

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

- and -

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

- between -

SEA SEARCH-ARMADA, LLC (USA)

- and -

THE REPUBLIC OF COLOMBIA

PCA Case No. 2023-37

Hearing on Respondent's objections pursuant to  
Article 10.20.5 of the TPA

Friday, December 15, 2023

Center for Arbitration and Conciliation  
Bogotá Chamber of Commerce  
Calle 76 #11-52  
Bogotá, Republic of Colombia

The hearing in the above-entitled matter came on  
at 9:00 a.m. before:

MR. STEPHEN DRYMER, President

MR. STEPHEN JAGUSCH KC, Co-Arbitrator

DR. CLAUS VON WOBESER, Co-Arbitrator

ALSO PRESENT:

MS. DINA PROKIC  
Tribunal Arbitral Secretary

MR. JOSÉ LUIS ARAGÓN CARDIEL  
MS. JI SOO KIM

Secretary of the Permanent Court of Arbitration

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MS. SILVIA COLLA

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APPEARANCES:

On behalf of the Claimant:

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MS. KATHLEEN REGN  
MR. RAHIM MOLOO  
MR. ROBERT L. WEIGEL  
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On behalf of the Respondent:

MS. MARTHA LUCÍA ZAMORA ÁVILA  
MS. ANA MARÍA ORDÓÑEZ PUENTES  
MR. GIOVANNY VEGA-BARBOSA  
MR. CAMILO VALDIVIESO  
MS. JUANA MARTÍNEZ  
MS. MANUELA SOSSA  
MS. MARIANA REYES  
MR. JUAN CAMILO MEJÍA  
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APPEARANCES: (Continued)

Non-Disputing Party to the Proceedings:

(appearing remotely)

MR. DAVID BIGGE

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P R O C E E D I N G S

1  
2 PRESIDENT DRYMER: All right. Señora Ordóñez,  
3 all set on your side?

4 MS. ORDÓÑEZ PUENTES: All set.

5 PRESIDENT DRYMER: Very good. Court reporters,  
6 looking good down there? Thank you. Interpreters, thumbs  
7 up? Gracias. Nick, you're all set? All right. Please  
8 get us going.

9 Good morning, everybody. Bienvenida a todos.  
10 Muy buenos días, y bienvenido a este segundo día de la  
11 audiencia.

12 Welcome to the second day, and final day, of this  
13 public hearing on jurisdiction in the case between--the  
14 arbitration between Sea Search-Armada, LLC, and the  
15 Republic of Colombia.

16 Before we get going, does either Party have any  
17 housekeeping or administrative matters that it wishes to  
18 raise with the Tribunal?

19 Mr. Moloo, for Claimant?

20 MR. MOLOO: Not for Claimant. Thank you.

21 PRESIDENT DRYMER: Thank you.

22 Señora Ordóñez?

23 MS. ORDÓÑEZ PUENTES: Yes. We just wanted to  
24 confirm that yesterday we agreed among the Parties that  
25 each one of us is going to present a map.

1           PRESIDENT DRYMER: Perfect.

2           MS. ORDÓÑEZ PUENTES: So, we will be including a  
3 map in presentation, and they will be doing the same.

4           PRESIDENT DRYMER: That's perfect. Thank you.

5           The Tribunal has one of its own housekeeping  
6 matters it would like to raise with you. This, of course,  
7 is in the interest of transparency. The Tribunal received  
8 overnight, or at least was delivered overnight--sent  
9 overnight and received by the Tribunal several hours ago  
10 this morning, a fleshed-out request for intervention in the  
11 proceedings by the Republic of Spain, by which I mean--I  
12 haven't counted the pages--several pages and several  
13 annexes.

14           It's received. It has not been read by the  
15 Tribunal yet. We just haven't had time. And we've had  
16 other things to attend to in preparing for the hearing  
17 today.

18           As far as we're concerned, it changes nothing for  
19 today. As in the normal course, it's addressed to the  
20 Tribunal. The Tribunal will review it. It's very likely  
21 that we will, of course, share it with the Parties and  
22 perhaps seek further comment from you.

23           For the moment, I simply wanted to alert  
24 everybody to the fact that this had happened and to make it  
25 clear that it has been received. The Tribunal still



1 expects you, please, to respond to the idea of an  
2 intervention by Spain based on what we told you yesterday.  
3 It is, of course, understood that your responses this  
4 morning may be preliminary in the event that we ask for  
5 further comment based on Spain's written and fleshed-out  
6 request.

7           Is that clear? Does that pose any problem to any  
8 Party?

9           Mr. Moloo?

10          MR. MOLOO: No. Thank you.

11          PRESIDENT DRYMER: Very well.

12          Señora Ordóñez?

13          MS. ORDÓÑEZ PUENTES: No problem.

14          PRESIDENT DRYMER: No objection to proceeding in  
15 this matter?

16          MR. MOLOO: No.

17          MS. ORDÓÑEZ PUENTES: No objection.

18          PRESIDENT DRYMER: Very good.

19          Any objections or any concerns about the conduct  
20 of the first day of the Hearing that either Party may wish  
21 to raise with the Tribunal at this point?

22          MR. MOLOO: Not at all. Thank you.

23          PRESIDENT DRYMER: Thank you.

24          MS. ORDÓÑEZ PUENTES: No, Mr. President.

25          PRESIDENT DRYMER: Very good.

1           One further preliminary comment. You have  
2 received--you received late last night a list of questions  
3 that the Tribunal invites you to address in the course of  
4 your submissions today. Again, let me acknowledge, it came  
5 late. But that's because we were thinking about these  
6 issues and working on them ourselves before we sent them to  
7 you. And we appreciate, as always, your hard work and your  
8 efforts to address the Tribunal's concerns.

9           And so, without further ado, let us proceed. The  
10 Respondent, I believe, has some submissions to make.

11           MS. ORDÓÑEZ PUENTES: Yes.

12           PRESIDENT DRYMER: Oh, you know what? It's been  
13 pointed out to me--and my apologies to any representatives  
14 of the Kingdom of Spain who may be watching--I referred to  
15 Spain as the Republic earlier. I meant, of course, the  
16 Kingdom of Spain.

17           Señora Ordóñez, the floor is yours.

18           RESPONDENT'S CLOSING ARGUMENT

19           MS. ORDÓÑEZ PUENTES: Thank you. Good morning,  
20 everyone. Colombia's presentation will be divided into  
21 sections.

22           First, Colombia will submit its closing remarks.  
23 And, second, it will address the Tribunal's questions.

24           PRESIDENT DRYMER: Excuse me for asking. Could  
25 you have a member of your team email the slides to us,

1 please.

2           You don't need to wait. Keep speaking but--

3           MS. ORDÓÑEZ PUENTES: Yes.

4           PRESIDENT DRYMER: I'd like to get those, please.

5           MS. ORDÓÑEZ PUENTES: Absolutely. Claimant's  
6 opening remarks were oriented towards leading the Tribunal  
7 to believe that there are many unresolved issues that  
8 required us to go to the merits of the case.

9           However, Claimant has failed to comply with its  
10 duty at this stage of the proceedings, which is to fulfill  
11 the burden of proof regarding the Tribunal's jurisdiction  
12 to hear the case. Apart from answering the Tribunal's  
13 questions, Colombia's closing statement will show that the  
14 issues presented by Claimant as unresolved are non-issues  
15 at this stage, for the purposes of issuing an award on  
16 jurisdiction.

17           Having heard SSA's oral pleadings, the  
18 distinction between what we have referred to as the "real"  
19 and "virtual" scenario remains untouched and has become  
20 more relevant than ever. This distinction demonstrates the  
21 vast contrast between, on one side, the rights granted by  
22 DIMAR and recognized by Colombia's judiciary to Claimant's  
23 alleged predecessors pursuant to domestic law and, on the  
24 other, the inexistent rights invoked by Claimant in this  
25 arbitration.

1 Under Colombian law, Claimant doesn't hold any  
2 right over the Galeón San José because neither Claimant,  
3 nor its alleged predecessors, were ever granted rights over  
4 the Galeón San José by DIMAR or the Colombian courts. The  
5 Tribunal is in possession of all the relevant facts related  
6 to the rights as invoked by Claimant before this Tribunal.  
7 No additional evidence can be adduced by Claimant for the  
8 Tribunal to rule on this matter.

9 For this exercise, the Tribunal needs just to  
10 review the rights granted by Resolution 354 and the Supreme  
11 Court's decision. And this is the time for the Tribunal to  
12 rule on this matter. There is no point in advancing to the  
13 merits of this case. Claimant doesn't hold a protected  
14 investment that permits to activate the competence of the  
15 Tribunal to claim the rights it is claiming before this  
16 Tribunal.

17 An award ruling in Claimant's favor would be the  
18 only document emanating from an authority granting,  
19 recognizing, and thus creating Claimant's rights over the  
20 Galeón San José.

21 Even in the hypothetical scenario, where the  
22 Tribunal would be led to believe that Claimant has any  
23 potential right over the Galeón San José, in several  
24 occasions and relevant scenarios, Claimant recognized the  
25 alleged violation of its rights by the Colombian State,

1 either before the TPA's entry into force or well beyond the  
2 three-year limitation period established in the TPA.

3 Resolution 85 of 2020 is not related to  
4 Claimant's rights as recognized under Colombian law. As we  
5 will further elaborate, this resolution was issued for  
6 reasons completely unrelated to Claimant's rights under  
7 Resolution 354 and the Supreme Court's decision.

8 Mr. Vega will now address certain outstanding  
9 questions regarding Article 10.20.5 and the alleged  
10 investment. But, before we continue, I would like to  
11 confirm if you got the presentation and if you would like  
12 to get printed versions of the presentation.

13 PRESIDENT DRYMER: In order, the answer is no and  
14 yes.

15 MS. ORDÓÑEZ PUENTES: Okay.

16 PRESIDENT DRYMER: No, we haven't received it  
17 electronically and, yes, at least two members of the  
18 Tribunal would like it in hard copy.

19 Let me be clear, your friends representing  
20 Claimant should also receive at least one hard copy.

21 MS. ORDÓÑEZ PUENTES: Sorry. I'm offering  
22 something we don't have. We don't have the physical copy.

23 PRESIDENT DRYMER: Oh. Thank you for  
24 acknowledging that.

25 MS. ORDÓÑEZ PUENTES: Sorry.

1           PRESIDENT DRYMER: Well, electronic versions to  
2 everybody as soon as possible, please.

3           And, Mr. Moloo, any objection?

4           MR. MOLOO: No, that's fine.

5           PRESIDENT DRYMER: Very well.

6           I'm going to suggest, as well, that Señora  
7 Ordóñez or Señor Vega proceed, even while we're waiting to  
8 receive the electronic versions.

9           ARBITRATOR JAGUSCH: Just before you do, if you  
10 don't mind, can we just go back a slide.

11           Is it your understanding that the basis for the  
12 rights asserted by the Claimant is Resolution 354 and the  
13 Supreme Court Decision of 2007?

14           MS. ORDÓÑEZ PUENTES: That is correct.

15           ARBITRATOR JAGUSCH: Okay. My understanding is  
16 that rights are also asserted under the Civil Code.

17           MS. ORDÓÑEZ PUENTES: Yeah. That's how the  
18 Supreme Court upheld the rights. It framed those rights  
19 within Article 700 and 701 from the Civil Code.

20           ARBITRATOR JAGUSCH: Yes.

21           MS. ORDÓÑEZ PUENTES: But that was upheld by the  
22 Supreme Court Decision. So, that's why we refer to those  
23 domestic instruments.

24           ARBITRATOR JAGUSCH: Okay. Well, when--but when  
25 addressing whether or not the Claimant has rights, we would

1 like to hear from you also in relation to whether or not  
2 they have rights arising from the Civil Code. In  
3 particular, as they assert, the discoverer of the  
4 treasure.

5 MS. ORDÓÑEZ PUENTES: Yes.

6 ARBITRATOR JAGUSCH: Okay.

7 MS. ORDÓÑEZ PUENTES: Mr. Vega will be addressing  
8 those points.

9 ARBITRATOR JAGUSCH: Very good. Thank you.

10 PRESIDENT DRYMER: Will Mr. Vega also address the  
11 question, or this question, whether under Resolution 354 or  
12 the 2007 Corte Suprema decision the Claimant has any  
13 rights, period? Never mind to the Galeón San José. Any  
14 rights whatsoever arising from those acts?

15 MR. VEGA-BARBOSA: It is not one of the selected  
16 outstanding legal issues we're going to address. But we  
17 are prepared to address that question, of course.

18 PRESIDENT DRYMER: May I suggest you address it  
19 when it comes to the question we asked you of: What does  
20 it matter whether the Galeón San José is mentioned  
21 specifically or not?

22 MR. VEGA-BARBOSA: Yeah. For sure.

23 PRESIDENT DRYMER: Very good.

24 MR. VEGA-BARBOSA: And, actually, I'm going to  
25 address your question when addressing Articles--

1           PRESIDENT DRYMER: In due course.

2           Thank you. Please proceed.

3           MR. VEGA-BARBOSA: --700 and 701.

4           Thank you, Members of the Tribunal.

5           Although there are several instances of  
6 disagreement with what our colleagues noted and submitted  
7 yesterday, we have selected what we believe at the moment  
8 are the two--the three more outstanding legal issues. And  
9 I will deal with two of them, and Ms. Ordóñez will address  
10 the remaining third one.

11           Let's address our first outstanding dispute,  
12 which concerns the relationship between an invocation of  
13 Article 10.20.5 of the TPA and Claimant's burden of proof  
14 regarding the relevant conditions of jurisdiction.

15           Our main proposition is that although in our  
16 view, the interaction between Article 10.20.5 and Article  
17 21 of the 2021 UNCITRAL Rules means that the Tribunal  
18 preserves its discretion when deciding on objections to  
19 competence, Claimant still bears the burden at the  
20 jurisdictional stage to prove all facts relevant to  
21 establish jurisdiction.

22           Moreover, we submit that when the available  
23 evidence allows the Tribunal to rule on its jurisdiction,  
24 including because Claimant has failed to meet its burden of  
25 proof regarding the conditions of consent, then there is a



1 time--or it is the perfect time for the Tribunal to rule on  
2 its jurisdiction.

3           And we actually believe there is a high degree of  
4 agreement between the Parties and the Non-Disputing Party  
5 in this respect.

6           Yesterday, in response to Mr. Drymer's question,  
7 we expressed the view that although the Tribunal's  
8 discretion can be exercised, for example, by deciding the  
9 preliminary objections at this juncture, or by deciding to  
10 join the analysis with the merits, our view was that the  
11 Tribunal had everything at its disposal to dismiss the case  
12 at this jurisdictional stage.

13           Now, when dealing with this same part of the  
14 case, Mr. Moloo went on to note, relying on Bridgestone,  
15 and prompted by Mr. Drymer's question, that when there is a  
16 purely jurisdictional fact, this is something that must be  
17 decided at this stage by the Tribunal.

18           The relevant quote from Bridgestone is Paragraph  
19 118, which was quoted by Claimant in its written response  
20 to Colombia's Article 10.20.5 objection.

21           Finally, at the end of yesterday's session, the  
22 Non-Disputing Party reaffirmed that when jurisdiction is  
23 based on the existence of certain facts, those facts must  
24 be proven at the jurisdictional stage.

25           Now, important to show that States are

1 independent, and that instances of agreement between the  
2 Disputing and the Non-Disputing Party should be  
3 appreciated. There is not yet an agreement between  
4 Colombia and the United States that the interaction between  
5 Article 21 of the UNCITRAL Rules and Article 10.20.5 of the  
6 TPA afford you, Members of the Tribunal, with discretion  
7 when deciding upon objections to competence.

8           But, all in all, for what is relevant for this  
9 part of Colombia's case, what this shows is that Claimant  
10 bears the burden of proof regarding the conditions of the  
11 consent of the Republic of Colombia to investor-State  
12 arbitration, which means that if at this stage the  
13 available evidence or lack--the lack of evidence allows the  
14 Tribunal to conclude that it does not have jurisdiction,  
15 then the Tribunal should exercise its discretion to render  
16 an award on jurisdiction.

17           I will now move to address the Parties' most  
18 important outstanding issue regarding Article 10.28 of the  
19 TPA. And this will allow me to go deeply into the content  
20 of Article 700 and 701 of the Civil Code of Colombia and  
21 the way it was interpreted by the Supreme Court of Justice.

22           Now, Respondent submits that the Tribunal lacks  
23 jurisdiction because Claimant has not proven that it owns  
24 or controls a protected investment under Article 10.28 of  
25 the TPA.

1           As explained yesterday, Claimant autonomously,  
2 and we are confident very carefully, defined the alleged  
3 investment at Paragraphs 171 and 212 of the Rejoinder. And  
4 "investment" was defined as the right to 50 percent of the  
5 treasure at the Discovery Area. And they say this right  
6 was vested in SSA's alleged predecessors by the operation  
7 of, inter alia, the DIMAR Resolutions 48, the DIMAR  
8 Resolution 354, pursuant to Article 700 and 701 of the  
9 Civil Code. And this was confirmed, they say, by the  
10 Supreme Court in 2007.

11           Now, although this was previously a matter of  
12 dispute, yesterday Mr. Moloo seemed to have accepted that  
13 Claimant is, in fact, relying on Article 10.28.g of the TPA  
14 as a form of protected investment in the non-exhaustive  
15 list of qualifying assets in Article 10.28.

16           Mr. Moloo argued that Claimant could rely on  
17 three types of domestic law instruments to demonstrate that  
18 the alleged predecessors had been conferred with the  
19 alleged investment--that is Articles 700 and 701--and the  
20 DIMAR Resolutions.

21           We will deal with Article 700 and 701 more  
22 specifically, because the focus after the Rejoinder is on  
23 Article 700 and 701 rather than on the Resolutions.

24           So, the first instrument relied upon by Mr. Moloo  
25 was Article 700 and Article 701 of the Colombian Civil

1 Code.

2 Now, prompted by Colombia's indication that  
3 Claimant's translation of Article 701 was incomplete,  
4 Mr. Chairman asked Mr. Moloo about the proper and complete  
5 translation of said provision and about the substantive,  
6 the material implication, if any, of the inclusion of the  
7 word "the."

8 In response, Mr. Moloo argued that he did not see  
9 any substantive impact because, in any case, Article 701  
10 was about the treasure or treasure found in another's land.

11 What comes next is, we say, at the very least--at  
12 the very least--astonishing because against the express  
13 wording of Articles 700 and 701, Claimant now argues that  
14 when a private company simply reports a find, the reporter  
15 has a right over whatever treasure is find--is  
16 found--sorry--in that find under Article 701, even if that  
17 treasure is not yet found at the time the relevant rights  
18 under Article 701 are requested.

19 Now, again on the screen are Articles 700 and  
20 701, which I explained and went through in detail  
21 yesterday. And I will read from them again because they  
22 are very, very important.

23 According to Article 700, the discovery of a  
24 treasure is a kind of invention or discovery. And  
25 according to the correct translation of Article 701, the

1 correct--the treasure--the treasure found on another's land  
2 shall be divided equally between the owner of the land and  
3 the person who made the discovery.

4 ARBITRATOR JAGUSCH: Counsel, if you don't  
5 mind--just seeing as we're looking at this, it's  
6 always--this interpret--translation of Article 700 has  
7 always--I'm speaking for myself--bothered me because, as a  
8 lawyer, I hate a circular definition. Right?

9 Are the Parties agreed that this is a correct  
10 translation? Sorry. No. Article.

11 PRESIDENT DRYMER: With the addition of the word  
12 "the."

13 ARBITRATOR JAGUSCH: Yes. But only as you're  
14 looking at Article 700, not 701, that I'm looking at. I'm  
15 not talking about the word "the." Just Article 700. The  
16 discovery of a treasure is a kind of invention or  
17 discovery.

18 As a matter of the English language, I don't find  
19 that a very useful expression. And I just wonder how much  
20 of a faithful translation that is and if anyone has thought  
21 about that.

22 ARBITRATOR CLAUS VON WOBESER: I suggest--why  
23 don't we read the Spanish. Why don't you read the Spanish  
24 or project the Spanish on the screen.

25 PRESIDENT DRYMER: Could you enlarge the top of

1 the screen, please.

2 MR. VEGA-BARBOSA: But I understand your concern.  
3 Because, actually, even a literal translation would be a  
4 better one for the last word. It would be "the discovery  
5 of a treasure is a kind of invention or find."

6 "Hallazgo." "Hallazgo" we could agree to define  
7 it as "find."

8 MR. MOLOO: I'll confirm with my colleagues, but  
9 I think that's probably an accurate--but let me confirm  
10 with my colleagues.

11 ARBITRATOR JAGUSCH: Certainly sounds better to  
12 me.

13 MR. MOLOO: Yeah. I mean, just looking at the  
14 Spanish version, they're two different words.

15 ARBITRATOR JAGUSCH: Yeah. That's right. So,  
16 then see the last word appearing earlier in the sentence.

17 MR. MOLOO: Yes. Exactly.

18 MR. VEGA-BARBOSA: So I would read it in Spanish  
19 as well. I think it's important.

20 According to Article 700: "El descubrimiento de  
21 un tesoro es una especie de invención o hallazgo."

22 And according to Article 701: "El tesoro  
23 encontrado en terreno ajeno el tesoro encontrado en terreno  
24 ajeno se dividirá por partes iguales entre el dueño del  
25 terreno y la persona que haya hecho el descubrimiento."

1           Yesterday, we emphasized that the translation of  
2 Article 701 provided by Claimant had failed to include the  
3 word "the"/"el" at the beginning of this provision. This  
4 word we believe, and we say, is decisive as it illustrates  
5 that the conferral of rights under Article 700 and 701 is  
6 premised on two grounds. The discovery of a treasure and  
7 on the treasure being found on another's land.

8           And we repeat what we said yesterday. It is the  
9 treasure found--the treasure found, not an unfound  
10 treasure, not a yet-to-be-found treasure--which shall be  
11 divided equally.

12           And this is not only Colombia's view.

13           ARBITRATOR JAGUSCH: Can you stop for a second,  
14 please. What does "found" mean in this context? I mean, I  
15 don't understand how something can be "unfound." I don't  
16 know what that means.

17           MR. VEGA-BARBOSA: I think that the best  
18 comparison is not between "found" and "unfound" for the  
19 moment. I will go to that, but first--

20           ARBITRATOR JAGUSCH: Now, how about "discovery"  
21 and "found"? How are they different? How is "to discover  
22 something" different from "to have found something"?

23           MR. VEGA-BARBOSA: If we can go back, please, to  
24 the description of Article 700 and 701. Further back,  
25 please.

1           We'll see that all Article 700 requires--and this  
2 is actually very important. I'm happy that we're using  
3 some time to discuss this, because this is very important.  
4 All Article 700 requires is for the discovery of a treasure  
5 to be reported.

6           And this is, for example--and I'm not sure if  
7 you'll recall. But if you don't recall, we can move  
8 forward two slides.

9           ARBITRATOR JAGUSCH: Just--if you don't mind,  
10 just go on back. So--

11           MR. VEGA-BARBOSA: This is the case of Reynolds.

12           ARBITRATOR JAGUSCH: No. Hold on. Just before  
13 you get to that. I just want to--I'm just struggling with  
14 the language a bit. Can we go back to, I think, the  
15 previous slide. Again, that one's fine. Just pause there.

16           I understand the distinction--or the two elements  
17 you're referring to. There's the discovery of treasure and  
18 the treasure being found on another's land.

19           Does it--would it have the same meaning for your  
20 purposes if the second element read "the treasure being  
21 discovered on another's land"?

22           ARBITRATOR CLAUS VON WOBESER: No. I think the  
23 Spanish is very clear. It is the treasure which is found.  
24 It doesn't say that the treasure is "*el descubrimiento de*  
25 *un tesoro.*"



1           In 700, (in Spanish), which is the relevant  
2 provision, which is 701, which is a treasure found in the  
3 land (in Spanish)--in a third party's land will be divided  
4 in equal parts between the owner of the property, the  
5 person that discovered it.

6           But it talks about "found," which is--you  
7 actually have--it has to be--you have to say, "Here it is.  
8 This is the treasure."

9           It's a particular treasure. It's not a  
10 concept--a vague concept where you say, "I discovered  
11 something." But you have to--you have to link--interpret  
12 both the 700 and 701 together because the word speaks about  
13 the division. It says it has to be found.

14           It's not the actual concept of somewhere it is.  
15 You have to say, "Here it is."

16           And I mean, if I understand correctly, Colombia  
17 is saying the act of finding it, saying "Here it is," is  
18 what's missing, the way I understand it, the argument they  
19 are making, in the way I read both Article 700 and 701.

20           And I note the translation has always been a  
21 problem with laws because it's so hard--I mean, if you  
22 speak several languages. But the meaning of this, you have  
23 to read together 700 and 701, and that's what I think is  
24 the argument, if I correctly understand Colombia.

25           ARBITRATOR JAGUSCH: What I'm interested in is

1 Colombia's submission on what the difference is between a  
2 discovery and something being discovered, which would  
3 activate Article 700 on the one hand and something being  
4 found. Forget another's land. I understand that.

5 How is something being found in order to activate  
6 Article 701 different from something being discovered, as  
7 required by Article 700?

8 MR. VEGA-BARBOSA: Well, I'm glad I can give you  
9 the answer with an example we have on the record.

10 If we move two slides further, we'll see an  
11 example of an investor that was only able to activate  
12 Article 700. Reynolds reported the discovery of the San  
13 José. And based on Article 700, he was recognized as a  
14 reporter of a discovery.

15 But the reason why subsequent investors were able  
16 to also look for the San José and to potentially allege  
17 rights over the San José is because Reynolds never found  
18 the San José and, accordingly, was never in the position  
19 regulated by Article 701.

20 ARBITRATOR JAGUSCH: Okay. So just pausing here,  
21 this is where I'm slightly troubled. Because if they  
22 couldn't follow up the discovery with a find, wouldn't that  
23 imply that they hadn't actually discovered it? It was a  
24 false reporting of a discovery?

