contract with MAC, on 27 May 2015, Colombia wrote to SSA, noting that it would assess SSA's analysis and, in the meantime, asked SSA to specify what it considered to be the "*margin of error*" associated with the reported coordinates.[541] Specifically, Colombia noted that "*it is necessary for us to be able to complete a full analysis of the content* [of] *your document, that Sea Search Armada specifies and defends what it considers to be the margin of error, with respect to the*

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[537] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, p. 10 ("*This authorization to report the 'presumed' location of the discovery, with the consequent acceptance of margins of error in such reporting, is due to the fact that in 1968, when this decree was issued, there were no methods of measurement that could accurately determine the location of a shipwreck*.").

[538] **Exhibit C-35**, Letter from SSA to the Minister of Culture, 20 May 2015, pp. 13-15.

[539] *See* **Exhibit C-36 [EN]**, Ministry of Culture Resolution No. 1456, 26 May 2015, art. 1 ("*APPROVE the pre-feasibility and AUTHORIZE Maritime Archaeology Consultants Limited -MAC- the exploration in Colombian maritime waters to identify contexts likely to contain submerged cultural heritage under the parameters established in the present resolution*.") (SSA's Unofficial Translation). *See also* **Exhibit C-43**, Ministry of Culture Resolution No. 0113, 4 March 2022 ("*That on January 29, 2015, the Ministry of Culture received an offer from MARITIME ARCHEOLOGY CONSULTANTS LIMITED -MAC- . . . to execute the activities made reference to in article 4 of Law 1675 of 2013 in the development of a project of submerged cultural patrimony named the 'San José' . . . That through Resolution No. 1456 of 26 May 2015, the Ministry of Culture approved the prefeasibility presented by the Originator and authorized MARITIME ARCHEOLOGY CONSULTANTS LIMITED -MAC- to explore the Colombian maritime waters to identify areas susceptible to having submerged cultural patrimony*.") (SSA's Unofficial Translation).

[540] **Exhibit C-43**, Ministry of Culture Resolution No. 0113, 4 March 2022, art. 14 ("*If, as a result of the authorized exploration activities, a discovery is made, the remuneration to whoever is awarded the public-private partnership contract for the development of the activities of intervention, economic use, preservation, conservation and curatorship of the underwater cultural heritage, will be 20% of the value of the assets that do not constitute heritage*.").

[541] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.

coordinates of the Court's ruling."[542] Colombia now also refused to indicate that the ship in question was in fact the San José, insisting that the purpose of the negotiations was to conduct a verification of the discovery.[543]

231. On 3 June 2015, SSA responded proposing a meeting to discuss the Discovery Area, including the margin of error inherent in the coordinates.[544] In an effort to progress the discussions, SSA also noted that, in the spirit of cooperation, it was willing to table the discussion on whether it had rights to the San José pending verification of its Predecessors' discovery.[545]

232. SSA followed up on 9 June 2015, explaining that various advancements in technology over the last 30 years would have an impact on the margin of error, necessitating a meeting to properly delineate the area for verification purposes.[546] Among other things, SSA pointed out that:

a. The location of the shipwreck was not at the coordinates listed in the 1982 Report but in its vicinity.[547]

b. Even the coordinates listed in the 1982 Report could not simply be transposed to today's coordinate system. This was because navigation in 1981-1982 was based on "*a pre-World War II navigational chart*" while "*current navigation is based on the World Geodetic System 84 and GPS*," and these systems are "*not interchangeable*".[548]

c. The oceanographic data from the expeditions in the 1980s was in a format that would be time-consuming and costly to convert to a format that was readable by modern computers; thus "*it would be preferable to*

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[542] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.

[543] **Exhibit C-82**, Letter from Ministry of Culture to SSA, 27 May 2015.

[544] **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015.

[545] **Exhibit C-83**, Letter from SSA to Ministry of Culture, 3 June 2015.

[546] *See* **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, PDF p. 2 ("*The purpose of this brief account is to show that the project has been profoundly affected by the 31 years that have elapsed since the litigation arose, because the technical advances made during those years have made the information obtained in the early 1980s obsolete.*"). *See also* **Exhibit C-85**, Letter from SSA to Ministry of Culture, 26 June 2015, p. 2 (following up with its request for a meeting date).

[547] **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, PDF p. 2.

[548] **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, PDF p. 3.

invest that time and money in reviewing the search area" as reported by SSA in the 1982 Report.[549]

233. SSA thereby proposed that it would present these and other technical considerations at the next meeting with the Minister of Culture.[550] Indeed, as Mr. Morris confirms, the coordinates listed in the 1982 Report will not correspond with the GPS coordinates currently in use.[551] This is because, among other reasons, the coordinates listed in the 1982 Report (i) were relative to the position of the shore-based stations;[552] and (ii) were based on a physical paper map at 1:80,000 resolution that is different from the GPS mapping currently in use.[553]

234. On 25 June 2015, the Ministry of Culture informed SSA that it was coordinating its response with the Antiquities Commission (which had by now substituted the Committee on Shipwrecked Goods),[554] which SSA viewed as a potential delay tactic.[555]

235. In fact, during the month of June 2015, MAC (working with the Woods Hole Oceanographic Institution ("**WHOI**")) had begun its survey of the area it was presumably licensed by Colombia using an autonomous underwater vehicle. However, the search of this initial area was unsuccessful, and no shipwreck was found.[556]

236. While MAC was searching in its designated area, Colombia was stalling on responding to SSA. Accordingly, on 21 July 2015, SSA wrote again to the Ministry of Culture, reiterating its request for a meeting.[557] Colombia finally responded on 28 July 2015,

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549 **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, PDF p. 3.

550 **Exhibit C-84**, Letter from SSA to Ministry of Culture, 9 June 2015, PDF p. 4.

551 *See* **CER-1 [Morris]**, ¶¶ 53-56.

552 *See supra* ¶¶ 61, 102; **CER-1 [Morris]**, ¶ 36.

553 *See supra* ¶ 61; **CER-1 [Morris]**, ¶ 34.

554 *See supra* ¶¶ 110-111.

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

556 *See* **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck/ ("*REMUS was initially deployed off the Malpelo to survey an approved area in June 2015. The overall search area was divided into search blocks, and in the initial blocks surveyed, the shipwreck was not found*.").

557 *See* **Exhibit C-86**, Letter from SSA to Ministry of Culture, 21 July 2015.

rejecting SSA's request for a meeting. Colombia asserted that "*it is not necessary or pertinent*" to hold a meeting with SSA until the verification exercise had been completed even though the very purpose of SSA's request was to discuss the parameters of that exercise.[558] Notwithstanding the Injunction Order,[559] Colombia also asserted that it was ready to conduct the supposed verification exercise with or without SSA's consent.[560]

237. On 31 July 2015, SSA appealed to the President of Colombia to intervene in the process given the inexplicable reversal of position by the Minister of Culture.[561] The President, however, rejected SSA's proposal.[562]

238. SSA kept trying in vain to secure a meeting with Colombian authorities. On 24 August 2015, then again on 5 October 2015 and on 3 November 2015, SSA reached out to the Antiquities Commission to request a meeting to discuss the matter.[563] The Ministry of Culture, the Ministry of Foreign Affairs, DIMAR and several members of Colombia's Antiquities Commission were made aware of SSA's request directly by the President.[564] On 19 November 2015, SSA reached out again to the Minister of Culture to advance the dialogue after being informed in early November that Colombia's Shipwrecked Antiquities Commission had rejected its request for a meeting.[565] SSA reiterated that

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

559 *See supra* ¶¶ 176-177.

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

561 *See* **Exhibit C-88**, Letter from SSA to President of Colombia, 31 July 2015.

562 *See* **Exhibit C-89**, Letter from President of Colombia to SSA, 3 August 2015.

563 *See* **Exhibit R-25**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 24 August 2015, p. 2; **Exhibit R-26**, Letter from Sea Search Armada, LLC to Colombia's Shipwrecked Antiquities Commission, 5 October 2015, p. 1; **Exhibit C-204 [EN]**, Letter from SSA to the Legal Secretary of the Presidency, 3 November 2015. *See also* **Exhibit C-205 [EN]**, Letter from the President of Colombia to SSA, 6 November 2015 (this letter confirms that SSA's letter from 3 November 2015 had been indeed distributed to the members of Colombia's Shipwrecked Antiquities Commission).

564 *See* **Exhibit C-197 [EN]**, Letter from the President of Colombia to the Ministry of Culture, 4 September 2015; **Exhibit C-198 [EN]**, Letter from the President of Colombia to the Ministry of Foreign Affairs, 4 September 2015; **Exhibit C-199 [EN]**, Letter from the President of Colombia to DIMAR, 4 September 2015; **Exhibit C-200 [EN]**, Letter from the President of Colombia to the Administrative Department of the Presidency of the Republic, 4 September 2015; **Exhibit C-201 [EN]**, Letter from the President of Colombia to Mr. Arrieta Padilla, Colombia's Shipwrecked Antiquities Commission's Expert, 4 September 2015; **Exhibit C-202 [EN]**, Letter from the President of Colombia to Mr. Prieto, Colombia's Shipwrecked Antiquities Commission's Expert, 4 September 2015; **Exhibit C-203 [EN]**, Letter from the President of Colombia to Mr. Martinez Neira, Colombia's Shipwrecked Antiquities Commission's Expert, 4 September 2015.

565 *See* **Exhibit C-205 [EN]**, Letter from the President of Colombia to SSA, 6 November 2015.

the shipwreck was in the "*immediate vicinity*" of the coordinates reported in the 1982 Report.[566]

239. In the meantime, in November 2015, MAC and WHOI "*under the supervision of ICANH and DIMAR,* ***returned to the search area determined by previous historical research*** *to finalize the survey in the blocks that had not been completed.*"[567] Accordingly, it appears that the reason for Colombia's sudden silent treatment of SSA was that **Colombia had authorized MAC to search for the San José shipwreck in the Discovery Area identified by SSA**. Unsurprisingly, it was during this November expedition at the "*search area determined by previous historical research*" that MAC "*got the first indications of the find from side scan sonar images of the wreck*," following which it lowered its autonomous underwater vehicle to "*capture photos of a key distinguishing feature of the San José—its cannons*."[568] Through subsequent missions, and with vastly superior technology to what was available to SSA in the 1980s, MAC was able to conclusively identify the wreck site as that of the San José.[569]

240. Shortly thereafter, on 5 December 2015, Colombian President Santos issued a press release declaring that on 27 November 2015, "*without a doubt, we have found the San José Galleon.*"[570]

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566 *See* **Exhibit R-27 [EN]**, Letter from Sea Search Armada, LLC to the Minister of Culture, 19 November 2015, p. 2 ("*Given this reality, SSA reiterates what it stated in its communication of 19 October, regarding its non-participation in the verification of the shipwreck at the coordinates referred to in the 18 March 1982 report, on the grounds that since that day the reporter left perfectly and clearly established the location of its finding in a place different from the coordinates where the verification will be carried out. Therefore, it does not make sense to propose to it that, assuming its costs, it verifies the same thing that he has repeated for 33 years, that is, that its discovery is not in those coordinates but in its immediate vicinity*.") (Colombia's Unofficial Translation).

567 **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck/ (emphasis added).

568 **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck/.

569 *See* **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck/ ("*Subsequent missions at lower altitudes showed engraved dolphins on the unique bronze cannons*.").

570 **Exhibit C-37**, Statement from President Santos on the discovery of the San José Galleon, 5 December 2015.

241. At the time, the details of MAC's mission were not known to SSA. Thus, SSA continued trying to maintain a channel of communication with the Government.[571] On 10 December 2015, SSA asked Colombia to take it to the site of its purported new find to verify whether the shipwreck Colombia had allegedly discovered was outside of the area reported in the 1982 Report.[572] SSA reiterated this request to the President on 1 April 2016.[573] Colombia responded to this request by a claiming it would be willing to conduct an exploration but only of the specific pinpoint coordinates from the 1982 Report,[574] ignoring both the plain language of the 1982 Report, its prior Resolutions, and the 2007 Supreme Court Decision (which had defined SSA's rights as concomitant with the Discovery Area identified by the 1982 Report).[575]

242. SSA was thus left with no choice but to inform Colombia that as a rightful co-owner of the treasure located in the Discovery Area, it would exercise all its rights and would seek to salvage and secure the goods in advance of any attempt by Colombia to deprive SSA of the goods by either Colombia or any third-party contractor.[576] Colombia responded to SSA's notice with a veiled threat, "*reminding*" SSA that any activity

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571 *See* Colombia's Preliminary Objections, ¶¶ 100, 107-08.

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

573 *See* **Exhibit R-28**, Letter from the Minister of Culture to SSA, 17 June 2016.

574 *See* **Exhibit C-206 [EN]**, Letter from the Minister of Culture to SSA, 14 December 2015. *See also* **Exhibit C-207 [EN]**, Letter from SSA to the Ministry of Culture, 18 December 2015; **Exhibit C-208 [EN]**, Letter from the Ministry of Culture to SSA, 23 December 2015.

575 *See* **Exhibit R-28**, Letter from the Minister of Culture to SSA, 17 June 2016. *See also* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 235 ("***THIRD:*** *Notwithstanding the determinations adopted in the two previous points,* ***CONFIRM*** *the rest and pertinent, the aforementioned judgment of first instance.*") (emphases in original) (SSA's Unofficial Translation); **Exhibit C-10 [EN]**, Confidential Report on the Underwater Exploration by Glocca Morra Company in the Caribbean Sea, Colombia (filed with Colombia on 18 March 1982), 26 February 1982, PDF p. 13 ("*The main targets, in bulk and interest, are slightly west of the 76th meridian and are just centered around the target 'A' and its surrounding areas that* ***are located in the immediate vicinity of 76º 00' 20" W 10º 10' 19" N***.") (emphasis added) (SSA's Unofficial Translation).

576 *See* **Exhibit R-35**, Letter from SSA to the Ministry of Culture, 4 January 2016 (Colombia's Unofficial Translation).

"*performed in the territorial sea, contiguous zone, or economic zone or continental shelf must have the permission of the Ministry and DIMAR.*"[577]

243. SSA explained to Colombia that the 2007 Supreme Court Decision confirmed SSA's rights over the treasure located in the Discovery Area and noted that Colombia's insistence that SSA would need its prior authorization to salvage the treasure not only violated those rights, but it was also clearly motivated by the intention to protect a third party contractor, and not Colombia's own interests.[578] To this, Colombia's Ministry of Culture dismissively requested SSA to "*refrain from continuing with an unnecessary epistolary exchange*."[579]

244. Given Colombia's outright refusal to even engage in communications, on 29 February 2016, SSA wrote directly to WHOI describing the background and context of its rights as confirmed by the 2007 Supreme Court Decision and informing WHOI that "*any attempts to interfere with SSA's property rights or interfere with SSA's own salvage operations will be aggressively fought by all legal means.*"[580]

245. Also, on 4 April 2016, SSA reached out directly to the President of Colombia, seeking to reengage in communications. SSAs expressed that "*the dynamics, complexity, and transcendence of this matter make it almost impossible to eliminate all contact between the parties, and it should be feasible and desirable that through dialogue a peaceful solution be found to any of their differences*."[581] SSA invited the President once more to reach a peaceful solution and move forward.[582] In response, on 17 June 2016, the Ministry of Culture informed SSA that it was prepared to authorize and accompany

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577 **Exhibit C-209 [EN]**, Letter from the Ministry of Culture to SSA, 12 January 2016 (SSA's Unofficial Translation).

578 *See* **Exhibit C-210 [EN]**, Letter from SSA to the Ministry of Culture, 18 January 2016.

579 *See* **Exhibit R-36**, Letter from the Ministry of Culture to SSA, 5 February 2016 (Colombia's Unofficial Translation).

580 **Exhibit C-211**, Letter from Argus Legal on behalf of SSA to Woods Hole Oceanographic Institution, 29 February 2016, p. 3.

581 *See* **Exhibit R-28**, Letter from the Ministry of Culture to SSA, 17 June 2016, p. 2. (SSA's Unnoficial Translation).

582 *See* **Exhibit R-28**, Letter from the Ministry of Culture to SSA, 17 June 2016, p. 2. (SSA's Unnoficial Translation).

SSA to the exact coordinates listed in the 1982 Report and recognized its rights of the treasure located there, but not its vicinity.[583]

246. It was clear that Colombia's posture with SSA was informed by its desire to recover the shipwreck. Indeed, on 30 July 2016, the President himself made a public announcement that the Government would be moving forward with the salvage of the San José.[584] In his announcement, the President made clear that 50% of the salvaged goods would be given to the contractor entrusted with the salvage, as payment.[585] Thus, on 3 August 2016, **SSA reminded Colombia that the Civil Court and the Superior Court had issued an Injunction Order protecting SSA's rights that was still in place**.[586] SSA explained that since Colombia's rediscovery of the San José in 2015 appeared to confirm that the shipwreck was located in the Discovery Area, the Injunction Order would require that any asset recovered from the site should be catalogued and subject to the Civil Court's jurisdiction.[587] Given this, SSA proposed, once again, a joint verification of the site.[588] While Colombia continued to insist that SSA's rights were limited to a pinpoint,[589] SSA's threat to enforce the Injunction Order prompted into motion Colombia's attempts to remove it as an obstacle to recover the San José shipwreck.[590]

247. In fact, it appears that Colombia was avoiding any sort of verification exercise in the Discovery Area because MAC's purported discovery of the San José shipwreck is within that Area. Leaked reports suggest that Colombia found the San José shipwreck at coordinates of 76º 00' 20" W 10º 13' 33" N, approximately 3 nautical miles from the

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583 *See* **Exhibit R-28**, Letter from the Ministry of Culture to SSA, 17 June 2016, p. 2. (SSA's Unnoficial Translation).

584 *See* **Exhibit C-212 [EN]**, Letter from SSA to the President of Colombia, 3 August 2016, PDF p. 1.

585 *See* **Exhibit C-212 [EN]**, Letter from SSA to the President of Colombia, 3 August 2016, PDF p. 1.

586 *See* **Exhibit C-212 [EN]**, Letter from SSA to the President of Colombia, 3 August 2016, PDF p. 2.

587 *See* **Exhibit C-212 [EN]**, Letter from SSA to the President of Colombia, 3 August 2016, PDF p. 2.

588 *See* **Exhibit C-212 [EN]**, Letter from SSA to the President of Colombia, 3 August 2016, PDF p. 2. *See also* **Exhibit C-213 [EN]**, Letter from SSA to the President of Colombia, 12 September 2016, PDF p. 2.

589 *See* **Exhibit C-214 [EN]**, Letter from the Ministry of Culture to SSA, 20 September 2016; **Exhibit C-215 [EN]**, Letter from the Minister of Culture to SSA, 4 October 2016; **Exhibit C-216 [EN]**, Letter from SSA to the Minister of Culture, 12 October 2016; **Exhibit R-29**, Letter from Minister of Culture to Sea Search Armada, 30 November 2016.