25 MR. VEGA-BARBOSA: In my presentation, I address

1 that particular situation. Because in our particular case,  
2 we do have a particular application of the distinction of  
3 the two.

4 So--

5 ARBITRATOR JAGUSCH: I'm more interested just how  
6 was the law--how were these provisions intended to operate?  
7 Then we'll come to how they might operate in this case.  
8 I'm trying to understand how a discovery is different from  
9 a find.

10 MR. VEGA-BARBOSA: Yeah.

11 ARBITRATOR JAGUSCH: And I get the concept that  
12 there might be two phases. We have reason to think that  
13 there might be something, and you could report that maybe  
14 as a discovery. I'm not saying that is the correct  
15 approach. But let's, for the purposes of this discussion,  
16 treat it as one.

17 But then you go on to see if you can find it.  
18 Well, it seems to me it must follow that if you fail in  
19 your attempt to find it, then you hadn't actually  
20 discovered it. Nothing had been discovered because nothing  
21 was then subsequently found.

22 Now, it seems to me there could well be a problem  
23 with the analysis that I've just set forth, in which case  
24 I'd like to understand what that problem is. Or how else  
25 do these two concepts fit together? How can you have one

1 without the other?

2 MR. VEGA-BARBOSA: Actually, we believe--if I  
3 may, Mr. von Wobeser, I believe that the way that the  
4 Colombian Civil Code regulates this is actually very wise  
5 in order to prevent abuse. Because anyone can claim to  
6 have discovered something. But the law only provides or  
7 grants a right of 50 percent of the economic value of that  
8 find to the person that actually is able to find what it  
9 has reported as a discovery.

10 Many times, and I believe most of the times,  
11 investors stop at Article 700 because they are only able to  
12 claim they discovered something, but then they are unable  
13 to prove, as Reynolds, that they actually found something,  
14 and that is why they cannot claim a 50 percent right over a  
15 treasure. And that is a particular control our law  
16 provides.

17 But the law actually protects the situation of  
18 the person that falls within Article 700. As an example of  
19 protection is DIMAR Resolution 354. Resolution 354 is an  
20 example of application of Article 700.

21 You claim to have discovered something even as  
22 undetermined as the 1982 Confidential Report reported to  
23 have found treasures or a shipwreck, and you are recognized  
24 by the law as a reporter.

25 Now, the second question is whether you have

1 found something. And that would require further, in this  
2 case, marine exploration, which explains why this  
3 particular investor went to exercise further exploration to  
4 be able to sit in the position of Article 701.

5 And that's all Colombia's case. After exhausting  
6 all this procedure, all this Claimant was able to do was to  
7 be recognized under Article 701 as the founder of  
8 indetermined treasures, not the Galeón San José. And as I  
9 mentioned before--

10 And we can go back three slides. One more. One  
11 more. One more. Go to the slide where they define the  
12 investment as 50 percent rights over the Galeón San José in  
13 particular. And that is an investment that they did not  
14 secure under Article 701 of the Colombian Civil Code.

15 ARBITRATOR CLAUS VON WOBESER: I have a question.

16 Isn't 700 really, the first phrase, a definition?  
17 Because, basically, it says discovery of the treasure is a  
18 type of invention or find.

19 MR. VEGA-BARBOSA: "Hallazgo."

20 ARBITRATOR CLAUS VON WOBESER: And "hallazgo" is  
21 finding. And then when you read the relevant  
22 provision--because it's the one only--finding an invention  
23 or a finding, it's basically an issue of what discovery  
24 means of a treasure. But then the relevant provision to  
25 me--and correct me if I'm right, Counsel--is the treasure

1 found in a foreign property would be divided in equal parts  
2 between the owner of the land and the person who discovered  
3 it.

4 So I think--I think by trying to interpret this  
5 under 700--I think 700 is only definition. The relevant  
6 provision is 701.

7 Is that a correct reading or am I making a  
8 mistake?

9 MR. VEGA-BARBOSA: It is correct. And it is more  
10 a definition than a concession over rights. It is written  
11 more in those terms. That is true.

12 But to be completely transparent with the  
13 Tribunal, Colombian law does protect the position of the  
14 person who claims to have discovered something. The law  
15 protects that rather incipient--

16 How do you say that in English?

17 PRESIDENT DRYMER: "Incipient" is a perfect word.

18 MR. VEGA-BARBOSA: --incipient position. But  
19 that is not enough for that person to be positioned in  
20 Article 701 and be able to claim 50 percent rights. To be  
21 able to do that, you have to prove that you found the  
22 treasure. And that's pretty much all our case.

23 ARBITRATOR JAGUSCH: I think I understand.

24 And speaking for myself, that would mean that  
25 there isn't a meaningful distinction between discovery and

1 finding, which would be consistent, then, with the reading  
2 of 701, which seems to swap from "found" to "made the  
3 discovery" in the same sentence.

4 The discovery, it seems to me, is linking back to  
5 what's being found.

6 MR. VEGA-BARBOSA: Yeah. But the problem with  
7 that line of argument is that I think it's a general  
8 principle that we don't have superfluous provisions in our  
9 treaties, in our domestic statutes, and we do believe that  
10 Article 700 and Article 701 play different functions for  
11 the purposes of the Colombian Civil Law. They are not the  
12 same. They're related differently.

13 As Mr. von Wobeser just told us, there is a  
14 perfect difference in Article 701, which is the only one  
15 that creates a right expressly in terms a right to  
16 50 percent. The other one is written more in the terms of  
17 a definition, not as a right-creating provision.

18 But, as I'm telling you, the law in Colombia  
19 protects the incipient position of the one who fairly  
20 claims to be a discoverer, as Reynolds, who was recognized  
21 as a reporter. But why Reynolds is not anywhere claiming  
22 50 percent rights over the San José? He was reported to  
23 have discovered. Because he was never able to put himself  
24 in the position of Article 701. That is the real value of  
25 the preamble of Resolution 48.

1           PRESIDENT DRYMER: I hear your representations  
2 regarding the Reynolds situation.

3           Is there any evidence? Is there any evidence  
4 that the Article 700/701 distinction was raised either by  
5 Reynolds or by the government, or is this your gloss on  
6 what would happen?

7           MR. VEGA-BARBOSA: Yeah. We are not in  
8 possession of the case file for Reynolds, but what we do  
9 have is Resolution 48.

10          PRESIDENT DRYMER: Yes.

11          MR. VEGA-BARBOSA: Where Reynolds--

12          PRESIDENT DRYMER: And remind me what that says,  
13 please.

14          MR. VEGA-BARBOSA: We can go to--

15          PRESIDENT DRYMER: There it is. No?

16          MR. VEGA-BARBOSA: Resolution 48 is the  
17 resolution that granted GMC, Inc., with several areas  
18 susceptible of being explored.

19                 Under the preamble, it refers to the situations  
20 of previous explorers, and one of those is Reynolds,  
21 Aluminum Europe, who reported, different to this Claimant,  
22 that he had reported finding the Galeón San José.

23          PRESIDENT DRYMER: I don't want to be rude, but I  
24 don't need you to repeat the representations.

25                 I don't recall seeing in that, nor have I heard



1 this morning, that Reynolds itself made any--based a claim  
2 on Article 700 or that its lack of going any further is  
3 related to its view or the Government's view that it had no  
4 rights under Article 701. That's all I'm pointing out or  
5 asking you whether I'm wrong, whether I've missed something  
6 in the record.

7 MR. VEGA-BARBOSA: I would like to be able to  
8 come back to Resolution 48--

9 PRESIDENT DRYMER: Okay. Fine.

10 MR. VEGA-BARBOSA: --to further explain the  
11 situation with Reynolds and also to look at our exchanges.  
12 Because the Reynolds situation was actually part of our  
13 written exchanges in the past. This is not something--

14 PRESIDENT DRYMER: It's simply that. It's a  
15 factual question: Was the Civil Code--were these  
16 provisions of the Civil Code--is there anything on the  
17 record that demonstrates that these provisions of the Civil  
18 Code were actually at issue at the time or--as opposed to  
19 you are simply telling us that the Government's resolution  
20 was based on its thinking regarding the Civil Code?

21 MR. VEGA-BARBOSA: Well, we can represent to you  
22 that these provisions from the Civil Code were the ones  
23 applicable to the position of Reynolds, because this is the  
24 Andres Bello Civil Code that is 200 years old.

25 PRESIDENT DRYMER: Yep. Very good. And, of

1 course, the Government acts in accordance with the Civil  
2 Code. I appreciate that.

3 My second question--and you can get to it later  
4 if you feel it necessary--no. Strike that. I'll ask the  
5 question later.

6 Please proceed.

7 MR. VEGA-BARBOSA: I believe that I have  
8 exhausted all I have to say about the distinction between  
9 Article 701 and 700. Everything I can say now will be a  
10 repetition.

11 So I prefer to, with your permission, defer to  
12 Ms. Ordóñez, who will address the *ratione voluntatis*  
13 objection.

14 PRESIDENT DRYMER: Permission granted. And thank  
15 you for engaging with us on this important point.

16 But not so fast. I think Mr. Jagusch may have a  
17 question for you.

18 ARBITRATOR JAGUSCH: No, no.

19 PRESIDENT DRYMER: All right.

20 MS. ORDÓÑEZ PUENTES: Mr. Chairman, members of  
21 the Tribunal, I will move forward to explain why what we  
22 heard yesterday in this Hearing clearly confirms that all  
23 Claimant's claims are time-barred because Claimant  
24 first--and I stress the word "first"--acquired knowledge of  
25 the alleged breaches it is now claiming before 18

1 December 2019.

2 Claimant has not been able to disprove that SSA  
3 believed since 2010 that Colombia had definitively  
4 expropriated SSA of its alleged property rights and  
5 breached the Fair and Equitable Treatment, Full Protection  
6 and Security, Most Favored Nation, and National Treatment  
7 Standards as SSA expressly recognized before the D.C.  
8 District Court and the Inter-American Commission On Human  
9 Rights.

10 Rather than disproving these facts, because  
11 Claimant clearly can't, SSA relied only on two arguments to  
12 state that they somehow--those arguments--that they, after  
13 December 2019, were still confident they had rights over  
14 the Galeón San José up until Resolution No. 85 of 2020 was  
15 issued.

16 ARBITRATOR JAGUSCH: Counsel, if you don't mind.  
17 So you've made the argument that Claimant has not been able  
18 to disprove that SSA believed since 2010 that Colombia had  
19 definitively expropriated the property rights.

20 My question is this: What is Colombia's position  
21 as to whether or not it had expropriated SSA's property  
22 rights?

23 MS. ORDÓÑEZ PUENTES: At this point of the  
24 proceedings, Colombia is not assuming a position as regards  
25 the expropriation of the rights. But what we are saying is

1 that if any of the alleged claims happened, the violations  
2 that Claimant is claiming before this Tribunal happened,  
3 everything occurred before the three-year limitation  
4 period.

5 ARBITRATOR JAGUSCH: Okay. But just so I  
6 understand. Colombia is not positively asserting that it  
7 had expropriated the Claimant's property rights prior to  
8 Resolution 85?

9 MS. ORDÓÑEZ PUENTES: Well, yeah. Colombia is  
10 not asserting that it had expropriated any rights from  
11 Claimant. And, in any case, it is worth having in mind  
12 that the provision does not require the recognition from  
13 the State but knowledge by Claimant. And that's what I  
14 will address within my presentation.

15 ARBITRATOR JAGUSCH: I'm just trying to  
16 understand the context. A criticism appears to be being  
17 made of Colombia for not recognizing--the criticism was  
18 made of the Claimant for not proving that there wasn't a  
19 previous expropriation.

20 So, I think it's important to understand  
21 Colombia's position as to whether there was a previous  
22 expropriation. If there wasn't a previous expropriation,  
23 then what is there for the Claimant to prove?

24 MS. ORDÓÑEZ PUENTES: Well, criticism to  
25 Claimant's position deals with the fact that they had

1 knowledge about the claimed violations. That's Colombia's  
2 position, and that's what we criticize.

3 ARBITRATOR JAGUSCH: Okay.

4 MS. ORDÓÑEZ PUENTES: They have not been able to  
5 prove before this Tribunal that they didn't have knowledge  
6 of the position that Colombia has taken regarding the  
7 rights that were granted by Resolution 354 and the Supreme  
8 Court Decision in the virtual world. And that might be  
9 useful, actually.

10 PRESIDENT DRYMER: For the sake of  
11 clarification--you heard me try to do this many times so  
12 that I understand your position. Correct me if I'm wrong,  
13 please. I'm not trying to rephrase your statements or to  
14 misstate them, obviously.

15 I think you're telling us that the Claimant's  
16 position or its alleged predecessors' positions in the  
17 previous litigation demonstrate a subjective belief that  
18 their rights had been, let's say, eviscerated, just to use  
19 the word that they use, and that that subjective belief is  
20 sufficient to have triggered the clock ticking, if you  
21 will, for any argument regard prescription or time-barred.

22 Is that the position of the Republic?

23 MS. ORDÓÑEZ PUENTES: That is correct because  
24 that's the only practical and operative interpretation of  
25 the statute of limitations.

1           PRESIDENT DRYMER: Right. And so that means that  
2 subjective belief is, in your view, I think, the same thing  
3 as knowledge of the breach.

4           MS. ORDÓÑEZ PUENTES: Well, subjective belief  
5 and--yeah, which is represented in Claimant's own  
6 admissions.

7           PRESIDENT DRYMER: Right. Thank you. That's  
8 clear. I appreciate that.

9           MS. ORDÓÑEZ PUENTES: So, the first argument SSA  
10 relied on is that after the commencement of the D.C.  
11 District Court and the Inter-American Commission on Human  
12 Rights petition, Colombia accepted SSA's proposal to  
13 dialogue. They want this Tribunal to infer that from 20  
14 November 2014, the underlying conditions of the petition  
15 and the U.S. action were addressed, and the clock, for the  
16 purposes of the three-year limitation period, started to  
17 run again.

18           ARBITRATOR JAGUSCH: Counsel, that would be the  
19 clock starting to run in respect of the events or  
20 complaints or acts or omissions that give rise to that  
21 complaint. Yeah?

22           MS. ORDÓÑEZ PUENTES: That is correct.

23           ARBITRATOR JAGUSCH: Right.

24           But the claims here are not made on the basis of  
25 the pre-Resolution 85 acts or omissions of the State.

1 MS. ORDÓÑEZ PUENTES: That's precisely Colombia's  
2 position, that the claims that are submitted before this  
3 Tribunal are exactly the same that they have submitted  
4 before the foreign court--

5 ARBITRATOR JAGUSCH: I'm really struggling with  
6 that because--and it's not--the Claimant has not put their  
7 case that way. That's not the case we're asked to decide.  
8 We're asked to decide whether Resolution 85 had the effects  
9 that the Claimant's assert in terms of the Treaty  
10 violation.

11 So, doesn't time start to run from Resolution 85?

12 MS. ORDÓÑEZ PUENTES: That would be the case if  
13 Claimant had the rights--if you--if the Tribunal will  
14 accept that Claimant has been conferred, under Colombian  
15 law, a right over the Galeón San José.

16 ARBITRATOR JAGUSCH: Yes. It makes that  
17 assumption, yes.

18 MS. ORDÓÑEZ PUENTES: Yeah. Exactly.

19 So the point is that, yes, if Claimant had been  
20 conferred a right over the Galeón San José, that would be  
21 the position. But the facts show that Claimant has never  
22 had a right over the Galeón San José. And that's--

23 ARBITRATOR JAGUSCH: Okay. I understand that  
24 that's your argument. But that's a different argument,  
25 isn't it, from the argument you're now making about time

1 limitation? You're arguing that there wasn't a right in  
2 the first place. There was no right to which the TPA  
3 applied. We don't even get to when time runs because you  
4 say there wasn't a particular investment.

5 MS. ORDÓÑEZ PUENTES: That's a very good  
6 question. Because our position is that in the real world,  
7 they do have some rights, but not over the Galeón San José.  
8 So that's--that's the source of the confusion.

9 And I understand why it is so difficult to follow  
10 the Claimant's position so that the way we could unravel  
11 this confusion that leads us to having this discussion when  
12 Article 18.1 places the emphasis on the alleged breach, and  
13 the alleged breach is the same as the one in the  
14 Inter-American Commission, is precisely because they have  
15 modified their narrative and they have somehow advanced  
16 that the Supreme Court decision did recognize them--rights  
17 over the Galeón San José.

18 But if you don't separate both worlds, it is very  
19 complicated to understand Claimant's position.

20 And that's why in our factual recollection, we  
21 did separate both worlds to assist the Tribunal because  
22 it's not our assertion. Are the facts. Those are the  
23 facts. And it's not an allegation. It's just the facts.  
24 It's the facts that are present in this case and will not  
25 change, because we are not basing our arguments on



1 allegations, but facts. Just their assumptions, what is in  
2 the record.

3 ARBITRATOR JAGUSCH: Thank you.

4 PRESIDENT DRYMER: Very quick question related to  
5 a small part of your answer a moment ago.

6 What rights does Colombia assert the Claimant has  
7 at this date in the real world?

8 MS. ORDÓÑEZ PUENTES: In the real world, Claimant  
9 has Resolution 354, which was upheld by the Supreme Court  
10 Decision in 2007.

11 PRESIDENT DRYMER: Perfect.

12 MS. ORDÓÑEZ PUENTES: That's Colombia's position  
13 in the real world.

14 PRESIDENT DRYMER: In the real world. And in the  
15 real world, which I hope we're all operating in--at least  
16 the three of us are trying--isn't the debate precisely on  
17 the interpretation of Article 354 and the Supreme Court  
18 Decision that upheld it, among other facts?

19 MS. ORDÓÑEZ PUENTES: Colombia's position is that  
20 those two instruments need no interpretation.

21 PRESIDENT DRYMER: I understand. I understand.  
22 When I say "the debate," I'm not asking you to acknowledge  
23 that the other side is right.

24 MS. ORDÓÑEZ PUENTES: Okay.

25 PRESIDENT DRYMER: But you do acknowledge that

1 they're saying that those two instruments accord them the  
2 very rights which Resolution 85 eviscerated--again, to use  
3 their terms--which requires the Tribunal, I suppose you'd  
4 agree, to determine for itself whether you're right or  
5 whether Claimant is right in respect specifically of the  
6 nature of the rights that Claimant or its predecessors have  
7 held since the date of Resolution 354?

8 MS. ORDÓÑEZ PUENTES: Yeah, that's Colombia's  
9 position. But Colombia's position is also that that  
10 conclusion can be reached from a comparison exercise.

11 PRESIDENT DRYMER: I understand. Can and should  
12 be reached on the basis of the evidence before the Tribunal  
13 at this stage.

14 MS. ORDÓÑEZ PUENTES: Correct.

15 PRESIDENT DRYMER: And that we should decide on  
16 the issue at this stage and, obviously, that we should  
17 decide it in the manner that you're advocating. That's  
18 your position.

19 MS. ORDÓÑEZ PUENTES: And that you have enough  
20 evidence--

21 PRESIDENT DRYMER: Yes.

22 MS. ORDÓÑEZ PUENTES: --to do so. Yeah, that's  
23 the point.

24 PRESIDENT DRYMER: Thank you.

25 MS. ORDÓÑEZ PUENTES: So they want this Tribunal

1 to infer that--okay, I will--that from 20 November 2014,  
2 the underlying conditions of the petition and the U.S.  
3 action were addressed and the clock, for the purposes of  
4 the three-year limitation period, started to run again.

5           Members of the Tribunal, as I was saying, this  
6 argument is artificial and completely deprives any  
7 limitation provision of its practical effects. If  
8 Claimant's proposition is accepted, this Tribunal would  
9 admit that every time a State accepts a request to dialogue  
10 from a troubled investor, this would suppose that the  
11 time-limitation clock restarts because the underlying  
12 breaches were addressed by the State.

13           Under this understanding, Claimant would never  
14 again have to worry about time-limitation provisions, since  
15 with a simple dialogue request accepted by the host State,  
16 the time limitation, in this case the three-year period,  
17 should restart again.

18           Furthermore, taking this argument at face value  
19 would imply that Claimants can always escape from their own  
20 admissions and actions with one simple unilateral request  
21 to negotiate with a State.

22           In this case, this is precisely what SSA argued  
23 yesterday since it is using this contention to undermine  
24 the fatal probative value of its admissions before the D.C.  
25 District Court and the Inter-American Commission on Human

1 Rights. But we are confident that the Tribunal has already  
2 figured this out.

3           Colombia's acceptance of SSA's request to start a  
4 dialogue and Colombia's subsequent request to stop the  
5 international proceedings to meet with SSA does not erase  
6 SSA's previous admissions of the breaches Claimant is now  
7 alleging before this Tribunal, nor does it imply that the  
8 underlying conditions for said breaches were addressed.

9           The second argument raised by SSA is that because  
10 the injunction decision was reinstated on 29 May 2019, its  
11 rights over the Discovery Area or the Galeón San José were  
12 somehow confirmed. Therefore, even if before they believed  
13 that they had been expropriated, this injunction order  
14 somehow revived the conviction that they had not been  
15 expropriated.

16           This argument is problematic at least on three  
17 fronts:

18           First front, because, as already explained by  
19 Mr. Vega, the injunction is an ancillary proceeding to the  
20 civil actions that culminated with the 2007 Supreme Court  
21 Decision; therefore, any rights referred to in said  
22 proceeding clearly could not be either about the Galeón San  
23 José or about the so-called Discovery Area.

24           Second, because after this decision, the  
25 Vice-President reaffirmed that SSA still had no rights over

1 the Galeón San José or the Discovery Area. The injunction  
2 and the Vice-President's letter both fall outside the  
3 three-year limitation period; therefore, the Tribunal can  
4 comfortably decide that by the latest, the proscription  
5 clock had to start ticking on 18 June 2019.

6 And third, because if the injunction order did  
7 not confer any new rights and the rights supposedly  
8 confirmed by the Supreme Court decision were already  
9 recognized as expropriated by Claimants before the  
10 different international venues, Claimant's claims are still  
11 time-barred despite the 2019 Secuestro Decision.

12 We think that this last front addresses the  
13 question that Arbitrator Jagusch posed to Claimant  
14 yesterday regarding this point.

15 Claimant is trapped in its position because it  
16 either recognizes that the injunction order did not  
17 recognize any additional rights or it recognizes that, in  
18 fact, those rights emanate from that Supreme Court  
19 Decision, which they already accepted since 26  
20 November 2012 that were fully expropriated by the Colombian  
21 Government.

22 As President Drymer clearly pointed out,  
23 Colombia's position here is that the proscription clock  
24 started ticking at the exact moment Claimant admitted it  
25 had been permanently deprived of its alleged investment in

1 2012 and calculated the damages of that deprivation between  
2 4 and 17 billion dollars.

3 Per Claimant's own admissions, this is the first  
4 time they knew about the alleged breaches now claimed  
5 before you, as you can see in Appendix C, which we have  
6 shown several times.

7 This is very important because the inclusion of  
8 the word "first" in Article 10.18.1 implies, as the  
9 non-disputing party intervention recognized, that in case  
10 several measures constituted a single breach of the TPA,  
11 the Claimant cannot arbitrarily pick a subsequent measure  
12 to renew the limitation period because this would render  
13 the limitation provisions worthless and would deprive  
14 States on having legal certainty over the disputes that can  
15 be brought under the investment arbitration.

16 This is further important because this wording  
17 prevents a Claimant from doing what SSA is precisely  
18 advancing before this Tribunal. This is that a right that  
19 was already supposedly violated can be revived at the point  
20 in time that suits Claimant best to escape the three-year  
21 limitation provision.

22 This goes in line with the Non-Disputing Party  
23 intervention and several investment tribunals like the one  
24 in Grand River v. USA that have stated that the three-year  
25 limitation period does not allow any suspension,

1 prolongation, or other modifications or qualifications.

2           Therefore, Claimant's argument regarding the  
3 injunction is totally invalid because it would imply a  
4 suspension and a prolongation of the clear limitation  
5 provided for in Article 10.18.1.

6           Finally, Claimant has not even been able to  
7 challenge the content of the six letters sent by different  
8 Colombian authorities between 2015 and 2018 where it is  
9 informed by the authorities that it did not have any  
10 protected rights over the Galeón San José.

11           By means of these letters, the Republic of  
12 Colombia adduces that since 2015, Claimant acquired  
13 knowledge of the alleged breaches over its rights.  
14 Claimant did not disprove its acquired knowledge of the  
15 breaches by means of these letters.

16           ARBITRATOR JAGUSCH: Counsel, are you able to  
17 address the Claimant's argument that until Resolution 85,  
18 the ongoing dispute had been essentially whether the  
19 Claimant or its predecessors had discovered the Galeón San  
20 José? Right? And the principal argument being advanced by  
21 Colombia was that no rights accrued to Claimant because it  
22 hadn't discovered the San José. And that's broadly  
23 consistent with your opening of yesterday. That's on the  
24 one hand.

25           Whereas Resolution 85 was strikingly different

1 because Resolution 85 pulled the carpet out from under  
2 their feet completely. It effectively provides that  
3 whether or not they had found the San José, they were not  
4 entitled to the 50 percent of the value of the treasure  
5 because it's no longer treasure; right?

6 So it's their point that it's a fundamentally  
7 different dispute that arises with Resolution 85. Because  
8 on the basis of Resolution 85, even if it's accepted that  
9 they did find the San José, the law has changed, meaning  
10 that their rights have been taken completely.

11 Now, if that argument works, then it seems to me  
12 that defeats your argument that Resolution 85 was merely  
13 the latest step in a series of consistent steps, which  
14 they're not allowed to now cherry-pick as the final sort of  
15 act, if you like, in order to get treaty protection.

16 Do you understand the point I'm making?

17 MS. ORDÓÑEZ PUENTES: I think I understand. So I  
18 will answer, and you let me know if I'm not understanding.

19 So the point is that Claimant and its  
20 predecessors have always--since they decided to mix up the  
21 two worlds, they started to claim before the Colombian  
22 authorities that they had rights over the Galeón San José.

23 ARBITRATOR JAGUSCH: On the basis that they had  
24 found it?

25 MS. ORDÓÑEZ PUENTES: Well, they have--that's



1 what they say.