590 *See infra* ¶ 248.

coordinates listed in the 1982 Report,[591] and well within the debris field that would have been generated by the explosion of the San José before it sank.[592] While Colombia denies that the San José shipwreck is within the Discovery Area (including the leaked coordinates), it has yet to offer any evidence to the contrary. Instead, Colombia claims that it cannot disclose these coordinates because of alleged confidentiality concerns.[593] This is despite the fact that the absence of the San José from the Discovery Area would be a complete defense to the claims in this Arbitration for Colombia.[594]

(b) Colombia Attempts To Withdraw The Injunction Order And Fails

248. Soon after SSA raised the specter of enforcing the Injunction Order, on 16 December 2016, more than 12 years after it had been issued, Colombia applied to the Civil Court to lift the Injunction Order. Colombia argued that because the Supreme Court had reached a final decision in 2007, and thus the dispute had been resolved, the Injunction Order was no longer required.[595] Colombia did not explain why it was only now seeking to lift the Injunction, given that the Supreme Court had rendered its decision almost a decade earlier.

249. Curiously, it was not the Attorney General's Office or the Office of the Presidency—the parties in the original court proceedings[596]—that made the application to remove the Injunction Order. Rather, the request came from the Director of the Legal Department of the **Ministry of Culture**, Mr. Juan Manuel Vargas Ayala. Not only was Mr. Vargas

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591 **Exhibit C-94 [EN]**, Iván Bernal Marín, *Exclusivo: el lugar donde el Gobierno colombiano dice haber localizado el galeón San José y la disputa por sus 10.000 millones de dólares*, INFOBAE, 18 January 2018, *available at https://www.infobae.com/america/colombia/2018/01/18/exclusivo-el-lugar-donde-el-gobierno-colombiano-dice-haber-localizado-el-galeon-san-jose-y-la-disputa-por-sus-10-000-millones-de-dolares/* ("*76º 00' 20" W 10º 13' 33" N are the coordinates where the Government found the remains of the Spanish flag vessel, with the support of the prestigious private firm Woods Hole Oceanographic Institution(WHOI), who also worked on the discovery of the Titanic*.") (SSA's Unofficial Translation).

592 *See* **CER-1 [Morris]**, ¶ 67 (noting that the debris field could have a radius of up to 5 nautical miles). *See also supra* ¶ 22.

593 *See* Colombia's Reply to Interim Measures Application, ¶ 68.

594 Hearing on PO Day 1, 1:40:08-1:42:59 ("***ARBITRATOR JAGUSCH:*** *My question is: If you could demonstrate that the San José is not in the area of the--as identified in the 1982 Confidential Report, one would expect Colombia to put that forward as an absolute defense.* ***MS. ORDÓÑEZ PUENTES****: Yeah, that would be, but--* ***ARBITRATOR JAGUSCH****: Okay. Right."*) (emphases added).

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

596 *See supra* ¶¶ 174, 181-182.

Ayala responsible for overseeing the contract with MAC,[597] but he had also been the recipient of most of the correspondence between SSA and the Ministry of Culture for years.[598] Accordingly, it appears that the Ministry of Culture was interested in revoking the Injunction Order to remove what it perceived as a legal barrier to salvaging the San José. Notably, Mr. Vargas Ayala is also the main drafter of Law 1675 of 2013, which regulates Submerged Cultural Patrimony and which served as the legal basis for Resolution No. 0085.[599]

250. As the Ministry of Culture was attempting to remove the Injunction Order that SSA had warned it about, SSA further cautioned third parties that the Injunction Order remained in force. Indeed, on 20 January 2017, SSA wrote to WHOI once again (copying the President of Colombia and Ministry of Culture), informing them of the Injunctive Order and reminding them that if, despite "*the precautionary measure that guarantees this judgment, Woods Hole Oceanographic Institute insists to sign a contract for shipwreck rescue,* [it] *will be responsible for the consequences and damages from any order that will result from their conduct*."[600]

251. Conscious of the litigation risk it and WHOI faced, Colombia agreed to finally meet with SSA. On 15 February 2017 met with representatives of the Ministry of Culture and DIMAR to discuss an expedition to the site. In the meeting, SSA's equipment and financial stability was assessed and found satisfactory.[601] When the discussion moved to the definition of "*immediate vicinity*" per the 1982 Report, SSA accepted the same area assigned by the GOC to the Swedes (100 square miles) in the MOU in 1988.[602] Indeed, as Mr. Morris notes, this would have been a reasonable debris field associated

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[597] *See* **Exhibit C-36 [EN]**, Ministry of Culture Resolution No. 1456, 26 May 2015 (showing that Mr. Ayala approved the contract with MAC) (SSA's Unofficial Translation).

[598] *See, e.g.*, **Exhibit C-193 [EN]**, Letter from SSA to the Ministry of Culture, 7 May 2010 (letter directly addressed to Mr. Vargas Ayala); **Exhibit C-195 [EN]**, Letter from SSA to the Minister of Culture, 31 July 2013 (directly addressing a communication from Mr. Vargas Ayala); **Exhibit C-84**, Letter from SSA to the Ministry of Culture, 9 June 2015; **Exhibit C-85**, Letter from SSA to the Ministry of Culture, 26 June 2015 (directly addressing a communication from Mr. Vargas Ayala); **Exhibit C-216 [EN]**, Letter from SSA to the Minister of Culture, 12 October 2016; **Exhibit C-218 [EN]**, Letter from SSA to the Minister of Culture, 17 February 2017.

[599] *See infra* ¶ 263; **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, p. 2 (SSA's Unofficial Translation).

[600] **Exhibit C-217**, Letter from SSA to Woods Hole Oceanographic Institution, 20 January 2017, p. 5.

[601] *See* **Exhibit C-218 [EN]**, Letter from SSA to the Minister of Culture, 17 February 2017.

[602] *See* **Exhibit C-218 [EN]**, Letter from SSA to the Minister of Culture, 17 February 2017, PDF p. 1.

with the San José shipwreck.[603] In the spirit of cooperation and efficient resolution, moreover, SSA made an alternative offer to have an international technical tribunal define "*immediate vicinity*", whose decision both parties could employ. No decision was made at this meeting. SSA reiterated both of its offers in a letter dated 17 February 2017. The Ministry of Colombia recognized the clarity of the technical presentation, but once again refused to allow any verification beyond the pinpoint coordinates,[604] perhaps in the hopes that the Injunction Order would be soon removed thus removing any obstacles to Colombia's ability to salvage from the shipwreck site.

252. Sensing this, on 14 March 2017, SSA wrote to the Ministry of Culture stating that the Injunction Order was still in place, but it could be lifted should the parties agree on the only remaining issue to be resolved at that time: the location for the salvage to take place.[605] On 17 April 2017, SSA wrote directly to the President of Colombia requesting that he remind and instruct the Ministry of Culture that no salvage operation could or should be conducted as doing so would be a violation of the Injunction Order (which at that point it was still in effect).[606]

253. The Civil Court granted the Ministry of Culture's request and lifted the Injunction Order on 31 October 2017,[607] which SSA subsequently appealed.[608] Among other things, SSA:

a. Questioned the Ministry of Culture's intervention in the proceedings as highly irregular.[609]

b. Challenged the decision on the basis that:

i. The fact that the underlying litigation had concluded did not mean that the Injunction Order lacked any further purpose but rather the

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603 *See* **CER-1 [Morris]**, ¶ 67.

604 *See* **Exhibit C-218 [EN]**, Letter from SSA to the Minister of Culture, 17 February 2017.

605 *See* **Exhibit C-219 [EN]**, Letter from SSA to the Minister of Culture, 14 March 2017.

606 *See* **Exhibit C-220 [EN]**, Letter from SSA to the President of Colombia, 17 April 2017.

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

608 *See* **Exhibit C-221 [EN]**, SSA's Appeal to the Third Civil Court of the Circuit of Barranquilla, Judgment dated 31 October 2017, 30 November 2017.

609 *See* **Exhibit C-221 [EN]**, SSA's Appeal to the Third Civil Court of the Circuit of Barranquilla, Judgment dated 31 October 2017, 30 November 2017, PDF pp. 17, 21-26.

opposite; the conclusion of the procedure enshrined SSA's rights and the Injunction Order was meant to protect those.

ii. The salvage of the wreck cannot take place without Colombia's assistance. Therefore, while the Civil Court did not order the salvage, the Injunction Order needed to stay in place until the salvage took place, which was entirely under Colombia's control.[610]

254. On 29 March 2019, the Superior Court reinstated the Injunction Order, upholding SSA's rights over the Discovery Area.[611] Notably, the Superior Court interpreted the 2007 Supreme Court Decision in precisely the same manner as SSA, finding that the Supreme Court only modified the declaration of ownership by SSA "*to property that can be legally qualified as treasure.*"[612] The Superior Court did not mention any other restrictions imposed by the 2007 Supreme Court Decision, including supposed geographic limitations to the area over which SSA's rights extended. The Superior Court then noted that the purpose of injunctive relief is to ensure compliance with a judicial decision, and "[t]*hus, the exercise of the injunctive relief measure was conditional upon access to the goods that are the object thereof once they were removed or salvaged*."[613] Since the goods had not been salvaged, SSA still had rights that needed to be protected, warranting the maintenance of the Injunction Order.

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610 *See* **Exhibit C-221 [EN]**, SSA's Appeal to the Third Civil Court of the Circuit of Barranquilla, Judgment dated 31 October 2017, 30 November 2017, PDF pp. 5-6, 9-10, 12.

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

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

613 **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF p. 6 (SSA's Unofficial Translation).

255. The Superior Court further found that the Injunction Order's reinstatement "*has not harmed, nor is it foreseen in any way to harm, the Nation, since the right of ownership of both parties has been settled*" by the 2007 Supreme Court Decision.[614] Rather:

> ***The harm that does exist is in depriving the plaintiff of the only tool it has at its disposal to enforce the 1994 and 1997 judgments, due to the failure to perform an action that is not in its power to perform.***
>
> *Thus, maintaining the injunction in this particular situation is reasonable, proportional, necessary and adequate, given that it seeks to achieve a legitimate objective; it serves the proposed purpose and there is no other measure that is less burdensome and that guarantees the rights of the plaintiff. Thus not only is it not feasible to revoke it; it is also not feasible to modify it.*[615]

256. Accordingly, the Superior Court reinstated in full the Injunction Order, which had ordered "*the seizure of goods that have the nature of treasure, that can be removed* ***from the area determined by the coordinates*** *indicated in* [the 1982 Report]".[616] By acknowledging that SSA had rights over the Discovery Area identified in the 1982 Report, and not a pinpoint as alleged by Colombia, the Superior Court affirmed SSA's interpretation of the 2007 Supreme Court Decision.

257. On 12 July 2019, SSA wrote to Colombia noting that the Superior Court had reinstated the Injunction Order, and that "*the Superior Court established in an unequivocal manner, both the location of the goods to be seized, as well as the detailed procedure for its practice" and "it ordered the [] salvage of the shipwreck and the deposit of [any items] recovered with the Banco de la República de Cartagena or a similar entity, under the Court's supervision.*"[617] SSA further noted that "*the Judge has already been requested to initiate*" the enforcement of the Injunction Order and any dispute regarding the parties' "*interpretation of the judgment as to the location of the assets to be seized*"

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614 **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF p. 6 (SSA's Unofficial Translation).

615 **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF pp. 6-7 (emphasis added) (SSA's Unofficial Translation).

616 **Exhibit C-26 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 6 July 1994, PDF p. 5 (emphasis added) (SSA's Unofficial Translation). *See also* **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF p. 7 (resolving to "*maintain the* [Injunction Order] *declared in the order of October 12, 1994.*") (SSA's Unofficial Translation).

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

would be ruled on by the Court "in a manner that is binding for all."[618] With the above in mind, SSA informed Colombia that the seizure process would begin imminently given that Colombia had "*rejected the possibility of a consensual resolution*" the matter now lay "*in the hands of the Judge, allowing the institutions to act, as it corresponds in any State under the rule of law*."[619]

G. Colombia Issues Resolution No. 0085

258. On 23 January 2020—just a few months after the Superior Court had reinstated the Injunction Order in favor of SSA (and SSA had told the Colombian Government that it would enforce the Injunction Order in court),[620] and facing the imminent enforcement of the Injunction Order—Colombia issued Resolution No. 0085, which declared the **entirety of the San José** a "*National Asset of Cultural Interest*."[621] Resolution No. 0085 completely eviscerated SSA's rights. Colombia does not deny that Resolution No. 0085 leaves no part of the San José—including items that would have been classified as "*treasure*"—subject to apportionment pursuant to Articles 700-701 of the Civil Code.

259. The circumstances leading to the issuance of Resolution No. 0085 is obscured by the lack of public records. According to Resolution No. 0085, "[t]*he documents that comprise* [this] *report are confidential*."[622]

260. Under normal circumstances, as Justice Ortíz explains in her expert report, "*in accordance with the provisions of Articles 35 and 37 of the Code of Administrative Procedure and Contentious Administrative Matters (CPACA)*," the issuance of a resolution by the State without a request by a private party "*requires notification of the start of the administrative procedure when there are individuals who may be directly*

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618 **Exhibit C-41 [EN]**, Letter from SSA to the Vice-President of Colombia, 12 July 2019, PDF pp. 2-3 (SSA's Unofficial Translation).

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

620 *See supra* ¶¶ 255-257.

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

622 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, p. 2 (SSA's Unofficial Translation).

affected. The Colombian State should have notified all interested parties, including SSA, prior to the issuance of Resolution No. 0085."[623] It did not.

261. Based on the limited information in Resolution No. 0085 itself, it appears that Colombia's Minister of Culture issued the resolution on the basis of a recommendation by the National Council of Cultural Heritage (*Consejo Nacional de Patrimonio Cultural* or "**CNPC**") adopted during the ordinary session of the CNPC on 19 December 2019, as recorded in Minutes No. 9 of 2019.[624] CNPC is an agency of the Ministry of Culture established in 1997 focused on the protection and management of cultural patrimony in Colombia.[625]

262. SSA has not seen a copy of said Minutes, and it was not invited to the CNPC session, despite the Colombian judiciary's continued affirmation of SSA's rights to the treasure aboard the San José. Indeed, SSA did not even have notice that this process was unfolding behind its back.

263. At the 19 December 2019 session, Colombia's Counsel in this case (*Agencia Nacional de Defensa Jurídica del Estado* or "**ANDJE**"), together with DIMAR and the Colombian Institute of Anthropology and History (*Instituto Colombiano de Antropología e Historia* or "**ICANH**"), apparently presented MAC's final exploration report relating to the San José ("**Final MAC Report**") for CNPC to supposedly "*determine if the finding is made up exclusively, or up to 80%, of goods that are part of* [Colombia's] *cultural heritage*" pursuant to the Law 1675 of 2013.[626] It is unclear, and no explanation is provided, as to why this determination was raised before CNPC now, over four years after MAC had reportedly rediscovered the shipwreck.

264. At the meeting, members of the CNPC purportedly "*learned that the visible objects on the ship were in an excellent state of preservation, as evidenced in the photographs that*

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623 **CER-5 [Ortíz]**, ¶ 150.

624 *See* **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 1 (SSA's Unofficial Translation).

625 *See* **Exhibit C-225 [EN]**, *Consejo Nacional de Patrimonio Cultural*, COLOMBIAN MINISTRY OF CULTURE, 30 May 2024 (last accessed), *available at* https://www.mincultura.gov.co/areas/patrimonio/secretaria-tecnica-del-consejo-nacional-de-patrimonio-cultural/Paginas/default.aspx.

626 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 1 (SSA's Unofficial Translation).

illustrate the [Final MAC Report]."[627] An ICANH archaeologist reportedly expressed the view that "*the wreck of the galleon San José* ***should be considered as a unit that allows it to be declared a National Asset of Cultural Interest so that its nature as a unit can always be legally maintained***."[628] There does not appear to have been any debate on this point at the session or otherwise or what views may have been advanced by which agencies. In particular, while the Resolution acknowledges that "*the contents of the ship include other objects, such as gold and silver coins, ingots and jewelry*" it declares that such objects too must be declared cultural patrimony along with the rest of the shipwreck because "*the value of the wreck lies precisely in the assemblage of pieces that comprise it, which, thanks to the state in which they are found and what they represent as a whole, this particular discovery being one of undeniable cultural importance*."[629] Resolution No. 0085 does not provide any details concerning how this evaluation was conducted or on the basis of what evidence. And again, the Resolution provides no evidence as to why this determination was being made now, more than 4 years after MAC's supposed discovery (and more than 40 years after SSA's).

265. In any event, the CNPC determined that:

> *the* ***whole of the discovery*** *identified as the galleon San José* ***constitutes assets to be considered cultural heritage of the nation****. Consequently,* ***the entirety of the wreck is a National-Level Asset of Cultural Interest,*** *and the conservation of its unity must be ensured for future generations.*[630]

266. The practical implication of this finding is that the San José would be treated as a "*unit*" such that SSA would be denied any share of the treasure even if the treasure consisted of numerous, non-unique, repeated items (like gold and silver coins, ingots, or gems) that would have ordinarily been considered treasure.[631]

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627 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 2 (SSA's Unofficial Translation).

628 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 2 (emphasis added) (SSA's Unofficial Translation).

629 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 3 (SSA's Unofficial Translation). It also notes that the cannons, ceramic pieces, armor, and objects belonging to the ship are "*unique and unrepeatable*."

630 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF pp. 3-4 (emphasis added) (SSA's Unofficial Translation).

631 *See* **CER-5 [Ortíz]**, ¶ 148.

267. As Justice Ortíz notes, Resolution No. 0085 does not furnish any evidentiary or legal basis for designating the **entirety** of the San José as cultural patrimony, particularly in light of the Supreme Court's ruling that expressly required that an **item-by-item evaluation** be conducted as part of the apportionment process to determine SSA's share of the treasure (which obviously could not be performed until items were recovered from the bottom of the ocean floor).[632] It bears emphasis that CNPC did not appear to have before it any evidence that would allow it to reach a conclusive determination about the contents of the treasure, as the contents of the San José were still submerged on the ocean floor.

268. The following month, the Minister of Culture, Carmen Inés Vásquez Camacho, publicly declared the entirety of the San José Galleon an "*Asset of National Cultural Interest*" with immediate effect.[633] It was only then that SSA learned about the designation of the San José Galleon and, along with it, the complete evisceration of its rights in the ship.

269. Indeed, Resolution No. 0085 was a complete reversal of Colombia's decades-long position that a substantial portion of the San José consisted of treasure. Not only had Colombia vested SSA's Predecessors' rights on this basis, but Colombia had consistently sought to contract with other potential salvage contractors on this basis as well.[634] For example, as a result of Resolution No. 0085, Colombia rescinded its contract with MAC on the basis that the entirety of the shipwreck was cultural patrimony, even though before issuing Resolution No. 0085 "*it was foreseen that more than 83% of* [MAC's] *remuneration would consist of recovered pieces that are not part of the Cultural Heritage of the Nation*."[635]

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632 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 223 ("*The extraction or exhumation of the declared goods, deep in the sea, which are the subject of this debate, has not yet been verified, and thus their characteristics, features, or individual traits are not fully known*.") (SSA's Unofficial Translation). *See also* **CER-5 [Ortíz]**, ¶ 148.

633 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, art. 1 & p. 4 (SSA's Unofficial Translation).

634 *See supra* **Sections II.C(g)–II.C(i)**.

635 *See* **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF p. 5 (SSA's Unofficial Translation). *See also* **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF pp. 5-6 ("*In accordance with the foregoing, it is clear that the financial model under which the Public-Private Partnership of Private Initiative without Disbursement of Public Funds was planned and structured is only feasible if it is remunerated with the handover of pieces from the find,* ***which is not currently legally possible****, insofar and inasmuch as the* [CNPC] *determined, in session of December 19, 2019, that the entirety of the*

H. SSA's Attempts To Protect Its Rights To The San José Treasure After Resolution No. 0085

270. Resolution No. 0085 was a watershed moment for SSA pursuant to which it lost its rights to the San José irretrievably, necessitating a direct intervention of the U.S. Government and face-to-face meetings with Colombian representatives.

271. Following the issuance of Resolution No. 0085, SSA enlisted the support of the U.S. Government to facilitate discussions. With the U.S. Government as the intermediary, SSA met twice with Colombian representatives in 2021–2022.[636] SSA again requested a verification mission, which Colombia again rejected, "*stating SSA owned nothing so the GOC had no interest*."[637] Instead, without informing or otherwise consulting with SSA, the Colombian Navy unilaterally went to the coordinates listed in the 1982 Report and declared that there was no shipwreck there.[638] The results of this survey are, however, meaningless. As SSA had explained to Colombia multiple times, the 1982 Report identified a target and its surrounding areas as the location of its find, an area that was in the vicinity of the listed coordinates, not at the coordinates themselves.[639] Moreover, the 1982 coordinates could not simply be transposed to the current GPS system.[640] As a result, as Mr. Morris confirms, the Colombian Navy went to the wrong location.[641]

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find identified as the galleon San José consists of goods considered to be National Cultural Heritage, and consequently the Ministry of Culture declared it to be a National-Level Asset of Cultural Interest through Resolution 0085 of January 23, 2020."); p. 7 ("*Considering the legal impossibility of remuneration in kind using pieces that are part of the find, procedure APP 001 of 2018 is inadmissible, because the entity cannot allocate funds to cover remuneration for whatever company winds up being awarded the contract*.") (emphases added) (SSA's Unofficial Translation).

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

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

638 *See* **Exhibit R-34**, Report on the 2022 Verification Campaign over the 1982 Coordinate reported by Glocca Morra Company, Inc., 25 May 2022.

639 *See supra* ¶¶ 227-228, 232.

640 *See supra* ¶¶ 76-77, 102, 232-233.

641 *See* **CER-1 [Morris]**, ¶¶ 53-56.

272. As a direct result of Resolution No. 0085, on 17 September 2022 SSA submitted a notice of its intent to submit a claim to arbitration pursuant to Article 10.16(2) of the TPA,[642] followed by the Notice of Arbitration on 18 December 2022.

I. Colombia Reinitiates Attempts To Salvage The San José

273. As reported by the press and confirmed by Colombian counsel during the Hearing on Colombia's Preliminary Objections, Colombian authorities have recently reinitiated plans to salvage the San José shipwreck, almost 40 years after their initial attempts.[643]

274. As a result, on 16 April 2024, SSA filed an Application for Interim Measures requesting an order for interim measures to preserve and protect evidence arising out of and related to its planned salvage of the San José shipwreck (the "**Application**" or "**Interim Measures Application**").[644] The Tribunal granted SSA's Application on 3 June 2024, and the Parties are currently in discussions to finalize an evidence preservation protocol.

275. In the meantime, Colombia has issued new regulations solidifying its possession over the San José shipwreck. On 22 May 2024, Colombia issued ICAHN's Resolution No. 0712 of 2024 declaring what it considered to be the area containing the wreck of the San José as an Archeologically Protected Area ("*Área Arqueológica Protegida*" or "**AAP**").[645] The resolution does not provide the coordinates of the area nor any way of clearly identifying the area. Indeed, the resolution expressly states that the coordinates will not be made public and only clarifies that the area is approximately 1 km^2, "*overlapping both the direct area and the area of influence of the archaeological context.*"[646] This is the first time in Colombian history that an area in the territorial sea is declared as an AAP.

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

643 *See supra* **Sections II.C(a)**, **II.C(d)**, **II.C(g)-II.C(i)**.

644 *See* SSA's Application for Interim Measures, 16 April 2024, Section IV.

645 *See* **Exhibit C-224 [EN]**, Colombian Institute of Anthropology and History (ICANH) Resolution No. 0712, 22 May 2024.

646 **Exhibit C-224 [EN]**, Colombian Institute of Anthropology and History (ICANH) Resolution No. 0712, 22 May 2024 (SSA's Unofficial Translation).

III. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

276. This Tribunal has jurisdiction over the present dispute under the requirements of the TPA.

A. SSA Is A Protected Investor Who Has Made A Protected Investment Under The TPA

(a) SSA Is A Protected Investor

277. SSA is a qualifying "*investor*" under the TPA. Article 10.28 of the TPA defines "*investor of a Party*" as:

> [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.*[647]

278. SSA is an "*enterprise*" of the United States. Article 1.3 of the TPA defines "*enterprise*" and "*enterprise of a Party*" as follows:

> ***enterprise*** *means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association;*
>
> ***enterprise of a Party*** *means an enterprise constituted or organized under the law of a Party . . .*[648]

279. Colombia does not contest that SSA is a company organized and existing under the laws of Delaware and accordingly is an "*enterprise*" of the United States,[649] as the Tribunal recognized in its Decision on PO.[650]

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[647] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 1: Initial Provisions and General Definitions, 15 May 2012 (entry into force), art. 10.28.

[648] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 1: Initial Provisions and General Definitions, 15 May 2012 (entry into force), art. 1.3.

[649] *See* **Exhibit C-29**, Certificate of Formation of Sea Search-Armada, LLC, 1 October 2008.

[650] *See* Decision on PO, ¶ 131 ("*the Tribunal deems it appropriate and efficient, in light of the fact that Claimant's US nationality appears uncontested*").

(b) SSA Made A Protected Investment

280. SSA made a protected "*investment*" under the TPA. Article 1.3 of the TPA defines "*covered investment*" as follows:

> ***covered investment*** *means . . . an* ***investment, as defined in Article 10.28*** *(Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter . . .*[651]

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

> ***investment*** *means* ***every asset*** *that an investor* ***owns or controls, directly or indirectly****, that has* ***the characteristics of an investment****, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.* ***Forms that an investment*** *may take include:*
>
> *an enterprise;*
>
> *shares, stock, and other forms of equity participation in an enterprise;*
>
> *bonds, debentures, other debt instruments, and loans;*
>
> *futures, options, and other derivatives;*
>
> *turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
>
> *intellectual property rights;*
>
> ***licenses, authorizations, permits, and similar rights conferred pursuant to domestic law****; and*
>
> ***other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges*** *. . .* [652]

282. SSA made a qualifying investment in Colombia by acquiring SSA Cayman's rights in 2008 via the APA. SSA thus acquired rights granted by Articles 700-701 of the Civil Code, pursuant to DIMAR Resolution Nos. 0048 and 0354, which gave SSA's Predecessors rights to 50% of the treasure in the Discovery Area.[653] The APA

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[651] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 1: Initial Provisions and General Definitions, 15 May 2012 (entry into force), art. 1.3 (emphases added).

[652] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 (internal citations omitted) (emphases added).

[653] *See supra* ¶¶ 33-35, 83-85.

constitutes a broad transfer of substantially all of SSA Cayman's assets, including, among others "[a]*ll rights, title and interest in and to the search area license. . .granted to Glocca Morra Company by the government of Colombia in Resolution 0048*", "*all the assets, business, goodwill and rights of Seller of whatever kind and nature*", "[e]*ach contract, agreement, understanding, lease, license, commitment, undertaking, arrangement or understanding*" and "[a]*ll governmental licenses, permits, authorizations, orders, registrations, certificates, variances, approvals*" as well as "[a]*ll other assets of Seller of every kind and description*."[654] In exchange, SSA assumed SSA Cayman's liabilities, including an obligation to distribute any and all proceeds to the SSA Cayman Partners, who were designated Economic Interest Holders in SSA.[655]

283. Colombia acknowledges that "*SSA Cayman's rights were successfully transferred to* [SSA] . . . *through the 2008 APA*",[656] as was confirmed by the Tribunal in its Decision on PO.[657] While Colombia disputes the validity of the transfer of the rights under Colombian law, as the Tribunal rightfully found in its Decision on PO, Colombia has failed to show that DIMAR authorization is required for the intra-company transfer of rights and obligations.[658] Rather, as the Tribunal explained:

> *DIMAR's overall role* [is] *as the State agency in charge of regulating maritime activities in Colombian waters. By 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.*[659]

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

655 *See supra* ¶ 210.

656 Colombia's Response to Spain's Application to Intervene, 22 December 2023, n. 15.

657 Decision on PO, ¶ 200.

658 Decision on PO, ¶¶ 206-07, 212.

659 Decision on PO, ¶ 206. Indeed, as Colombia acknowledged, DIMAR's authorization could not be required in respect to Resolution No. 0048, which had long expired by 2008. *See* Decision on PO, ¶ 211.

284. Furthermore, the Tribunal rightly found that:

> *Claimant's Predecessors' 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*.[660]

285. Thus, pursuant to Article 10.28 of the TPA, SSA validly acquired the investment under the APA, which it now "*owns*" and "*controls*". SSA's valid acquisition of the rights under the APA constitutes making an investment, as the Tribunal rightly confirmed in its Decision on PO.[661]

286. The investment also has the characteristics of one. As the Tribunal rightly found in its Decision on PO, SSA's investment reflects:

a. A commitment of "*capital and other resources*" both by SSA's Predecessors in the exploration and discovery of the San José shipwreck, as well as by SSA itself as it "*among other things, . . . assumed liabilities, not only to SSA Cayman's 'Economic Interest Holders' but also to its creditors*."[662]

b. An "*expectation of gain or profit*" as Article 701 of the Civil Code, on its face, would provide an expectation to rights to discovered treasure which the Colombian Supreme Court "*appears at least to have recognized*".[663]

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660 Decision on PO, ¶ 211.

661 Decision on PO, ¶ 216 ("*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, or rights arising from contracts 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*.").

662 Decision on PO, ¶¶ 179-80.

663 Decision on PO, ¶ 185. *See also* Decision on PO, ¶¶ 186-87.

c. An "*assumption of risk*", which was "*inherent*" in, *inter alia*, the "'*treasure searching' business*"[664] and "*assumption of liabilities under the APA*".[665]

287. Accordingly, SSA made a protected investment under the TPA. As the Tribunal confirmed, based on the record before it at the time, "*Claimant's Predecessors possessed or were entitled to certain rights derived from the relevant resolutions, as confirmed by the 2007 CSJ Decision*" which were validly acquired by SSA under the APA.[666]

B. The Requirements To Proceed To Arbitration Under The TPA Have Been Satisfied

(a) Less Than Three Years Have Elapsed Since SSA First Acquired Knowledge Of Colombia's Breach And That SSA Has Incurred Damages

288. SSA initiated this Arbitration less than three years after it first did or could have acquired knowledge of Resolution No. 0085.[667] Article 10.18.1 of the TPA provides:

> *No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of* ***the breach alleged*** *under Article 10.16.1* ***and*** *knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has* ***incurred loss or damage****.*[668]

289. The Parties agree that the critical date for the purposes of Article 10.18.1 is 18 December 2019.[669] It is indisputable that SSA could not have acquired knowledge of Resolution No. 0085 before it was issued on 23 January 2020. As Resolution No. 0085 is "*the breach alleged*" here that should be the end of the matter.

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664 Decision on PO, ¶ 190.

665 Decision on PO, ¶ 191.

666 Decision on PO, ¶ 214.

667 SSA notes that this also addresses Colombia's *ratione temporis* objections, to the extent Colombia still maintains them, and therefore SSA does not address them separately in this brief. *See* Colombia's Preliminary Objections, ¶¶ 170-81; SSA's Response, ¶¶ 218-20.

668 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.18.1 (emphases added).

669 *See* Decision on PO, ¶ 267; Colombia's Preliminary Objections, ¶ 202; SSA's Response, ¶ 257; Colombia's Reply, ¶ 372; SSA's Rejoinder, ¶ 253.

290. Colombia nonetheless claimed during the Preliminary Objections phase that SSA should have known before Resolution No. 0085 was issued that it had no rights to the San José shipwreck. That is wrong. As explained above, SSA had every reason to believe that it had discovered and therefore had rights to half the treasure found at the San José shipwreck.[670] Among other reasons:

a. Contemporaneous observations by the crew of SSA's Predecessors when they found the target and analysis of the surrounding debris (*e.g.*, visual observations, magnetometer readings, radiocarbon dating and other analysis of the surrounding woodpiles)[671] indicated that they had found a shipwreck consistent with that of the San José.[672] This is also the opinion of Mr. Morris based on his independent review of the currently-available contemporaneous evidence.[673] That the shipwreck they had found was the San José was also supported by the fact that it was in the location predicted by historical accounts of the battle.[674]

b. Colombian Navy observers who accompanied SSA's Predecessors and its contractors on the expeditions also believed that the crew had found the San José shipwreck based on their observations and contemporaneous analysis of the evidence.[675]

c. Following the 1982 Report, Colombian authorities expended considerable efforts to find an operator to salvage the San José shipwreck, including conducting negotiations not just with SSA's Predecessors but also other entities, including other State

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670 *See supra* **Sections II.A(b)**, **II.B**, **II.C(b)**.

671 *See supra* ¶¶ 49-52, 62-69.

672 *See supra* ¶¶ 49-52, 62-69.

673 *See* **CER-1 [Morris]**, ¶¶ 48 ("*The results of these tests added another piece of supporting evidence that the site identified by SSA was consistent with a shipwreck site of an 18th century vessel—more likely than not, the San José—which I understand was expected to be located in that area based on the prior research*."), 52 ("*The area exhibited a significant magnetic signature suggesting large ferrous materials such as cannons, shots, and/or anchors. The presence of these features is consistent with and indicates that SSA had found a portion of a shipwreck from the time period they were looking for*.").

674 *See supra* ¶¶ 30-31, 52, 62. *See also* **CWS-1 [Doty]**, ¶¶ 15, 23-24, 28.

675 *See supra* ¶¶ 98-99, 103.

governments.[676] In this respect, Colombian authorities stipulated that the salvage efforts would begin, in the first place, in the area identified by SSA's Predecessors (for example, in the Swedish MOU).[677]

d. MAC's rediscovery of the San José shipwreck appears to have been based on receiving the location reported by SSA's Predecessors.[678] Moreover, leaked reports indicate that MAC found the shipwreck well within the debris field that would be associated with the San José shipwreck, as reported by SSA's Predecessors.[679]

e. Colombia attempted to remove the Injunction Order after MAC had supposedly discovered the San José shipwreck and SSA notified MAC and Colombia that it intended to take steps to enforce the Injunction Order.[680]

f. Colombia issued Resolution No. 0085 almost immediately after its attempt to remove the Injunction Order failed and SSA notified Colombia that it would proceed to enforce the Order.[681]

g. Despite repeated requests from SSA and its Predecessors, Colombia has refused to allow SSA to participate in any of its so-called verification missions and has not allowed SSA to conduct independent verification of the discovery its Predecessors reported in 1982.[682]

291. Colombia argues that because it had announced that SSA had no rights to the San José, SSA had none.[683] This argument holds no water. Colombia's mere assertions, without any supporting evidence, have no value. Moreover, SSA's rights were consistently

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676 *See supra* Sections **II.C(a)**, **II.C(d)**, **II.C(g)-II.C(i)**.

677 *See supra* ¶¶ 148, 154-155.

678 *See supra* ¶239.

679 *See supra* ¶ 247.

680 *See supra* ¶¶ 246, 248.

681 *See supra* ¶¶ 257-258.

682 *See supra* ¶¶ 167, 241, 245, 271.

683 *See, e.g.*, Colombia's Preliminary Objections, ¶ 101; Colombia's Reply, ¶¶ 154-58.

recognized and upheld by the Colombian judiciary, including in 1994,[684] 1997,[685] 2007,[686] and then again in 2019 when the Colombian court upheld the Injunction Order.[687] Thus, there was no reason for SSA to take Colombia's assertions in its correspondence at face value—SSA had successfully enforced its rights before Colombian courts. As the Tribunal noted:

> *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).*[688]

292. Colombia has not disputed (nor can it) that its courts repeatedly reassured SSA of its rights. Accordingly, SSA could not have known of the deprivation of its rights over the San José shipwreck prior to Colombia's issuance of Resolution No. 0085.

(b) SSA Submitted Its Waiver With The Notice Of Arbitration

293. Colombia does not dispute that SSA validly submitted its waiver with its Notice of Arbitration.[689]

IV. COLOMBIA HAS BREACHED ITS OBLIGATIONS UNDER THE TPA

294. By adopting Resolution No. 0085, Colombia has breached its obligations under the TPA, including to (i) refrain from unlawful expropriation (**Section IV.A**); (ii) accord FET (**Section IV.B**); and (iii) accord FPS (**Section IV.C**).

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684 *See supra* ¶¶ 164-166, 176-177.

685 *See supra* ¶¶ 183-186.

686 *See supra* **Section II.D(e)**.

687 *See supra* ¶¶ 254-256.

688 Decision on PO, ¶ 276.

689 *See generally* Response to Notice of Arbitration; Colombia's Preliminary Objections.

A. Colombia Has Unlawfully Expropriated SSA's Investment

295. Through the actions described in **Section II** above, Colombia has denied SSA its rights to the San José treasure, which had been repeatedly recognized and upheld by the Colombian judiciary prior to Colombia's rushed issuance of Resolution No. 0085. This amounts to an expropriation of SSA's investment. Colombia's expropriation violated international law (including, specifically, the TPA), by, among other things, failing to compensate SSA.

296. The analysis below proceeds in three parts: (i) SSA describes the expropriation standard in the TPA (**Sections IV.A(1)** and **IV.A(2)**); (ii) SSA shows that Colombia's conduct resulted in the expropriation of its investment (**Section IV.A(b)**); and (iii) SSA demonstrates that Colombia's expropriation was unlawful (**Section IV.A(b)(4)**).