2 ARBITRATOR JAGUSCH: Yes. That's right.

3 MS. ORDÓÑEZ PUENTES: I'm not sure--well, the  
4 basis on which they have advanced the argument before the  
5 Colombian authorities has varied. And the reason I'm not  
6 responding to that precisely is because that's not relevant  
7 for Colombia's position.

8 The point is what their knowledge is. And they  
9 know that the Colombian Government for more than 30 years  
10 has unequivocally and consistently told them they have  
11 rights over the Galeón San José.

12 And here I'm trying to simplify the terms of the  
13 case. I'm fully aware of that. And before this Tribunal--

14 PRESIDENT DRYMER: Allow me, please, just to  
15 correct the record. I think you said that the Colombian  
16 government for more than 30 years has unequivocally and  
17 consistently told them that they have no rights over the  
18 San José.

19 MS. ORDÓÑEZ PUENTES: Yes. Thank you. Thank  
20 you, Mr. President. That's the case.

21 PRESIDENT DRYMER: We understand that, but I want  
22 it clear on the record.

23 ARBITRATOR JAGUSCH: Just on that point.

24 Can you summarize for us in a sentence or two why  
25 Colombia has taken the position that the Claimant has no

1 rights? What's the essential reason?

2 And just to help you: Is it because Colombia  
3 asserts that neither the Claimant nor its predecessors  
4 found or discovered the San José?

5 MS. ORDÓÑEZ PUENTES: Well, I will have to  
6 anticipate a response to the question you posed to me  
7 yesterday.

8 And the main reason that Colombia has taken this  
9 position is because the Galeón San José is not located in  
10 the coordinates reported in the 1982 Confidential Report.

11 And I told you yesterday that we are not going  
12 to--

13 ARBITRATOR JAGUSCH: And the coordinates--you  
14 mean at the coordinate or in the area of the coordinate?

15 MS. ORDÓÑEZ PUENTES: Well, in the  
16 coordinates--well, it's Colombia's position--

17 ARBITRATOR JAGUSCH: A coordinate is a small  
18 area. It's smaller than this room. Okay?

19 MS. ORDÓÑEZ PUENTES: I have a whole answer to  
20 clarify that point.

21 ARBITRATOR JAGUSCH: Okay.

22 MS. ORDÓÑEZ PUENTES: So should I move forward or  
23 continue?

24 ARBITRATOR JAGUSCH: Please.

25 MS. ORDÓÑEZ PUENTES: Because I do have an answer

1 to all of those questions that I think will assist the  
2 Tribunal to clarify the points you are asking.

3 ARBITRATOR JAGUSCH: We're getting away from the  
4 point that I'm trying to get you to engage with, which is,  
5 as I understand the Claimant's position, they have been  
6 locked in battle with Colombia for decades arising  
7 essentially from Colombia's assertion that neither the  
8 Claimant nor its predecessors found the San José; right?

9 Now, if that was the nature of the dispute, then  
10 it was an entirely new dispute that arose by Resolution 85.  
11 Because Resolution 85 takes away any right they might have  
12 had or any value they might have had, even if they had  
13 found the San José.

14 MS. ORDÓÑEZ PUENTES: Yeah. But the whole point,  
15 I think, within the question--I can elaborate on the  
16 answer. Because the whole point is that they did not find  
17 the San José, and Colombia informed them about that on  
18 several occasions.

19 And I know--I would want to go back to the 1994  
20 Columbus Report, which was adopted as State conduct. And  
21 then I have some more recent evidence that might assist the  
22 Tribunal, which is on the record.

23 ARBITRATOR JAGUSCH: Yeah. I'm not interested in  
24 debating with you whether or not they did find the  
25 San José.

1 I'm just dealing with the point--do you  
2 understand there is, according to the Claimant, a  
3 distinction between a dispute concerning whether or not  
4 they found the San José, on the one hand, and a dispute  
5 that even if they had found the San José, Resolution 85  
6 expropriates any rights they would have had from having  
7 found the San José?

8 Do you see the difference?

9 MS. ORDÓÑEZ PUENTES: I do see the difference.

10 ARBITRATOR JAGUSCH: That's the difference you  
11 need to engage with.

12 MS. ORDÓÑEZ PUENTES: Yeah. And I will engage  
13 immediately.

14 ARBITRATOR JAGUSCH: Okay.

15 MS. ORDÓÑEZ PUENTES: Because in order to  
16 determine whether the dispute is different or not, you need  
17 to go back to determine whether they have been granted  
18 rights over the Galeón San José.

19 PRESIDENT DRYMER: Right.

20 MS. ORDÓÑEZ PUENTES: And that's the dispute.

21 PRESIDENT DRYMER: May I suggest that you  
22 continue with your presentation?

23 MS. ORDÓÑEZ PUENTES: Absolutely.

24 PRESIDENT DRYMER: You're free to come back to  
25 these questions. You're certainly free to answer yes to

1 these questions later on, as you planned to do.

2 Please continue.

3 MS. ORDÓÑEZ PUENTES: Okay.

4 So for all these reasons and because  
5 Resolution 85's rationale had nothing to do with SSA, as  
6 Colombia will address later when answering the Tribunal's  
7 questions, Claimant's claims, if any, are time-barred.

8 I will now move to present some considerations on  
9 the maps, which Claimant didn't object Respondent to  
10 submit, as I anticipated before I started the presentation.  
11 And I hope this assists the Tribunal to clarify.

12 PRESIDENT DRYMER: We're starting at Slide 16 of  
13 your presentation, I believe.

14 MS. ORDÓÑEZ PUENTES: Yes.

15 PRESIDENT DRYMER: Yes. Thank you.

16 MS. ORDÓÑEZ PUENTES: So the title is "The 1982  
17 Confidential Report Coordinates versus Search Area 1 of  
18 Resolution No. 0048."

19 And this is for illustration purposes because, as  
20 we say, the whole point is if they have been granted rights  
21 over the Galeón San José, and that's what has been disputed  
22 within Colombia for 30 years.

23 ARBITRATOR JAGUSCH: Isn't the issue whether they  
24 had been granted rights in respect of treasure in a certain  
25 area?

1 MS. ORDÓÑEZ PUENTES: The issue is--

2 ARBITRATOR JAGUSCH: If the San José was in that  
3 area, then it, by definition, is included.

4 MS. ORDÓÑEZ PUENTES: No.

5 ARBITRATOR JAGUSCH: It's not as narrow as--

6 MS. ORDÓÑEZ PUENTES: The issue is if they have  
7 been granted rights over the Galeón San José. And that has  
8 been the issue for 30 years. And that's our point. And  
9 that's why we are submitting before this Tribunal that  
10 claims are time-barred, if they have been--

11 PRESIDENT DRYMER: Speaking for myself, I'm very  
12 keen to start looking at maps.

13 MS. ORDÓÑEZ PUENTES: Okay. So, Mr. Chairman,  
14 Members of the Tribunal, on the screen you find the map  
15 produced by DIMAR illustrating the 1982 Confidential Report  
16 coordinates and Area 1 of exploration as authorized by  
17 Resolution 0048.

18 PRESIDENT DRYMER: Area 1 is the yellow  
19 rectangle?

20 MS. ORDÓÑEZ PUENTES: Yes.

21 PRESIDENT DRYMER: And the coordinates is the  
22 little red dot?

23 MS. ORDÓÑEZ PUENTES: Yes.

24 PRESIDENT DRYMER: Thank you.

25 MS. ORDÓÑEZ PUENTES: So as the President

1 mentioned, the red dot represent 1982 coordinate, and the  
2 Area 1 of exploration is the yellow rectangle.

3           So, on the screen you can see that the  
4 coordinates reported in the 1982 Confidential Report  
5 encompasses a reduced area from the area of Exploration 1.  
6 Although it is a reduced area, it is certainly not a  
7 9-meter space.

8           So, for the record, we want to clarify that when  
9 we are talking about coordinates, we must differentiate if  
10 we are referring to coordinates specified in tenths of a  
11 second, as the ones you see on the left side of the screen,  
12 or if we are referring to coordinates specified in seconds,  
13 as the ones you see on the right side.

14           If we are referring to coordinates specified in  
15 tenths of a second, then the area of those coordinates will  
16 amount to 3 times 3 meters, which results in an area of  
17 9 square meters.

18           If we are referring to coordinates specified in  
19 seconds, then the area of those coordinates will amount to  
20 30 times 31 meters, which results in an area of  
21 approximately 900 square meters.

22           PRESIDENT DRYMER: And which of those was  
23 reported the Confidential Report?

24           Which of those two were reported in the  
25 Confidential Report?

1 MS. ORDÓÑEZ PUENTES: The one in seconds.

2 PRESIDENT DRYMER: Okay. The one to the right.

3 MS. ORDÓÑEZ PUENTES: The one in seconds, yeah,  
4 to the right. And that can be corroborated just by looking  
5 at the coordinates that are included in the report,  
6 Page 13.

7 PRESIDENT DRYMER: Okay.

8 MS. ORDÓÑEZ PUENTES: So that amounts to  
9 900 square meters, not 9 meters, as yesterday we  
10 incorrectly affirmed.

11 So the coordinates indicated in the 1982  
12 Confidential Report are specified in seconds, as Mr. Drymer  
13 said. So the area of the coordinates reported by  
14 Glocca Morra Company amount to roughly 900 square meters,  
15 which is an area that could fit up to three galleons. So  
16 not 9 meters.

17 ARBITRATOR JAGUSCH: Sorry. I have a question on  
18 this.

19 So when the expression is used "the area of the  
20 coordinate," do you understand that to mean the area  
21 occupied by that coordinate and no more?

22 MS. ORDÓÑEZ PUENTES: Yes. Because--that's  
23 Colombia's position because that's what is included in the  
24 second operative section of the Supreme Court's Decision.

25 ARBITRATOR JAGUSCH: Understood. Thank you.



1 MS. ORDÓÑEZ PUENTES: So, just for the Tribunal's  
2 reference, if the red dot on the map amounts to roughly  
3 900 square meters, you can get the idea of how vast the  
4 area of the yellow rectangle is, which is Search Area 1 as  
5 authorized by Resolution 0048.

6 Because Claimant has recognized that there is  
7 nothing within the coordinates in--reported in the 1982  
8 Confidential Report. On June 9, 2015, SSA affirmed before  
9 the Ministry of Culture that, in their view, the immediate  
10 vicinity or surrounding area of the coordinates reported in  
11 the 1982 Confidential Report were all the areas included in  
12 Section I of Article 1 of Resolution No. 0048 of 1980.

13 Of course, back in 2015, the Ministry of Culture  
14 rejected this absurdity because that would imply to grant  
15 them rights, as I mentioned yesterday, over an area which  
16 is 18 times Cartagena or bigger than the entire City of  
17 New York.

18 Yesterday we heard Claimant submitting before  
19 this Tribunal that Colombia considered--they say that  
20 Colombia considered that the immediate vicinity amounts to  
21 100 square miles, because that was the area recognized in  
22 the MoU signed with Sweden back in 1988. But this is not  
23 what the MoU says. This is simply Claimant's  
24 interpretation of these documents.

25 And from what we saw from the map that they sent

1 us, it seems like they are going to present the map with  
2 the graphic representation of the 100 square miles. And we  
3 just want to alert the Tribunal so that it can corroborate  
4 that the 100 miles were not defined as the immediate  
5 vicinity by Colombia, back in 1988 when it signed the MoU  
6 with the Swedish Government.

7 As shown in Claimant's own slide from yesterday's  
8 presentation, the MoU does not make any reference to the  
9 immediate vicinity, surrounding areas, or the so-called  
10 Discovery Area.

11 ARBITRATOR JAGUSCH: Sorry, Counsel. I've just  
12 got another question.

13 MS. ORDÓÑEZ PUENTES: Yes.

14 ARBITRATOR JAGUSCH: And I may have misremembered  
15 or misread the record.

16 We know that Columbus did a search. Am I right  
17 to remember that they did a search area of over 100 square  
18 miles, or have I just got that--

19 MS. ORDÓÑEZ PUENTES: I can ask my colleagues to  
20 confirm. But the Columbus Report does mention that it  
21 explored an area 100 times greater--

22 ARBITRATOR JAGUSCH: Sorry.

23 MS. ORDÓÑEZ PUENTES: --than reported in the  
24 coordinates. So we could do the math. 900--

25 PRESIDENT DRYMER: Square meters times 100.

1 MS. ORDÓÑEZ PUENTES: --square meters times 100.

2 ARBITRATOR JAGUSCH: Okay. So does that indicate  
3 that the--not only--just go back to the slide again.

4 No, no. The next one. Discussion between the  
5 President. That's right.

6 So we would--that discussion concerned, if I'm  
7 not mistaken, the search area negotiated with the Swedes.

8 MS. ORDÓÑEZ PUENTES: Correct.

9 ARBITRATOR JAGUSCH: Okay. And that is broadly  
10 the same search area that was agreed with or conducted by  
11 Columbus broadly?

12 MS. ORDÓÑEZ PUENTES: No. No, I cannot confirm  
13 that because the documents show different things. The  
14 Columbus Exploration was hired within the virtual parallel  
15 world in order to confirm the hypothesis.

16 So, the hypothesis was directly linked to the  
17 1982 Confidential Report.

18 ARBITRATOR JAGUSCH: Just so you know, I struggle  
19 every time you refer to "real world" and "virtual world."  
20 Just so you understand, I'm not necessarily with you every  
21 time you make this distinction. I'm just concerned with  
22 the real world and the evidence on the record.

23 And I understood from our discussion a moment ago  
24 when I inquired about the search area that Columbus  
25 searched, that it was about 100 square miles as well.

1 Did I misunderstand that?

2 MS. ORDÓÑEZ PUENTES: Yes. It's 100 times  
3 greater than the ones reported in the 1982 Confidential  
4 Report, which is a different statement, but we can confirm  
5 an exact quote.

6 ARBITRATOR JAGUSCH: Yeah. What would 100 times  
7 greater--what does that mean if you do the math?

8 MS. ORDÓÑEZ PUENTES: 100 times. 100 times.  
9 900.

10 ARBITRATOR JAGUSCH: It's 100 times what? Is it  
11 100 times the coordinate--the area of the coordinate?

12 MS. ORDÓÑEZ PUENTES: Well, actually, actually  
13 the Columbus Exploration report was hired to confirm the  
14 hypothesis which included, as well, the immediate vicinity.

15 So that's why it said that it included the 100  
16 times more precisely to have a satisfactory answer to the  
17 question.

18 PRESIDENT DRYMER: It's approximately--according  
19 to my imperfect math and geometry, approximately 90 square  
20 kilometers is 100 times the 900 square meters.

21 Forget that. Strike that.

22 ARBITRATOR CLAUS VON WOBESER: No, no. A  
23 thousand meters is not the same. No, no.

24 PRESIDENT DRYMER: Okay. Fine. Strike that.  
25 We'll let somebody else--

1 MS. ORDÓÑEZ PUENTES: But since the location of  
2 the Galeón San José is not something the Tribunal needs to  
3 decide at this point, this is just for illustration  
4 purposes so that the Tribunal--this assists the Tribunal on  
5 the fact of why was it that the Colombian Government for  
6 30 years told Claimant and Claimant's predecessors that  
7 they did not have any right over the Galeón San José and  
8 that they did not have any right that potentially could  
9 lead them to claim a right over the Galeón San José.

10 Because I think we all--if I'm with you, the  
11 potential right comes out from the area that the Tribunal  
12 gives to the Discovery Area.

13 ARBITRATOR JAGUSCH: You know, one of the things  
14 we're interested in is what is meant by "the vicinity of."

15 MS. ORDÓÑEZ PUENTES: Yes.

16 ARBITRATOR JAGUSCH: And it may or may not be  
17 relevant to that question.

18 The area that was contracted with the Swedes and  
19 the area that was contracted for Columbus, it may or may  
20 not be relevant. And that's why I'm interested to know  
21 what the area that Columbus searched was. And if someone  
22 can do the math for me--

23 MS. ORDÓÑEZ PUENTES: We can actually project the  
24 Columbus--

25 ARBITRATOR CLAUS VON WOBESER: To give us an idea

1 of the 300 meters is this room. I would calculate--would  
2 it be in meters? I think you guys have different--I think  
3 this would have 100 meters, so it would be like three times  
4 this room is the area which was granted.

5 Is that correct? Is it 300 meters?

6 MS. ORDÓÑEZ PUENTES: Yes. 900 meters.

7 ARBITRATOR CLAUS VON WOBESER: 900, sorry. So  
8 that's 10 times.

9 MS. ORDÓÑEZ PUENTES: Nine times. Nine times.

10 ARBITRATOR CLAUS VON WOBESER: Nine times.

11 MS. ORDÓÑEZ PUENTES: So when Colombia referred  
12 to the exact coordinates, it was referring to an area  
13 amounting to almost three times--

14 ARBITRATOR CLAUS VON WOBESER: Nine times. Nine  
15 times this room. Nine times this room would be only to  
16 give--more or less for all of us thinking in miles and  
17 other measures, this would be like nine times this room.

18 PRESIDENT DRYMER: And the figure again? The  
19 figure was 900 square meters?

20 MS. ORDÓÑEZ PUENTES: That is correct.

21 PRESIDENT DRYMER: And the issue, apparently,  
22 seems to be that--whereas that might be a lot of  
23 wall-to-wall carpeting, whether or not that is a large area  
24 as compared to the exploration sites--

25 MS. ORDÓÑEZ PUENTES: Yes. But--

1           PRESIDENT DRYMER: --either by SSA's predecessors  
2 or by Columbus or by anybody else.

3           Now, we've been running already for approximately  
4 an hour and a half, of which I believe Respondent has used  
5 no more than approximately 35 minutes of its own time,  
6 something like that. The Secretary will give you an  
7 appropriate count later.

8           My question to you is: Is it an appropriate time  
9 to take a break now, or would you like to continue?

10          MS. ORDÓÑEZ PUENTES: I can finish with the line  
11 of the Swedish Government, because I know it's a matter of  
12 concern.

13          PRESIDENT DRYMER: Yes.

14          MS. ORDÓÑEZ PUENTES: And it's a good time for a  
15 break then.

16          PRESIDENT DRYMER: Right. It's going to be a  
17 short break then, because we will want to continue your  
18 pleadings as quickly as possible.

19          But I'm sure that our assistants in the  
20 interpretation booth and our trusty court reporters would  
21 appreciate the ability to rest their vocal cords and their  
22 fingers for a couple of minutes.

23          So, please continue.

24          MS. ORDÓÑEZ PUENTES: So, we just wanted to point  
25 you to the slide--no, go back--to the slide that was used

1 yesterday by Claimant's counsel just to alert you that this  
2 MoU does not refer--make any reference to a vicinity area.  
3 It was just the terms in which it was negotiating with the  
4 Swedish Government. So, to determine that the vicinity  
5 area was defined by what is included there would not be  
6 accurate.

7 And this is a good time for the break.

8 PRESIDENT DRYMER: Okay. Now, how much time do  
9 they have--do Respondents have left formally?

10 MR. ARAGÓN CARDIEL: 29 minutes.

11 PRESIDENT DRYMER: Okay. Let's please take a  
12 10-minute break. This is going to be our morning break.  
13 And let's come back promptly, please, at 10:35.

14 Thank you. We are adjourned.

15 (Brief recess.)

16 PRESIDENT DRYMER: Señora Ordóñez, please  
17 continue.

18 MS. ORDÓÑEZ PUENTES: Thank you. We understand  
19 our friends opposite will reproduce a map with the Infobae  
20 coordinates. The ones of that news report that was also  
21 discussed yesterday.

22 For the record, the Republic of Colombia doesn't  
23 accept, as a reliable source of evidence regarding the  
24 location of the Galeón San José, the coordinates indicated  
25 in this news report, which does not even specify the source



1 of the information regarding the coordinates it is  
2 presenting.

3 PRESIDENT DRYMER: That's clear, and it was clear  
4 yesterday.

5 But there's a--it reminds me of an important  
6 point.

7 I have to guess that neither party accepts  
8 necessarily as accurate the maps produced by the other in  
9 their presentations today. And if that's the case, I'd  
10 like that clear on the record. Is my understanding  
11 correct, Mr. Moloo?

12 MR. MOLOO: We haven't had a chance to verify it,  
13 so correct. Yes.

14 PRESIDENT DRYMER: That's one reason why you  
15 wouldn't accept them as accurate.

16 Señora Ordóñez, is that my understanding, to  
17 whatever they may show us as coordinates, you're  
18 not--wherever they've come from, you're not accepting as  
19 necessarily accurate?

20 MS. ORDÓÑEZ PUENTES: Exactly.

21 PRESIDENT DRYMER: Very well.

22 MS. ORDÓÑEZ PUENTES: Colombia used them for  
23 illustrative purposes that we think would assist the  
24 Tribunal.

25 PRESIDENT DRYMER: That's very good. Thank you.

1 MS. ORDÓÑEZ PUENTES: So, it's important to  
2 clarify that the coordinates that are included there are  
3 not recognized by the Republic of Colombia as the ones of  
4 the location.

5 PRESIDENT DRYMER: We heard that yesterday and a  
6 few minutes ago. It's very clear to the Tribunal.

7 MS. ORDÓÑEZ PUENTES: But it is worth noting that  
8 this news report expressly mentioned that the President of  
9 the Republic, by the time of the actual discovery of the  
10 San José in 2015, Juan Manuel Santos, denied that the  
11 Galeón San José was in the coordinates reported by SSA's  
12 alleged predecessors.

13 So, at this point, I would like to come back to  
14 Mr. Jagusch's question related to the fact that an absolute  
15 defense would be to prove that the Galeón San José is not  
16 located in SSA's reported coordinates.

17 And my answer is yes. It would be a line of  
18 defense that Colombia would advance successfully in the  
19 merits phase.

20 And we wouldn't be able to do anything different  
21 because the President of the Republic, Juan Manuel Santos,  
22 has affirmed that the Galeón San José is not located in the  
23 coordinates reported by SSA Predecessors in 1982. And we  
24 would use that, of course, with the information I told you  
25 yesterday, which is the Columbus Exploration report.

1           To conclude this submission, and in response to  
2 the President's question as to the costs of--

3           PRESIDENT DRYMER: Do I understand that--your  
4 point when you say that you wouldn't do anything  
5 differently if we were on the merits, because your view is  
6 the President's statement is complete proof?

7           MS. ORDÓÑEZ PUENTES: Yeah. And that we--as a  
8 State, it's very difficult to advance defenses that are not  
9 true.

10          PRESIDENT DRYMER: Of course.

11          MS. ORDÓÑEZ PUENTES: Because there are several  
12 documents that prove that. So, if there's--if this  
13 statement is in a news report, this--we are sure--can be  
14 found in several documents and the declarations. So, yes,  
15 that would be Colombia's line of defense.

16          PRESIDENT DRYMER: Well, in the event that we end  
17 up on the merits, you'll have other opportunities to state  
18 whatever defense you may have.

19          Thank you.

20          MS. ORDÓÑEZ PUENTES: Absolutely. Thank you.

21          So, to complete this submission and in response  
22 to the President's question, the Republic of Colombia  
23 confirmed that the costs it is claiming correspond to the  
24 administrative fees that have already been paid to the  
25 Permanent Court of Arbitration and the legal costs for the

1 representation.

2           So, we would ask the Tribunal to allow the  
3 Parties to submit a statement on costs whenever it  
4 estimates it is appropriate to do so.

5           PRESIDENT DRYMER: Thank you.

6           MS. ORDÓÑEZ PUENTES: With this, I conclude  
7 Colombia's closing remarks. And I will pass the floor to  
8 Mr. Vega-Barbosa, who will address the questions posed by  
9 the Tribunal that have not been answered yet.

10          PRESIDENT DRYMER: Thank you.

11          MS. ORDÓÑEZ PUENTES: If it's okay with the  
12 Tribunal. Or if you would like to proceed differently,  
13 please let us know. Okay.

14          PRESIDENT DRYMER: It's perfectly fine with the  
15 Tribunal. I'm simply going to ask, Señor Aragón, how much  
16 time you have left according to the illustrative schedule.

17          MR. ARAGÓN CARDIEL: That would be 25 minutes, by  
18 my count.

19          PRESIDENT DRYMER: Right. I'll ask you, please,  
20 to conclude within 15 to 20 minutes, please. All right.  
21 Just given all of the questions that have come from the  
22 Tribunal today. Do your best, please.

23                 And why do I make that request? Is to be sure  
24 that your friends opposite have a fair and equal  
25 opportunity to address us before the close of the hearing.

1 MR. VEGA-BARBOSA: Thanks. And good morning  
2 again, Members of the Tribunal. The questions were  
3 numerous. I will do my best to be concise. So for the  
4 first question--

5 PRESIDENT DRYMER: Let me also make it clear to  
6 all. This, too, is on the illustrative schedule. There's  
7 substantial time set aside later in the day for Tribunal  
8 questions. You can expect there will be later Tribunal  
9 questions, which I imagine will give you a chance to circle  
10 back to these very answers.

11 MR. VEGA-BARBOSA: Okay. Perfect.

12 So, here we have the very first question. And  
13 asked, in general, which are the relevant facts, not legal  
14 questions, in dispute at this very moment.

15 And we say--and there was a small error in the  
16 last version I sent to the team, so it doesn't show.

17 But for the very first question, I'll--I refer to  
18 the next slide and to the next four slides, which reveal a  
19 third section, which are the relevant factual questions.  
20 For the second--for the B question, we say that most of  
21 those factual issues are actually contested by the Parties.

22 But we do say as well that that is not a problem.  
23 Because, as we already have shown, on Article 10.20.5  
24 submission is not an article where we're supposed to be in  
25 agreement, in respect to the relevant facts. And we also

1 say--and we have been saying this throughout these two  
2 days--that all of the contextual factual issues are capable  
3 of being resolved definitively in the present, expedited  
4 preliminary objections--preliminary proceedings because  
5 they are very well attached to a jurisdictional objection  
6 and they are not intertwined with the merits. But, of  
7 course, the elaboration of that is something that we did  
8 already.