(a) The Standard For Unlawful Expropriation

297. The TPA prohibits expropriation of covered investments by the Contracting Party unless certain conditions are met. As set out in Article 10.7:

> *1.* ***No Party may expropriate or nationalize a covered investment either directly or indirectly*** through ***measures*** equivalent to expropriation or nationalization ('expropriation'), ***except***:
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation; and*
>
> *(d) in accordance with due process of law and Article 10.5.*
>
> *2. The compensation referred to in paragraph 1(c) shall:*
>
> *(a) be paid without delay;*
>
> *(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');*
>
> *(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and*

(d) be fully realizable and freely transferable . . .[690]

298. The term "*measure*" in Article 10.7(1) is defined broadly to include "*any law, regulation, procedure, requirement, or practice.*"[691] The BIT does not provide a definition of "*expropriation*" or "*nationalization*," but both are well-established international law concepts.[692] As the tribunal in *Krymenergo v. Russia* explained,

> *In an "expropriation" a State, exercising its sovereign powers, dispossesses an investor of a protected investment, depriving the investor of the ability to manage, use or control its property, or of the ownership of the investment. The definition of expropriation is centered on the taking suffered by the investor: there is no requirement that the investor's loss translate into enrichment of the State – although typically expropriations will result in wealth passing from the investor to the State, to a public entity, or to a private beneficiary favored by the State.*
>
> *Expropriations on a sector or industry-wide basis are usually referred to as "nationalizations."*[693]

299. The factors in Article 10.7(2) are cumulative: if any one of the four conditions described above is not met, the expropriation is unlawful and Colombia has breached its obligations under the TPA and customary international law.[694]

300. In addition, Annex 10-B of the TPA specifically recognizes **both** direct and indirect expropriation, confirming the Contracting Parties' "*shared understanding that*:"

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690 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.7 (emphasis added). The TPA states that Article 10.7 shall be interpreted in accordance with Annex 10-B (n. 4 to art. 10.7). In addition, it makes clear that, "*for purposes of this article, the term 'public purpose' refers to a concept in* ***customary international law****. Domestic law may express this or a similar concept using different terms, such as 'public necessity,' 'public interest,' or 'public use'*" (n. 5 to art. 10.7) (emphases added).

691 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 1.3

692 **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶ 558.

693 **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶¶ 559, 660.

694 *See, e.g.*, **Exhibit CLA-124**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.5.21; **Exhibit CLA-134**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 428; **Exhibit CLA-153**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶¶ 361-62; **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶ 697.

> *1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a **tangible or intangible property right or property interest** in an investment.*
>
> *2. Article 10.7.1 addresses two situations. The first is **direct expropriation**, where an investment is nationalized or otherwise directly expropriated through **formal transfer of title or outright seizure**.*
>
> *3. The second situation addressed by Article 10.7.1 is **indirect expropriation**, where an action or series of actions by a Party has an **effect equivalent to direct expropriation** without formal transfer of title or outright seizure.*
>
> *(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires **a case-by-case, fact-based inquiry** that considers, among other factors:*
>
> *(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
>
> *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
>
> *(iii) the character of the government action.*
>
> *(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*[695]

301. As noted above, the TPA thus specifies the types of rights that may be subject to expropriation, such as a "*tangible or intangible property right or property interest in an investment.*"[696]

302. As Article 10.7 of the TPA confirms, expropriations can be direct or indirect. The standard for each is set out below.

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[695] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-B, art. 3 (emphases added).

[696] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-B, art. 1.

(1) The Legal Standard For Direct Expropriation

303. Direct expropriations involve measures that result in a "***formal transfer of title*** *or* ***outright seizure***."[697] This is consistent with the general understanding of direct expropriation as "*the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action*."[698]

304. While direct expropriations often involve the physical takeover of the investor's assets,[699] a State may also expropriate an investor's rights. For example, in *Kardassopoulos v. Georgia*, claimants owned half of a joint-venture company (GTI), which held rights to develop a pipeline and build other energy infrastructure in Georgia, until the government decreed that all previously granted rights relating to pipeline concessions (including claimants') that contradicted the decree were cancelled.[700] The tribunal found that this "*present*[s] *a classic case of direct expropriation, Decree No. 178 having deprived GTI of its rights in the early oil pipeline and Mr. Kardassopoulos' interest therein*."[701]

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697 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-B, art. 2 (emphasis added).

698 **Exhibit CLA-119**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 187. *See also* **Exhibit CLA-174**, A. REINISCH & C. SCHREUER, *Expropriation*, *in* INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS (Cambridge University Press) (2020), ¶ 156 ("*A direct expropriation involves the outright taking or seizure of property rights in assets owned by private parties, usually combined with a transfer of such rights to either the expropriating state or to third parties*."); **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶ 662; **Exhibit CLA-134**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 427 (a direct expropriation occurs "*when the title of the owner is affected by the measure in question*"); **Exhibit CLA-106**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103 (defining direct expropriation as "*open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State*").

699 *See, e.g.*, **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶¶ 680-86.

700 *See* **Exhibit CLA-141**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB07/15, Award, 3 March 2010, ¶¶ 2, 155-62.

701 **Exhibit CLA-141**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB07/15, Award, 3 March 2010, ¶ 387. *See also* **Exhibit CLA-134**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 427 (holding that claimants' investment was directly expropriated when Egypt formally transferred ownership of the land in Taba from claimants); **Exhibit CLA-175**, *JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award, 17 May 2023, ¶¶ 548-50 (finding that respondent had directly expropriated claimants' rights in their resorts where it adopted nationalization orders that expressly directed a state agency to "[a]*ssume state ownership over* [the claimants' resorts]").

305. Similarly, in *Stans Energy v. Kyrgyz Republic*, the government invalidated a series of mining licenses it had previously issued to claimants on the purported basis (confirmed by the Kyrgyz courts) that they had violated Kyrgyz law.[702] As the *Stans* tribunal readily concluded that respondent's termination of claimants' mining licenses, whether individually or collectively, had deprived claimants of the effective use and control of their licenses and therefore constituted an expropriation.[703] The tribunal also concluded that the dispossession was unlawful as it was not accompanied by compensation.[704]

306. The same was true in *Southern Pacific v. Egypt*.[705] In that case, claimants had entered into an agreement in the early 1970s with the government to build the "*Pyramids Oasis Project*"—a tourism complex at the pyramids of Giza. However, in 1978, Egypt's Ministry of Information and Culture declared the land surrounding the Pyramids "*public property (Antiquity)*" due to the presence of antiquities in the region, following which Egypt's General Investment Authority withdrew its approval of the project by decree, declaring that, "[a]*s a result of the Decree of the Minister of Culture and Information dated 28/5/78, considering the Pyramids Plateau one of the monumental areas, and accordingly the nature of the land had changed to be a public domain owned by the State as public property, it is impossible legally to implement this project on this land*."[706] This was followed by additional decrees declaring these lands *d'utilite publique* and placing claimants' assets under judicial trusteeship.[707] In 1979, the World Heritage Committee accepted Egypt's nomination of "*the pyramid fields*" for inclusion in the inventory of property to be protected by the UNESCO Convention.[708]

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[702] *See* **Exhibit CLA-172**, *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic*, UNCITRAL, PCA Case No. 2015-32, Award, 20 August 2019, ¶¶ 317, 321, 334.

[703] *See* **Exhibit CLA-172**, *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic*, UNCITRAL, PCA Case No. 2015-32, Award, 20 August 2019, ¶ 555.

[704] *See* **Exhibit CLA-172**, *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic*, UNCITRAL, PCA Case No. 2015-32, Award, 20 August 2019, ¶¶ 579-81.

[705] *See* **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992.

[706] **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶¶ 62-63.

[707] *See* **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶¶ 65-66.

[708] *See* **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 156.

307. Claimants did not challenge respondent's right to cancel the project but sought compensation for the expropriation.[709] The *Southern Pacific* tribunal agreed that Egypt, as a matter of international law, was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities.[710] However, the tribunal also held that the cancellation amounted to an expropriation of claimants' investment for which they were entitled to compensation, as "[t]*he obligation to pay fair compensation in the event of expropriation applies equally where antiquities are involved*."[711] In particular, it determined that Egypt's cancellation of the project "*had the effect of taking certain important rights and interests of the Claimants*," which amounted to expropriation even though "*those rights and interests were of a contractual rather than* in rem *nature*."[712] As the tribunal emphasized, the duty to compensate in the event of an otherwise lawful expropriation cannot be evaded "*by contending that municipal regulations give a narrow meaning to the term 'expropriation' or apply the concept only to certain kinds of property*."[713]

(2) The Standard For Indirect Expropriation

308. In addition to direct expropriation (which is characterized by the forcible transfer of title in favor of the host State and may also include situations of outright seizure, as set out above), the TPA also protects investors against **indirect expropriation**, which is characterized by an equivalent interference without the forcible transfer of title or an outright seizure.[714]

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709 *See* **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 183.

710 *See* **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 158.

711 **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 159.

712 **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 164.

713 **Exhibit CLA-102**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 168.

714 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.3(a). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 1190; **Exhibit CLA-177**, *JSC DTEK Krymenergo (Ukraine) v. The Russian Federation*, UNCITRAL, PCA Case No. 2018-41, Award, 1 November 2023, ¶ 662 (stating that indirect expropriation "*occurs when the property is otherwise destroyed or there is a significant depreciation of the value of the assets, or the owner is deprived of its ability to manage, use or control its property, without the legal title being affected*."); **Exhibit CLA-142**, *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v. The*

309. To determine whether an indirect expropriation has taken place, the TPA lists some of the factors that a tribunal may consider as part of its "*case-by-case, fact-based inquiry*."[715] In reviewing an analogous provision under the U.S.-Peru TPA, the *Gramercy* tribunal stated that the treaty "*establishes three cumulative factors that must be analyzed when addressing a claim for indirect expropriation*," *i.e.*, (i) the economic impact; (ii) the investor's reasonable investment-backed expectations; and (iii) the character of the government action.[716] For example, with respect to the first factor, the tribunal would consider the economic impact that the impugned measure had on the value of the investment, where such impact is to be measured by establishing the fair market price of the investment immediately prior and immediately after the adoption of the measure.[717]

310. The TPA reflects the well-accepted doctrine in international law that expropriation includes:

> [N]*ot only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*[718]

311. Therefore, a State expropriates an investment "*when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and*

United Mexican States, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 8.23 ("*an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way and a direct expropriation occurs if the state deliberately takes that investment away from the investor*."); **Exhibit CLA-174**, A. REINISCH & C. SCHREUER, *Expropriation*, *in* INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS (Cambridge University Press) (2020), ¶ 203 ("*Whether legal title to property is affected or not is often seen as the main distinguishing criterion between a direct and an indirect expropriation*").

715 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-B, art. 3(a).

716 *See, e.g.*, **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 1206.

717 *See, e.g.*, **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 1211.

718 **Exhibit CLA-106**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103.

economic use of his property."[719] Arbitral tribunals have consistently endorsed this standard.[720]

(b) SSA's Investment Was Unlawfully Expropriated

312. Colombia's adoption of Resolution No. 0085, purporting to declare the entirety of the San José shipwreck cultural patrimony, thereby precluding any possibility of SSA's private stake in the shipwreck, constitutes an expropriation of SSA's rights under Article 10.7 of the TPA. Colombia's expropriation was, moreover, unlawful as, among other things, Colombia has failed to compensate SSA.

(1) SSA Had Rights Capable of Expropriation

313. Before Colombia issued Resolution No. 0085, SSA had rights to 50% of the San José shipwreck that constituted treasure.

314. In 1982, SSA's Predecessor, GMC Inc., acquired rights in the shipwreck it had discovered pursuant to DIMAR Resolution No. 0354, which:

> [A]*cknowledge*[d] *the Glocca Morra Company, established in accordance with the laws of the Cayman Islands (British West Antilles) as* ***claimant of the treasures or shipwrecked goods in the coordinates referred to in the*** [1982 Report, page 13].[721]

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[719] **Exhibit CLA-105**, *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 77. *See also* **Exhibit CLA-106**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 3 ("*Thus, expropriation . . . includes . . . interference with the use of property which has the effect of depriving the owner, in whole or in significant part, or the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State*."); **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107 ("*When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or . . . as measures 'the effect of which is tantamount to expropriation.*'"); **Exhibit CLA-115**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 262 ("*The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases . . . is that of substantial deprivation*.").

[720] *See, e.g.,* **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 604 ("*De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.*"); **Exhibit CLA-64**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 408 ("*Thus, even if the 1998 and 1999 JAAs remain nominally in force, Claimant's investment may still have been expropriated if the contracts have been 'rendered useless' by the actions of the Ukraine government*.").

[721] **Exhibit C-13**, DIMAR Resolution No. 0354, 3 June 1982, art. 1 (emphasis added).

315. Page 13 of the 1982 Report provided, in turn:

> *The main targets, in bulk and interest are slightly west of the 76th meridian and are* ***just centered around the target "A" and its surrounding areas that are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N***.[722]

316. Accordingly, SSA's Predecessors had rights to 50% of the "*treasures or shipwrecked goods in the coordinates*" "***just centered around the target 'A' and its surrounding areas that are located in the immediate vicinity of 76 degrees 00'20"W, 10 degrees 10'19"N***", which SSA refers to as the Discovery Area in its submissions.[723] It is important to note that GMC Inc. described its finding as—and thus Resolution No. 0354 gave the company rights to—not a pinpoint, but an area. GMC Inc. and its crew knew that, given the manner in which the San José sank, after being blown up, its remains would be scattered over a considerable area of the ocean floor.[724] As Mr. Morris notes, the spread of debris would be amplified by the ocean currents, significant water depth, and steeply sloped ocean floor:[725] "[t]*herefore, in the case of the San José, the team would be looking for a large debris field containing articulated and disarticulated sections of a wooden ship, magnetic anomalies, and diagnostic artifacts over a large area*."[726] And so when SSA's Predecessors' crew discovered the debris field, that is what they reported—an area, not a pinpoint.

317. The Colombian courts agreed that SSA's Predecessors had a right to the area covering the shipwreck, not just a pinpoint. The Civil Court held that SSA Cayman was entitled to 50% of "*the goods of economic, historic, cultural, and scientific value that qualify as treasures*" which are "*found within the coordinates and surrounding areas referred to in the*" 1982 Report, *i.e.*, the Discovery Area.[727] The Supreme Court upheld this,

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

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

[724] *See* **CWS-2 [Swann]**, ¶ 19.

[725] *See* **CER-1 [Morris]**, ¶¶ 23, 60.

[726] **CER-1 [Morris]**, ¶ 23.

[727] **Exhibit C-25 [EN]**, 10th Civil Court of the Circuit of Barranquilla, Judgment, 6 July 1994, PDF p. 2 (*"2.) Declare that 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*

finding that SSA Cayman had the right to 50% of the "*goods that due to their own characteristics and features, in accordance with the circumstances and the guidelines indicated in this ruling, may legally qualify as treasure*" and that were those "*referred to in Resolution 0354*", *i.e.*, "*those that are in 'the coordinates referred in*'" the 1982 Report.[728] Thus, the Supreme Court only modified the lower court's ruling by noting that the goods had to be defined as treasure "*in accordance with the guidelines set out*" by the 2007 Supreme Court Decision, not the location of that treasure. While the Supreme Court noted that the area to which SSA had rights "*does not include other spaces, zones, or areas*", that did not limit the area beyond what was already referred to in the 1982 Report.[729] Rather, the Supreme Court reconfirmed the 1982 Report as the basis for SSA's rights, which refers to an area over which the debris of the shipwreck SSA reported would be spread. Were there any doubt, the Superior Court upheld this reading in its 2019 decision rejecting Colombia's attempt to remove the Injunction Order, ordering that the seizure continue under precisely the same terms as it had been ordered in 1994, *i.e.*, over "*goods that have the nature of treasure, that can be removed* ***from the area determined by the coordinates*** *indicated in* [the 1982 Report]", without any further limitations to the prescribed area.[730]

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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 the General Directorate of the Maritime and Port Authority*") (SSA's Unofficial Translation).

728 **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 234-35 (which reads in full: "***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 goods 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 to in the 'Confidential Report on Underwater Exploration conducted by the GLOCCA MORRA Company in the Caribbean Sea, Colombia February 26, 1982,' Page 13 No. 49195 Berlitz Translation Service,' which does not include other spaces, zones, or areas*.") (SSA's Unofficial Translation).

729 *See* **CER-5 [Ortíz]**, ¶¶ 87-88.

730 **Exhibit C-26 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 6 July 1994, PDF p. 5 (emphasis added) (SSA's Unofficial Translation). *See also* **Exhibit C-39 [EN]**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF p. 7 (resolving to "*maintain the* [Injunction Order] *declared in the order of 12 October 1994.*") (SSA's Unofficial Translation).

318. As the Colombian Supreme Court also confirmed, these rights were assignable.[731] And they were indeed validly assigned by GMC Inc. to SSA Cayman,[732] and then from SSA Cayman to SSA.[733] Accordingly, by 2008, SSA had vested rights to 50% of the treasure in the Discovery Area that its Predecessor had reported with the 1982 Report.[734]

319. As also set out above, the treasure to which SSA had rights comes from the San José. All available contemporaneous evidence collected from SSA's Predecessors' exploration and discovery of the shipwreck indicate that they had found a ship of the same period as the San José, at the location historical records indicated the shipwreck would be.[735] This included, *inter alia*, sonar and magnetometer readings from the area, sightings of cannons, and several woodpiles with characteristics indicating that they were violently separated from the body of a ship that was built at around the same time as and of the same type of wood that would have been used in the San José.[736] The result of all this evidence is that "*the site identified by SSA was consistent with a shipwreck site of an 18th century vessel—more likely than not, the San José*."[737]

320. It is, moreover, clear that Colombia believed that SSA's Predecessors had found the San José shipwreck. Not only were Colombia's Navy officers on board SSA's Predecessor's vessels convinced of this fact,[738] but Colombia's internal discussions thereafter confirm that the discovery had prompted Colombia to undertake substantial efforts to salvage what it "*presumed*" was the San José shipwreck.[739] This included, *inter alia*, Colombia entering into an MOU with the Swedish Government for "*the identification and salvage of the San José*" that were to "***start in the first place within the coordinates declared by Sea Search Armada***."[740] In light of the numerous and

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731 *See supra* ¶ 195.

732 *See supra* **Section II.C(c)**.

733 *See supra* ¶¶ 209-211.

734 *See also* **CER-5 [Ortíz]**, Section V.

735 *See supra* ¶¶ 30-31, 49-52, 62-69. *See also* **CER-1 [Morris]**, ¶ 52.

736 *See supra* ¶¶ 49-52, 62-69. *See also* **CER-1 [Morris]**, ¶¶ 23, 48, 52.

737 **CER-1 [Morris]**, ¶ 48.

738 *See supra* ¶¶ 98-99, 103.

739 *See supra* ¶¶ 111, 127.

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

express references to efforts regarding the discovery and salvage San José in Colombia's own contemporaneous records, Colombia's present-day efforts to deny that SSA's rights were in connection with the San José must fail.[741]

321. Indeed, Colombia's actions over the past 40 years have only further confirmed that it continues to believe that SSA found and thus had rights to the San José shipwreck. WHOI's description of its rediscovery of the shipwreck in 2015 indicates that it did so only after it "*returned to the search area determined by previous historical research*" after its first mission was unsuccessful.[742] Moreover, after SSA indicated that it would take measures to enforce the Injunction Order in its favor, Colombia immediately attempted to revoke it.[743] And when Colombia's efforts to get rid of the Injunction Order were unsuccessful, and once Colombia faced the renewed threat of the Injunction Order's enforcement, Colombia issued Resolution No. 0085,[744] nullifying the entirety of SSA's rights.

322. Thus, SSA had a vested right to 50% of the treasure found in the San José shipwreck, which, as explained below, Colombia expropriated and unlawfully interfered with.

(2) Colombia Directly Expropriated SSA's Investment

323. Resolution No. 0085 has directly expropriated SSA's rights to the San José shipwreck by transferring title of the entirety of the shipwreck to Colombia, including all of the shipwreck that was treasure.