9           And we--I wanted to walk you very quickly through  
10 the next slide, which reveals--and this will be available  
11 to the Tribunal--the relevant factual questions for the  
12 first preliminary objection--the *ratione personae*  
13 preliminary objection. The preliminary objection  
14 concerning Article 10.28, that Claimant is not a protected  
15 investor.

16           And in the next slide, you will see a reference  
17 to the factual issues relevant to our 10.28 objection, that  
18 Claimant doesn't own or control a protected investment. In  
19 the next slide, you will see recollection of the relevant  
20 factual issues for the *ratione temporis*. And, finally, the  
21 description of the factual issues for the *ratione*  
22 *voluntatis* preliminary objections.

23           And we say that we have discussed this many times  
24 these two days. And we think this is a proper place to  
25 stop for a bit and to do a more substantive analysis. Here

1 we have an important question.

2 PRESIDENT DRYMER: Let me just say immediately,  
3 without having seen more than the 30-second exposition a  
4 moment ago, it will be very helpful to us. So, thank you  
5 for setting those out for us.

6 MR. VEGA-BARBOSA: So, here you bring Claimant's  
7 definition of the investment in--or, of the underlying  
8 legal basis for the investment in the response where  
9 Claimant argued that the legal basis were Resolutions 48  
10 and 354. And we have a very important question in the next  
11 slide.

12 And it's whether the rights granted under  
13 Resolution 48 are strictly linked to GMC Inc., the entity  
14 that requested the exploration rights, meaning whether  
15 these rights are perasonalísimos or intuitu personae. And  
16 we say that there is no doubt. They are intuitu personae.  
17 These rights were granted, as the relevant exhibit shows,  
18 Exhibit C-02, only and specifically to GMC Inc., and they  
19 detailed very specific obligations for the exploring  
20 company.

21 And, turning to the next one, to the next  
22 question, which is whether--considering the Resolution 48  
23 granted GMC the right to conduct marine exploration,  
24 whether DIMAR authorization was needed in order for the  
25 rights under said Resolution to be transferred to SSA.

1           Now, we believe we understand correctly that by  
2 "SSA," you're referring to Claimant right now. So, we're  
3 making a big jump from 1980, where GMC Inc. received these  
4 rights for the first time to 2008, 28 years. So, the  
5 question is whether at that moment the authorization by  
6 DIMAR was still necessary.

7           And the answer is pretty straightforward. The  
8 authorization by DIMAR was not necessary, but for a reason  
9 that is not associated with the nature, scope, and extent  
10 of DIMAR's competences, but with the fact that Resolution  
11 48 had already expired.

12           Many years ago--many years before that  
13 moment--and that is the reason why the DIMAR authorization  
14 was not required, because that resolution authorizing  
15 exploration rights had already lost any effect a long time  
16 ago.

17           For the next question, which is: What is the  
18 legal basis or provision under Colombian law that requires  
19 DIMAR authorization prior to the transfer of rights under  
20 Resolution No. 48?

21           And we have noted that Claimant have many times  
22 asserted that we have not come with any type of legal  
23 justification of why the transfer of DIMAR authorizations  
24 required also DIMAR authorization, and we say that we are  
25 surprised with that because since our Article 10.20.5



1 submission, we made clear that the basis for that is the  
2 fact that it is DIMAR pursuant to Decree 2349 of 1971, who  
3 regulates and authorized the recovery of shipwrecked  
4 species, that regulates and authorizes a recovery of  
5 shipwrecked species, the one that issued resolutions to  
6 authorize the activity and operation of foreign ships in  
7 Colombian waters, authorizes the maritime imports  
8 exploration, investigation, construction, and exploitation  
9 in Colombian sea beds. So, we think there is a clear basis  
10 for their request.

11 But--and that is not in the slide. But, as you  
12 may have seen, the contemporary conduct of Claimant's  
13 alleged predecessors is pretty straightforward. GMC Inc.  
14 requested DIMAR authorization when assigning their  
15 exploration rights to Glocca Morra Company. Glocca Morra  
16 Company requested DIMAR's authorization when assigning its  
17 rights to SSA Cayman. The only exception here is SSA, LLC,  
18 who never request an authorization by DIMAR when acceding  
19 to the rights granted. But we will see that there is a  
20 problem with their line of argument, but we will see that  
21 in a second.

22 As the next question says: What is the meaning  
23 of Articles 3 through Paragraph 17 and 21, and in  
24 4(5)(b)(d) of Decree Number 2349 of 1971? How should these  
25 provisions be interpreted for the purposes of the transfer

1 of rights between SSA Cayman and SSA?

2 And now we are in 2008. And we have--and we want  
3 to be completely honest with you. At that time, this  
4 decree was no longer in force. The decree in force was  
5 Decree 2324 of 1984. But the authority of DIMAR concerning  
6 marine exploration remained pretty much the same. And we  
7 think that we have to draw a distinction between the  
8 effects of the general authority of DIMAR with respect to  
9 the two big resolutions here, Resolution 48 and 354.

10 So, for Resolution 48, we say that at the time of  
11 the 2008 Asset Purchase Agreement, exploration rights under  
12 DIMAR Resolution No. 48 had ceased. Hence, no need for  
13 DIMAR to authorize the assignment of said rights.

14 But they did need to come back to DIMAR in case  
15 marine exploration was still needed. And we say that the  
16 contemporary conduct of the Parties reveal, since the 1982  
17 Confidential Report, that marine exploration was still  
18 needed for one particular purpose, for identification  
19 purposes.

20 Now, turning to DIMAR Resolution 354 on the  
21 bottom--no, that same slide. We say that the APA did not  
22 expressly transfer the rights under DIMAR Resolution 0354  
23 because, on its face, the APA does not transfer expressly  
24 Resolution 0354. But we know its global assignment of  
25 assets. But it is a fact that the APA does not expressly

1 transfer Resolution 0354. The only express mention is to  
2 Resolution 03--048, which is a bit irrelevant because by  
3 that moment it was completely--it has completely lost any  
4 effect.

5 We say also that the contemporaneous conduct of  
6 Glocca Morra Company shows that DIMAR's authorization for  
7 the assignment of Resolution 354 to SSA Cayman was needed  
8 because that was precisely what happened. Glocca Morra  
9 Company, after being recognized as a reporter, pursuant to  
10 Resolution 354, still required DIMAR authorization when  
11 assigning the resolution to SSA Cayman.

12 So, we say SSA Cayman should have requested  
13 DIMAR's authorization when assigned the rights to SSA, LLC.

14 And why do we say this? And this is very  
15 important. If after Resolution 354, which granted--granted  
16 Glocca Morra the status of a reporter, pursuant to the 1982  
17 Confidential Report, Glocca Morra still believed that it  
18 was required to request DIMAR's authorization to assign the  
19 resolution rights to SSA Cayman.

20 The only difference in time would be the decision  
21 of the Supreme Court of Justice. That would be the only  
22 reason why SSA Cayman would not be in need to try--to go to  
23 DIMAR to authorize this transfer. But Claimant has been  
24 absolutely repetitive in telling us that the decision of  
25 the Supreme Court is not constitutive. It is merely

1 declarative.

2           There is no real reason in law for SSA Cayman not  
3 to have followed the same path GMC Inc. and Glocca Morra  
4 Company followed, even after Resolution 354.

5           PRESIDENT DRYMER: Unless I'm wrong, Claimant has  
6 gone further and said the Supreme Court Decision is not  
7 simply declarative, but it's declarative of rights that  
8 preexisted in any event.

9           MR. VEGA-BARBOSA: Precisely.

10           PRESIDENT DRYMER: And effectively--maybe I'm  
11 wrong, and Mr. Moloo will tell me I'm wrong later on if  
12 that's the case, if he dare--that it was merely declarative  
13 of the rights enshrined in Resolution 354.

14           MR. VEGA-BARBOSA: Correct.

15           PRESIDENT DRYMER: As long ago as Resolution 354.

16           MR. VEGA-BARBOSA: So, we say--2007, the judgment  
17 changes nothing in the legal status of the parties, and  
18 they should have followed the consistent pattern of conduct  
19 of the previous assignees.

20           PRESIDENT DRYMER: Normally when a Party--any  
21 Party in any case spends so much time talking about prior  
22 conduct, it's in aid of an argument that the Parties should  
23 be estopped from pleading anything differently now.

24           But that's not what you're claiming here, is it?  
25 You're not asking us to find that they're somehow estopped

1 from pleading differently. You haven't made that case.  
2 You're asking us to rely on them for an accurate  
3 interpretation of the law.

4 MR. VEGA-BARBOSA: We just think the conduct of  
5 the companies are absolutely consistent.

6 PRESIDENT DRYMER: Understood. But I'm asking  
7 you what we're to make of what evidentiary value is that  
8 consistency? Does it make--I don't know how that  
9 necessarily makes their conduct a correct interpretation of  
10 the law or not? But in any event, come back to that later  
11 please.

12 MR. VEGA-BARBOSA: Okay. And, moreover, we say  
13 that coming back to DIMAR was necessary because, as a  
14 matter of principle, you have to come to DIMAR every time  
15 you need to carry out marine exploration. And the conduct  
16 of the alleged predecessors was absolutely consistent that  
17 even after the 1982 Confidential Report, even after  
18 Resolution 354, they considered that they still needed  
19 marine exploration for the purposes of identification.

20 Now, the next slide contains the question: Does  
21 the fact that the exploration rights conferred by DIMAR on  
22 the Resolution 48 expired in July of 1982 after several  
23 extensions affect the transfer of rights to SSA in 2008,  
24 would DIMAR authorization of the transfer of rights have  
25 still been needed had Resolution No. 48 not expired?

1           And we say, again, that at the time of the 2008  
2 APA, exploration rights under DIMAR Resolution 48 had  
3 already ceased. Hence, no exploration rights pursuant to  
4 DIMAR Resolution could have been assigned in 2008. This is  
5 conceptually impossible.

6           Second, we say the assignment of exploration  
7 rights by DIMAR is made *intuito personae*. This means in a  
8 scenario where Resolution No. 48 is still in force, the  
9 transfer of exploration rights would have still required  
10 DIMAR's authorization. Additionally, in the present case,  
11 the authorization was necessary because there was a  
12 declared need to carry out further marine exploration for  
13 the purposes of identification of a particular shipwreck.  
14 That never changed.

15           Now, let's go to (f). Could the rights under  
16 Resolution No. 354 be transferred without prior  
17 authorization from DIMAR? And the answer is no. And let's  
18 recall that Resolution 354 is about the recognition of  
19 Glocca Morra as a reporter.

20           But let's look--and we have the relevant exhibit  
21 here, C-17. And C-17 contains Resolution 204 of 24 March  
22 1983. And I think that the relevance of this Resolution  
23 may have been underestimated by the Parties in  
24 principal-- mainly--so I will take this opportunity to  
25 highlight its importance.

1           Because via Resolution 204 of 24 March 1983,  
2 DIMAR authorized the assignment of Resolution 354 from  
3 Glocca Morra to SSA Cayman.

4           So per the Parties--per Claimant's alleged  
5 predecessor's conduct, which are required to act under the  
6 law, and our authorities are required to act under the law,  
7 there was a requirement for the Resolution 354 to be  
8 transferred with the prior authorization from DIMAR. It's  
9 their exhibit.

10           Finally, I think it's the final question  
11 regarding the resolutions. And Question g is: Are  
12 Resolutions No. 48 and No. 0354 linked, or can they be  
13 unlinked for purposes of obtaining DIMAR's authorization  
14 for the transfer, if applicable?

15           And we spent a lot of hours with Ms. Ordóñez  
16 reflecting on this question. But then, again, the  
17 question--the answer to the question is C-17 containing  
18 Resolution 204 of 24 March 1983, because that resolution  
19 comes as a result of Glocca Morra's request not only for  
20 authorization of DIMAR to transfer Resolution 354, but also  
21 because Resolution 48 had already expired, Glocca Morra  
22 Company and SSA Cayman requested new exploration rights.

23           So, we say you cannot divorce. Resolution 48 no  
24 longer in force, but they requested a new resolution  
25 authorizing marine exploration activities, because back

1 then they were trying to carry out further marine  
2 exploration for the purposes of identification. So they  
3 cannot be unlinked.

4 PRESIDENT DRYMER: All right. Question 3, the  
5 famous "Why does it matter?" question.

6 MR. VEGA-BARBOSA: Yeah. This is a very  
7 important question for the Republic of Colombia. And I  
8 must say--

9 PRESIDENT DRYMER: And, therefore, for this  
10 Tribunal.

11 MR. VEGA-BARBOSA: And it's a great honor and  
12 responsibility to be the one addressing for the last time  
13 this question.

14 Why it's important that the Galeón San José is  
15 not specifically mentioned in many of the key documents  
16 supporting the Claimant's assertion of rights? And this  
17 goes to many of the questions Mr. Jagusch asked Ms. Ordóñez  
18 today.

19 It is important that none of the documents--of  
20 the key documents contain a recognition of rights  
21 specifically over the Galeón San José. And it is important  
22 that not even the 1982 Confidential Report where Claimant's  
23 alleged predecessor presented its claim of discovery  
24 because this is the way, under Colombian law, rights are  
25 created pursuant to allegations of discovery.



1           You need formal documents to say that. You need-  
2 -

3           PRESIDENT DRYMER: Just to be clear. You're back  
4 to the discussion of the provisions of the Civil Code? Is  
5 that what you mean about formalizing allegations of  
6 discovery?

7           Very good. Don't show me the picture. I just  
8 wanted to be sure I understand.

9           MR. VEGA-BARBOSA: It is not enough--it is not  
10 enough for a Claimant to report the discovery of the  
11 Galéon, even if it is made in express terms. It would be  
12 then required to demonstrate to be able to place itself,  
13 under Article 701, that it found the Galeón San José.

14           But because this Claimant--this particular  
15 Claimant--did not report the Galeón San José,  
16 Resolution 354 did not recognize it as a reporter of the  
17 Galeón San José. But even after the further exploration  
18 activities were carried out, did not report to have found  
19 the Galeón San José, Resolution 354 never changed.

20           And because of that, Claimant's prayer for relief  
21 before the Supreme Court of Justice never requested a  
22 declaration of rights over the Galeón San José but over  
23 undetermined shipwreck species. And because of that,  
24 Members of the Tribunal, the Supreme Court of Justice never  
25 declared a right over the Galeón San José.

1           And this is why, Members of the Tribunal, we say  
2 the location is not relevant. What is relevant is that  
3 Claimant had 30 years to perfect their right over the  
4 Galeón San José and it never perfected such a right. And  
5 this is the case you have today.

6           You have a case, a unique case, where USD  
7 10 million hinges upon the preamble of a resolution because  
8 there is no other mention to the Galeón San José in any of  
9 the formal documents issued in 30 years. Your award, we  
10 say, would be the only document where a right over the  
11 Galeón San José would have ever existed.

12           And we say this is not how the arbitral function  
13 works. It is the exact opposite. You come here with a  
14 consolidated right and you claim expropriation over that  
15 consolidated right.

16           And this is important for jurisdictional purposes  
17 because of what you see on the right. Because we all here  
18 admit that the scope of application depends on the relevant  
19 measures being attached to a protected investment. To a  
20 protected investment. If you cannot prove a protected  
21 investment, you have a jurisdictional problem. You don't  
22 have jurisdiction.

23           PRESIDENT DRYMER: Very good.

24           Question 4, the rationale behind the adoption of  
25 Resolution No. 85 of 2020.

1 MR. VEGA-BARBOSA: I will be blunt on this,  
2 because this is very important.

3 PRESIDENT DRYMER: Indeed.

4 MR. VEGA-BARBOSA: SSA, LLC, is not that  
5 important for Colombia. SSA, LLC, is not the reason why we  
6 enacted Resolution 85.

7 You failed to protect the right over the Galeón  
8 San José a long time ago. Resolution 85 is a consequence,  
9 as the preamble of that Resolution shows, of years of  
10 discussions internally in Colombia to try to come to terms  
11 with an important discussion. And it's an important  
12 discussion for Colombia as a whole whether--in light of  
13 criteria such as repetition, identity, the second coin, out  
14 of 30 millions of coins, should it be considered a treasure  
15 or should it be considered as part of the cultural heritage  
16 of Colombia?

17 I was part of the debates in the Congress of  
18 Colombia where the last law was discussed--was enacted.  
19 And this was a huge confrontation between the promoters of  
20 these private enterprises looking for the second coin to be  
21 considered as treasure and from the protectors of the  
22 cultural heritage saying that the second coin was actually  
23 also cultural heritage.

24 Because back in the 1870--I think in the 18th  
25 century, no two coins were made equally. Part of the

1 history that we want to tell is that the second coin was  
2 different from the first one, because that is the story of  
3 how coins were made back then.

4           And because of the discovery in 2015 that,  
5 surprisingly, against the allegation of the explosion of  
6 the Galeón San José, the items--and the resolution says  
7 this--the items were perfectly preserved, Colombia decided  
8 that it was not a good idea, it is not what protected our  
9 cultural heritage, to make the Galeón San José--to make the  
10 second coin a treasure and the totality of the Galéon part  
11 of our cultural heritage. And that is the rationale before  
12 Resolution 85 of 2020.

13           PRESIDENT DRYMER: All right. Could you  
14 ask--could I ask you, please, to address very briefly the  
15 second more specific aspect to this question?

16           If, as you contend, the government believed that  
17 it was already the sole finder, discoverer, and owner of  
18 the Galéon--in other words, it was already in the public  
19 domain, the State domain, not the private domain--why was  
20 it necessary to enact or to promulgate this resolution?

21           MR. VEGA-BARBOSA: There are many reasons, but  
22 there is--there's a beautiful reason from a public  
23 international law perspective and a law of the sea  
24 perspective.

25           PRESIDENT DRYMER: Let's hear it.

1 MR. VEGA-BARBOSA: You may know that the  
2 protection of cultural heritage declared as cultural  
3 heritage is important because this is one of the types of  
4 competence that is not restricted in the law of the sea.  
5 One of the reasons for a coastal state to have enhanced  
6 powers of protection over cultural heritage is for this  
7 heritage to be formally declared as such. That is one of  
8 the reasons.

9 The other reason is that we have finally found  
10 the Galeón San José. And if you look at the first recitals  
11 of the Resolution, you will see that it is a very easy  
12 task, or at least an easy decision to reach, that a  
13 shipwreck of 300 years qualifies within the definition of  
14 cultural heritage in the Republic of Colombia.

15 The Galeón San José and its protection is a  
16 historical debt of the Colombian Government. And because  
17 it was found finally in 2015, we were able to finally  
18 discuss.

19 And, actually, if you look--and this is very  
20 important. If you look at the recitals, you will find--and  
21 there is--it's like a "One Hundred Years of Solitude"  
22 coincidence--

23 PRESIDENT DRYMER: Okay. I was waiting for a  
24 reference to one of Colombia's greatest artists and  
25 cultural treasures.

1 MR. VEGA-BARBOSA: Because if you look at the  
2 recitals of Resolution 85, you will see the real decision  
3 where the decision to protect and to qualify the Galeón San  
4 José as cultural heritage was made not by the Ministry of  
5 Culture. And we haven't went far into that because it's  
6 relevant.

7 If you go into the recitals, you will see that  
8 the "*Consejo del Patrimonio Cultural*"--the Cultural  
9 Heritage Council, which is the real entity, who  
10 characterizes assets part of Colombia's cultural heritage,  
11 characterized the Galeón San José's cultural heritage--

12 PRESIDENT DRYMER: I know.

13 MR. VEGA-BARBOSA: --exactly three years before  
14 the submission of the Notice of Intent. This is a  
15 consequence of--we always ask ourselves: Why did it  
16 happen?

17 But they filed their Notice of Intent exactly  
18 three years after the minute of the Council of Cultural  
19 Heritage decision to qualify the Galeón San José as--in  
20 totality as cultural heritage. That doesn't create an  
21 issue of the three-year limitation period, but it explains  
22 to you that it is not even Resolution 85, which did that;  
23 it was the decision of the Council for Cultural Heritage.

24 PRESIDENT DRYMER: Right.

25 MR. VEGA-BARBOSA: And I think this answers to

1 your question, Mr. Chairman.

2 PRESIDENT DRYMER: Thank you. I said earlier I  
3 was going to ask you to shorten your presentation. I've  
4 actually let you go on longer than you originally had. So  
5 please answer Question 5 in three minutes.

6 MR. VEGA-BARBOSA: It's the last one; right?

7 PRESIDENT DRYMER: Yep.

8 MR. VEGA-BARBOSA: For the alleged independence  
9 of Claimant's Resolution 85 claim, further to the  
10 Tribunal's question on Day 1 of the hearing: Please  
11 explain whether, and if so, how the Tribunal needs to  
12 pronounce on the lawfulness of pre-Treaty acts in order to  
13 determine that Claimant's claims in relation to  
14 Resolution--well, yeah, I understand the question.

15 PRESIDENT DRYMER: It's all independently  
16 actionable issue as to whether you say it's not. And tell  
17 us why again.

18 MR. VEGA-BARBOSA: Yeah. So to frame the  
19 question in the proper legal context, this goes to Article  
20 10.1.3 of the TPA, which protects the principle of  
21 non-retroactivity. And the principle of non-retroactivity  
22 prohibits to pass judgment on State conduct where the  
23 alleged breach or the obligation concerns--the  
24 international concern--did not exist at the time.

25 PRESIDENT DRYMER: I'm reluctant to cut you

1 short, but--I don't want to do so, so I'm going to cut  
2 straight to the chase, to the actual question. All right.

3 We understand your position. All right.

4 We're simply getting at the question. You say  
5 that Resolution 85 or their claims in respect of the  
6 lawfulness of Resolution 85 are not independently  
7 actionable because it requires us to make findings on the  
8 lawfulness of pre-Treaty acts.

9 And I asked yesterday--right?--whether we are, in  
10 fact, required to make findings on the lawfulness of  
11 pre-Treaty acts or just to consider those pre-Treaty acts  
12 as facts.

13 So tell me--and you said, "That's a good  
14 question. I'll think about it."

15 You've thought about it. What's your answer?

16 MR. VEGA-BARBOSA: Because Resolution 85 is only  
17 about the Galeón San José and through unequivocal and  
18 definitive pre-Treaty State, Colombian conduct we deprived  
19 Claimant of any right to the Galeón San José.

20 That's our answer, and we do not have a better  
21 one.

22 That's our answer.

23 PRESIDENT DRYMER: You know what? It hasn't come  
24 out on the transcript. That's fine. That will be  
25 corrected.



1           So will you just repeat that final best answer so  
2 I can remember it.

3           MR. VEGA-BARBOSA: Because Resolution 85 is about  
4 the Galeón San José and about the Galeón San José only.  
5 And as I explained these two days, through definitive and  
6 unequivocal pre-Treaty State conduct, Colombia denied  
7 Claimant any right over the Galeón San José.

8           PRESIDENT DRYMER: Okay.

9           MR. VEGA-BARBOSA: Meaning: to pass judgment upon  
10 Resolution 85 would mean to pass judgment on our conduct.

11           PRESIDENT DRYMER: Noted. And that I understand.  
12 Very good. Thank you. That concludes your  
13 remarks?

14           MR. VEGA-BARBOSA: I think this concludes  
15 Colombia's remarks.

16           PRESIDENT DRYMER: And concludes your closing  
17 submission, subject to questions and answers that may arise  
18 later on?

19           Very good. Thank you, sir. Thank you, Madame.  
20 Very nicely done.

21           All right. Mr. Moloo, are you prepared to  
22 commence immediately? If you were to say no, it wouldn't  
23 be unreasonable.

24           MR. MOLOO: I would like to have a break. I  
25 think there's a 30-minute break scheduled. We can probably

1 condense that a little bit, but I was hoping to have some  
2 time to confer with--

3 PRESIDENT DRYMER: As I said, I'm not surprised.

4 We can go off the record just for this scheduling  
5 discussion. So we're off the record.

6 (Brief recess.)

7 PRESIDENT DRYMER: All right. Welcome back,  
8 everybody. We proceed now to hear Claimant's Closing  
9 Submission.

10 Mr. Moloo, Ms. Ritwik, we're in your hands.

11 MR. MOLOO: Thank you, Members of the Tribunal.

12 Can the court reporters hear me okay?

13 THE STENOGRAPHER: It's a little soft.

14 MR. MOLOO: Is that better?

15 THE STENOGRAPHER: Yes, sir.

16 CLOSING ARGUMENT BY CLAIMANT

17 MR. MOLOO: Okay. What I hope to do, Members of  
18 the Tribunal is, in the course of my presentation, address  
19 all of your questions. And I'll try my best to reference  
20 which question I'm addressing when I reach the part of my  
21 presentation that will address a particular question. I'm  
22 sure you will remind me if I've forgotten to address any,  
23 but I think I have them all covered.

24 Before I get into Question 1, I think it's  
25 helpful to remind everyone where I think we ended up after

1 the written submissions and after the oral submissions  
2 yesterday with respect to the standard that ought to be  
3 applied.

4           And you will have seen much of this yesterday.  
5 But, just added to this, you see a transcript quote from  
6 yesterday from Mr. Vega-Barbosa. And my understanding is  
7 that the Parties agree that the Tribunal has discretion to  
8 decide whether or not to decide a particular objection now  
9 or join it to the merits if--and they can apply that  
10 discretion.

11           The question becomes, I think, for this Tribunal,  
12 is what--how should they apply that discretion? What is  
13 the test that they might consider in deciding: Should we  
14 decide a particular objection now or should we defer it for  
15 the merits?

16           PRESIDENT DRYMER: Simply for the sake of the  
17 transcript--pardon this interruption. You're showing us a  
18 statement by Mr. Bigge, not by Mr. Vega-Barbosa.

19           MR. MOLOO: I'm sorry. If I go back to the prior  
20 slide. The bottom quote on the prior slide is--

21           PRESIDENT DRYMER: Ah, very good. Thank you.  
22 That's it. That's it.

23           MR. MOLOO: --Mr. Vega-Barbosa's transcript quote  
24 from yesterday.

25           What we then saw from Mr. Bigge, which is the

1 U.S. Government's submission, was they were not taking a  
2 position. He said: We did not opine on this particular  
3 issue.

4 The particular issue being whether or not the  
5 UNCITRAL Rules provide the Tribunal with that jurisdiction.

6 And he went on to clarify that what we--the only  
7 position we are saying or making or taking is that if you  
8 are going to defer a jurisdictional issue, you ultimately  
9 need to decide the facts related to that jurisdictional  
10 issue, whether now or later, before determining that you  
11 have jurisdiction.

12 So, I think there is no objection, and there is  
13 agreement that the party--that the Tribunal has discretion  
14 to decide whether to determine a particular fact now or  
15 later join it to the merits. And we suggest that the  
16 appropriate test to apply in exercising that discretion is  
17 found in Bridgestone.

18 Which is if one of the facts that you are being  
19 called upon to decide for jurisdictional purposes is  
20 fundamentally intertwined with the merits, then that is a  
21 fact that it makes good sense to defer, hear appropriate  
22 testimony on, if, as the case may be, or further fact  
23 development after discovery for us all to consider it and  
24 make proper submissions to the Tribunal, as opposed to  
25 saying one day 3-by-3, the next day we're at 900 square

1 meters, and we'll see what we are at tomorrow.

2           But there are certain facts that you have heard  
3 about over the course of the proceedings and, in fact,  
4 yesterday and today that continue to shift, which suggests  
5 to me that to the extent those facts are relevant--and I'm  
6 not saying they are. I will come on to this point. But to  
7 the extent the Tribunal finds any of those facts relevant,  
8 I think the last two days have made eminently clear that  
9 further fact development is necessary to be able to decide  
10 those factual issues. And, therefore, the Tribunal ought  
11 to defer--use its discretion and defer the determination of  
12 those factual issues to the extent relevant to the next  
13 phase of the proceeding.

14           So, what are the factual issues that in our  
15 submission the Tribunal ought to decide? It's a dense  
16 slide, but I thought it might be helpful for you to have  
17 it.

18           PRESIDENT DRYMER: These are issues which--that  
19 the Tribunal ought to decide because you're--you will tell  
20 us they are distinct from the merits, and we have the  
21 evidence before us to decide them? Is that it?

22           MR. MOLOO: No. This-- This--

23           PRESIDENT DRYMER: No. Very good. I'll be quiet  
24 and listen to you.

25           MR. MOLOO: No, no, no, no. This is--well, let

1 me respond to that in two ways.

2 PRESIDENT DRYMER: Very good.

3 MR. MOLOO: The first is this is intended to give  
4 you our submission to respond to your Question 1(a), which  
5 is: What factual issues must the Tribunal resolve, must  
6 the Tribunal resolve to determine jurisdictional issues?

7 In my submission, you can actually determine all  
8 of these factual issues now. Now, there are--there is a  
9 dispute, I think, between the Parties as to what factual  
10 issues you actually need to decide.

11 Now, if you decide there are additional factual  
12 issues, then those may be ones that are appropriate to be  
13 deferred in our submission.

14 PRESIDENT DRYMER: Noted.

15 MR. MOLOO: You may disagree with my submission  
16 to you that all of these are capable of being decided now.  
17 But my submission to you is that all of these are capable  
18 of being decided now.

19 ARBITRATOR JAGUSCH: Can I just--I just want to  
20 be very clear what your position is in response to the  
21 application before us. Is it that the jurisdictional  
22 objections can and should be resolved now in your favor?  
23 Is that your primary position?

24 MR. MOLOO: That is my primary position.

25 ARBITRATOR JAGUSCH: Okay. And your alternative

1 is otherwise we exercise our discretion and join it to the  
2 merits.

3 MR. MOLOO: To the extent there are factual  
4 issues that are related to questions on the merits, then  
5 yes.

6 ARBITRATOR JAGUSCH: Thank you.

7 MR. MOLOO: Then those should be joined to the  
8 merits. Correct.

9 So, I'm going to take you through--well, let's  
10 just go through each of these now. We'll start with Issue  
11 1, which is on the next slide.

12 So, Issue 1 is whether Claimant is a protected  
13 investor. And in our submission, Claimant is a protected  
14 investor. I wish I had this printed for you, but I will  
15 continue to refer to it, so forgive me if I do that.

16 But the first question we think the Tribunal  
17 ought to decide is whether SSA is a U.S. Enterprise. I  
18 think that's my--I don't think that that's in dispute.

19 The second point is whether SSA made an  
20 investment by acquiring it. And that is a fact that  
21 appears to be in dispute. The third question I think the  
22 Tribunal has to decide is whether the investment is in the  
23 territory in Colombia, and I don't think that is in  
24 dispute. So, with respect to that first issue of whether  
25 Claimant is a protected investor, I think the only--

1           ARBITRATOR JAGUSCH: So, can we just be very  
2 clear? Just go back to your questions. So 1(ii) is  
3 whether SSA made an investment by acquiring it.

4           Can you elaborate on what the "it" is?

5           MR. MOLOO: It's a bit circular. You're right.  
6 Whether it made an investment by acquiring the rights from  
7 its predecessor.

8           ARBITRATOR JAGUSCH: So, that's--that's under the  
9 APA.

10          MR. MOLOO: Under the APA, yeah.

11          ARBITRATOR JAGUSCH: Thank you.

12          ARBITRATOR CLAUS VON WOBESER: A question. The  
13 rights include the licenses?

14          MR. MOLOO: And I will come on to precisely this  
15 point. I think there actually might be more agreement than  
16 I was maybe expecting on what the investment is, and I will  
17 come on to that.

18          But for present purposes, I think the key to  
19 answer another question, which is 1(b) of the Tribunal,  
20 which factual issues--to determine that first question,  
21 what is in dispute?

22          I think what is in dispute is whether or not we  
23 actually acquired the rights, whatever they may be. And  
24 that leads me to--and let's just stay on this slide for a  
25 second. Whether Claimant possesses a qualifying



1 investment, I think there--it's (i) (2)--Sub 2--is related  
2 to 2(i) which is whether SSA, in fact, owns or controls  
3 50 percent of the treasure, because that relates to whether  
4 or not we validly acquired it.

5 So, I think those are the two issues under 1 and  
6 2 that are contested. And they're related, and I'll  
7 address that to you.

8 I don't think it's--I didn't hear it this  
9 morning, but I don't think it's being maintained--and it  
10 may be worth confirming this--that if we did acquire those  
11 rights that they satisfy the characteristics of an  
12 investment. I don't hear--I didn't hear that argument over  
13 the last two days from Colombia.

14 I addressed you on those points yesterday, and I  
15 don't intend to revisit those today. But I think the real  
16 issues in dispute relate to: Did we acquire the rights  
17 that SSA's predecessor had?

18 So let me take you those--through those two, and  
19 then I'm going to come back on 3 and 4, which are the  
20 temporal issues.

21 PRESIDENT DRYMER: And if it's helpful, we agree  
22 that that is the key question.

23 MR. MOLOO: I'm glad we're on the same page in  
24 that regard. Based on the submissions from my colleagues  
25 this morning, it seems that they also feel that that is an

1 important issue, as I think they defined it.

2 So, let me jump, then, straight to Slide--this  
3 slide, whatever the number is. Yes.

4 So, the first question is: What are the rights  
5 we're talking about? To your point, Mr. Von Wobeser.

6 The rights we're talking about--and one of them  
7 may be somewhat irrelevant. But the rights that we have  
8 characterized as being our investment are the rights that  
9 arise from the Civil Code, and in particular--and then are  
10 reflected in 348--354--Resolution 354.

11 Now, there's been some talk about 48.  
12 Ultimately, I think it's somewhat irrelevant. One thing  
13 that was confirmed for us this morning, by the way--which I  
14 think was potentially helpful for the Tribunal, and it was  
15 Slide 53 of Colombia's submissions, was that at least with  
16 respect to 48, they say there is no need for DIMAR to  
17 authorize the assignment of those rights.

18 So, to the extent there's any question about the  
19 valid assignment of rights--to the extent they're relevant  
20 under 48--I understand from the submissions this morning  
21 that that's been conceded, that there was no requirement  
22 for DIMAR to approve the assignment of rights under 48.  
23 That's in Slide 53.

24 I think the rights that are particularly  
25 pertinent arise from the law, the Civil Code. What happens

1 when you find the treasure. And they are reflected in and  
2 confirmed by, I would say, Resolution 354 and then  
3 ultimately the Supreme Court.

4           It seems to me--my understanding is  
5 Mr. Vega-Barbosa yesterday agreed that at least SSA Cayman  
6 possessed important assets. That was his statement. And I  
7 think there's a further dispute about--based on what I  
8 heard this morning, as to what rights exactly were  
9 transferred with these--with these resolutions. And I'm  
10 going to come on to that.

11           But our definition of the investment, at least  
12 what's particular--what's of critical importance, is--I  
13 think accords with what the other side has said, which is  
14 354 as reflected in--and confirmed by the Supreme Court.

15           I see your mic is on. I'm not sure if you have a  
16 question, Mr. President.

17           PRESIDENT DRYMER: Nope. Nope. I'm just keeping  
18 it on so that when I do, I don't get reminded by the court  
19 reporters to turn my mic on.

20           MR. MOLOO: That's a strategy I will--may adopt  
21 in the future.

22           PRESIDENT DRYMER: May; right? There are dangers  
23 inherent in it.

24           MR. MOLOO: Ultimately, then, those rights, we  
25 say, were transferred by virtue of the APA. Now, the APA

1 transfers all rights that SSA Cayman had.

2 That's what it purports to do. And the only  
3 question, then, is, is whether or not it failed to do that  
4 because there was some requirement by DIMAR to approve  
5 that. And our submission is that there was not. And I'm  
6 going to come on to that.

7 But let's just understand exactly what the rights  
8 are. Because this morning you heard about a lot about 700  
9 and 701. You'll forgive any translation issues. There is  
10 a protocol for dealing with translations. There were no  
11 formal objections to any of these until--I understand until  
12 yesterday. But this is what we have in the record, so  
13 that's what I put up on the slide.

14 Putting translation issues to one side, I think  
15 it is clear from 700 that the discovery of a treasure gives  
16 certain rights to the person or entity that discovers it.

17 And what 700 says--and I think I agree with what  
18 you were saying, Mr. Von Wobeser, is it's sort of  
19 definitional in the--definitional in nature.

20 What it says is a discovery is when you find a  
21 treasure or you discover a treasure, or whatever--I think  
22 those are words that are more or less used synonymously for  
23 purposes of 700 and 701.

24 It says: This is what a treasure constitutes.  
25 And then the Supreme Court ultimately clarifies that, what

1 700 means. But 701 says: Now, if you find that treasure,  
2 these are the rights that arise. That's all 701 says.

3 So, when it, whether we're talking about the  
4 treasure, a treasure, or treasure, it's just talking about  
5 the treasure in 700; right? This has to be understood in  
6 context. It's just saying--so, 700 is the discovery of a  
7 treasure is a kind of invention or discovery or finding or  
8 whatever word we'll end up agreeing to.

9 And then it's saying--701 says: The treasure  
10 that one finds shall be divided equally.

11 Now, there's something important in the language  
12 of 700 that undermines the submission that you've heard  
13 from Colombia. And the submission, as I understand it, is:  
14 You have to define with precision the specific treasure.  
15 You have to say it was the San José that I found.

16 Now, if we look at 700, it in and of itself  
17 confirms that that cannot be true. Why?

18 Well, treasure is oftentimes something--if  
19 we--let's look at the second part. Coins or jewels or  
20 other precious artifacts that, embellished by man, have  
21 been long buried or hidden without memory or indication of  
22 its owner are treasure.

23 Well, if you don't know whose it is or if you  
24 don't know--by it's very definition, it's something that  
25 you don't necessarily know who it belongs to because

1 there's a long history of it being lost.

2           So, if I find a treasure chest at the bottom of  
3 the ocean floor, by virtue of finding it, I am entitled it  
4 no matter whether I know it belonged to Ship A, B, C, or D.  
5 It doesn't matter. It's the fact that I made a discovery  
6 of something that is categorized as a treasure gives rise  
7 to certain rights.

8           I don't need to define it with any degree of  
9 certainty. And by the way--I'm going to come on to  
10 this--the Supreme Court, in my submission, confirms this.  
11 But it cannot, by virtue of the definition of "treasure,"  
12 be something that can be specified with the degree of  
13 certainty that Colombia, in my understanding, is suggesting  
14 we had to do before our rights vested.

15           So, what is it that we obtained rights over?  
16 Well, what we obtained rights over were reflected in the  
17 1982 Report. And I don't have this up on a slide. But for  
18 your reference, it's our Slide 33 of our Opening. The  
19 Tribunal will probably have memorized this by now, but I'm  
20 going to read it into the record because I think it's  
21 important.

22           The main--and this is from--it's actually the top  
23 of Page 13. And this is the part that's adopted into the  
24 Resolution, 354.

25           "The main targets in bulk and interest are

1 slightly west of the 76th meridian and are just centered  
2 around the Target A and its surrounding areas."

3 They're centered around the Target A and its  
4 surrounding areas.

5 And then it equates that with the second part.  
6 It says--so, "Target A and its surrounding areas that are  
7 located in the immediate vicinity of a particular  
8 coordinate."

9 That's where we found the treasure. We, we're  
10 saying we found it in this area. And that area goes beyond  
11 9 square meters, 900 square meters. Whatever that specific  
12 coordinate is, it specifically says "the surrounding areas  
13 that are located in the immediate vicinity of" those--now  
14 we're hearing--900 square meters.

15 And that makes perfect sense too, by the way.  
16 Because 900 square meters--I'm going to try to do some math  
17 here. Always dangerous for lawyers to be doing math on the  
18 fly. But 30-by-30 equals 900; right?

19 This is a 50-meter-long ship. So, we're still  
20 not fitting--if you're just saying directly straight down  
21 without any dispersion field at all, it's still 50 meters  
22 long; right? So, I mean, it just is still nonsensical.

23 Now, between yesterday and today, we heard a  
24 change in position, I think, because they realized: Well,  
25 okay. Maybe 9 square meters is a little small. We

1 should--that doesn't sound that reasonable. Let's move it  
2 to 900 square meters. That's a couple of these rooms as  
3 opposed to just a tenth of this room.

4 But it still doesn't fit. It just still doesn't  
5 make any sense. And, separate from that, it is not what is  
6 reflected in the language of the Report, which is what was  
7 reported and adopted in the Resolution.

8 So, on the next slide, I do have Resolution 354  
9 which confirms and adopts, like I say, Page 13 of the  
10 Confidential Report, which is what I just read. And it  
11 acknowledges the find. It acknowledges the find.

12 It says: "As the Claimant of the treasures or  
13 shipwreck in the coordinates referred in the Confidential  
14 Report." Page 13.

15 So it's acknowledging you found a shipwreck; you  
16 found a treasure. Now they're saying: You have certain  
17 rights, but you don't have rights to the San José.

18 The way I view this is, we have rights to, I  
19 think, something broader than perhaps just the San José.  
20 We have rights to whatever treasure or shipwreck is found  
21 in this vicinity.

22 So, it's a circle. I'm drawing a circle with my  
23 hands. But it's a circle like this; right? The San José  
24 is a subset of that circle in our submission.

25 Now, that's something you three gentlemen, in my



1 submission, will need to determine on the merits of this  
2 case, if I'm right about that or wrong about that.

3 ARBITRATOR JAGUSCH: Can I just ask you one  
4 thing? What--to what--does, does the San José, which is a  
5 ship--and in the current context, it means whatever remains  
6 of the ship across a field--dispersment field.

7 MR. MOLOO: Correct.

8 ARBITRATOR JAGUSCH: But is there any sense in  
9 which that itself is treasure? I mean, would--are you  
10 entitled to the San José? What does that mean? Because  
11 San José, it seems to me, wouldn't fit within 701 because  
12 it's not treasure itself.

13 MR. MOLOO: Correct.

14 ARBITRATOR JAGUSCH: It's heavily decomposed or  
15 rotted wood or bits and pieces of whatever remains of the  
16 ship.

17 What--

18 MR. MOLOO: And--

19 ARBITRATOR JAGUSCH: We keep talking about  
20 finding the San José. But isn't what's important to you  
21 the treasure on the San José?

22 MR. MOLOO: That is precisely correct. And I  
23 think a very important point when we're talking about the  
24 definition of what we found--because at the end of the day,  
25 what we are entitled to is the treasure on the San José in

1 our submission, because that's what was found and what  
2 we're entitled to. Not the San José itself as a ship.

3 And so, to say, as we heard many times, they have  
4 no rights over the San José--we're not claiming any rights  
5 over the San José as a ship. We're claiming rights over  
6 the treasure that we found, which we say is the treasure  
7 that was all--that was on the San José.

8 ARBITRATOR JAGUSCH: As it happens, yeah.

9 MR. MOLOO: As it happens to be the case. I  
10 mean, it was once--well, by the way, it's no longer on the  
11 San José either. It was, once upon a time, on the San  
12 José. But today it is scattered on the bottom of the ocean  
13 floor.

14 And so, to say that we found the San José is  
15 actually--it may be that a treasure ship is not on the San  
16 José, but it's within the dispersion field. We are  
17 entitled to that treasure because it's within the reported  
18 area. I'm going to come on to, by the way, how the Supreme  
19 Court confirms all of what I'm saying. So, you don't have  
20 to take my word at it. You can take the Supreme Court's.

21 But that is--that comports precisely with my  
22 submissions today.

23 PRESIDENT DRYMER: I don't want to ask any  
24 further questions now that require you to answer now. You  
25 said a moment ago--we're talking about the definition of

1 what we found.

2 At some point, please tell us what you say you  
3 found--a ship, a piece of wood from the ship, the treasure  
4 from the ship--and whether that has anything to--any  
5 relevance to our decision-making.

6 MR. MOLOO: For--Well, let me answer the second  
7 question first. For present purposes, I don't think it  
8 matters. But what we say is we found the remnants of,  
9 ultimately, the San José. We found the shipwreck, and that  
10 was noted in 343 as well. It talked about the claimant of  
11 treasures or shipwreck.

12 But we also found what we say is treasure. There  
13 were many different findings, including ceramics and other  
14 things, that were noted in the Resolution itself. But we  
15 found treasure and a shipwreck, and that's what we found.

16 For present--but, again, I don't think the  
17 specific definition of what we found is something that  
18 needs to be--I think for purposes of quantum in particular,  
19 I think that will--if we ever get there--hopefully--

20 PRESIDENT DRYMER: That's not a factual point  
21 that needs to be resolved for jurisdictional purposes.

22 MR. MOLOO: It does not need to be resolved for  
23 jurisdictional purposes.

24 ARBITRATOR JAGUSCH: Just out of interest--and  
25 you may need instructions on this--but I would be curious

1 to know what your position is. Would the finding of a  
2 cannon be treasure? Would that be considered a treasure?

3 MR. MOLOO: I would submit--well, let me come  
4 back to you on that. But I would say--very possibly, would  
5 be my current answer to you. But let me come back to you  
6 on that.

7 What then were our rights in this treasure?  
8 Because what we've heard this morning--I was a bit  
9 surprised by this, quite frankly. Because the analysis was  
10 exclusively based on 700 and 701. But there are a number  
11 of court decisions that have explained what those rights  
12 are. And what I think I heard this morning is that we had  
13 certain rights, but it did not extend to 50 percent of the  
14 treasure.

15 Well, let's look at what the Civil Court decided.  
16 The Civil Court said they declared that the goods of  
17 economic, historic, cultural, and scientific value that  
18 qualify as treasure belong, in common and undivided equal  
19 parts--50--they're saying it belongs. It belongs. It is a  
20 right you have to the Colombian Nation and Sea  
21 Search-Armada, which goods are found within these  
22 coordinates.

23 That's what they're saying we were entitled to.  
24 50 percent of what we found of that treasure that was  
25 within the--what was once--and hopefully now is not a

1 contested term--the Discovery Area, which I'm referring to  
2 as what was in the 1982 Report.

3 And then we got--

4 ARBITRATOR CLAUS VON WOBESER: Sorry to  
5 interrupt. But you just said it's generic; right? The  
6 declaration of the Court is talking generically. The  
7 50 percent which goods are found. But is it referring to  
8 specific ones or is it generic?

9 MR. MOLOO: Generic, and the Supreme Court  
10 addresses this point exactly. And I'll--very shortly I'll  
11 have a slide on precisely this point.

12 ARBITRATOR CLAUS VON WOBESER: All right.

13 MR. MOLOO: In fact, let me see if I can find it  
14 now, and I'll just take you to it right now. I think it's  
15 two slides forward.

16 ARBITRATOR CLAUS VON WOBESER: That's--no. Go  
17 ahead. Go ahead. We will get it when you come to it.

18 MR. MOLOO: Okay. It's two slides away.

19 And, in parallel, the Tribunal will recall that  
20 we then got an injunction that confirmed that we would be  
21 entitled to remove--any seizure of goods that have--and I  
22 think this partly answers your question.

23 Any seizure of goods that have the nature--this  
24 is the injunction--that have the nature of treasure, that  
25 are rescued or removed from the area determined by the

1 coordinates indicated in the Confidential Report--so,  
2 anything that's within that area, any--would form part of  
3 the injunctive order, which they're saying we're entitled  
4 to a right to.

5           So, you can see that even the injunctive relief  
6 recognizes that it's any treasure that's within this area  
7 that has been designated. And as we know, that 1994  
8 injunction is then confirmed in 2019.

9           In 1997 we have the Superior Court confirming  
10 everything that was just said. So, now we come to the  
11 Supreme Court Decision. The Supreme Court Decision talks a  
12 lot about many things that we've discussed. And it answers  
13 a lot of the questions, I think, that were posed this  
14 morning.

15           To the specific question, Mr. Von Wobeser, that  
16 you just asked, the Supreme Court says: Strictly speaking,  
17 it is not required that everything revealed a priori, must  
18 inevitably have the appearance or intrinsic nature of a  
19 treasure.

20           Because sometimes, due to the way in which the  
21 discovery is made, it is not possible to conduct a detailed  
22 or at least adequate physical verification, as is often the  
23 case--which is often the case with marine discoveries or  
24 finds.

25           It's a taking a very practical point to say:

1 This is the way in which you discover shipwrecks. With  
2 marine finds and discoveries, you don't know the  
3 characteristics of everything that you've found. And it's  
4 saying: Which are characterized by their known obstacles  
5 or complex accessibility (depth, location, darkness,  
6 pressure, environment, aquatic threats, adverse weather  
7 conditions, underwater currents, turbulence, water  
8 turbidity).

9           You can't define with specificity all it is that  
10 you've found. And it quotes--and it says--it relies on the  
11 source at the bottom from the Argentinian Civil Code,  
12 making an analogy: "The discoverer of a treasure is the  
13 first person to outwardly express the sensory perception of  
14 its existence, even if he or she does not know that it is  
15 even treasure."

16           So, even if they don't know that there is--that  
17 it's all treasure, it's the perception of its existence  
18 that gives rise. Because they're saying that's the way  
19 shipwrecks are found.

20           And then in a different part of their decision,  
21 they go on to say: "Therefore, from a legal perspective, it  
22 is clear that the right to a treasure is not only  
23 exclusively acquired when there is a physical or material  
24 discovery of the precious objects themselves, but also when  
25 the place where they are located is specified or

1 identified, even if they have not been extracted and fully  
2 identified."

3 In other words, being the discoverer, stricto  
4 sensu, or reporting party, is deemed sufficient. A  
5 sufficient circumstance to recognize the right of ownership  
6 to the treasure of whoever possesses either status.

7 So, they're saying you don't have to define it  
8 specifically. But if you're the discoverer, you have a  
9 right to whatever is in that area of discovery. And it is  
10 clear, therefore, that the right to the treasure  
11 itself--the right to the treasure itself is acquired by its  
12 discovery. That's the Supreme Court.

13 And it goes on to say: "And not by its material  
14 or physical apprehension." A concept that it also includes  
15 reporting its location, applicable to discoveries that  
16 occur on land or property owned by others."

17 It's making this distinction between land  
18 discoveries and marine discoveries.

19 So, ultimately, what does the Supreme Court  
20 decide? It says we confirm everything below except for one  
21 thing that it clarified, which was that--and you can see it  
22 says: "First, to provide full and unequivocal protections  
23 to the Nation's cultural heritage, we want to clarify that  
24 the 50 percent ownership is only with respect to that."

25 And then in the second part, which is the only



1 part that's quoted by Colombia, they're saying: "In  
2 accordance with the proceeding ruling"--which I just  
3 summarized--"the second item of the court is modified to  
4 reflect that." To confirm that it's just 50 percent of  
5 everything that's not cultural heritage.

6           Because, as you heard earlier, for example, in  
7 our submission--and you're going to hopefully be able to  
8 hear from us, we hope, on this. But the first gold coin,  
9 for example, can be cultural heritage. But the law says  
10 that everything that comes thereafter is not. And so,  
11 there's a legal understanding of what that is. But the  
12 Supreme Court wanted to clarify that aspect of the  
13 judgment, and that's what it did.

14           And then it said: Other than that, we're not  
15 changing anything. We're not changing the fact that SSA is  
16 entitled to 50 percent of their discovery or any of that.  
17 They say in the third part: "We confirm the rest and  
18 pertinent the aforementioned judgment of first instance."

19           And in my submission, this--you know this  
20 already. But the 2019 Decision of the Superior Court is  
21 critical for many reasons. One of them is in relation to  
22 the submissions I've just been making to you three  
23 gentlemen, which is it confirms many things. One of the  
24 things it confirms--and part of this language is covered  
25 by, unfortunately, my face.

1           But it says the plaintiff. So it says: "Since  
2 the right of ownership"--so, let me take a step back.  
3 Let's look at that last box. And I want to read the whole  
4 thing.

5           PRESIDENT DRYMER: Help me out by just telling me  
6 what page this is of your PDF.

7           MR. MOLOO: Oh. This is PDF Page 6 of C-39.

8           PRESIDENT DRYMER: Thank you.

9           MR. MOLOO: And it says: "This chamber  
10 finds"--this is the highlighted part on the screen.

11           "This chamber finds that the seizure measure has  
12 not harmed, nor is it extended, expended in any way to harm  
13 the Nation since the right of ownership of both Parties has  
14 been settled."