324. On 23 January 2020, Colombia issued Resolution No. 0085, which declared "*the whole of the discovery identified as the galleon San José constitutes assets to be considered cultural heritage of the nation*" with immediate effect.[745] The effect of this, which is undisputed, was to transfer ownership of the entirety of the shipwreck and its contents,

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741 *See* Colombia's Preliminary Objections, ¶¶ 8-9, 32, 101-102, 233; Colombia's Reply, ¶¶ 71-161.

742 **Exhibit C-222**, *New Details on Discovery of San Jose Shipwreck*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, 21 May 2018, *available at* https://www.whoi.edu/press-room/news-release/new-details-on-discovery-of-the-san-jose-shipwreck. *See also supra* ¶ 239.

743 *See supra* ¶¶ 246, 248.

744 *See supra* ¶¶ 257-258.

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

including any and all treasure, to the State.[746] In effect, none of the San José shipwreck could be privately owned, thereby eviscerating any private rights over the treasure that was part of the San José shipwreck.[747] Instead, Colombia now owns the entirety of the San José shipwreck, including SSA's 50% share of the shipwreck's treasure.

325. Thus, by issuing Resolution No. 0085, Colombia has directly expropriated SSA's investment.

(3) In the Alternative, Colombia Indirectly Expropriated SSA's Investment

326. In the alternative, should the Tribunal find that Resolution No. 0085 did not transfer title to or outright seize SSA's rights, Colombia has indirectly expropriated SSA's rights to the treasure in the San José shipwreck as Resolution No. 0085 is a measure "*equivalent to expropriation or nationalization*" pursuant to TPA Article 10.7.1 that had "*an effect equivalent to direct expropriation.*"[748]

327. Under the TPA whether a measure or measures constitute indirect expropriation "*requires a case-by-case, fact-based inquiry*" that "*considers, among other factors"* (i) *"the economic impact of the government action*", (ii) "*the extent to which government action interferes with distinct, reasonable investment-backed expectations*" and (iii) "*the character of the government action*."[749] Here, all the factors indicate that Resolution No. 0085, if not directly expropriatory, resulted in an indirect expropriation of SSA's rights.

328. With respect to the <u>first</u> factor, it is indisputable that Resolution No. 0085 has completely eviscerated the value of SSA's investment, as it can no longer partake in any of the treasure in the San José shipwreck. Like in *ADC v. Hungary*, "[t]*here can*

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[746] *See* **CER-5 [Ortíz]**, ¶ 134.

[747] *See* **CER-5 [Ortíz]**, ¶¶ 155-60.

[748] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.7.1.

[749] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-B, art. 3(a).

be no doubt whatsoever" that Resolution No. 0085 "*had the effect of causing the rights of* [SSA] *to disappear and/or become worthless*."[750]

329. With respect to the second factor, it is equally indisputable that Resolution No. 0085 interfered with reasonable investment-backed expectations. SSA's Predecessors undertook to find the San José under a regulatory scheme that awarded them 50% of the treasure of that galleon if they found and reported it.[751] They did so and as such they had vested rights in their discovery, as the Colombian Supreme Court expressly confirmed in 2007,[752] and the Superior Court reconfirmed in 2019 by the Injunction Order.[753] Thus, for more than 40 years, SSA and its Predecessors reasonably expected to be able to enforce their rights to 50% of the treasure at the galleon.

330. It was, moreover, reasonable to expect that a significant portion of the San José shipwreck consisted of treasure. Indeed, Colombia sought to negotiate with SSA and later other contractors on the basis that a substantial portion of the San José was treasure, not cultural patrimony.[754] As recently as 2015, in its contract with MAC, Colombia contemplated that "*more than 83% of* [MAC's] *remuneration would consist of recovered pieces that are not part of the Cultural Heritage of the Nation*."[755]

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750 **Exhibit CLA-118**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 304.

751 *See supra* **Section II.A(b)**. *See also* **CER-5 [Ortíz]**, Section III.

752 *See supra* ¶¶ 196-199. *See also* **CER-5 [Ortíz]**, ¶¶ 91-94.

753 *See supra* ¶¶ 254-256. *See also* **Exhibit C-39**, Superior Court of the Judicial District of Barranquilla, Judgment, 29 March 2019, PDF p. 6 ("[t]*his Chamber finds that the [Injunction Order] has not harmed, nor is it expended in any way to harm, the Nation, since the property rights of both parties has been settled*.") (SSA's Unofficial Translation). **CER-5 [Ortíz]**, ¶ 115.

754 *See supra* ¶¶ 120-127, 147.

755 **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF p. 5 (SSA's Unofficial Translation). *See also* **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF pp. 5-6 ("*In accordance with the foregoing, it is clear that the financial model under which the Public-Private Partnership of Private Initiative without Disbursement of Public Funds was planned and structured is only feasible if it is remunerated with the handover of pieces from the find,* ***which is not currently legally possible****, insofar and inasmuch as the* [CNPC] *determined, in session of December 19, 2019, that the entirety of the find identified as the galleon San José consists of goods considered to be National Cultural Heritage, and consequently the Ministry of Culture declared it to be a National-Level Asset of Cultural Interest through Resolution 0085 of January 23, 2020*."); p. 7 ("*Considering the legal impossibility of remuneration in kind using pieces that are part of the find, procedure APP 001 of 2018 is inadmissible, because the entity cannot allocate funds to cover remuneration for whatever company winds up being awarded the contract*.") (emphases added) (SSA's Unofficial Translation).

331. With respect to the third factor, Resolution No. 0085 is patently a government action as the resolution was issued by a body of the Colombian Government, the Ministry of Culture.[756]

332. Accordingly, should the Tribunal not find a direct expropriation here, Resolution No. 0085 has indirectly expropriated SSA's investment.

(4) Colombia's Expropriation Is Unlawful

333. Pursuant to the TPA, in order to be lawful, any expropriation by Colombia must be carried out in compliance with all four of the following conditions: (i) with payment of prompt, adequate, and effective compensation; (ii) under due process of law; (iii) in a non-discriminatory manner; and (iv) for a public purpose.[757] Colombia has not complied with at least three of the conditions here.

334. With respect to the first condition, it cannot be disputed that Colombia has failed to pay SSA any compensation for its expropriation. This is, on its own, sufficient to render Colombia's expropriation unlawful under the TPA and customary international law.[758]

335. With respect to the second condition, Resolution No. 0085 was not issued in accordance with due process. Under international law, States hosting investments are required to accord investors both substantive and procedural due process protections.[759] As the tribunal in *ADC v. Hungary* explained:

> [D]*ue process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the*

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[756] *See supra* ¶ 261.

[757] *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.7.

[758] *See* **Exhibit CLA-162**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 543-45 (finding that the lack of compensation was sufficient to render Ecuador's expropriation unlawful); **Exhibit CLA-168**, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶ 411 (finding that a failure to offer or pay compensation rendered Hungary's expropriation unlawful).

[759] *See* **Exhibit CLA-118**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435; **Exhibit CLA-122**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶ 395; **Exhibit CLA-134**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 440.

> *actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow.*[760]

336. Here, Colombia offered no legal process at all for SSA to participate in. Rather, the entire process and decision-making behind Resolution No. 0085 was and remains shrouded in secrecy.[761] While Colombia has claimed that the location of the San José shipwreck must be kept confidential, it has never explained why the reasoning and process behind the designation of the entirety of the San José as the State's cultural patrimony must also be confidential. Indeed, there appears to be no reasonable basis for Colombia to be so tight-lipped about this other than to preclude those with rights to the San José, like SSA, from enforcing their rights. As set out above, it is no accident that Colombia set out to re-designate the entirety of the San José as cultural patrimony mere months after failing to remove the Injunction Order.[762] Further, as explained by Justice Ortíz in her expert report, at the time Resolution No. 0085 was issued "*the State agencies involved in its issuance (CNCP, ICANH and the Ministry of Culture) did not have sufficient and conclusive evidence, as required by the applicable law, to conclude that the San José Galleon should be declared cultural patrimony including declaring everything that could be found in* [the] *area*"[763] Similarly, Justice Ortíz points out that "*ANDJE's participation in this process suggests that the Government was aware of the possibility of litigation by affected private parties such as SSA and, despite this, did not consider it appropriate to notify and involve such parties. This could suggest, as a preliminary matter, that the administrative process was not impartial as required by Law 1437 of 2011*."[764] Thus, Colombia failed to grant substantive or procedural due process to SSA.

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760 **Exhibit CLA-118**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435.

761 *See supra* ¶¶ 259, 262-263.

762 *See supra* ¶ 258.

763 **CER-5 [Ortíz]**, ¶ 149.

764 **CER-5 [Ortíz]**, ¶ 152.

337. With respect to the fourth condition, Colombia did not issue Resolution No. 0085 for a public purpose. A State cannot simply purport to act with a public purpose. As the tribunal in *ADC v. Hungary* observed:

> [A] *treaty requirement for 'public interest' requires some genuine interest of the public. If a mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless.*[765]

338. Here, Colombia has not explained why the entirety of the San José shipwreck must be declared property of the State in order to preserve its cultural and historical value. Rather, common sense would suggest (and Colombia previously appeared to agree) that the treasure in the San José would be used to pay for costly exploration and salvage efforts and would not constitute part of cultural heritage that must be owned by the State. Indeed, as Mr. Morris confirms, what is commonly understood as treasure (gold, silver, jewels) does not have much archaeological value as compared to other parts of the ship that would provide cultural and historical knowledge about the lives and events of the past.[766] Accordingly, Colombia has failed to articulate a public purpose for deeming the entirety of the San José shipwreck, including all its treasure, cultural patrimony.

B. Colombia Breached Its Obligation To Provide Fair And Equitable Treatment

339. Colombia's conduct described above,[767] individually and collectively, also amounts to a breach of the FET obligation in the TPA and customary international law. The analysis below proceeds in two parts: *(i)* SSA describes the FET standard (**Section IV.B(a)**), and *(ii)* SSA shows that, by issuing Resolution No. 0085, Colombia has breached the FET standard by undermining SSA's legitimate expectations, arbitrarily and unreasonably depriving SSA of its investment, and acting in a non-transparent manner without according SSA due process (**Section IV.B(b)**).

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[765] **Exhibit CLA-118**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 432. The TPA equates the term "*public purpose*" with "*different terms, such as 'public necessity,' 'public interest,' or 'public use.*'" **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.7, n. 5.

[766] *See* **CER-1 [Morris]**, ¶ 15.

[767] *See supra* **Sections II.C-II.G**.

(a) The Fair and Equitable Treatment Standard

340. Article 10.5 of the TPA guarantees all foreign investors treatment that is fair and equitable and consistent with customary international law:

> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, **including fair and equitable treatment** and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "**fair and equitable treatment**" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "**full protection and security**" requires each Party to provide the level of police protection required under customary international law.*
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*[768]

341. Annex 10-A of the TPA ("*Customary International Law*") offers additional guidance on the interpretation of Article 10.5:

> *The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.*[769]

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[768] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.5 (emphases added).

[769] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), Annex 10-A.

342. A State's obligation to provide "*fair and equitable treatment*" is a cornerstone protection of customary international law and is enshrined in almost all investment treaties.[770] Indeed, the TPA itself acknowledges that customary international law now "*includ*[es]" the FET standard of protection.[771]

343. Tribunals interpreting analogous provisions in other recent U.S. investment treaties have reached the same conclusion. For example, in *Gramercy v. Peru*,[772] the tribunal held that the United States-Peru Free Trade Agreement ("**U.S.-Peru FTA**") "*provides clear rules incardinating the FET standard under the Treaty within customary international law and the MST*."[773] Similarly, in *Elliott v. Korea*,[774] the tribunal held

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[770] *See, e.g.*, **Exhibit CLA-120**, *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239 (stating that this standard "*allow*[s] *for justice to be done in the absence of the more traditional breaches of international law standards . . . thus ensuring that the protection granted to the investment is fully safeguarded*.").

[771] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.5(1).

[772] *Gramercy* was decided under the U.S.-Peru FTA—a treaty with language analogous to Article 10.5 of the TPA. *See* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 814 (citing Article 10.5 of the U.S.-Peru FTA as "***Article 10.5: Minimum Standard of Treatment****. 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights [...]*") (emphasis in original).

[773] **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 824.

[774] *Elliot* was decided under the United States-Korea Free Trade Agreement ("**U.S.-Korea FTA**")—a treaty with language analogous to Article 10.5 of the TPA. *See* **Exhibit CLA-176**, *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023, ¶¶ 566-67 (citing Article 11.5 of the U.S.-Korea FTA as "***ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT****. 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article*.") (emphasis in original), 567 (citing Annex 11-A of the U.S.-Korea FTA as "*The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 15.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens*.").

that it must interpret the terms "*fair and equitable treatment*" "*in the context of, and as an element of, the MST obligation, while giving meaning to such terms in accordance with the general rule of treaty interpretation as set out in the VCLT, which requires that a treaty be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*,'" while taking into account the State parties' "*shared understanding of customary international law*," as stated in the treaty's annex.[775]

344. Moreover, numerous tribunals have recognized that customary international law has evolved to include FET (as expressly recognized by the FTA, here). Specifically, the weight of authority now recognizes that the treatment under customary international law is a progressive standard that has evolved and has converged with the autonomous FET standard, such that it now provides the same level of protection.[776] As a result of the evolution of the minimum standard of treatment ("**MST**") in international law, acts that once may not have been previously considered to breach the minimum standard may today constitute a breach of such.[777]

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[775] **Exhibit CLA-176**, *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023, ¶ 568.

[776] *See, e.g.*, **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 125 ("[T]*he* [Free Trade Commission] *interpretations* [of the international law minimum standard of treatment] *incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of . . . the foreign investor and his investments.*"); **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 291 (finding that "*the difference between the* [treaty FET standard] *and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real.*"); **Exhibit CLA-153**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489 ("*The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago . . . . What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today*"); **Exhibit CLA-158**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 208 ("[T]*here is no material difference between the customary international law standard and the FET standard under the present BIT.*"); **Exhibit CLA-160**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520 ("[T]*he CIS Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter . . . there is no substantive difference in the level of protection afforded by both standards.*").

[777] *See, e.g.,* **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 117 ("*It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the* Neer *Tribunal (in a very different context) meant in 1927.*"); **Exhibit CLA-147**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 218 (finding that the MST is "'*constantly in a process of development,' including since* Neer's *formulation*"); **Exhibit CLA-151**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 567 ("*It is the*

345. Similarly, in *Railroad Development Corporation v. Republic of Guatemala*,[778] the tribunal found that the MST is "*constantly in a process of development*."[779] The tribunal defined the standard as follows:

> [T]*he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is* ***arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory*** *and exposes the claimant to sectional or racial prejudice, or* ***involves a lack of due process*** *leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a* ***complete lack of transparency and candor in an administrative process****. In applying this standard it is relevant that the treatment* ***is in breach of representations*** *made by the host State which were reasonably relied on by the claimant*.[780]

Tribunal's view that public international law principles have evolved since the Neer *case and that the standard today is broader than that defined in the* Neer *case on which Respondent relies.*"); **Exhibit CLA-78**, *Eco Oro v. Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 744 ("[T]*he Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves . . . it is the Tribunal's view that the standard today is broader than that defined in the* Neer *case.*").

[778] *Railroad Development Corporation v. Republic of Guatemala* was decided under the Central America-Dominican Republic Free Trade Agreement ("**DR-CAFTA FTA**")—a free trade agreement between the United States and six Central American countries with similar substantive provisions to the TPA. *See* **Exhibit CLA-147**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 212 (citing Article 10.5 and Annex 10-B on customary international law of the DR-CAFTA FTA as: "*1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article*" and "*The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens*.").

[779] **Exhibit CLA-147**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 218.

[780] **Exhibit CLA-147**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219 (emphases added). *See also* **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 454 (holding that "*the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is* ***arbitrary, grossly unfair or idiosyncratic****, is* ***discriminatory*** *or involves a* ***lack of due process*** *leading to an outcome which offends judicial propriety*")

346. Likewise, the tribunal in *Eco Oro v. Colombia*, a recent decision under the Canada-Colombia Free Trade Agreement, defined the MST in the following terms:

> *Reviewing past decisions, concepts such as* ***transparency, stability and the protection of the investor's legitimate expectations*** *play a central role in defining the FET standard, as does* ***procedural or judicial propriety and due process and fairness, refraining from taking arbitrary or discriminatory measures, or from frustrating the investor's reasonable expectations*** *with respect to the legal framework affecting the investment. Unjust or idiosyncratic actions, a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith have all been found to be in breach of FET. A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.*[781]

347. In any event, should the Tribunal find that there are aspects of SSA's claims under Article 10.5(1) that are not protected under MST, SSA is entitled to autonomous FET protection granted to Swiss investors in Colombia pursuant to Article 4.2 of the Swiss-Colombia BIT[782] through the TPA's most-favored nation ("**MFN**") clause.[783] It is well

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(emphases added), 456 ("*the minimum standard is part and parcel of the international principle of good faith*"), 457 ("*a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard*"); **Exhibit CLA-176**, *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023, ¶¶ 571-73.

781 **Exhibit CLA-78**, *Eco Oro v. Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 754 (emphases added), *citing, among others,* **Exhibit RLA-24**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 116 ("[W]*hat is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith*."); **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 288 (stating FET is infringed by bad faith conduct); **Exhibit CLA-135**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 178 (finding FET includes "*the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment*").

782 *See* **Exhibit CLA-137**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 6 October 2009 (entry into force), art. 4(2) ("*Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party*.").

783 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), arts. 10.4(1) ("*Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*"), 10.4(2) ("*Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"). This provision serves to ensure that "*a host country* [] *extend*[s] *to investors from one foreign country treatment no less favourable than it accords to investors from any other foreign country in like cases*." **Exhibit CLA-104**, United Nations Conference on Trade and Development, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in

accepted by tribunals that MFN provisions such as Article 10.4 of the TPA can be used to import a more favorable FET provision from a Treaty with a non-Party State, such as Article 4.2 of the Colombia-Swiss BIT.[784] The FET standard in Article 4.2 of the Colombia-Swiss BIT unequivocally provides protection to the autonomous standard.[785]

348. Thus, the FET standard accordingly constitutes a broad and flexible protection, requiring a fact-specific assessment to determine whether conduct is "*fair*" and "*equitable*" in the context and particular circumstances in dispute.[786] It "*should be*

International Investment Agreements, 1999, PDF p. 9. *See also* **Exhibit CLA-132**, Stephan W. Schill, *Multilateralization through most-favored-nation treatment*, *in* THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009), p. 142 (MFN clause is a "*tool for the multilateralization and harmonization of substantive standards of investment protection. . . . MFN clauses elevate the level of protection in any given host State to the maximum level granted in any of that State's investment treaties*.").

[784] *See* **Exhibit CLA-145**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 254 ("[T]*he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT*."); **Exhibit CLA-112**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104 (noting the MFN provision may be used to import additional rights into FET provision "*that can be construed to be part of the fair and equitable treatment of investors*"); **Exhibit CLA-135**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57 (using the MFN provision to import FET, where the protection was not available in the BIT); **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575 (parties agreeing that MFN could be used to import an FET provision); **Exhibit CLA-152**, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55 (using the MFN provision to import FET, where the protection was not available in a multilateral treaty).