15           It's been settled. It's been settled by the  
16 Supreme Court to say: You own 50 percent, and they own  
17 50 percent of the treasure within the area. So, we're not  
18 affecting your rights, Nation, to 50 percent of the  
19 treasure. This injunction is not harming you in any way.  
20 Rather, the harm that does exist is in depriving the  
21 plaintiff--and by the way, who is the plaintiff? SSA.

22           And I'm going to come back to this in a moment.  
23 Of the only tool it has at its disposal--at its  
24 disposal--to enforce the 1994 and 1997 judgments due to the  
25 failure to perform an action that is not in its power to

1 perform, which is to salvage and allocate those goods.

2 Now, why is--I'm going to tell you specifically  
3 why that's important. In addition to SSA being the  
4 plaintiff--in fact, standing was challenged in this, in  
5 this particular proceeding, not of SSA, but of the Ministry  
6 of Culture. SSA actually said: Ministry of Culture, you  
7 do not have standing to lift this injunction because you  
8 don't have authority to represent the State.

9 That argument was rejected. That argument was  
10 rejected. The Court said: No. The Ministry of Culture  
11 does have standing to challenge the injunction.

12 And ultimately we prevailed on the merits at the  
13 Superior Court, but standing was specifically raised by  
14 SSA. So if the Ministry of Culture had any standing  
15 concerns with respect to this Claimant that's before you  
16 three gentlemen, you would have expected them to raise it  
17 at that point in time. It was not raised. And instead  
18 what you see is a confirmation that the plaintiff, i.e.,  
19 the very same Claimant that's before you three gentlemen,  
20 has certain rights, and those were enforced.

21 By the way, this is in addition to a number of  
22 correspondence that I showed you yesterday--I'm not going  
23 to take you back to it--with various government officials,  
24 some of them even, in fact, referring to the assignment to  
25 SSA where over the course of several years they

1 acknowledged that there was a valid assignment to SSA of  
2 the rights that we're talking about now.

3 PRESIDENT DRYMER: Are you answering now the  
4 question about the validity of the transfer of rights to  
5 the Claimant in part?

6 MR. MOLOO: In part. And I will add that we are  
7 making an estoppel argument and have made submissions with  
8 respect to estoppel. You saw yesterday I referred you to  
9 Bin Cheng. But our written submissions also make an  
10 estoppel argument in addition to the primary position,  
11 which is there was no requirement to seek authorization  
12 from DIMAR.

13 And that's, in fact, my next slide, and I think  
14 this answers a couple--

15 PRESIDENT DRYMER: Well, that's why I asked the  
16 question of Respondent, so that we should be clear.

17 MR. MOLOO: And my understanding is they have not  
18 made an estoppel argument, and that's why I wanted to  
19 clarify that Claimants are advancing an estoppel argument  
20 in respect to this particular argument. That is an  
21 alternative argument. I don't think we need to get there.

22 But to answer your question, Mr. President, we  
23 are advancing an estoppel argument with respect to the  
24 conduct of the State and the pronouncements of its courts  
25 with respect to the rights of SSA.

1           Nowhere in the submissions that I have heard over  
2 the last two days have we been pointed to any law in  
3 Colombia that shows that DIMAR was required to authorize  
4 the transfer of the rights that we now possess. Nowhere.  
5 They refer to course of conduct. But as I showed you  
6 yesterday, even the request we made--the original request,  
7 which is the only one on the record--we unfortunately don't  
8 have it; in fact, Respondent put it on the record--said:  
9 We have made an assignment. And now what we're seeking  
10 your approval for is authorization to go and continue  
11 exploring underwater.

12           Because that--so even the course of conduct  
13 argument doesn't fly because the only evidence on the  
14 record is predecessors of SSA saying we've made an  
15 assignment, and we are now asking that DIMAR approve the  
16 entity to whom the assignment has been made the ability to  
17 undertake underwater explorations.

18           Now, the DIMAR authorization says we approve the  
19 assignment too. But to the extent there's a course of  
20 conduct argument being advanced, it cannot--it wasn't  
21 anything that SSA's predecessors did.

22           PRESIDENT DRYMER: That was very clear yesterday  
23 in your presentation and your answer to the question.

24           MR. MOLOO: And despite saying I was not going to  
25 make that argument again, I just have. I couldn't help

1 myself.

2 ARBITRATOR CLAUS VON WOBESER: Will you cover the  
3 question specifically, or are you covering it now, the  
4 question about the transfer of the licenses?

5 MR. MOLOO: I think I will, yes, right now.

6 ARBITRATOR CLAUS VON WOBESER: Okay. Sorry.

7 MR. MOLOO: And tell me if I don't answer any  
8 question you might have, Mr. Von Wobeser, because I want to  
9 make sure I do.

10 And I think it answers two of your questions. If  
11 you look at Decree No. 2349, in my submission, if you read  
12 each and every one of these, what is the authority of  
13 DIMAR? It is to regulate, control, and authorize what?  
14 The marine and coastal exploration, to regulate and  
15 authorize the recovery of shipwrecks.

16 To issue resolutions to do what? To authorize  
17 the activity and operations of foreign ships in Colombian  
18 waters.

19 To authorize the maritime and port exploration,  
20 investigation, construction, and exploitation. It  
21 authorized that. It authorized that in Resolution 48 for  
22 Glocca Morra to do that.

23 What then happened?

24 The entities that were authorized to do  
25 that--there's no dispute that the entities that were

1 authorized to do that were the ones that then found  
2 treasure. Finding the treasure gives rise to independent  
3 legal rights that were--that, as the Supreme Court  
4 said--and I think it's important just to go back to it. If  
5 we go back to that slide with the red underlining.

6           Once you discover the treasure, you now have a  
7 new right by virtue of Colombian law. And it's not by  
8 virtue of anything that DIMAR did. It's by virtue of 700  
9 and 701. You have a right to that treasure that is vested.  
10 And when is it vested? When you discover it.

11           And as you saw in the 2019 Decision--if we go  
12 back to that--on the two slides forward, one slide. That's  
13 the one. Right.

14           It's saying the right of ownership of both  
15 Parties has been settled by the Supreme Court because it  
16 vested when you discovered it. So this now--you now have a  
17 new vested right, and that vested right DIMAR has no  
18 authority over. That is now a vested right that you have,  
19 and you are entitled to it. It can be enforced by the  
20 Colombian courts, as we tried to do, and it can be  
21 transferred.

22           And that transfer, as we heard yesterday, is not  
23 governed by Colombian law but was governed by the APA and  
24 Illinois law. And for all the reasons that Ms. Ritwick  
25 took you to yesterday, it was validly transferred.

1           So there's no--nothing under--there's no  
2 authority of DIMAR to approve the transfer of those rights  
3 which are separate and apart from the rights to be able to  
4 explore for the treasure in the first place.

5           ARBITRATOR CLAUS VON WOBESER: Can I--sorry to--

6           MR. MOLOO: Please.

7           ARBITRATOR CLAUS VON WOBESER: I think you  
8 answered the question.

9           The question we posed to you, both parties, in  
10 the Request for Arbitration, you say: SSA owns and  
11 controls directly, among other things, licenses,  
12 authorizations, permits, and similar rights conferred  
13 pursuant to domestic law to grant SSA the authorization to  
14 explore and discover and acquire rights to discover  
15 Colombian waters, including through DIMAR Resolution 0048  
16 of 20 January 1980 authorizing GMC to search for  
17 shipwrecks.

18           So--and then B, DIMAR Resolution 0345--354, 3  
19 June '82, recognizing GMC as a reporter of the shipwrecks,  
20 treasures, and artifacts. GMC is Claimant of treasures of  
21 shipwreck.

22           Is that correct or not correct?

23           Because what you're saying today is something  
24 different. And your answer clearly goes to the fact you're  
25 saying the treasure we can transfer freely.



1           So my question is: Is this correct, or do you  
2 withdraw what you have said? Because your answer--I  
3 understand your answer, and I agree with the part that you  
4 have described. But then is this correct or is it not  
5 correct?

6           MR. MOLOO: I think it can be more precise. And  
7 I think over the course of our submissions, both written  
8 and oral, I think we have been--we have tried to be more  
9 precise, in part thanks to the very helpful questions,  
10 actually, from the Tribunal to help elucidate precisely  
11 what this all means.

12           But what I would say in relation to Resolution 48  
13 is I don't think it's in dispute anymore that whatever  
14 rights Resolution 48 had--and it may be none--but those  
15 were validly transferred. And that, I think, is confirmed  
16 by Slide 83 from this morning. Because they said that any  
17 rights arising from Resolution 48 did not need DIMAR to  
18 authorize assignment of said rights, and they say in part  
19 because they were--

20           MR. VEGA-BARBOSA: Sorry to interrupt. I know  
21 this is extraordinary. But this is a complete  
22 misconstruction of what we on the other side said. It's a  
23 complete misconstruction.

24           What we said was that because by the time of the  
25 APA, Resolution 48 was no longer--had already expired,

1 there was conceptually no need. Our whole case rests on a  
2 completely different argument. It is--

3 PRESIDENT DRYMER: That's what I understood--

4 MR. VEGA-BARBOSA: --unacceptable. It is  
5 unacceptable.

6 PRESIDENT DRYMER: --you to say. That's what I  
7 understood Mr. Moloo to be paraphrasing.

8 MR. MOLOO: Yes. I accept all of that. And to  
9 be clear, I fully accept and understand that that is why  
10 they are saying--

11 PRESIDENT DRYMER: Right.

12 MR. MOLOO: --that no authorization was required--

13 -

14 PRESIDENT DRYMER: Because it had expired.

15 MR. MOLOO: --because it had expired.

16 PRESIDENT DRYMER: Right. Is that correct?

17 MR. VEGA-BARBOSA: That is correct.

18 PRESIDENT DRYMER: Very good. Thank you.

19 Let me reassure you that's what we understood  
20 your position to be, and it's still what we understand your  
21 position to be.

22 MR. MOLOO: And for the avoidance of any doubt,  
23 it is also what I understand their position to be, and I  
24 don't think that's in dispute.

25 PRESIDENT DRYMER: Right.

1 MR. MOLOO: That the right to explore under  
2 Resolution 48 came to an end and--

3 PRESIDENT DRYMER: That's what I understand you  
4 to understand their position to be.

5 MR. MOLOO: Yes.

6 PRESIDENT DRYMER: So we're all in agreement.

7 MR. MOLOO: We're all in agreement.

8 But what is, what I think is critical is the  
9 rights to which we are seeking protection and this  
10 Tribunal's assistance with respect to are the rights to the  
11 treasure. We are not saying we have any rights to explore  
12 or anything like that, that is, for purposes of this  
13 Tribunal's jurisdiction, in my submission irrelevant.

14 I hope that clarifies.

15 I think I've addressed 1 and 2, and we'll go  
16 back, maybe, to the slides, because I think it's helpful  
17 just to use that as a reference point.

18 So all of those things, I think the Tribunal has  
19 what it needs to decide those issues. Unless the Tribunal  
20 finds that for some reason it needs to decide the issue of  
21 whether or not we actually found the San José. I don't  
22 think you need to decide that issue to definitively find  
23 that you have jurisdiction over the dispute that's before  
24 you.

25 I think you can say: Fine, that we--you have all

1 the facts you need to say we are an investor, and we have  
2 an investment. Whether or not our rights were  
3 expropriated, our investment was expropriated turns on a  
4 factual question as to whether or not our rights encompass  
5 the treasure that was on the San José. That, I would  
6 submit, is not a jurisdictional fact at all. It is a  
7 merits fact. And we've talked a lot about it, but I don't  
8 think you need to decide that to decide definitively that  
9 we are an investor and we have a protected investment.

10 The three--Questions 3 and 4, whether the  
11 Tribunal--or issues 3 and 4, I should say, whether the  
12 Tribunal has *ratione temporis* jurisdiction under 10.1.3 of  
13 the TPA.

14 I submit to you that these are the issues you  
15 need to decide:

16 What is the impugned measure? And I will answer  
17 that for you. You could probably guess what my answer is.  
18 The impugned measure is Resolution 85.

19 Did Resolution 85 occur after the TPA came into  
20 effect? Yes, it did. It happened in 2020.

21 And is Resolution 85 independently actionable?  
22 Now, that seems to be the issue where the Parties seem to  
23 have a particular dispute.

24 So, again, I think you can answer (i) and (ii)  
25 fairly easily. I think it's the third sub-issue of 3 that

1 I will come on to.

2 Question 4: Whether Claimant's claims are  
3 time-barred by the three-year limitation contained in  
4 10.18.1.

5 The first question we think you have to answer in  
6 that respect is: What is the alleged breach? It's the  
7 same. It's the passage of Resolution No. 85.

8 Question 2 is: Did SSA know that Resolution 85  
9 was issued beforehand? We would submit no, it couldn't, it  
10 was issued afterwards.

11 And Question 3: Did SSA know that it incurred  
12 loss or damage as a result of Resolution 85, and obviously  
13 it did not because Resolution 85 didn't come about until  
14 after 2020?

15 I think they would pose the questions slightly  
16 differently and say, did you know that you had been  
17 expropriated beforehand. And I think that relates to the  
18 Question 3(iii), and so I'm going to address those issues.  
19 But I think those are, in substance, the critical issues  
20 that the Tribunal will need to grapple with in order to  
21 resolve the jurisdictional question.

22 Now, in my submission, those are factual issues  
23 that the Tribunal has what it needs before it in the record  
24 to decide now, unless, again, the Tribunal finds, for  
25 whatever reason, that it needs to decide whether or not we

1 actually found the San José. Again, for the reasons I've  
2 said, I don't think that's relevant to either of these  
3 inquiries.

4 So, let's go and deal with the fundamental  
5 question under 3(iii), and we'll go back to where we were,  
6 of whether or not Resolution 85 was an independently  
7 actionable measure. And in my submission, it was. Why?

8 Because it is unrelated to anything--you don't  
9 need to assess the legality of any measure beforehand to  
10 assess whether or not Resolution 85 was expropriatory.  
11 There may be a question as to what it expropriated, if  
12 anything, of Claimants. But its legality or illegality as  
13 a measure is independent of anything that came before.  
14 It's unrelated.

15 And it's, I think, helpful to juxtapose our case  
16 to the two cases relied upon by Colombia. The first is  
17 Carrizosa v. Colombia. And I spoke about it briefly  
18 yesterday, but I skirted over this slide.

19 Carrizosa v. Colombia, same FTA as the one that's  
20 before you three gentlemen. And they found that they did  
21 not have jurisdiction for the following reason.

22 They said: The Claimant acknowledged that the  
23 annulment--so, what was the factual background?

24 There was a decision by a court that found  
25 against the Claimant. It was after the Treaty came into

1 force that the Claimant sought to annul the decision that  
2 had already been made. And so the--and the Claimant  
3 acknowledged that the annulment of that decision was an  
4 exceptional possibility which does not involve a de novo  
5 review of the merits of the case and is allowed only in  
6 special circumstances.

7 And what the Tribunal found was that the legal  
8 effect of the 2014 Order was to leave unaltered the outcome  
9 of the 2011 Decision, which, in turn, had annulled the 2007  
10 Judgment.

11 So what they're saying is these were all  
12 connected decisions. It was the Court being asked to annul  
13 its own decision. And the inquiry as to whether or not  
14 that annulment of its prior decision required an assessment  
15 of the prior decision, which had predated the entry into  
16 force of the treaty.

17 So it did require the Tribunal to assess the  
18 legality of those prior decisions in order to assess  
19 whether or not the post-Treaty conduct was, in fact, legal.

20 That's very different from what we have here. I  
21 think Berkowitz is even more instructive. Berkowitz v.  
22 Costa Rica is a decision where the Tribunal, likewise,  
23 decided--very similar language to here--that it did not  
24 have jurisdiction over certain aspects of the dispute, but  
25 it did have jurisdiction over other aspects. In that case,

1 the pre-Treaty conduct was an expropriation, so the  
2 expropriation had happened beforehand.

3 And the decisions that had happened--the acts or  
4 facts that happened post-Treaty was the decision as to the  
5 amount of compensation awarded for the expropriation that  
6 had happened pre-Treaty.

7 And what the Tribunal decided is that it did not  
8 have jurisdiction with respect to the exploration itself,  
9 but it did have jurisdiction over whether or not the  
10 compensation was manifestly arbitrary or blatantly unfair.  
11 And you can see that in 303 up on the screen here.

12 And so that goes to show that the Tribunal said:  
13 Well, look. To the extent we have to assess pre-treaty  
14 conduct to assess whether or not an expropriation happened,  
15 we're not going to do that. But there is certain separate  
16 post-Treaty conduct, which is the assessment of  
17 compensation.

18 Now, if that was arbitrary, we have jurisdiction  
19 over that, but just that limited dispute because that's the  
20 only post-Treaty conduct.

21 So those are the two cases that they rely upon,  
22 and I think they confirm in our submission, our argument  
23 that everything we're talking--we're not referring to  
24 anything pre-Treaty.

25 We are simply asking this Tribunal to assess the



1 legality or not of Resolution 85. That is all we are  
2 asking this Tribunal to assess the legality of.

3 Now, in deciding--

4 ARBITRATOR JAGUSCH: So can I--is that what  
5 you're asking, or are you asking us to assess whether the  
6 passing of the resolution amounts to a violation of the  
7 Treaty?

8 MR. MOLOO: Yes, that is--

9 ARBITRATOR JAGUSCH: I don't understand you to be  
10 putting in question the legality of the resolution itself.

11 MR. MOLOO: Fair. Very good point. And I agree  
12 with you completely. So I should have properly--

13 ARBITRATOR JAGUSCH: I just want to be clear that  
14 I've got it right.

15 MR. MOLOO: It is an unlawful--it is not unlawful  
16 as a matter of Colombian law. Well, it might be, but  
17 that's not what we're contesting here.

18 What we are contesting here is that we are saying  
19 that that, as a measure--was a measure that expropriated  
20 our investment.

21 ARBITRATOR JAGUSCH: That's fine. It's not what  
22 you just said--

23 MR. MOLOO: Correct.

24 ARBITRATOR JAGUSCH: --but I'm guessing you just  
25 misspoke.

1 MR. MOLOO: Yes.

2 ARBITRATOR JAGUSCH: Thanks.

3 MR. MOLOO: Yes. And what I would submit to you  
4 is that in making that assessment as to whether or not  
5 Resolution 85 expropriated Claimant's investment, the  
6 Tribunal may need to assess: Did we find the San José?

7 Because if we didn't find the San José, then it  
8 didn't expropriate any rights to which we had.

9 But that is a question in my submission for the  
10 merits. You will--in assessing whether or not Resolution  
11 85 expropriated our investment, you three gentlemen will  
12 have to assess that--make that assessment.

13 But that is actually not a fact that you need to  
14 decide at all for purposes of jurisdiction. If you three  
15 gentlemen disagree with me, then I would submit you should  
16 defer that determination to the next phase of this  
17 arbitration.

18 But I do not think you need to make that  
19 assessment for present purposes. And I would say if you  
20 were to make that assessment today based on the evidence  
21 that's in the record, you would find for us. Because the  
22 only thing you have on that side is a neither confirm nor  
23 deny that everything that we've said is accurate about  
24 where the San José is actually located.

25 PRESIDENT DRYMER: Mr. Moloo, you heard--and I

1 believe it was Señor Vega's answer, but in any  
2 event--Colombia's answer to this question earlier.

3           If I recall correctly, it was something to the  
4 effect that a declaration or a finding by this Tribunal  
5 that Resolution 85 improperly interfered with Claimant's  
6 rights would be implicit--implicitly to find that previous  
7 acts by the Government and the Courts may have been  
8 illegal. I think that was what they called their best  
9 answer to my question.

10           Have you got a comment on that? Again, I always  
11 like to be sure the issues are joint and the Parties are  
12 talking to each other.

13           MR. MOLOO: I do not think that that's the case,  
14 because ultimately--

15           PRESIDENT DRYMER: Did I understand--do you  
16 understand the same as I?

17           MR. MOLOO: I think so. Yes.

18           PRESIDENT DRYMER: Okay.

19           MR. MOLOO: And I think we're saying the same  
20 thing, but let me just confirm it.

21           As I understood it--well, yes. I actually think  
22 we're saying the same thing, which is it would--

23           The reason why I'm hesitating is because I think  
24 the argument that's being put to you is actually not a  
25 jurisdictional argument.

1           PRESIDENT DRYMER: That could be.

2           MR. MOLOO: Because I think for purposes of  
3 jurisdiction, you three gentlemen just need to decide  
4 whether or not you have jurisdiction to make the assessment  
5 as to whether or not Resolution 85 expropriated our  
6 investment. That's all you're deciding right now. You're  
7 just deciding do we or do we not have jurisdiction to make  
8 that determination as to whether or not Resolution 85  
9 expropriated our investment.

10           PRESIDENT DRYMER: But we only - But do you agree  
11 that we would only have jurisdiction if that question were  
12 independently actionable? It did not require a finding of  
13 legality relating to pre-Treaty acts?

14           MR. MOLOO: Yes. We don't dispute the legal  
15 standard. And my submission is you don't need to do any of  
16 that, and you're not being asked by Claimant to do that in  
17 making that determination.

18           PRESIDENT DRYMER: I think that they say we are  
19 being asked--

20           MR. MOLOO: Right. And this is the--

21           PRESIDENT DRYMER: --implicitly. Because any  
22 finding we make on this question would be an implicit  
23 finding in relation to the legality of previous acts by the  
24 Colombian State.

25           MR. MOLOO: And so this isn't the way it has been

1 put, but I don't know if it's a question--and it hasn't  
2 been put this way.

3 PRESIDENT DRYMER: Until this morning.

4 MR. MOLOO: Right. And I don't know if it's a  
5 question of them saying you don't have an investment so,  
6 you know, it goes to the questions that we talked about  
7 earlier. It has not been put in that way.

8 So that just hasn't been a submission that's been  
9 made that we have not made a valid investment for that  
10 reason.

11 And that's why I said if the Tribunal thinks that  
12 it needs to make that determination to say that we have a  
13 valid investment, then that is one that should be deferred.

14 But that would be surprising to me in light of  
15 the admissions yesterday that said: We have valid--or SSA  
16 Cayman at the very least has valid rights, and it's just a  
17 question of a disagreement as to what those valid rights  
18 entailed.

19 I think these are questions for the merits as to  
20 whether or not Resolution 85 expropriated our investment.  
21 I think it's clear we have an investment. I think the  
22 only--you know, there are valuable rights that we're  
23 talking about. Everybody agrees. There may be some  
24 disagreement as to whether or not they were validly  
25 transferred to SSA, but nobody--it doesn't seem like

1 there's a disagreement about whether or not the rights that  
2 we are saying are transferred were valuable. And I think  
3 we've established that we are an investor.

4 And our submission to you, that we are asking you  
5 to find jurisdiction over to decide then the merits of, is  
6 that Resolution 85 took our investment. But I say that  
7 that is a merits question.

8 PRESIDENT DRYMER: All right. Please continue.

9 MR. MOLOO: So turning then--so the acts and  
10 facts that this Tribunal is being called upon to adjudicate  
11 are all post-Treaty.

12 Now, one important point. The fact that--well,  
13 two important points. One is it is not in dispute before  
14 you three gentlemen as a result of what I have understood  
15 the submissions to be by Colombia that there has been no  
16 expropriation before 2020. That is our submission to you.  
17 And this morning that is the submission put to you by  
18 Respondent's counsel. They confirmed it. There is no  
19 expropriation pre-2020.

20 So as far as you three gentlemen are concerned,  
21 that is not a fact in dispute. And, therefore, I think to  
22 the extent you three gentlemen are being asked, you know,  
23 to make a determination with respect to any pre-Treaty  
24 acts, we have a--there is agreement between--a violent  
25 agreement between the Parties that no pre-2020

1 agreement--no pre-2020 conduct has expropriated the  
2 investment.

3           And, by the way, to the extent they are saying  
4 they were--they definitively deprived us--because I heard  
5 something perhaps slightly different in the second part of  
6 the submission. It cannot be that to deprive a tribunal of  
7 jurisdiction, all a Respondent needs to say is: We took  
8 this already before the Treaty. And because I'm making  
9 those submissions to you, you, Tribunal, are going to need  
10 to decide whether we took this before the Treaty came into  
11 effect. And because you now need to decide this issue,  
12 because we've put it at issue, you don't have jurisdiction  
13 over the post-Treaty conduct.

14           That cannot be correct. That cannot be correct.

15           So let's then turn to the three-year statute of  
16 limitations. The question here--and there are two  
17 questions--is about when we acquired knowledge and when we  
18 knew we suffered loss, to paraphrase the requirements of  
19 the Treaty.

20           And in my submission--and you heard this  
21 yesterday, but just to confirm--this can be completely--our  
22 submission is you can decide this now because you know, as  
23 a result of the 2019 Colombian Court decision, that  
24 everybody understood that we had valid rights. We had--we  
25 continued to have rights just before the 2020 Resolution

1 was adopted. So in my submission, that is the end of the  
2 matter.

3           You need not go into various statements that may  
4 or may not have been made. And to the extent you want to  
5 go into those statements, it--I encourage the Tribunal to  
6 read, for example, if it's at all of interest or relevant  
7 to their decision-making--I don't think it is--but some of  
8 the decisions from the D.C. Courts.

9           What was at issue there? We never argued that we  
10 didn't have any legal rights to the treasure. What we were  
11 arguing is we were being deprived of the ability to salvage  
12 the treasure itself.

13           We're not making those submissions to you. We're  
14 not saying to this Tribunal that we have any rights to  
15 salvage the treasure. We're just saying that we have legal  
16 rights to the treasure itself.

17           That was not being challenged in the other  
18 proceedings. And at the end of the day, even if there  
19 are--even if it was being challenged, it's totally  
20 irrelevant, because we did not believe that we had been  
21 permanently deprived of our rights. Because ultimately we  
22 withdraw--we were not, as a factual matter, permanently  
23 deprived of our rights.

24           We withdraw those proceedings. We reengage in  
25 discussions. And ultimately, in 2019--and that's the



1 critical point--our rights are confirmed.

2 Now, let's just say--let's just say that there  
3 was an expropriation beforehand. Okay? Let's just say  
4 that someone stole my car and they took it away. And  
5 that's basically what they're saying. We took it already.  
6 Right?

7 Even if that were true, 2019 confirms that we  
8 have it back. If you get your car back, is what they're  
9 saying that because I expropriated your investment at some  
10 point in the past, and then some--and then I give it back  
11 or some court where I recognize that you have those rights,  
12 any future expropriation I'm in the clear because I  
13 expropriated it once?

14 If that were the case, then if I were a State, I  
15 would just expropriate, give it back, and then I am forever  
16 protected for any future expropriation. That cannot be the  
17 case.

18 And so the question, I think, the Tribunal needs  
19 to answer and can easily answer as a result of 2019  
20 Decision is: Did we believe before the 2020 measure was  
21 adopted that we had rights, that we had--did we believe  
22 that we had been deprived of our rights, our investment?  
23 And the answer is unequivocally no. After this 2019  
24 Decision, we write to the Vice-President and we say: We  
25 are now going to enforce the injunction that has been

1 reinstated, and we are going to have this ship  
2 salvaged--not the ship--the treasure salvaged and  
3 distributed pursuant to our rights.

4           So did we think we had suffered a loss or that we  
5 had lost all of our rights on the eve of this  
6 expropriation? And the answer--and our submission--well,  
7 Resolution 85? The answer is absolutely not. We thought  
8 we had those legal rights. And in our submission, those  
9 legal rights were eviscerated as a result of Resolution 85,  
10 which we are asking this Tribunal to make a determination  
11 of. Not today, but in the next phase.

12           PRESIDENT DRYMER: Got it.

13           MR. MOLOO: I'll go to one point that I think is  
14 important, and that's the next slide.

15           PRESIDENT DRYMER: Before you do, and at the risk  
16 of hearing later that you've misstated the other side's  
17 position, we had a discussion with Colombia's counsel  
18 earlier today who made it clear that as far as--I think as  
19 far as they're concerned, the fact that would start the  
20 proscription clock ticking is your subjective belief that  
21 you had effectively suffered the same harm as you are now  
22 claiming today. And that that subjective belief manifested  
23 itself before--early enough so as to proscribe your claim  
24 today. All right. Subjective belief, no matter whether  
25 you were right or wrong.

1 Do you have an answer to that specific point?

2 MR. MOLOO: I would--if we go to the  
3 language--and I'm trying to find it.

4 PRESIDENT DRYMER: Yes. They took us to the  
5 language too.

6 MR. MOLOO: And it's 10.18, which is...

7 PRESIDENT DRYMER: Again, I just want to be sure  
8 that each side is answering the other's contentions.

9 MR. MOLOO: The language used in the Treaty:  
10 If more than three years have elapsed from the  
11 date on which the Claimant first acquired our should have  
12 acquired knowledge of the breach alleged.

13 That's Criteria Number 1. What is knowledge of  
14 the breach alleged? The breach alleged is that Resolution  
15 85 expropriated our investment. We could not have had  
16 knowledge of the breach that's alleged before 2020.

17 We further--if we--and if we're talking about a  
18 breach in a broader sense of an expropriation, we could not  
19 have known--we did--a subjective belief that we were being  
20 deprived of access to salvage the treasure could not have  
21 satisfied a knowledge requirement. Knowledge is knowing  
22 that that actually has happened.

23 PRESIDENT DRYMER: Right. The other side's  
24 argument is that clearly you couldn't have known three  
25 years before its existence that Resolution 85 would have

1 been promulgated and would have had any effect on you.

2 But their argument is that the effect of  
3 Resolution 85 is, in effect, the same--the same effect on  
4 your rights of which you complained and, therefore, seem to  
5 have a subjective belief more than three years prior. In  
6 other words, the impact of the particular measure; right?  
7 They say is effectively what you claimed before the U.S.  
8 Courts and the Inter-American Courts.

9 MR. MOLOO: Factually that's incorrect--

10 PRESIDENT DRYMER: I hear you on that.

11 MR. MOLOO: --in my submission.

12 PRESIDENT DRYMER: Yes.

13 MR. MOLOO: But even if they are right on that--

14 PRESIDENT DRYMER: That's what I want you to  
15 answer.

16 MR. MOLOO: --it's totally irrelevant.

17 PRESIDENT DRYMER: Okay.

18 MR. MOLOO: And the reason for that is  
19 because--it comes back to what I was saying earlier. Let's  
20 say that we believe that our expropriation--that our rights  
21 have been expropriated. Okay?

22 PRESIDENT DRYMER: Right. Five years ago.

23 MR. MOLOO: Five years ago. If the next day the  
24 State comes back to me and says, "No. You're wrong. You  
25 have your rights," is the fact that I thought mistakenly

1 that I had been expropriated--if that were true, then if I  
2 mistakenly understood that I had been expropriated or I had  
3 been expropriated and the State gave it back to  
4 me--any--any--pick either one of those fact patterns--then  
5 the State now is free and clear to expropriate me in the  
6 future forever?

7 ARBITRATOR JAGUSCH: Or, dare I say it, you  
8 take--you think you've been expropriated. You then take  
9 legal advice and told you haven't been. What? What's the  
10 position then? Because for a period you thought you had  
11 been expropriated, you've surrendered somehow your rights.  
12 It doesn't seem to add up to me.

13 MR. MOLOO: And what is critical, I think, is  
14 before the measure--that's why I keep coming back to the  
15 measure that we're talking about; right? Because, because  
16 there's a long history here; right?

17 The question is: When do we start looking at the  
18 history for purposes--I mean, I could take you to a  
19 snapshot--right?--that starts in 2018, let's say.

20 And if I took you to--or 2015; right? And  
21 everybody would agree--if I just took you to that snapshot,  
22 the State agrees/we agree that we have rights. In 2019,  
23 the Court, Colombian Courts confirmed we have rights.

24 So it's--I think it's--that's why I say even if  
25 it is true that we had been expropriated, even if it was

1 true, I think it's irrelevant.

2 Because at some point after then, we have  
3 confirmed rights by Colombia, and we have the subjective  
4 and objective and every possible intent and knowledge that  
5 we think we have those rights. And that's because they're  
6 enforced by Colombia in 2019.

7 PRESIDENT DRYMER: I get all of that.

8 MR. MOLOO: It gives you a clean slate. It gives  
9 you a clean slate.

10 PRESIDENT DRYMER You've answered now their  
11 point, I think, about--you've answered--whether we agree  
12 with you or not is something else.

13 You've answered the contention that it's simple  
14 subjective belief--were the words I used--that it triggers  
15 prescription, and you're saying it cannot be.

16 MR. MOLOO: Cannot be.

17 PRESIDENT DRYMER: Got it.

18 MR. MOLOO: And even more than that, even if we  
19 were expropriated, that in and of itself does not preclude  
20 a potential or future claim of expropriation if you have a  
21 valid investment and belief, using their test, subjectively  
22 understood to have rights that you continue to possess  
23 prior to the expropriation. That is being alleged to be  
24 the breach before this Tribunal.

25 PRESIDENT DRYMER: Very clear. Please move on.

1 MR. MOLOO: Even if you apply the standard that  
2 the TP--that they are--that should be more than--that  
3 should be enough. Not more than that. I withdraw that.

4 What you heard from Mr. Vega-Barbosa is the  
5 following with respect to their standard. And, again, I'm  
6 not accepting their standard.

7 But with respect to their standard, what they  
8 told you yesterday is what Colombia is required to prove  
9 under 10.1.3 is simply that the alleged expropriatory  
10 conduct has already taken place prior to the TPA's entry  
11 into force, even if it went unremedied post-Treaty. That's  
12 what they're saying they need to prove.

13 And this morning when asked, "Has there or has  
14 there not been expropriation?" they said, "No." Our  
15 position is there has not been an expropriation.

16 So they said, "That's what we have to establish."  
17 And when asked, "Was there an expropriation?" they said,  
18 "No, there was not." So they have not satisfied their own  
19 test.

20 Now, I have just told you that what I'm about to  
21 tell you is not relevant for purposes of your  
22 jurisdictional assessment, but I'm going--but I know  
23 there's been a lot of interest in this, so I'm going to  
24 end--the Tribunal has asked about it, so I will obviously  
25 answer the question.

1           What did we find? What is the area we're talking  
2 about? What is, in fact, Target A and its surrounding  
3 areas that are located in the immediate vicinity?

4           I referred you yesterday to the Colombia-Sweden  
5 MoU. And they said: Well, that's just an area as between  
6 Colombia and Sweden. That has no bearing on what Colombia  
7 understood their obligations to be vis-à-vis SSA.

8           But they left out Clause 2, which I showed you  
9 yesterday, which was they said if the Swedish Government  
10 finds it within the area, then they need to give 5 percent  
11 of it to SSA.

12           Why are they saying that? Well, you'll remember  
13 that they had changed the law in between here, and that  
14 ultimately was deemed unconstitutional.

15           But what is important for present purposes is  
16 Colombia clearly understood in 1988 that this area that  
17 they were contracting with with Sweden, if anything was  
18 found in that area, they owed 5 percent of the gross value  
19 to SSA.

20           So, in my submission, that is highly probative of  
21 what they understood "the area" to mean.

22           And what--again, none of this impacts your  
23 jurisdictional analysis. But I want to answer this because  
24 a lot of time has been spent on it. What did SSA  
25 understand it to mean?



1 Well, we were asked about it in 2015. Why were  
2 we were asked? It's important to remember why we were  
3 asked. We were asked because the day before we were asked,  
4 they had contracted with MAC, and MAC was going to - was  
5 asked to go and find the treasure.

6 And they were told: You have to--well, what we  
7 know is that the very next day we were asked: What's the  
8 margin of error? Where should we be looking? Because we  
9 want to look there so that we can assess whether or not the  
10 ship is there.

11 And we sent these coordinates to them.

12 Now, those were the contemporaneous  
13 understandings. Before anything was found, those were the  
14 positions that had been established by the two Parties.

15 Now we hear it's somewhere between 9 meters  
16 squared and 900 meters squared, which is, simply doesn't  
17 comport with the language of the 1982 Report. It does not  
18 comport with the contemporaneous actions of the Colombian  
19 Government. It does not comport with the contemporaneous  
20 actions pre-finding the treasure of SSA.

21 And it simply does not comport with reality of  
22 finding a shipwreck where the dispersion field is going to  
23 be more than 9 meters squared/more than 900 meters squared,  
24 because we're talking about a shipwreck. And it makes no  
25 logical sense.

1           So let's look at a map and see how these  
2 all--these various data points you've heard about relate.

3           Forgive me on the purple boxes. This is a  
4 software that plots maps, and we can't remove the purple  
5 markings, so ignore those.

6           PRESIDENT DRYMER: Got it.

7           MR. MOLOO: The blue dot is SSA's coordinates.  
8 The purple dot is the leaked coordinates that, you know,  
9 Colombia will not confirm or deny whether or not are the  
10 correct coordinates. But that's what we have, the Infobae  
11 article report. Those are those two dots.

12           The blue circle is the perimeter that was agreed  
13 between Colombia and Sweden as the 100 meters squared.  
14 That's a 5.6 nautical mile--roughly--radius around SSA's  
15 coordinates. And you can see that the reported  
16 coordinates are within that perimeter. They're about  
17 3 miles--3 nautical miles away, in fact.

18           And then you'll see the reported polygon in 2015  
19 from SSA. And, obviously, it comes within that as well.

20           I think it is helpful, perhaps, to look at the  
21 next map as well, unless you have any questions about this  
22 one.

23           PRESIDENT DRYMER: Only because the colors aren't  
24 clear, and so I'll have to--we will be reading a  
25 transcript. The SSA polygon--

1 MR. MOLOO: Yes.

2 PRESIDENT DRYMER: I'm just going to try to do it  
3 verbally so we can get it captured on the transcript.

4 The upper horizontal is in yellow, and the two  
5 sides on the bottom are in orange. That's the SSA polygon?

6 MR. MOLOO: Sorry. What was sent in 2015 was a  
7 rectangle.

8 PRESIDENT DRYMER: Well, a rectangle is a  
9 polygon.

10 MR. MOLOO: Yes. Yes. But it's the lower of the  
11 two lines.

12 PRESIDENT DRYMER: Right. Got it.

13 MR. MOLOO: The higher of the two lines--

14 PRESIDENT DRYMER: The orange diagonal--

15 MR. MOLOO: Yes.

16 PRESIDENT DRYMER: --at the upper edge.

17 MR. MOLOO: Let's look at the next map.

18 SSA had been authorized in Resolution 0048 to  
19 search these three areas: the purple, the blue, and the  
20 orange. And so the reason why I think this is helpful is  
21 simply to say we did not just report back all three  
22 areas--all the areas that we were able to search. It was a  
23 subset of one of the three areas.

24 PRESIDENT DRYMER: Thank you.

25 MR. MOLOO: And by the way, I should make clear,

1 today we're using GPS coordinates.

2 PRESIDENT DRYMER: Right.

3 MR. MOLOO: In 1982, when this was reported, you  
4 couldn't look on your phone and say: This is where we are.  
5 We're using--so all the more reason why there was clearly  
6 an area that was being reported.

7 This is a totally different technological era.  
8 We're talking about 700 and 701 and what they mean in terms  
9 of dispersion--you know, a treasure being discovered. That  
10 law is passed in the 1800s. So--

11 PRESIDENT DRYMER: And as pointed out by counsel  
12 this morning.

13 MR. MOLOO: Right.

14 PRESIDENT DRYMER: It is a venerable Civil Code.

15 MR. MOLOO: It is a venerable Civil Code that has  
16 lasted the test of time. But one was to understand when  
17 we're talking about areas and things of this nature, the  
18 time context of both the law when it was passed and when  
19 this finding was made and reported.

20 We're not talking about GPS coordinates like  
21 today. So the precision, one needs to take it with a grain  
22 of salt for present purposes because this has been done  
23 overnight.

24 ARBITRATOR JAGUSCH: Can you go back to the  
25 previous--the purple line. That's a territorial boundary?

1 MR. MOLOO: That's a territorial boundary;  
2 correct.

3 ARBITRATOR JAGUSCH: And go back to the previous  
4 page.

5 You don't show that boundary on that page.

6 MR. MOLOO: Yes. I can--

7 ARBITRATOR JAGUSCH: But it cuts through the top  
8 left-hand corner of the rectangle or the polygon.

9 MR. MOLOO: Yes, it does. And our understanding  
10 of where is both the blue and the purple dots fall within  
11 Colombian territorial waters.

12 ARBITRATOR JAGUSCH: Okay. Thank you.

13 MR. MOLOO: But you're right that it cuts  
14 basically the corner of that box--that yellow box.

15 PRESIDENT DRYMER: Mr. Moloo, how much time do  
16 you think you have left? We've interrupted you a bit.

17 MR. MOLOO: Two minutes.

18 PRESIDENT DRYMER: Say no more. Let's go.

19 MR. MOLOO: The only thing, subject to confirming  
20 that I've answered all of your other questions--

21 PRESIDENT DRYMER: To be clear, the Tribunal  
22 still reserves its time to ask questions of both Parties.  
23 Fear not.

24 MR. MOLOO: I think I've answered all your  
25 questions, but I'll end on this note, a question from

1 yesterday, which was how much has Colombia spent on finding  
2 the San José.

3           And we understand that the Columbus Exploration  
4 cost \$716,000. They didn't find anything in an area that  
5 was a hundred times--by the way, just to confirm, this  
6 morning we were talking about 100 times the coordinates.  
7 But we're not sure whether they were searching 100 times  
8 those coordinates or the reported area, which we submit and  
9 everybody understood at that time was much larger than just  
10 the coordinate.

11           But they spent \$716,000.

12           With MAC, who ultimately found the San José, it  
13 says: If as a result of the authorized exploration  
14 activities a discovery is made, the remuneration will be  
15 20 percent of the value of the assets that do not  
16 constitute heritage.

17           So the out-of-pocket cost was zero. So as far as  
18 the record reflects, it's less than a million dollars. And  
19 the Colombian Government has found the San José and has now  
20 declared the entire thing cultural patrimony, and it's all  
21 theirs.

22           Just to be clear, they can declare it cultural  
23 patrimony. They can say the whole thing is theirs. And I  
24 understand that they may find and decide that, for whatever  
25 reason, it is important to them to take it.

1 I don't--whether or not that's a valid exercise  
2 or they validly declared it all cultural heritage is going  
3 to be for the merits of this case.

4 PRESIDENT DRYMER: Validly under the Treaty.

5 MR. MOLOO: Under the--as a matter of  
6 international law and potentially even Colombia law.

7 But for this Tribunal, our claim before you is  
8 for compensation so that Colombia is not left with a  
9 windfall, so that the work that SSA did that led to  
10 Colombia being able to announce that the San José has been  
11 found, that this important treasure and material is now  
12 going to be in a museum, perhaps, in Cartagena, which  
13 hopefully all of us will one day be able to visit.

14 Our request of this Tribunal is that SSA deserves  
15 compensation for its part in that. And its part in that  
16 was finding it, reporting it. And those rights have been  
17 established and recognized time and time again, most  
18 recently in 2019 by the Colombian courts, and were,  
19 unfortunately, eviscerated in 2020.

20 Our submission to you is to allow us to appear  
21 before you and have the merits of that claim assessed. And  
22 I think you have everything before you to decide  
23 definitively that you can and do have jurisdiction over  
24 that claim.

25 And I hope the next time we appear before you

1 three gentlemen we'll be able to expand on that particular  
2 proposition in further detail. But for today, those are my  
3 submissions.

4 PRESIDENT DRYMER: Thank you very much,  
5 Mr. Moloo.

6 I'm going to shut my mic and just confer for a  
7 second with my colleagues.

8 (Pause in the proceedings.)

9 PRESIDENT DRYMER: Subject to everyone's  
10 agreement--well, no, not subject to your agreement. But  
11 I'll take your views. We suggest to take a 10-minute break  
12 now before coming back for a period during which the  
13 Tribunal will have questions for both Parties.

14 All right?

15 That means, one, a quick break; two, we're  
16 further postponing lunch. Is everybody okay with that?

17 I see nods from the lawyers and from the court  
18 reporters. Yes, and a thumbs-up from the interpretation  
19 booth. So that's what we'll do.

20 Let's please be back at 20 to 2:00, and we are  
21 adjourned.

22 (Brief recess.)

23  
24 PRESIDENT DRYMER: All right. Mr. Moloo,  
25 Señora Ordóñez, are you ready to proceed?



1 MS. ORDÓÑEZ PUENTES: Yes.

2 MR. MOLOO: Yes. Thank you.

3 PRESIDENT DRYMER: Very good. Before I do, I  
4 just want to make one thing clear on the record. I'll ask  
5 you this question. Mr. Moloo, had you before the break  
6 concluded the arguments and submissions by the Claimant?

7 MR. MOLOO: Yes, Mr. President.

8 PRESIDENT DRYMER: Thank you. Same question to  
9 you, Ms. Ordóñez. By the time you concluded your rebuttal  
10 this morning, had that concluded your submissions to the  
11 Tribunal? Subject to whatever you may say in response to  
12 our questions a few minutes from now.

13 MS. ORDÓÑEZ PUENTES: Yes, I confirm.

14 PRESIDENT DRYMER: Thank you. All right.

15 Well, this is the time that had been reserved for  
16 the Tribunal to put any final questions to either Party  
17 based on what we have heard from you over the course of the  
18 last day and a half. We've been a fairly engaged Tribunal,  
19 if I can use those words. And for better or worse, that  
20 means that most of the questions that we might have  
21 reserved, we've actually not reserved and have put to you  
22 already in the course of your submissions. But there are  
23 still a few remaining points that we would like to address.  
24 There aren't many. And that's what we intend to do now.  
25 In no particular order.

1 I'm going to begin. And my colleagues may have  
2 other questions to ask. First of all, this will be a  
3 question that I'd like each Party, to which I'd like each  
4 Party to respond briefly.

5 On the assumption--or in the hypothesis, if you  
6 will, that the Tribunal decides that one or more--or indeed  
7 all--of the agreed issues are sufficiently separate from  
8 the merits as to be appropriate for determination now; all  
9 right? That's the hypothesis. We decide we're going  
10 to--or we'd like to answer certain questions at this  
11 expedited stage.

12 How would you propose the Tribunal proceed in the  
13 event--also hypothetical for the moment--where it might  
14 consider that the evidence before it at this stage is not  
15 as robust as it might like? Do we decide on the record  
16 simply as-is? Or if a question is indeed separate from the  
17 merits, do we have any discretion to say, yes, but we'd  
18 like further evidence on it, which would obviously have to  
19 be taken at a further stage? Hypothetical questions as to  
20 how we should proceed.

21 Because this is Respondent's hearing, if you  
22 will, of its objections, I'll begin with Respondent.

23 MR. VEGA-BARBOSA: We believe that we have  
24 already provided an answer to this question.

25 PRESIDENT DRYMER: Yes.

1           MR. VEGA-BARBOSA: We do submit that you have  
2 discretion in deciding. What we submit is that if you were  
3 to consider that the relevant facts for deciding on the  
4 particular preliminary objections that we are submitting  
5 are enough, you should decide the preliminary objections  
6 now.

7           But as we said on the very first day, your  
8 discretion includes the possibility to, for example, join  
9 this question with the merits. Decide it now.

10          PRESIDENT DRYMER: Understood.

11          MR. VEGA-BARBOSA: You're entitled to decide.  
12 That's the whole thing about discretion; no?

13          PRESIDENT DRYMER: You know what? That--you're  
14 right. The important--what I've understood is an important  
15 clarification--yesterday, when we were talking about  
16 discretion, we were talking about the discretion to defer  
17 issues that are intertwined with the merits.

18          You're now suggesting--and I hear you--that even  
19 issues that are not intertwined with the merits, we have  
20 discretion to defer if we would like to hear further  
21 evidence on the point anyways.

22          MR. VEGA-BARBOSA: No.

23          PRESIDENT DRYMER: No. Good. That's what I want  
24 you to clarify.

25          MR. VEGA-BARBOSA: Now, in our position--

1 PRESIDENT DRYMER: Yes.

2 MR. VEGA-BARBOSA: --and this is what I explained  
3 today.

4 PRESIDENT DRYMER: Yes.

5 MR. VEGA-BARBOSA: Based on the explanation of  
6 the relationship between Article 10.20.5 and the  
7 relationship with Article 21 of the 2021 UNCITRAL Rules and  
8 the principle of the burden of proof, is that if you  
9 consider that Claimant has failed to provide you with the  
10 relevant facts that are necessary to establish  
11 jurisdiction, you should decide now that you don't have  
12 jurisdiction.

13 PRESIDENT DRYMER: That's what I thought your  
14 answer was going to be. So, I'm glad that I reframed it to  
15 make sure that your answer is what you intended.

16 Mr. Moloo.

17 MR. MOLOO: If I'm understanding the Tribunal's  
18 questions correctly, if there is a jurisdictional fact that  
19 the Tribunal needs to determine--feels IT needs to  
20 determine now and it does not have sufficient evidence, I  
21 think it has discretion, of course, to ask the Parties to  
22 answer any questions that they have in my submission. And  
23 if the Tribunal had such a question that it would be  
24 appropriate to give the Parties an opportunity to respond  
25 to any question the Tribunal has with respect to any such

1 evidence.

2           PRESIDENT DRYMER: In other words, file or submit  
3 further evidence in the course of this expedited  
4 preliminary phase?

5           MR. MOLOO: Yes.

6           PRESIDENT DRYMER: Very good. Not a discretion,  
7 simply to kick the question down the road to the merits  
8 phase. In other words, you'd agree with your friend on  
9 that point?

10           MR. MOLOO: I think the Tribunal has discretion  
11 to--well, I'm not sure I agree on that point. But I think  
12 there's two different questions.

13           PRESIDENT DRYMER: Right. Yes, there are.

14           MR. MOLOO: I think the Tribunal has discretion  
15 with respect to both of them. One of them is if the  
16 Tribunal decides that it wants to make a determination now  
17 on this expedited basis but feels it has a particular  
18 question or needs particular information from one of the  
19 Parties, then it has the discretion to ask for that during  
20 this phase. It also has the discretion to kick that issue  
21 to the next phase.

22           PRESIDENT DRYMER: All right. Thank you. Yes,  
23 you--something you'd like to add?

24           MR. VEGA-BARBOSA: Yes. It's important for us  
25 to--this is something that we should not need to clarify,

1 but it's something that has to do with the burden of proof.

2 PRESIDENT DRYMER: Yes.

3 MR. VEGA-BARBOSA: That Claimant is required to  
4 meet--in the moment it was required to meet the burden of  
5 proof. So, for some reason there seems to be doubt, at  
6 least created by our colleagues from Claimant, that they  
7 have not filed their Statement of Claim, that they have  
8 only filed their notice of arbitration.

9 But the particular rules for this arbitration,  
10 UNCITRAL Rules--I believe it's Article 23--allow Claimant  
11 to unilaterally decide that their Notice of Arbitration  
12 also constitutes their Statement of Claim.

13 So, we have here a Claimant that has freely  
14 decided that its notice of arbitration is also their  
15 Statement of Claim. And we considered that that matters  
16 when assessing whether they have met their burden of proof  
17 at the relevant moment. That is what we have here.

18 They have submitted already their Statement of  
19 Claim. That is important for the purposes of establishing  
20 whether right now they should be measured against their  
21 burden of proof.

22 PRESIDENT DRYMER: Mr. Moloo, I presume you have  
23 a comment to make.

24 MR. MOLOO: I do. Obviously, the Tribunal  
25 appreciates the early stage of these proceedings. This is

1 a preliminary phase that it has filed after the Notice of  
2 Arbitration. The Statement of Claim has not been filed.  
3 There's been no discovery during this phase or anything  
4 like that.