[785] *See* **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1309 (interpreting the Colombia-Switzerland BIT).

[786] *See* **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 285 ("*There is agreement between the parties that the determination of the legal meaning of the 'fair and equitable treatment' standard is a matter of appreciation by the Tribunal in light of all relevant circumstances*."), 291 ("*To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied*."), 309 ("*In applying this standard, the Tribunal will have due regard to all relevant circumstances*."); **Exhibit CLA-143**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 188 ("*A fourth important characteristic of* [FET] *is that its application is crucially dependent on an evaluation of the facts of each case*."); **Exhibit CLA-148**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 505-506 ("*It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CLA-151**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566 ("*The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered*."); **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 544 ("*The Tribunal further wishes to point out that the analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CLA-161**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 362 ("*In*

understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[787]

349. Accordingly, the FET standard must be read to protect investments from treatment including conduct that is *(i)* in frustration of the investor's legitimate expectations (**Section IV.B(1)**), *(ii)* unreasonable, discriminatory and arbitrary (**Section IV.B(2)**), and *(iii)* not transparent and lacking in due process (**Section IV.B(3)**).[788] Each of these factors is addressed below.

(1) The FET Standard Protects An Investor's Legitimate Expectations

350. The protection of an investor's legitimate expectations is "*firmly rooted in arbitral practice*."[789] Indeed, legitimate expectations serve as the "*touchstone*" to an assessment of whether an investor has been afforded FET under customary international law.[790]

351. As the tribunal in *Tecmed* noted, FET requires a host State to:

> [P]*rovide to international investments treatment that does not affect the* ***basic expectations that were taken into account by the foreign investor to make the investment*** *. . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions . . . that were relied upon by the investor to assume its*

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other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.").

787 **Exhibit CLA-112**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113. *See also* **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1308 ("*A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor*.").

788 *See, e.g.*, **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543 ("*FET comprises,* inter alia*, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency*.").

789 **Exhibit CLA-148**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667.

790 **Exhibit CLA-159**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 458 ("*There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith*"), 463 ("[W]*hatever the scope of the FET standard, the legitimate expectations of the investors have generally been considered central to its definition.*"). *See also* **Exhibit CLA-166**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018, ¶ 648 (referring to legitimate expectations as the "*primary element*" of FET).

> *commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.*[791]

352. A host State will be in breach of the FET standard if its conduct results in "*evisceration of the arrangements in reliance upon* [which] *the foreign investor was induced to invest*."[792]

353. The tribunal in *Glencore v. Colombia* further considered that legitimate expectations:

> [A]*rise when a State (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgement) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor. The protection of legitimate expectations is closely connected with the principles of good faith, estoppel, and the prohibition of* venire contra factum proprium.
>
> *A State can create legitimate expectations vis-à-vis a foreign investor in two different contexts. In the first context, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations.*[793]

354. Legitimate expectations may therefore be formed through explicit or implicit representations by the host State. While direct representations made by the State to an investor will be sufficient to create legitimate expectations,[794] it is also well-recognized

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791 **Exhibit CLA-111**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (emphasis added).

792 **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611. *See also* **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 302 (finding that the State assumed "*an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations*.").

793 **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1367-1368.

794 *See, e.g.*, **Exhibit CLA-116**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 226, 231-32 (finding Poland breached legitimate expectations arising from obligations contained in a share purchase agreement); **Exhibit CLA-122**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision

that legitimate expectations can be generated through a host State's legal and regulatory frameworks.[795] As the tribunal in *Murphy v. Ecuador* explained:

> *An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual*

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on Jurisdiction, 6 July 2007, ¶¶ 192-94 (finding Georgia breached legitimate expectations arising from representations and warranties set forth in a joint venture agreement); **Exhibit CLA-129**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 359-64 (finding Ecuador breached legitimate expectations arising from specific payment provisions of a power purchase agreement); **Exhibit CLA-154**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶¶ 198-205 (finding Romania breached legitimate expectations arising from representations made in a government notice); **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 563, 575 (finding Venezuela breached legitimate expectations arising from specific representations made in a letter); **Exhibit CLA-167**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶¶ 9.130, 9.145 (finding Egypt breached legitimate expectations arising from representations made in a letter).

795 *See, e.g.*, **Exhibit CLA-113**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 191 (observing that "*there is certainly an obligation not to alter the legal and business environment in which the investment has been made.*"); **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 301 ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable*."); **Exhibit CLA-119**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 133 (finding that Argentina had "*created specific expectations among investors*" through guarantees provided in its legislation and regulations, and was therefore bound by these guarantees); **Exhibit CLA-126**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 298 (observing that "[t]*he duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest*"), 310 (concluding that Argentina breached the investor's legitimate expectations when it "*fundamentally modified the investment Regulatory Framework, which, as stated above, provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations*"); **Exhibit CLA-131**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 179 (finding breach of FET where Argentina "*fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them*"); **Exhibit CLA-143**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 226 (noting, in relation to investment decisions that have considered the investors' legitimate expectations "*that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of* [FET]. *It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*."); **Exhibit CLA-144**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 167-68 (finding Argentina breached legitimate expectations arising from general assurances contained in a regulatory framework); **Exhibit CLA-146**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 513 (finding Argentina breached legitimate expectations arising from general assurances contained in a regulatory framework); **Exhibit CLA-148**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 674 (finding Romania had made a promise or assurance, through its legal framework and issued certificates, which gave rise to the investors' legitimate expectation).

> *arrangements concluded between the investor and the State. Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations on the part of the investor but they are not necessary for legitimate expectations to exist.* ***An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor***.[796]

355. Specific representations warrant even greater reliance when made within a regulatory framework that calls for the issuance of such representations by the Government.[797]

(2) The FET Standard Protects An Investor From Arbitrary, Unreasonable, And Discriminatory Treatment

356. The tribunal in *EDF (Services) v. Romania*, concluded that unreasonable or arbitrary treatment amounting to an FET violation includes any of the following:

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure.[798]

357. This formulation has been cited with approval in a number of recent decisions.[799]

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[796] **Exhibit CLA-158**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 248 (emphasis added).

[797] *See, e.g.*, **Exhibit CLA-165**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶¶ 917-42.

[798] **Exhibit CLA-138**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303 (accepting Professor Schreuer's definition when acting as an expert in the case). *See also* **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578 ("*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker*."); **Exhibit CLA-140**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-63 (quoting Professor Schreuer's description in *EDF* and, "[s]*umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*."); **Exhibit CLA-133**, C. SCHREUER, *Protection against Arbitrary or Discriminatory Measures*, *in* CATHERINE A. ROGERS AND ROGER P. ALFORD, EDS., THE FUTURE OF INVESTMENT ARBITRATION (2009), pp. 184-88.

[799] *See, e.g.*, **Exhibit CLA-163**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 923, n. 1116; **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No.

358. Similarly, in *Gramercy v. Peru*, the tribunal reasoned that there was no relevant distinction between the terms "*arbitrary*", "*unjustified*", or "*unreasonable*" in the FET context.[800] The *Gramercy* tribunal summarized existing investment arbitration cases concerning the concept of arbitrariness in the following terms:

> *Arbitrariness has been described as "**founded on prejudice or preference rather than on reason or fact**"; "not so much something opposed to a rule of law, as something **opposed to the rule of law**"; "**willful disregard of due process of law**, an act which shocks, or at least surprises, a sense of judicial propriety"; or conduct which "**manifestly violate**[**s**] **the requirements of consistency, transparency, even-handedness and non-discrimination**"; "measures that affect the investments of nationals of the other Party **without engaging in a rational decision-making process**". . . .*
>
> *Summing up, **the underlying notion of arbitrariness is that prejudice, preference, bias and lack of reason is substituted for the rule of law and proper procedure**.*[801]

359. The *Gramercy* tribunal further held, on the basis of existing arbitral decisions, that arbitrary conduct is a breach of MST. In particular, it observed:

> *The MST which an alien can expect includes that the State will abstain from arbitrariness and that **the rule of law will not be undermined by prejudice, preference, bias, lack of reason or absence of proper procedure**. If an investment has been subject to arbitrary or unreasonable treatment by the host State, the necessary consequence is that the MST under customary international law, including FET, have been violated.*[802]

360. At issue in *Gramercy* was the 2013 decision of Peru's Constitutional Tribunal relating to the repayment process for government-issued land reform bonds in which the claimants had invested and the legality of subsequent decrees adopted by Peru's Ministry of Finance prescribing a specific method for the valuation of those bonds,

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ARB/16/6, Award, 27 August 2019, ¶ 1449; **Exhibit CLA-78**, *Eco Oro v. Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 760.

800 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 827-29.

801 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 830, 832 (underline in original; bolded emphases added).

802 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 833 (emphasis added). *See also* **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 834-35.

which had allegedly diminished the total value of the bonds owned by the claimants. The *Gramercy* tribunal found that Peru's measures constituted a breach of MST required by customary international law, including the FET standard, guaranteed in Article 10.5 of the U.S. Peru TPA as they "*do not properly transpose the mandate received from the* [Constitutional Tribunal]*, but rather create an arbitrary and unjust regime, the sole purpose of which appears to be to minimize the amounts payable by the Republic to the holders of* [Agrarian Bonds]*, including (and in particular) Gramercy*."[803]

361. In general, where a State is acting contrary to its own legal principles, this constitutes arbitrary conduct and breaches the State's FET obligations.[804]

362. Notably, the FET standard can be violated by unreasonable conduct, even in the absence of bad faith or malicious intent.[805]

(3) The FET Standard Requires A State To Act Transparently And With Due Process

363. Host States bear an affirmative obligation to act transparently and with due process.[806] Transparency has been recognized as a crystallized component of the MST by

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803 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 986.

804 *See* **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 664-711.

805 *See, e.g.*, **Exhibit CLA-117**, *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372 (rejecting as "*incoherent*" the notion that the respondent could breach its FET obligations "*only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious*"); **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543 ("[T]*he state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard.*").

806 *See, e.g.*, **Exhibit CLA-107**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 83 ("[T]*he lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment*."); **Exhibit CLA-111**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154 ("*The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently*."), 167 (observing that "*Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly*"); **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 307 ("*A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination*."), 309 ("*A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e. *unrelated to some rational policy), or discriminatory (*i.e.

numerous tribunals, including *Eco-Oro v. Colombia*.[807] As the tribunal in *TECMED v. Mexico* confirmed, investors are:

> [E]*ntitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly.*[808]

364. Relatedly, investors are entitled to be treated with substantive and procedural due process, within both administrative and judicial proceedings.[809]

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based on unjustifiable distinctions)."); **Exhibit CLA-119**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 128 (holding that "*violations of the* [FET] *standard may arise from a State's failure to act with transparency —that is, all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors*."); **Exhibit CLA-121**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 308–309 (finding that respondent showed a lack of transparency in denying access to claimant to an administrative file in breach of FET); **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Award, ¶ 618 ("[T]he *process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle*."); **Exhibit CLA-140**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 (noting that "*an absence of transparency in the legal procedure or in the actions of the State"* is a factor relevant to the FET standard); **Exhibit CLA-151**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570 ("*Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner*"); **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 579 ("*Furthermore, as noted by a number of arbitral tribunals, FET 'requires that any regulation of an investment be done in a transparent manner*'").

[807] *See, e.g.,* **Exhibit CLA-78**, *Eco Oro v. Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 752 ("[T]*he Tribunal is satisfied that FET encompassing concepts of non-arbitrariness, transparency and fairness are recognised elements of customary international law within the confines of reasonableness*.").

[808] **Exhibit CLA-111**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 167.

[809] *See, e.g.*, **Exhibit CLA-106**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 90-93 (finding a violation of FET where a municipality did not act with procedural propriety); **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143 (finding a violation of FET where there was a procedural failure to give notice and an attachment order was executed by police without directly notifying the owner of the property); **Exhibit CLA-111**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 162, 166 (finding a violation of FET where a government agency failed to notify the claimant of its intention to refuse renewal of a permit); **Exhibit CLA-60**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 308 ("[A]*ccording to the* [FET] *standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.*"); **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1319 ("*It is undisputed that* ***a breach of due process****, whether in judicial proceedings or in administrative proceedings,* ***may result in the violation of the FET standard***.") (emphases added).

365. The duty to provide due process as part of the FET obligation can have different facets, as illustrated in arbitral decisions and commentary.[810] This includes, *inter alia*:

a. The duty to notify an investor of hearings and not to decide about a claim in their absence or in gross violation of procedural rules;

b. The duty that the government not seek to influence administrative or court procedures;

c. The obligation not to maliciously misapply substantive law;

d. The obligation not to use powers for an improper purpose (*i.e.*, a purpose not covered by the law authorizing the powers); and,

e. The obligation not to act intentionally against the investor to harm its investment.[811]

366. Ultimately, the application of the due process/transparency standard will vary across cases and requires a case-by-case analysis.[812]

367. For example, the tribunal in *TECO v. Guatemala* found that "*a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard*," noting that "*it is relevant that the Guatemalan administration* ***entirely failed to provide reasons for its decisions or disregarded its own rules***."[813] In this regard, the tribunal observed:

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[810] *See* **Exhibit CLA-136**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 221 ("*It is recognized in literature and jurisprudence that the duty to provide due process is part of the obligation to provide fair and equitable treatment*.").

[811] *See* **Exhibit CLA-136**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 221.

[812] *See* **Exhibit RLA-24**, *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 127 (finding that, "[i]*n the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.* ***This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities***.") (emphasis added).

[813] **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 457 (emphasis added).

> *Based on such principles, the Arbitral Tribunal considers that a* ***willful disregard of the fundamental principles upon which the regulatory framework is based****, a* ***complete lack of candor*** *or* ***good faith*** *on the part of the regulator in its dealings with the investor, as well as* ***a total lack of reasoning****, would constitute a breach of the minimum standard.*[814]

368. In *Middle East Cement v. Egypt*, for example, a government agency subjected claimant's ship *Poseidon* to an administrative seizure under domestic legislation which allowed for seizure where a debtor was "*absent*" from the vessel and then auctioned it off (all without notifying claimant).[815] The tribunal ruled that the agency's application of the "*absent*" procedure was unreasonable as it could not be expected that there was always somebody on the ship, and, further, that respondent could have reached out to claimant given its many contacts with the claimant.[816] The tribunal concluded that, for "*a matter as important as the seizure and auctioning of a ship*," claimant should have been notified by a direct communication and found that Egypt's actions amounted to a breach of the FET standard (as well as expropriation).[817]

369. Similarly, in *Rumeli v. Kazakhstan*, the tribunal identified several FET breaches where a government agency terminated claimants' telecommunications contract without first notifying them and suspending the contract so that the alleged breaches could be redressed.[818] In addition, the *Rumeli* tribunal scrutinized the decision-making process of a government-appointed Working Group that appeared to rubber-stamp the termination decision and concluded that it "*lacked transparency and due process*."[819] The tribunal noted that the Working Group "*issued a three and a half pages decision, summarily reasoned, and concluded that the Contract was lawfully terminated and that*

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814 *See* **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 458 (emphases added). *See also* **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 493, 587.

815 *See* **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 132.

816 *See* **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143.

817 **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143.

818 *See* **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶¶ 612-16.

819 **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617.

there were no grounds for its restauration."[820] The tribunal also noted that the Working Group's reasoning was founded on grounds that were entirely from those forming the basis for the initial decision, and that the decision was made without claimants having a real possibility to present their position, having been "*only verbally invited to a meeting just two days before the meeting of the Working Group*."[821] On that basis, the tribunal concluded that "*the process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the* [FET] *principle*," amounting to a breach of the treaty by the State.[822]

370. For the avoidance of doubt, SSA notes that, as a number of tribunals interpreting a similarly worded treaty provision have confirmed, due process is a discrete component of the MST, separate from a denial of justice standard.[823]

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371. With these guidelines in mind, the next section sets out the specific standards for breaches under the FET by (*i*) failure to protect Claimant' legitimate expectations (**Section IV.B(b)(1)**); (*ii*) unreasonable, discriminatory and arbitrary conduct (**Section IV.B(b)(2)**); and (*iii*) failure to act transparently and with due process (**Section IV.B(b)(3)**).

(b) Colombia Treated SSA Unfairly And Inequitably

372. Resolution No. 0085 patently breached the FET standard by (*i*) failing to protect SSA's legitimate expectations; (*ii*) engaging in unreasonable and arbitrary conduct; and (*iii*) failing to act transparently and with due process.

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820 **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617.

821 **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617.

822 **Exhibit CLA-128**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 618.

823 *See, e.g.*, **Exhibit CLA-149**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 484, 587 ("*Article 10.5 CAFTA-DR also obliges the State to observe due process in administrative proceedings. A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings*."); **Exhibit CLA-147**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219.

(1) Colombia Frustrated SSA's Legitimate Expectations

373. Colombia violated SSA's (and its Predecessors') legitimate expectations by issuing Resolution No. 0085.

374. It is undisputed that at the time SSA's Predecessors acquired permission to explore Colombian waters for the San José shipwreck pursuant to Resolution No. 0048, Colombian law entitled the discoverer to 50% of its discovery.[824] This was made clear by Article 700 and 701 of the Civil Code which provided that "*treasure*"—defined as "*coin*[s] *or jewels or other precious effects that, crafted by man, have been long buried or hidden, without memory or indication of its owner*"—"*shall be divided equally between the owner of the land* [here, Colombia] *and the person who made the discovery* [here, SSA's Predecessor]."[825] Thus, when SSA's Predecessors reported their discovery, their rights to it vested as recognized by DIMAR Resolution No. 0354.[826] SSA's Predecessors then validly transferred these rights to SSA by 2008.[827]

375. When it acquired the investment in 2008, SSA inherited its Predecessors' expectations,[828] and thus reasonably expected it was entitled to 50% of the goods in the San José shipwreck that were treasure. No legal or other change had reduced the scope of the rights in question. On the contrary, the Supreme Court had recently reaffirmed in 2007,[829] that SSA Cayman's rights extended to 50% of the treasure in the shipwreck its Predecessors had discovered, *i.e.*, goods that were not Colombian cultural patrimony.[830]

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824 *See* **Exhibit C-1bis [EN]**, Colombian Civil Code (excerpts), 31 May 1873, PDF p. 2, art. 701 ("*The treasure found on another's land shall be divided equally between the owner of the land and the person who made the discovery. But the latter shall not be entitled to his share unless the discovery is fortuitous, or when the treasure has been sought with the permission of the owner of the land*") (SSA's Unofficial Translation). *See also* **Exhibit C-15 [EN]**, Letter No. 04264/CORAC from the Colombian National Navy to the Legal Advisor to the President, 18 July 1982, PDF p. 1 (SSA's Unofficial Translation).

825 **Exhibit C-1bis [EN]**, Colombian Civil Code (excerpts), 31 May 1873, arts. 700-701 (SSA's Unofficial Translation). *See also* **CER-5 [Ortíz]**, ¶¶ 40-41.

826 *See* **CER-5 [Ortíz]**, Section IV.

827 *See supra* ¶¶ 209-211, 313-322.

828 *See, e.g.*, **Exhibit-CLA-69**, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶¶ 112, 170-75, 324-42 (recognizing that legitimate expectations formed at a time preceding the assignment of the shares to the claimant).

829 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF pp. 234-35 (SSA's Unofficial Translation).

830 *See* **CER-5 [Ortíz]**, Section IV.

376. Moreover, given that the search was undertaken for the San José at the location it was calculated to be on the basis of extensive historical research, and that all contemporaneous evidence and accounts (including those by the Colombian Navy) expressed the belief that the discovery was that of the San José,[831] SSA reasonably believed that its rights were over 50% of the treasure in the San José shipwreck. In this respect, the Columbus Report and other assertions by Colombia that the pinpoint coordinates SSA's Predecessors reported were "*empty*" were of little consequence given that Colombia refused to take SSA (and its Predecessors) to the Discovery Area.[832] Instead, Colombia clearly believed that the Discovery Area reported by SSA's Predecessors contained the San José shipwreck. For example, Colombia entered an MoU with the Swedish Government for the identification and salvage of the San José, with "*identification* [to] *start in the first place within the coordinates declared by Sea Search Armada*",[833] and entitling SSA to proceeds as the original discoverer "*if the shipwrecked goods* [were] *found within the reported area*."[834] Additionally, Colombia appears to have shared that location with MAC to enable its rediscovery of the galleon in 2015.[835] Moreover, when threatened with enforcement of SSA's Injunction Order, which effectively precluded Colombia from salvaging any of the shipwreck in the Discovery Area, Colombia immediately set out to attempt to remove it.[836] Thus, SSA reasonably expected that it held rights to 50% of the San José shipwreck's treasures.

377. At no point until 2008 (or even thereafter) did SSA (or its Predecessors) have any reason to believe that the entirety of the San José shipwreck was (or could be) cultural patrimony. Quite the opposite. Colombia's negotiations with SSA for the salvage of the San José shipwreck reflect its belief that the shipwreck consisted of treasure that could be owned by SSA's Predecessors.[837] For example, the Draft Contract offered by DIMAR to SSA's Predecessor proposed a 50-50 split between SSA Cayman and

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831 *See supra* ¶¶ 30-31, 49-52, 62-69, 98-99, 103.

832 *See supra* ¶¶ 167, 241, 271. *See also* **CER-1 [Morris]**, ¶¶ 53-56.

833 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, PDF p. 2, art. 5 (SSA's Unofficial Translation).

834 **Exhibit C-59 [EN]**, Memorandum of Understanding Between the Authorized Representatives of the Governments of Colombia and Sweden, 18 July 1988, PDF pp. 1-2, art. 2 (SSA's Unofficial Translation).

835 *See supra* ¶ 239.

836 *See supra* ¶¶ 248-257.

837 *See supra* **Section II.C(g)**.

Colombia of all goods, including those of "*historical*" value, which Colombia would exclusively acquire, subject to their determination as such by "*experts*".[838] This was a specific and express representation by the Colombian Government that the San José shipwreck consisted of divisible treasure.[839]

378. Moreover, any designation of the goods as treasure or cultural patrimony would have to be done on an item-by-item basis, once salvaged, as confirmed by the 2007 Supreme Court Decision.[840] Indeed, as late as 26 May 2015, Colombia entered into a contract with MAC where "*it was foreseen that more than 83% of* [MAC's] *remuneration would consist of recovered pieces that are not part of the Cultural Heritage of the Nation*."[841]

379. Accordingly, Resolution No. 0085 was a complete reversal of Colombia's decades-long position that a substantial portion of the San José consisted of treasure that could be owned by a private party. As such, its adoption of Resolution No. 0085 "*eviscerate*[d] *the arrangements in reliance upon which*" SSA acquired the investment, and thus Colombia violated its FET obligations.[842]

(2) Resolution No. 0085 Constitutes Unreasonable And Arbitrary State Conduct

380. Resolution No. 0085 was moreover issued in an unreasonable and arbitrary manner "*undermined by prejudice, preference, bias, lack of reason or absence of proper*

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838 **Exhibit C-16bis**, Draft Salvage Contract from Colombia to GMC (complete), 23 August 1984, cl. 8, PDF pp. 17-18. *See also supra* ¶¶ 121-122.

839 *See supra* ¶¶ 350-352.

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

841 **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF p. 5 (SSA's Unofficial Translation). *See also* **Exhibit C-43 [EN]**, Ministry of Culture Resolution No. 0113, 4 March 2022, PDF pp. 5-6 ("*In accordance with the foregoing, it is clear that the financial model under which the Public-Private Partnership of Private Initiative without Disbursement of Public Funds was planned and structured is only feasible if it is remunerated with the handover of pieces from the find,* ***which is not currently legally possible****, insofar and inasmuch as the* [CNPC] *determined, in session of December 19, 2019, that the entirety of the find identified as the galleon San José consists of goods considered to be National Cultural Heritage, and consequently the Ministry of Culture declared it to be a National-Level Asset of Cultural Interest through Resolution 0085 of January 23, 2020*."), 7 ("*Considering the legal impossibility of remuneration in kind using pieces that are part of the find, procedure APP 001 of 2018 is inadmissible, because the entity cannot allocate funds to cover remuneration for whatever company winds up being awarded the contract*.") (emphasis added) (SSA's Unofficial Translation).

842 *See* **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611. *See also supra* ¶ 352.

procedure."[843] That is because Colombia does not appear to have issued Resolution No. 0085 on the basis of scientific or objective analysis. Rather, the timing suggests that Colombia issued Resolution No. 0085 to circumvent the Injunction Order and thus obtain full access and rights to the San José shipwreck.

381. While there is considerable (and largely unexplained) secrecy surrounding the adoption of Resolution No. 0085, what is clear is that it was issued without the recovery or salvage of the San José shipwreck. As Colombia repeatedly claimed in its submissions on SSA's Application for Interim Measures, it has not yet conducted salvage of any items from the San José shipwreck.[844] Thus, Colombian authorities designated the entirety of the galleon as cultural patrimony without conducting the type of analysis contemplated by the Supreme Court in its 2007 Decision.[845]

382. In fact, it is unclear if any analysis was conducted by Colombian authorities at all before issuing Resolution No. 0085. According to the limited documentary record that is available, the CNPC engaged in circular reasoning to proclaim that the shipwreck should be considered an asset of cultural heritage to preclude any private ownership of its parts: "*the wreck of the galleon San José* ***should be considered as a unit that allows it to be declared a National Asset of Cultural Interest so that its nature as a unit can always be legally maintained.***"[846]

383. Moreover, nothing in the Resolution or otherwise explains why Colombia arrived at this designation over 40 years after it first awarded SSA's Predecessors the license to look for the ship. The only reasonable conclusion for this timing appears to be

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843 **Exhibit CLA-57**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 833. *See also supra* ¶¶ 358-360.

844 *See* Colombia's Response to Interim Measures Application, ¶¶ 85 ("[T]*his project is currently in its early stages, and no archaeological excavations are anticipated—nor planned—in the upcoming months. In fact, there is not even a schedule of activities regarding an eventual extraction of items since there is no certainty of any extraction even taking place.*"), 111 ("*The first campaign, scheduled for 2024, is merely for exploration purposes -with no planned excavation or extraction*."); Colombia's Sur-Reply to Interim Measures Application, ¶¶ 14 ("[T]*he San José Project is currently in the early stages, not envisaging the extraction of items in the near future*."), 24 ("*Furthermore, as formally announced in a formal press release issued by the Ministry of Cultures on 14 May 2024, in the second half of this year, the San Jose Project will still be in the early stages, which do not include retrieving items from the Galeón*.").

845 *See* **Exhibit C-28 [EN]**, Colombian Supreme Court of Justice, Case File No. 08001-3103-010-1989-09134-01, Judgment, 5 July 2007, PDF p. 223 (SSA's Unofficial Translation).

846 **Exhibit C-42 [EN]**, Ministry of Culture Resolution No. 0085, 23 January 2020, PDF p. 2 (SSA's Unofficial Translation).

Colombia's recent loss before its own Court in removing the Injunction Order that precluded it from conducting salvage within SSA's Discovery Area. Indeed, after issuing Resolution No. 0085, Colombia has recommenced its efforts to salvage the San José shipwreck.[847]

384. A pretextual designation of the entirety of the San José shipwreck as cultural patrimony without any evidence of scientific, objective analysis, and done instead to circumvent SSA's rights is patently arbitrary and unreasonable. Colombia's actions have thus violated its FET obligation.

(3) Colombia Acted Without Transparency And Due Process

385. The manner in which Colombia issued Resolution No. 0085 also lacked transparency and failed to accord due process.

386. Colombia does not dispute that Resolution No. 0085 was shrouded in secrecy. Rather, it insists that secrecy was necessary due to purported confidentiality concerns.[848] But the only confidentiality concerns Colombia has asserted relate to the location of the San José shipwreck because Colombia purportedly wants to protect the location from potential looters.[849] This does not explain why the reasoning and process behind Resolution No. 0085—which did not disclose the location of the shipwreck but simply declared that it must all be cultural patrimony—must be kept from the public eye.

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847 *See* SSA's Interim Measures Application, ¶ 8; SSA's Reply to Interim Measures Application, ¶¶ 6, 8. During the Hearing on Colombia's Preliminary Objections on 15 December 2023, Respondent asserted that the plan was to "*develop a study*" such that "*there* [was]*, if any, a responsible extraction from the San José*," and that "*a commission of scientists* [would] *meet in Cartagena to discuss the best options in order to guarantee that any extraction would be made with the highest standards.*" Hearing on PO Day 2, 487:3-8, 487:24-488:4. *See also* **Exhibit C-121**, Interview of Captain Germán Escobar, BLURADIO COLOMBIA, 23 February 2024, minute 1:10-1:20; **Exhibit C-122bis**, Transcript of Interview of Captain Germán Escobar, BLURADIO COLOMBIA (additional excerpts), 23 February 2024; **Exhibit C-127**, Agencia EFE, *El Gobierno hará en el 2024 una exploración al pecio del galeón San José*, LA PATRIA, 21 December 2023, PDF p. 2, *available at* https://www.lapatria.com/nacional/el-gobierno-hara-en-el-2024-una-exploracion-al-pecio-del-galeon-san-jose; **Exhibit C-128**, Andrés Vizcaino Villa, *No vamos a recuperar tesoros: Mincultura sobre Galeón San José*, CARACOL RADIO, 23 February 2024, PDF p. 2, *available at* https://caracol.com.co/2024/02/23/no-vamos-a-recuperar-tesoros-mincultura-sobre-galeon-san-jose/.

848 *See* Colombia's Response to Interim Measures Application, ¶¶ 117, 129, 134.

849 *See* Colombia's Response to Interim Measures Application, ¶ 68 ("*it* [sic] *would be contrary to the duty of confidentiality for the ship to keep its satellite navigation systems on, thereby revealing the location of the Galeón San José and creating a risk of looting and tampering from third parties*.").

387. Moreover, any concerns over the location of the shipwreck does not explain why Colombia failed to even notify, much less allow SSA to participate in the process leading to Resolution No. 0085.

388. Accordingly, Resolution No. 0085 lacked due process and transparency, and thus Colombia violated its FET obligation to SSA under the TPA.

C. Colombia Breached Its Obligation To Provide SSA With Full Protection And Security

389. Through the actions described above, Colombia has failed to provide SSA with FPS for its investment in Colombia, in further breach of the TPA. The analysis below proceeds in two parts: (*i*) SSA describes the FPS standard in the TPA (**Section IV.C(a)**), and (*ii*) SSA shows that Colombia's conduct breached that standard (**Section IV.C(b)**).

(a) The Full Protection and Security Standard

390. As Article 10.5.2(b) of the TPA notes, the FPS obligation requires Colombia "*to provide the level of police protection required under customary international law*."[850]

391. The FPS standard requires the host State to guarantee a legally stable and secure investment environment, both physical and economic. To satisfy this standard, the host State is required to exercise (i) "*vigilance*," which requires the host State to "*take all measures necessary to ensure the full enjoyment and protection and security of* [the investor's] *investment*"[851] and (ii) due diligence, which requires the host State to take reasonable, precautionary, and preventive action against harm to the protected investment.[852] While the standard is not one of strict or absolute liability, the host State must take all reasonable measures to protect foreign investments against harm from both the actions of the host State and its representatives and the actions of third parties.

392. Though set out in the same article of the TPA, the content of the FET standard and the FPS standard differ. As Professor Christoph Schreuer explained, the FET standard

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[850] **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.5.2(b).

[851] **Exhibit CLA-103**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.05.

[852] *See* **Exhibit CLA-101**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b) (finding breach of FPS and violation of the due diligence obligation through "*failure to resort to . . . precautionary measures*" and "*inaction and omission*").

"*consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable*."[853] By assuming the FPS obligation, by contrast,

> **[T]*he host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs.*** *In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.*[854]

393. The weight of arbitral jurisprudence indicates that FPS extends beyond the obligation to ensure the physical security of an investment, and includes the guarantee of commercial and legal security.[855] Indeed, the definition of "*investment*" in the TPA includes intangible assets,[856] which are equally protected under the FPS provision,[857] but are not prone to physical harm; rather, it is the commercial and legal security of those investments that is of concern. Thus, the TPA contemplates a positive obligation under the FPS standard to grant commercial and legal security in addition to physical security.[858]

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853 **Exhibit CLA-139**, C. SCHREUER, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

854 **Exhibit CLA-139**, C. SCHREUER, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14 (emphasis added).

855 *See, e.g.*, **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613 (finding a breach of FPS where the host State's conduct was "*targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic*" through the amendment of laws and arbitrary conduct by the host State); **Exhibit CLA-117**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 (explaining that FPS "*is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view*"); **Exhibit CLA-124**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 7.4.15-7.4.17 (stating that the obligation is "*not limit*[ed] . . . *to providing reasonable protection and security from "physical interferences*"); **Exhibit CLA-127**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 728-30 ("*It would . . . be unduly artificial to confine the notion of '*full security' *only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments*."); **Exhibit CLA-131**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 187 (there is "*no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties*.").

856 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.28 (Definition of "*investment*"). *See also supra* ¶ 281.

857 *See* **Exhibit CLA-121**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 303 ("*It is difficult to understand how the physical security of an intangible asset would be achieved*.").

858 SSA also notes that pursuant to Article 10.4 of the TPA, it is entitled to "*treatment no less favorable than*" what Colombia accords to "*investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its*

(b) Colombia Breached Its Obligation To Provide Full Protection And Security

394. Colombia has failed to fulfill its obligation to protect SSA and its investment in Colombia.

395. First, as already described above, Colombia has failed to ensure the legal security of SSA's rights in the San José shipwreck, and instead fully eviscerated them by issuing Resolution No. 0085 in a manner that was contrary to SSA's legitimate expectations, arbitrary and unreasonable and lacked due process and transparency.[859] Such conduct clearly contravenes Colombia's obligation to positively accord FPS to a protected investment.[860]

396. Second, as noted above, the FPS obligations that Colombia assumed under the TPA also require the Government to take the measures necessary to protect the investment against adverse actions by private persons as well as State organs.[861] As set out in SSA's Interim Measures Application, evidence has surfaced that the shipwreck site has been tampered with, if not looted, prompting a criminal complaint against the Government of Colombia.[862] By reportedly allowing this conduct to take place despite its supposed

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territory." SSA is therefore entitled to the substantive protection granted to investors under other Colombian investment treaties. This includes, for example, the substantive protection granted to investors pursuant to Article 2(3) of the Agreement between the Kingdom of Spain and the Republic of Colombia for the reciprocal promotion and protection of investments, which provides that: "*Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive fair and equitable treatment and shall enjoy full protection and security, in no way hindering, through arbitrary or discriminatory measures, the management, maintenance, use, enjoyment, and sale or liquidation of such investments*." **Exhibit CLA-125 [EN]**, Agreement between the Kingdom of Spain and the Republic of Colombia for the Promotion and Reciprocal Protection of Investments, 22 September 2007 (entry into force), art. 2(3) (SSA's Unofficial Translation).

859 *See supra* **Section IV.B(b)**.

860 *See, e.g.*, **Exhibit CLA-131**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶¶ 189-90 (finding that Argentina "*breached its obligation to provide protection and constant security on the same date as it breached its undertaking to treat investments fairly and equitably, namely, June 25, 2002*" for the same underlying measures); **Exhibit CLA-121**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 308-309 (finding that "*the full protection and legal security and fair and equitable treatment obligations under the Treaty have been breached by Argentina*" for the same underlying measures); **Exhibit CLA-117**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 (observing that "*having held that the Respondent failed to provide fair and equitable treatment to the investment,* [the tribunal] *finds that the Respondent also breached the standard of full protection and security under the BIT*."); **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 611-13.

861 *See supra* ¶¶ 391-392.

862 *See* **CER-1 [Morris]**, ¶ 61 ("*It must also be considered that these apparent scours and depressions could possibly be the work of unknown parties excavating or otherwise tampering with portions of the shipwreck*

control over the site, Colombia has further violated its FPS obligations by failing to take protect SSA's investment from physical threats or destruction.

site."). *See also* SSA's Interim Measures Application, ¶¶ 2, 7, 22, 30; SSA's Reply to Interim Measures Application, ¶¶ 28-31.

V. COLOMBIA MUST COMPENSATE SSA FOR ITS BREACHES OF THE TPA

A. Applicable Legal Standard

397. Article 10.26.1 of the TPA empowers the Tribunal to "*make a final award against*" Colombia, in which it may award "*monetary damages and any applicable interest*", including "*in lieu of restitution.*"[863] **Section IV** above establishes Colombia's violations of Articles 10.5 and 10.7 of the TPA. As a result of these breaches, SSA is entitled to reparation in accordance with the applicable principles of international law.

398. The TPA does not contemplate the applicable measure of damages in the event of an unlawful expropriation (as is the case here). Similarly, the TPA is silent on the measure of damages applicable for the State's breaches of Article 10.5 (FET).

399. Accordingly, one must turn to the applicable principles of international law to determine the appropriate remedy for violations of international law.[864] In the *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice articulated the basic purpose and principle of reparation under international law as follows:

> *The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that* ***reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed****. Restitution in kind, or, if this is not possible,* ***payment of a sum corresponding to the value which a restitution in kind would bear****; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to*

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863 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.26(1)(a) and (b) ("*1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*").

864 *See* **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.22(1) ("[T]*he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*").

determine the amount of compensation due for an act contrary to international law.[865]

400. The authoritative standard set out in *Chorzów*[866] has since been codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**").[867] Specifically, Article 31(1) of the ILC Articles on State Responsibility provides that "[t]*he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."[868]

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865 **Exhibit CLA-99**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, PCIJ Series A No. 17, 13 September 1928, p. 47 (emphases added).