5 PRESIDENT DRYMER: You're filing is styled  
6 "Notice of Arbitration and Statement of Claim."

7 MR. MOLOO: Because that is what--how the rules  
8 are. But as is common in these cases, that is--there is  
9 still an opportunity to file a more robust Statement of  
10 Claim. It is typically the case in these UNCITRAL  
11 proceedings.

12 PRESIDENT DRYMER: Understood.

13 MR. MOLOO: But in any event, 23(3) does make it  
14 very clear that the Tribunal has jurisdiction--has  
15 discretion--the Arbitral Tribunal may rule upon a plea,  
16 referred to in Paragraph 2, either as a preliminary  
17 question or an award on the merits.

18 So--and it says: "The Arbitral Tribunal may  
19 continue the arbitral proceedings and make an award  
20 notwithstanding any pending challenge to its jurisdiction  
21 before a court."

22 So, I think the Tribunal should take into  
23 account. I mean, that gives them the discretion clearly--

24 PRESIDENT DRYMER: Understood.

25 MR. MOLOO: --on any jurisdictional issue should

1 it feel has not been fully developed or that further  
2 discovery or anything would be appropriate.

3 PRESIDENT DRYMER: Understood.

4 MR. MOLOO: It also has discretion simply to  
5 ask--you know, for purposes of efficiency, to ask the  
6 Parties now to provide them with X or Y and make the  
7 determination now. That is within the terms--either option  
8 is available to the Tribunal.

9 PRESIDENT DRYMER: Right. Right. I think the  
10 Tribunal has heard enough. And if my colleagues have  
11 further questions, they'll put them to you.

12 Clearly, we're talking about the interaction, the  
13 Rules, and the Treaty; all right? Including the  
14 exceedingly tight timelines to which we have to adhere.

15 So, the idea of asking for the submission of  
16 further evidence at some undetermined time, when we have a  
17 decision due by the beginning of February, seems unlikely.  
18 But nonetheless, thank you for your answers.

19 All right. Our next question--the Tribunal's  
20 next question. This is, among other things, the product of  
21 our collegial and collective thinking. I'd like to come  
22 back to a point raised--that I raised this morning, and  
23 that actually caused me to say effectively, "Whoa." I  
24 didn't say that on the record before, but I guess I just  
25 said it now.



1           So that we're clear about what we're talking, I'm  
2 going to give you specific transcript references. And if  
3 you can pull them up on your individual screens, or you can  
4 just take it from me, as you see fit.

5           At 9:50:20, Señora Ordóñez said: "Our position  
6 is that they do have some rights, but not over the San  
7 José."

8           At 9:52:02, I said--I asked: "What rights does  
9 Colombia say the Claimant has at this stage in the real  
10 world?"

11           And at 9:52:23, Señora Ordóñez, you said: "The  
12 Claimant has Resolution 354, which was upheld by the  
13 Supreme Court in 2007. That's Colombia's position."

14           So, two questions. First question: You're  
15 suggesting that what the Claimant has today in the real  
16 world survived Resolution 85 of 2020, it seems to me.

17           MS. ORDÓÑEZ PUENTES: That is correct.

18           PRESIDENT DRYMER: Okay. I suggest to you that  
19 that sounds like you're saying that those rights were  
20 successfully transferred from SSA's predecessors to SSA;  
21 correct?

22           MS. ORDÓÑEZ PUENTES: Yes. That's correct.

23           PRESIDENT DRYMER: All right. I'll leave it  
24 there.

25           Any comments, Mr. Moloo?

1 MR. MOLOO: No comments.

2 PRESIDENT DRYMER: Very good. Thank you.

3 I think that's it for me but for one further  
4 question which may want to take us off the live feed. So,  
5 before I do that--not yet, Nick.

6 Anything, gentlemen, that you'd like to ask  
7 arising from these questions or anything else that's arisen  
8 over the last day and a half?

9 ARBITRATOR CLAUD VON WOBESER: No.

10 PRESIDENT DRYMER: No?

11 ARBITRATOR JAGUSCH: I do.

12 PRESIDENT DRYMER: Yes. Please go ahead.

13 ARBITRATOR JAGUSCH: Possibly--it's a question  
14 for both of you, but--although possibly slightly different  
15 questions. But I'll lay out the framework, and I'd like  
16 you to comment.

17 My understanding is that there is an application  
18 before us to accept or to reject. Accepting it would  
19 effectively terminate the proceedings because we would find  
20 that we lack jurisdiction.

21 But what would "rejecting it" mean? Would it  
22 mean that jurisdiction objections may still be pursued  
23 subsequently? And the reason I raise this is it ties in  
24 with my discussion with Mr. Moloo earlier where I asked  
25 what your primary relief was. And you said your primary

1 relief was that you sought that we would issue a decision  
2 or an award as appropriate, now finding that we do have  
3 jurisdiction.

4           So, you can see how that's a related issue. But  
5 also tied up with that is that's not actually your pleaded  
6 position. The, the, so, (a), it's not the relief you  
7 formally sought. And (b), I query whether you have the  
8 power or whether we would have the power, in any event, to  
9 give an affirmative ruling on jurisdiction at this stage.

10           So there's the broad sort of contour of what's  
11 going on in my head. And if either of you could add some  
12 clarity to that, I'd be very grateful.

13           PRESIDENT DRYMER: The world would be grateful  
14 for clarity as to what's going on in Mr. Jagusch's head.

15           ARBITRATOR JAGUSCH: Not just those in this room.  
16 That's right.

17           PRESIDENT DRYMER: The world.

18           MR. MOLOO: Let me say two things.

19           First, we would ask that the Tribunal--our  
20 primary position would be--well, more specifically, it is  
21 to deny the objections that have been presented today.

22           PRESIDENT DRYMER: All right.

23           MR. MOLOO: And I welcome Colombia's input on  
24 whether or not they intend to raise any other--or reserve  
25 the right to raise any other jurisdictional objections. If

1 the answer to that question is no, then I think you can  
2 make an appropriate finding of jurisdiction.

3 But I guess that will depend on Colombia's answer  
4 to my--of course, I'm not permitted to ask them questions  
5 in this proceeding. But to the extent that they have  
6 not--that they do not intend to raise--or reserve the right  
7 to raise additional jurisdictional objections, then I would  
8 submit the Tribunal could find--make an affirmative finding  
9 of jurisdiction. But it is correct to deny the objections.

10 ARBITRATOR JAGUSCH: You say "could". I presume  
11 you mean "could" in the sense that we have available to us  
12 what we need to do it.

13 MR. MOLOO: Yes.

14 ARBITRATOR JAGUSCH: How about the procedural  
15 regularity of us making an affirmative finding of  
16 jurisdiction when that is not the application before us,  
17 and nor sensibly construed is your reply. Nor can that be  
18 construed as a request for an affirmative ruling on  
19 jurisdiction.

20 MR. MOLOO: No. And that's why I--it would  
21 require Colombia to accept that they do not have other  
22 jurisdictional objections and do not intend to make any.  
23 But I think that it is a point well taken that the primary  
24 relief side, as it currently stands, is denial--definitive  
25 denial of the objections.

1           ARBITRATOR JAGUSCH: So, maybe the question for  
2 Colombia is: Are you asking us to rule now on jurisdiction  
3 or to rule now on your application?

4           A moment to have a think.

5           MR. VEGA-BARBOSA: Yeah, I wanted to confirm with  
6 my boss.

7           PRESIDENT DRYMER: Of course. Not just your  
8 colleague.

9           MR. VEGA-BARBOSA: And so, to be clear, we  
10 invoked Article 10.20.5 confident that all the objections  
11 we were going to raise were objections against the  
12 competence, jurisdictional objections. That doesn't mean  
13 that we're not entitled under the Treaty to raise, if this  
14 case moves forward, other types of objections.

15           For example, the objection under Article 10.20.4,  
16 which is not a jurisdictional objection. It's a  
17 jurisdiction--it's an objection that, as a matter of law,  
18 the Tribunal cannot issue an award in the terms of Article  
19 10.20.6.

20           We will presume your fact as true with certain  
21 restrictions, and we have dealt with this in the past. But  
22 we won't be prevented to do that. For the moment, we are  
23 requesting the declaration that this Tribunal lacks  
24 jurisdiction because all our objections are objections to  
25 jurisdiction.

1 ARBITRATOR JAGUSCH: That's understood.

2 Mr. Moloo, did you want to respond to that?

3 MR. MOLOO: Give me one second.

4 PRESIDENT DRYMER: Check with your boss,  
5 Ms. Ritwick.

6 MR. MOLOO: Honestly, just on the reading of  
7 10.20.5, it's not clear to me whether or not on its face  
8 all competence jurisdictions--if the Respondent decides to  
9 bring an application under 10.20.5--must be brought at that  
10 preliminary phase.

11 It is true that our request for relief is to  
12 reject the objections that are raised. I suppose we would  
13 defer the question if additional jurisdictional objections  
14 were raised at some later stage what our position would be  
15 with respect to those. But I think for present purposes,  
16 it would probably suffice--I'm trying to assist the  
17 Tribunal here, with my answer at least--to reject the  
18 objections that are raised by the Respondent.

19 ARBITRATOR JAGUSCH: You reserve your position in  
20 respect--

21 MR. MOLOO: I reserve our position with respect  
22 to their ability to raise additional jurisdictional  
23 objections under the rules.

24 ARBITRATOR JAGUSCH: Understood.

25 PRESIDENT DRYMER: Secondary position, I suppose,

1 for an alternative would be joined to the merits, in which  
2 case it's the proverbial "second bite of the cherry."

3 You've alluded to that in your own pleadings.

4 MR. MOLOO: Absolutely. And to the extent there  
5 are any factual issues that cannot be definitively  
6 determined at this stage or are intertwined with the merits  
7 that the Tribunal feels that it must decide in order to  
8 find jurisdiction, then those, we would say, can be  
9 deferred to the next phase.

10 PRESIDENT DRYMER: Thanks.

11 I see that Señor Vega would like to make a brief  
12 reply.

13 MR. VEGA-BARBOSA: Yeah. On the powers of the  
14 Tribunal--

15 PRESIDENT DRYMER: Yes.

16 MR. VEGA-BARBOSA: --and Claimant and Respondent,  
17 we made a critical choice some months ago, and we decided  
18 that because of the interaction of Article 10.20.5 with the  
19 UNCITRAL Rules, this is not only a binary option that you  
20 have to either issue an award upholding our jurisdictional  
21 objections or a decision rejecting our objections.

22 The U.S. actually is in doubt on whether this  
23 should be the case. But we, because of the interaction  
24 with the UNCITRAL Rules, accepted that the Tribunal remains  
25 with discretion. So, you don't have only two options to

1 decide on this matter, although we believe you have all the  
2 information you need to decide in our favor.

3 But conceptually and because of the way we have  
4 accepted to litigate this case, you have more than two  
5 options. That's our view.

6 PRESIDENT DRYMER: Anything further, gentlemen?  
7 Any further comment, Mr. Moloo?

8 MR. MOLOO: No.

9 PRESIDENT DRYMER: Very good. Thanks.

10 I said that I had one last question. I'm going  
11 to ask the question now, and then I'll give you a chance to  
12 tell me how you wish to proceed. And this is a question  
13 that arises, for better or worse, from the fact that both  
14 Parties have spent a lot of time talking to us about the  
15 wreck and the treasure and its salvage, even as you've told  
16 us some of it may be relevant; some of it irrelevant.

17 So, it also arises from the fact that Claimant  
18 has several times in its written pleading, and I think once  
19 over the course of this oral hearing, said, "As far as we  
20 know, the treasure remains submerged."

21 This is the question to the Republic: Has any  
22 part of the San José shipwreck or its contents, the  
23 discovery of which the Republic announced in 2015, been  
24 salvaged/been removed from the sea to date?

25 Second part of the question: Are there any



1 current concrete contracts in effect for the salvage or  
2 removal from the seabed of any part of the wreck or its  
3 contents?

4 Now, before you answer, you're free to tell me  
5 you'd like to go off the public record.

6 MS. ORDÓÑEZ PUENTES: Yes, I would like to go off  
7 the public record. But in any case, I'm going to answer  
8 based on information that is in the public domain.

9 PRESIDENT DRYMER: Well, let's see how that goes,  
10 because I'm not asking what's in the public record. I know  
11 what's in the public record.

12 So, Nick, please shut the live feed. This is a  
13 confidential discussion. And as agreed by the Parties and  
14 as ordered by the Tribunal and its protocol in PO2, when  
15 certain confidential matters arise, it's agreed that we're  
16 going off the public record and we'll be in camera,  
17 effectively a private hearing, as is traditional.

18 Nick, please shut the live feed.

19 (End Open Session.)

**CONFIDENTIAL SESSION**

1  
2 PRESIDENT DRYMER: Okay. I realize the  
3 sensitivity of what I'm asking, which is why I offered even  
4 before I put the question to go off the record. But I'm  
5 not asking you to tell me what's in evidence.

6 MS. ORDÓÑEZ PUENTES: Yeah. Okay, so-

7 MR. BIGGE: Mr. President, if I could interrupt  
8 before Colombia proceeds. I believe I was also being put  
9 into a private room.

10 Actually, if you don't mind, instead of putting  
11 me into a private room, Nick, I will take the  
12 opportunity--unless the Tribunal has any further questions  
13 for the United States, I would just propose to leave the  
14 Hearing with thanks again to the Parties and to the  
15 Tribunal.

16 PRESIDENT DRYMER: That works for me. And I  
17 would have come back and, among other things, thanked you  
18 and your colleagues for your participation in these  
19 proceedings to date, Mr. Bigge.

20 So you are free to go, as they say.

21 MR. BIGGE: Thank you very much. I just wanted  
22 to make sure that I wasn't exposed to material that I  
23 wasn't supposed to--

24 PRESIDENT DRYMER: That's very well done. And,  
25 again, with the Tribunal's thanks to the United States.

1 MR. BIGGE: Okay.

2 THE TECHNICIAN: Yeah, I was about to interrupt  
3 because I hadn't completed everything yet.

4 But we are now in private transmission. And just  
5 hang on a second. I'll make sure.

6 Yeah, Mr. Bigge has left the room.

7 PRESIDENT DRYMER: Alright.

8 Señora Ordóñez.

9 MS. ORDÓÑEZ PUENTES: Okay. So to go straight to  
10 the main point of your question, no. Anything has not been  
11 extracted from the Galeón San José yet.

12 PRESIDENT DRYMER: Right.

13 MS. ORDÓÑEZ PUENTES: Precisely because it's too  
14 deep. It's more than 600 meters depth. Yeah, exactly. So  
15 it's a very difficult operation, and there are  
16 some--there's even some risk that when the--anything is  
17 extracted, it could disappear, just...

18 PRESIDENT DRYMER: Understood.

19 MS. ORDÓÑEZ PUENTES: So that's a very delicate  
20 decision that has been under the study of the Colombian  
21 Government for the past, I would say, three years at least.  
22 It has been actually a change of government.

23 PRESIDENT DRYMER: Yes.

24 MS. ORDÓÑEZ PUENTES: And recently, during the  
25 first week of December, the Ministry of Culture publicly

1 announced--

2 PRESIDENT DRYMER: Yes.

3 MS. ORDÓÑEZ PUENTES: --that's why I said it is  
4 public information--that they will develop a study and that  
5 we will start applying to guarantee there is, if any, a  
6 responsible extraction from the San José so as to guarantee  
7 that it is going to be--it will be preserved, because  
8 that's the main concern of the Colombian State.

9 So they are holding that's a multidisciplinary  
10 team from different State agencies, including the  
11 Archeological National Institute, the Ministry of Culture,  
12 the Armada, and the Agency. And it's just a project that  
13 we'll start with a scientific evaluation because there's a  
14 big concern from the academic community--

15 PRESIDENT DRYMER: Yes.

16 MS. ORDÓÑEZ PUENTES: --as to what could happen  
17 with the--

18 PRESIDENT DRYMER: And the environmental  
19 community and others.

20 MS. ORDÓÑEZ PUENTES: Exactly.

21 PRESIDENT DRYMER: I realize the public stake  
22 here.

23 MS. ORDÓÑEZ PUENTES: Exactly.

24 So the project has been announced. And in  
25 March--next March a commission of scientists will meet in

1 Cartagena to discuss the best options in order to guarantee  
2 that any extraction would be made with the highest  
3 standards, that we will guarantee that the historical value  
4 will be preserved.

5 PRESIDENT DRYMER: That is--seems to me a very  
6 fulsome answer, and I'm grateful.

7 Please continue.

8 MS. ORDÓÑEZ PUENTES: And our answer is that no  
9 contract--

10 PRESIDENT DRYMER: Oh, clearly. Well, I would  
11 have asked just to be sure, but--

12 MS. ORDÓÑEZ PUENTES: No contracts are in place  
13 yet. But, of course, it's a big project that will require  
14 some public funds and resources, and the Colombian  
15 Government is working on that. Nothing is signed yet.

16 PRESIDENT DRYMER: Thank you. I appreciate that.  
17 And you recognize why I hope--well, I hope you recognize  
18 why I wanted to ask you for information other than what I  
19 can read in the newspapers; right? And other than what I  
20 can read on the internet, because much of what one reads on  
21 the internet is not true.

22 And so I'm asking you actually what's going on.  
23 You've told me what's going on. And I am very grateful not  
24 just to you personally, but to the Republic.

25 Any comment, Mr. Moloo, on that? And then that

1 will conclude the Hearing. Or at least I'll go back into  
2 public session, and then we'll conclude the hearing.

3 MR. MOLOO: No comment on that.

4 PRESIDENT DRYMER: Very well. Thanks again.

5 Nick, please bring us back briefly into public  
6 session.

7 MR. MOLOO: Mr. President, there is one point.

8 PRESIDENT DRYMER: Before you do.

9 MR. MOLOO: Well, I think it can be public. But  
10 there is one point that the Tribunal had asked both Parties  
11 to address which neither party has addressed.

12 PRESIDENT DRYMER: We'll get back to that back in  
13 the session.

14 We've concluded the confidential portion. Back  
15 into public session, please.

16 **(End Confidential Session.)**

1 OPEN SESSION

2 THE TECHNICIAN: We're live.

3 PRESIDENT DRYMER: On the record.

4 My thanks to the Republic publicly for having  
5 answered privately the question that the Tribunal put to  
6 it.

7 Now, are there any further matters which either  
8 Party believes that we should address before we close this  
9 hearing? Anything that the Tribunal may have forgotten to  
10 raise?

11 Let's start with the Claimant in this case.

12 MR. MOLOO: Sorry. I jumped the gun there.

13 Not anything that the Tribunal has forgotten to  
14 raise, but perhaps one that the Parties have not addressed  
15 and probably could very succinctly, which is Spain's  
16 intervention.

17 PRESIDENT DRYMER: Ah.

18 MR. MOLOO: And so I wonder whether--

19 PRESIDENT DRYMER: You're 100 percent correct.

20 MR. MOLOO: --you wanted to hear from us on that.

21 PRESIDENT DRYMER: I do. I had two further  
22 things on my list in the housekeeping area. One will be  
23 Spain's intervention. The second will be, by way of  
24 heads-up, any comments on the proposal for cost submissions  
25 to come after this hearing.

1           Let's take them one at a time.

2           In turn, I'll give the Republic the right to a  
3 first response since it's the Petitioner here, in respect  
4 of Spain's incipient, to use your good word, request to  
5 intervene.

6           MS. ORDÓÑEZ PUENTES: Thank you.

7           On that matter, we are in the hands of the  
8 Tribunal to decide whether it is relevant or not  
9 specifically at this moment of the proceedings.

10           So we would defer to the Tribunal this decision.

11           PRESIDENT DRYMER: So you have no view one way or  
12 the other?

13           MS. ORDÓÑEZ PUENTES: Correct.

14           PRESIDENT DRYMER: Based on the very laconic  
15 email that we received yesterday. I realize you may have  
16 further views if you see the more fleshed-out request that  
17 Spain has submitted. Do I understand you correctly?

18           MS. ORDÓÑEZ PUENTES: It might be the case.

19           PRESIDENT DRYMER: Might be the case.

20           MS. ORDÓÑEZ PUENTES: So we are in the hands of  
21 the Tribunal as to determine the relevance of that  
22 submission at this point of the proceedings.

23           PRESIDENT DRYMER: Are you saying you don't even  
24 want to see Spain's--

25           MS. ORDÓÑEZ PUENTES: For now, yes. That's



1 Colombia's position.

2 PRESIDENT DRYMER: Understood. Thank you.

3 Mr. Moloo.

4 MR. MOLOO: Well, we would very much like to see  
5 Spain's position.

6 I think--you know, our submission on this will  
7 not come as a surprise to the Tribunal, especially given  
8 the expedited nature of the current proceedings. We think  
9 it would be inappropriate to have Spain intervene at this  
10 preliminary phase.

11 As the Tribunal will be well aware, both the TPA  
12 and the Procedural Order Number 1 gave the Tribunal  
13 discretion as to whether or not to allow the intervention  
14 of an amicus.

15 Various cases, including *Antaris Solar v. The*  
16 *Czech Republic*, have set out criteria for the intervention  
17 of amicus. There are five criteria: assistance to the  
18 Tribunal, whether or not it addresses matters within the  
19 scope of the arbitration, whether or not the party has a  
20 significant interest in the arbitration, the public  
21 interest in the subject matter, avoiding disruption of the  
22 proceedings, and neither disputing party is unduly  
23 burdened.

24 And what I would suggest is the first four of  
25 those we do not have an answer because we don't yet know

1 what the intervention is.

2 But no matter what the answer to those first four  
3 are, the last two make it clear that it doesn't really  
4 matter what the answers to the first four are because it  
5 would be impossible to allow an intervention now that would  
6 not disrupt the proceedings and would, indeed, unfairly, we  
7 would suggest, prejudice the Parties given that we've  
8 already made all of our submissions, we've had a hearing.

9 And at this very late stage, Spain seeks to  
10 intervene in a not dissimilar situation in the Eiser v.  
11 Spain case in an award which was ultimately annulled. But  
12 the European Union sought to intervene just before the  
13 hearing, and the Tribunal there decided that it was much  
14 too late. I think despite the fact that that award was  
15 subsequently annulled, we have a similar fact pattern.

16 PRESIDENT DRYMER: And that was on the merits.

17 MR. MOLOO: Yes, that was on the merits, indeed.

18 So--and I don't--I can't even--maybe Spain has  
19 articulated some reason--but why--how or why they would  
20 have any interest in the jurisdictional phase of this  
21 particular arbitration. I have my doubts on the merits as  
22 well, by the way, but we don't need to address that to you  
23 now.

24 So, in short, my submission to you is for the  
25 present purposes in this particular preliminary phase, they

1 should not be allowed to intervene, even not having seen  
2 the submission. Nonetheless, I would like to see it.

3 PRESIDENT DRYMER: I think that's all clear.

4 Let me repeat: Neither has the Tribunal seen the  
5 submission. I mean, we've seen it. It's in our Outlook  
6 inboxes, but none of us has had a chance to read it since  
7 it only came in very shortly before we began the Hearing  
8 today. So we haven't looked at it either.

9 As I said, we will look at it, of course. It's  
10 addressed to us by the Kingdom. And we will decide how to  
11 proceed thereafter.

12 Very well. Thank you.

13 On the question--on the suggestion earlier, for  
14 the sake that we should ask for or allow cost submissions  
15 at an appropriate time.

16 For the sake of good order, Mr. Moloo, any  
17 comment on that suggestion?

18 MR. MOLOO: If the Tribunal feels that it would  
19 be assisted with cost submissions, we would be happy to  
20 provide them. We're in the Tribunal's hands. The Tribunal  
21 has the authority under 10.20.6 to award costs at this  
22 phase of the proceeding.

23 PRESIDENT DRYMER: I don't know what we're going  
24 to do with this. My colleagues and I haven't discussed it.

25 But I needn't tell you that one possibility that

1 is often used by tribunals is to say: Well, let's wait and  
2 see what the actual decision is before requesting cost  
3 submissions in the abstract.

4 Would that be objectionable to either party here?

5 MS. ORDÓÑEZ PUENTES: No objection. We are in  
6 the Tribunal's hands.

7 MR. MOLOO: No objection.

8 PRESIDENT DRYMER: All right. Because you both  
9 affirmatively asked us to award costs, and we can't award  
10 costs in the abstract. When we get around--if we are  
11 minded to award costs to whichever party, whatever our  
12 finding might be, we will need to know what exactly that  
13 the Parties or a Party is asking for.

14 All right. Anything further of a substantive or  
15 procedural nature that the Parties would like to raise?

16 Mr. Moloo, what does the boss say?

17 MR. MOLOO: Nothing further.

18 PRESIDENT DRYMER: Very well. Any further issues  
19 you think we need to raise--address at this hearing.

20 Señora?

21 MS. ORDÓÑEZ PUENTES: Nothing further.

22 PRESIDENT DRYMER: Colleagues, any questions?  
23 Anything?

24 All right. Well, then it falls to me, as it does  
25 traditionally, on behalf of the Tribunal to thank the

1 Parties--and I say the Parties first and then their  
2 counsel--for the time, attention, extremely good work, and  
3 long hours that you've put in getting to this Hearing and,  
4 in fact, taking us through this Hearing. The Tribunal has  
5 greatly benefited from your submissions and from our  
6 ability to put questions to you.

7 And you--I think you've made our lives a bit  
8 easier, though in certain respects you've made it more  
9 difficult because your advocacy has been so excellent on  
10 opposite sides.

11 Thank you as well, of course, on the record, to  
12 the court reporters and to the interpreters for your  
13 excellent and very professional work.

14 To the Tribunal assistant, Ms. Prokic, to the  
15 distinguished José Aragón Cardiel from the PCA, our thanks  
16 as well.

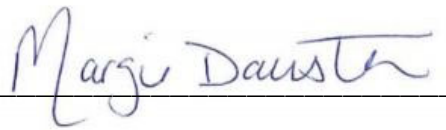
17 And we are adjourned.

18 (Whereupon, at 2:22 p.m., the Hearing was  
19 concluded.)

POST-HEARING REVISIONS  
CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in blue ink that reads "Margie Dauster". The signature is written in a cursive style and is positioned above a horizontal line.

MARGIE R. DAUSTER