866 *See* **Exhibit CLA-157**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 847-48 (describing *Chorzów* as "[a]*n authoritative description of the principle of full reparation*"); **Exhibit CLA-118**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 484-95 (reviewing decisions of international courts and tribunals to find that the principle set forth in *Chorzów* is the governing standard); **Exhibit CLA-124**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.2.4-8.2.5 (quoting *Chorzów* and observing that "[t]*here can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice*"); **Exhibit CLA-173**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1566 (noting that "[t]*he legal standard which the Tribunal must apply is not disputed by the Parties: it is the principle of full reparation of the injury caused, firmly established in jurisprudence since the PCIJ's seminal* Chorzów Factory *decision*."); **Exhibit CLA-150**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶¶ 1587-88, 1593 (quoting *Chorzów* and recognizing it as amongst "*accepted principles of international law*"); **Exhibit CLA-169**, *Foresight Luxembourg Solar 1 S.À.R.L., et al. v. The Kingdom of Spain*, SCC Arbitration V (2015/150), Final Award, 14 November 2018, ¶¶ 434-36 (noting that "*the principle of full reparation is generally accepted in international investment law*"); **Exhibit CLA-170**, *CEF Energia B.V. v. The Italian Republic*, SCC Arbitration V (2015/158), Award, 16 January 2019, ¶ 275 (refusing to adopt a valuation approach that "*would be inconsistent with the even longer-established* Chorzow Factory *principle*."); **Exhibit CLA-114**, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. REPORTS 2004, 136, ¶ 152 (referring to *Chorzów* as "*the essential forms of reparation in customary law*"); **Exhibit CLA-100**, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, ¶ 97.

867 *See* **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 31. *See also* **Exhibit CLA-155**, *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 682-84; **Exhibit CLA-156**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 327-28; **Exhibit CLA-121**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 350-52; **Exhibit CLA-151**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 678-79; **Exhibit CLA-109**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 617-18; **Exhibit CLA-158**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-25.

868 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 31(1).

401. The ILC Articles on State Responsibility identify three forms of reparation: restitution, compensation, and satisfaction.[869] Restitution is the primary remedy, which requires the State "*to re-establish the situation which existed before the wrongful act was committed*."[870] However, where restitution is materially impossible, Article 36 explains that "[t]*he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*."[871] Compensation must "*cover any financially assessable damage including loss of profits insofar as it is established*."[872] As the *Vivendi II* tribunal noted:

> [I]*t is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to* ***compensate the affected party fully and to eliminate the consequences of the state's action***.[873]

402. In other words, the "*full reparation*" standard under customary international law requires that SSA be placed in the same economic position they would have been in had Colombia not committed the wrongful acts—*i.e.*, the "*but-for*" scenario.[874] The Tribunal's task in valuing the damages owed to SSA as a result of Colombia's breaches is to consider the value of that investment in a but-for world, "*wip*[ing] *out all the consequences of the illegal act*."[875]

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869 *See* **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 34.

870 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 35.

871 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 36(1).

872 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 36(2).

873 **Exhibit CLA-124**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.7 (emphasis added).

874 *See* **Exhibit CLA-162**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 358 ("*In the Tribunal's view, when quantifying the value of the expropriated assets, the Tribunal must proceed on the basis that Burlington is entitled to exercise all of the contractual rights it would have had but for the expropriation, and that Ecuador would have complied with its contractual obligations going forward. In other words, when building the counterfactual scenario in which the expropriation has not occurred, the Tribunal must assume that Burlington holds the rights that made up the expropriated assets and that those rights are respected*.").

875 **Exhibit CLA-99**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, PCIJ Series A No. 17, 13 September 1928, p. 47.

B. Colombia Must Compensate SSA

403. As established above, SSA is entitled to 50% of the treasure at the San José wreck site. In coordination with experts Dr. David D. Hebb, Mr. John Foster, and Mr. Noel Matthews, SSA has reconstructed the contents of the San José based on historical records, valued them, and accordingly calculated its damages relating to its part of that treasure.

404. To do so:

a. Dr. Hebb, using his more than four-decades as a maritime historian and more than forty years studying the historical records relating to the San José, has (i) analyzed contemporaneous historical accounts and other reports of the San José's value when it sank;[876] and (ii) indicated, based on the historical record and his experience, what the San José's contents were.[877]

b. Using Dr. Hebb's analysis and other historical information provided by Dr. Hebb and others, Mr. Foster, applying his over thirty-five years of experience as a valuer and appraiser, has (i) constructed a sales plan designed to commercially market and realize the fair market value of SSA's treasure;[878] and (ii) assessed the value of certain treasure to be found at the wreck site of the San José.[879]

c. Taking Mr. Foster's valuations, Mr. Matthews, Senior Managing Director at FTI Consulting LLP and a chartered accountant, has assessed the loss suffered by SSA on the basis that, but for Colombia's breaches, SSA would have been entitled to 50% of the value of the treasure at the San José's wreck site.

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876 *See* **CER-2 [Hebb]**, ¶¶ 123-152.

877 *See* **CER-2 [Hebb]**, ¶¶ 153-224.

878 *See* **CER-3 [Foster]**, Section 4.

879 *See* **CER-3 [Foster]**, Sections 5-11.

405. As a result of the work of Dr. Hebb and Mr. Foster, Mr. Matthews quantifies SSA's loss at between USD 3,493.5 million and USD 9,091.6 million as of 14 June 2024.[880]

(a) Dr. Hebb's Assessment Of The San José's Treasure

406. As a preliminary matter, Dr. Hebb emphasizes that the scale of the San José's riches is significant, and likely unique. As such, its treasure likely has a substantial value.

407. While there is no known manifest for the San José in existence,[881] having reviewed and assessed documents in fourteen historical archives in four nations and based on over forty years studying the San José,[882] Dr. Hebb provides that the San José's then known contents were credibly reported as being between **7 and 9 million pesos** at the time.[883] Dr. Hebb's estimate is based on, among other things, testimony given by Rear Admiral Conde Vega Florida of the Santa Cruz.[884] In addition to this, Dr. Hebb's assessment considers the then well-known fact that unregistered treasure amounted to between 10–30% of the contents of Spanish galleons.[885] This range helps inform Mr. Foster's assessments of the quantities of gold and silver that will likely be found at the San José wreck site.

408. As for the cargo aboard the San José at the time of its loss, Dr. Hebb confirms that the list of items on the San José prepared by SSA's historians,[886] contains items that most probably would be found at the San José's wreck site.[887] Based on Dr. Hebb's analysis of the historical period and context in which the San José was lost, he estimates that between **43% and 70%** of the coins and bullion on the San José were gold rather than silver.[888] He confirms that in addition to carrying gold and silver, the San José's wreck

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880 *See* **CER-4 [FTI]**, Table 2.1.

881 *See* **CER-2 [Hebb]**, ¶ 10.

882 *See* **CER-2 [Hebb]**, ¶ 12.

883 *See* **CER-2 [Hebb]**, ¶¶ 10, 152. As Dr. Hebb notes, "pesos", as used during the time were an assessment of value rather than a reference to an actual piece of currency. "Pesos" was used to refer to coined gold and silver and gold and silver bullion (*i.e.*, in highly pure bulk metal).

884 *See* **CER-2 [Hebb]**, ¶¶ 136, 151.

885 *See* **CER-2 [Hebb]**, ¶ 125.

886 *See* **CER-2 [Hebb]**, Appendix II.

887 *See* **CER-2 [Hebb]**, ¶ 154.

888 *See* **CER-2 [Hebb]**, ¶¶ 174-175.

site will contain rough emeralds, pearls, and likely diamonds.[889] And, as confirmed by pictures of the wreck site,[890] the San José also carried chests of Chinese blue and white porcelain.[891]

409. Moreover, Dr. Hebb has confirmed that other objects of significant interest will also be found in the San José wreck and would almost certainly not have been included in contemporaneous estimates of her value, including her 64-bronze cannon, artillery, religious items, jewelry, objects d'art, ship's items, medical, clerical, and toiletry items, as well as items for everyday use.[892]

(b) Mr. Foster's Valuation Of The San José's Treasure

410. Mr. Foster has relied on his substantial experience to design a commercially reasonable plan to maximize the revenues generated by the sale of the objects recovered from the San José.[893] Mr. Foster proposes that a sale by auction would allow SSA to maximize value,[894] and has prepared a proposed sales plan for such an auction.[895]

411. Informed by his value-maximizing sales plan, Mr. Foster then values five categories of recoverable items[896] that Dr. Hebb indicates are, in his experience and based on the historical record, most likely to be found at the San José's wreck site[897]—specifically:

a. Gold coins and bullion;

b. Silver coins and bullion;

c. Rough emeralds;

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889 *See* **CER-2 [Hebb]**, ¶ 154.

890 *See* **Exhibit C-47**, DIMAR, First Non-Intrusive Verification Campaign For The Security Of The Property Of Cultural Interest At The National Level (2022), p. 117.

891 *See* **CER-2 [Hebb]** ¶¶ 191, 197.

892 *See* **CER-2 [Hebb]**, ¶ 154.

893 *See* **CER-3 [Foster]**, ¶ 2.3.

894 *See* **CER-3 [Foster]**, ¶ 2.7.

895 *See* **CER-3 [Foster]**, Section 4.

896 These items have been selected by counsel based on the information available at this juncture.

897 *See* **CER-2 [Hebb]**, Appendix II.

d. Porcelain; and

e. Cannon.

412. For each of these five categories of items, Mr. Foster (i) determines the quantity of the items the San José would have been carrying when it sank; (ii) assesses the likely condition of those items; and (iii) assesses the value of such items.[898]

413. In assessing the value of each category of items, Mr. Foster (i) uses his experience and expertise gained from over 35 years in the antiques and fine art industry; (ii) uses comparable items, historic sales and auctions of said items to the extent they exist; and (iii) has, as is his practice, consulted with specialists in certain areas.[899] While Mr. Foster has chosen the closest comparables from other shipwrecks, he notes that none of them are truly comparable to the San José because "*the unique circumstances of the San José mean that it carries an appeal and interest to potential buyers that will exceed any other shipwreck*."[900] Thus, while those items are useful benchmarks he notes that they "*will not reflect the full value that can be obtained from equivalent items from the San José*."[901] Mr. Foster also has drawn upon Dr. Hebb's Report, and considered assessments of historical evidence made by Dr. Lyon, historical sources, and photographs of the wreck site and items found there.[902] Mr. Foster confirms that his valuations reflect a "*more conservative approach*" and that objects from the San José wrecksite sold at a commercially reasonable auction "*will likely exceed* [his] *top estimates*."[903]

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898 *See* **CER-3 [Foster]**, ¶ 3.1.

899 *See* **CER-3 [Foster]**, ¶ 3.17.

900 **CER-3 [Foster]**, ¶ 3.26.

901 **CER-3 [Foster]**, ¶ 3.26.

902 *See* **CER-3 [Foster]**, ¶ 3.6-3.8

903 **CER-3 [Foster]**, ¶ 3.46.

Figure 19: Mr. Foster's summary of the value of the categories of items[904]

Object	Quantity (50% share of the cargo and objects)	Value per unit	Value (million)
Gold			
Eight-escudo coins	100,000	$20,000- $50,000	$2,000.0 - $5,000.0
Four-escudo coins	50,000	$15,000 - $25,000	$750.0 - $1,250.0
Presentation coins	500	$275,000 - $400,000	$137.5 – $200.0
Bullion	26,974.5 troy ounces	x4 bullion price ($2,348)	$250.0
Silver			
Finest coins	50,000 coins	£2,000 - £5,000	£100.0 - £250.0
Other coins (eight and four-reales)	850,000 coins	x3 bullion price ($31.265)	60.5
Bullion	172,649.5 troy ounces	x3 bullion price ($31.265)	16.0
Emeralds	15,000 emeralds	$20,000 - $150,000	$300.0 - $2,250.0
Chinese porcelain	4,000 pieces	$1,500 - $3,000	$6.0 - $12.0
Bronze cannon	32 cannon	$100,000 - $190,000	$3.2 - $6.1
Swivel guns	3 guns	$30,000 - $60,000	$0.1 - $0.2

(c) Mr. Matthew's Assessment of SSA's Damages

414. Mr. Matthews assesses SSA's damages on the basis that, but for Colombia's breaches, SSA would have been entitled to 50% of the value of the treasure at the San José wrecksite.[905] To calculate SSA's loss, Mr. Matthews relies on Mr. Foster's assessment of the value of the cargo and objects he valued, arriving at the following valuation of the various items of treasure:

[904] *See* **CER-4 [FTI]**, Table 4-1.

[905] *See* **CER-3 [Foster]**, Section 12.

Figure 20: Mr. Matthews' summary of Mr. Foster's valuation of items[906]

Item	Lower bound	Upper bound
Gold coins	2,750.0	6,250.0
Presentation coins	137.5	200.0
Gold bullion	250.0	250.0
Silver coins	187.7	378.6
Silver bullion	16.0	16.0
Rough emeralds	300.0	2,250.0
Chinese porcelain	6.0	12.0
Bronze cannon	3.2	6.1
Swivel guns	0.1	0.2
Total	**3,650.5**	**9,362.9**

415. Mr. Matthews then subtracts from these values (i) the costs of the recovery operation, assuming, conservatively, that SSA would undertake the entirety of those costs, as estimated by Mr. Morris; and (ii) the marketing and sales costs, as estimated by Mr. Foster. This leads him to the valuation of Claimant's damages below.

Figure 21: Mr. Foster's Summary Of SSA's Damages

	Lower bound	Upper bound
Income from sales of recovered cargo and objects	**3,650.5**	**9,362.9**
Less:		
Costs of the recovery operation	*33.0*	*33.0*
Conservation, storage and management costs	*30.0*	*30.0*
Surveying and conservation of the debris field	*21.0*	*21.0*
Marketing and sales costs	*73.0*	*187.3*
My quantification of the Claimant's loss	**3,493.5**	**9,091.6**

416. Accordingly, SSA's damages are between USD 3.5 to 9.1 billion. SSA intends to continue refining these numbers as more information from the wreck site becomes available, including through the anticipated document production process. Given that Mr. Foster believes that the value obtained at auction will likely exceed his estimates and that all the remaining information pertaining to the calculation of damages is

[906] *See* **CER-4 [FTI]**, Table 4-1.

exclusively in Colombia's hands, should Colombia fail to provide it, SSA submits that the amount awarded by the Tribunal should be the upper bound calculated by Mr. Matthews.

C. Colombia Must Pay Interest

417. SSA is entitled to both pre- and post-Award interest. Article 10.26(1)(a) of the TPA provides that a tribunal may award "*monetary damages and any applicable interest*."[907] With respect to lawful expropriations, Article 10.7(3) of the TPA provides further guidance. It provides that interest will be calculated "*at a commercially reasonable rate*" for the currency in which compensation is awarded, "*accrued from the date of expropriation until the date of payment*."[908]

418. The TPA's interest provisions are generally reflective of the well-established principle that interest forms an integral part of any award of compensation, the aim of which is to achieve "*full reparation*" and to re-establish the situation that would have existed had the illegal acts not been committed. Article 38 of the ILC Articles on State Responsibility provides that "*interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result*."[909] Article 38 further states that "*interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled*."[910] Accordingly, tribunals have repeatedly held that, in order to achieve full reparation, it is necessary that an award of damages bear interest.[911]

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907 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.26(1)(a).

908 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.7(3).

909 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 38.

910 **Exhibit CLA-108**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, INTERNATIONAL LAW COMMISSION (2001), art. 38.

911 *See, e.g.*, **Exhibit CLA-110**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 174-175; **Exhibit CLA-123**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶ 55; **Exhibit CLA-130**, *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 308; **Exhibit CLA-171**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1785, 1790; **Exhibit CLA-169**, *Foresight Luxembourg Solar 1 S.À.R.L., et al. v. The Kingdom of Spain*, SCC Arbitration

419. Although SSA is entitled to pre-Award interest, SSA does not seek pre-Award interest up to 14 June 2024, the date of Mr. Matthews' assessment of value, based on his conservative assumption that the recovery and sales process of SSA's half of the treasure would not have been completed until mid-2024, the approximate date of his report and of this filing.[912] Accordingly, he has not estimated an amount associated with pre-Award interest for this submission, but notes that it will be necessary to apply pre-award interest from mid-2024 up to the date of the Award.[913]

420. Accordingly, SSA reserves the right to add an amount for pre-Award interest until the date of the Award.

D. Colombia Must Pay SSA's Costs

421. In order to make SSA whole, Colombia must pay the entire costs and expenses of the Arbitration, including SSA's legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and the PCA's other costs.

422. The Tribunal's authority to award costs is established in Article 10.26(1) of the TPA, which provides that a tribunal "*may also award costs and attorney's fees*" in the final award.[914] Furthermore, Article 40 of the UNCITRAL Rules authorizes the Tribunal to award costs.[915]

423. If the Tribunal finds that Colombia breached its obligations under the TPA, the award of costs is consistent, and in fact required, by the full reparation principle set out in *Chorzów*.[916] The UNCITRAL Rules likewise confirm that "[t]*he costs of the arbitration shall in principle be borne by the unsuccessful party or parties.*"[917] SSA would not

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V (2015/150), Final Award, 14 November 2018, ¶¶ 544-45; **Exhibit CLA-150**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶¶ 1677, 1687.

912 *See* **CER-4 [FTI]**, ¶ 3.16.

913 *See* **CER-4 [FTI]**, n. 17.

914 **Exhibit CLA-1bis**, United States-Colombia Trade Promotion Agreement, Chapter 10: Investment, 15 May 2012 (entry into force), art. 10.26(1).

915 *See* **Exhibit CLA-2**, Arbitration Rules of the 2021 United Nations Commission on International Trade Law ("**UNCITRAL Rules**"), 2021, art. 40 ("*The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision*.")

916 *See, e.g.*, **Exhibit CLA-164**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 1060.

917 **Exhibit CLA-2**, UNCITRAL Rules, 2021, art. 42.

have brought this Arbitration, and incurred substantial costs and lost time as a result, if Colombia had respected its obligations under the TPA. Indeed, Colombia's actions have only further prolonged these proceedings, including as a result of its meritless Preliminary Objections Application and refusal to engage with SSA's requests leading to its Interim Measures Application. Accordingly, SSA should be awarded their costs and will submit a formal quantification of their costs at the appropriate phase of these proceedings.

VI. REQUEST FOR RELIEF

424. Claimant respectfully requests an Award:

a) **DECLARING** that Colombia has breached its obligations under the TPA;

b) **DIRECTING** Colombia to indemnify SSA for all damages caused as a result of its breaches in an amount between USD 3.4935 and 9.0916 billion, as of 14 June 2024;

c) **ORDERING** interest not covered in any damages awarded to SSA;

d) **ORDERING** Colombia to pay all costs of and associated with this Arbitration, including SSA's legal fees and expenses, management time, witnesses, experts and consultants' fees and expenses, administrative fees and expenses of the administration of this case by the Permanent Court of Arbitration, and the fees and expenses of the Tribunal, together with post-award interest on those costs so awarded; and

e) **GRANTING** such other and further relief as the Tribunal deems just and proper.

425. Claimant reserves the right to supplement, add and modify its claims and defenses, to request such additional or different relief as may be appropriate, to submit memorials, documents, exhibits, witness statements, expert reports, and other evidence elaborating its case and the relief sought in the course of these proceedings.

Respectfully submitted for and on behalf of Sea Search-Armada, LLC.

Gibson, Dunn & Crutcher LLP

Dated: 14 June 2024

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