BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration between:	
BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE AMERICAS, INC.,	
Claimants,	
and	Case No. ARB/16/11
REPUBLIC OF PANAMA,	
Respondent.	
	Volume 1

HEARING ON EXPEDITED OBJECTIONS

Sunday, September 3, 2017

The World Bank Group
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter commenced at 1:03 p.m. before:

LORD NICHOLAS PHILLIPS, President of the Tribunal

MR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

MR. J. CHRISTOPHER THOMAS, QC, Co-Arbitrator

ALSO PRESENT:

MS. LUISA FERNANDA TORRES
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporters/Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

APPEARANCES:

On behalf of the Claimants:

MR. JUSTIN WILLIAMS
Akin Gump Strauss Hauer & Feld, LLP
Ten Bishops Square
London, E1 6EG
United Kingdom

MR. STEPHEN KHO
MS. KATIE HYMAN
MR. JOHANN STRAUSS
MS. KATHERINE AFZAL
MR. KEVIN McCLINTOCK-BATISTA
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036
United States of America

Party Representative:

MR. TOM KINGSBURY
Assistant Secretary, Bridgestone Licensing Services, Inc; and Chief Counsel, Intellectual Property, Bridgestone Americas, Inc.

APPEARANCES: (Continued)

On behalf of the Respondent:

MS. GENIVA ESCOBAR
Ministerio de Economía y Finanzas Gerencia de Metas
MR. NORMAN HARRIS
Ministerio de Comercio e Industrias
Directora General de Defensa Comercial
Oficina de Negociaciones Comerciales Internacionales

MS. KARLA GONZÁLEZ
Deputy Chief of Mission
MR. FRANCISCO OLIVARDIA
Embassy of Panama in the United States

MR. WHITNEY DEBEVOISE
MS. GAELA GEHRING FLORES
MS. MALLORY SILBERMAN
MS. AMY ENDICOTT
MS. KATELYN HORNE
MR. KELBY BALLENA
MS. BAILEY ROE
MS. SARA UREÑA
Arnold & Porter Kaye Scholer, LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
United States of America

ALSO PRESENT:

On behalf of the United States:

MS. NICOLE C. THORNTON
MR. MATTHEW OLMSTED
MR. JOHN BLANCK
Attorney-Advisers,
Office of International Claims and
Investment Disputes
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800

MS. AMANDA BLUNT
Office of the U.S. Trade Representative

C O N T E N T S

P R O C E E D I N G S

PRESIDENT PHILLIPS: Good afternoon, ladies and gentlemen.

COURT REPORTER: Microphone is not on.

PRESIDENT PHILLIPS: And that's the first thing perhaps to say. We all have an on-off button. When you're on, you're being broadcast, so you want to be careful, if you have anything you want to say to your neighbor if you don't wish to be promulgated to the world, to switch off first.

Thank you all for coming on a Sunday afternoon when I'm sure there would be more pleasurable ways of spending the afternoon, particularly when the weather has turned nice. Your presence is very much appreciated.

You can see who we are from our nametags, but we can't see who you are, so perhaps you would like each to introduce yourselves, starting with the Claimants.

MR. WILLIAMS: Sir, my name is Justin Williams on behalf of the Claimants.

Perhaps I'll run down the line rather than

introducing themselves in turn.

So, to my right is Katie Hyman, Johann Strauss, Steve Kho, Katherine Afzal, and Kevin McClintock-Batista.

MR. DEBEVOISE: Good afternoon, Mr. President. And we, in turn, would like to thank the Tribunal for taking so much out of this erstwhile long holiday weekend to hold this session. It's equally sunny and nice for you, and you're missing it as well.

My name is Whitney Debevoise from Arnold & Porter Kaye Scholer. We represent the Respondent, Republic of Panama, in this arbitration. And here with me today, going down the table, we have my colleague Mallory Silberman, my partner Gaela Gehring Flores, my colleague Katelyn Horne, Kelby Ballena, Bailey Roe, and Sara Ureña.

PRESIDENT PHILLIPS: Thank you.

MR. DEBEVOISE: And we do not have any representatives of the Republic here today. I think we may have some tomorrow. I think with the last-minute change in schedule, again, for which we

are grateful but for Government personnel was not easy to rearrange flights and the like, so we do expect to have some representatives from the client here tomorrow.

PRESIDENT PHILLIPS: Good.

Now, there are one or two small items of housekeeping.

I beg your pardon.

MS. THORNTON: Ah, yes, hello, thank you very much. Just Nicole Thornton and John Blanck from the United States Department of State.

Thank you.

PRESIDENT PHILLIPS: One or two items of housekeeping. First of all, the schedule for tomorrow. When we're having our telephone conversation, I had indicated that there would be four hours devoted to witnesses, but that was before we extended the Hearing to straddle three days. And unless there's any reason to the contrary, we would propose to stick by the schedule of having a total of--is it 5 hours and 15 minutes that we proposed? Is there any strong objection to that?

That's not an invitation to take all the time set aside.

(No response.)

PRESIDENT PHILLIPS: Then there's a very important question of whether the aids to presentation should be produced immediately before they're used or half an hour before, and it seems to the Tribunal there wasn't much between them, but we would prefer to give half an hour's grace to produce these.

MS. SILBERMAN: Mr. President, if I may.

PRESIDENT PHILLIPS: Yes.

MS. SILBERMAN: Just based on the way that the schedule works out, today there is supposed to be a break of ten minutes in between the two presentations.

PRESIDENT PHILLIPS: Yes.

MS. SILBERMAN: And tomorrow there is supposed to be a break of 15 minutes between the two. And, in practical terms, that would mean that the Parties would need to interrupt each other midway through the presentation to hand out the hard copies. And, in effect, each party would be giving the other

the opportunity to see a presentation that they hadn't yet made midway through their own presentation. And I note that today we didn't receive any presentation from the Claimants 30 minutes in advance.

So, perhaps some parity could be established and we could relax the rule just a little bit to make sure that neither Party is actually interrupting the other or getting early access to the presentation.

PRESIDENT PHILLIPS: To put them in the interval between; is that what you were suggesting?

MS. SILBERMAN: Yes, that would make sense to us, sir.

PRESIDENT PHILLIPS: Well, if the Parties are happy with that...

MR. WILLIAMS: That's fine by us.

PRESIDENT PHILLIPS: Great.

MR. WILLIAMS: Mr. President, in terms of presentations for today--

PRESIDENT PHILLIPS: Yes.

MR. WILLIAMS: --you'll be relieved to hear that we, on the Claimants' side, do not have a substantial PowerPoint presentation, but we do have

just a simple table that we thought might assist the Tribunal. So, perhaps now would be a sensible time to hand it up to the Tribunal and to the Respondent.

PRESIDENT PHILLIPS: Yes, thank you very much.

MS. SILBERMAN: And, Mr. President, we did have one more preliminary issue that wasn't one of the disagreed items between the Parties that we'd like to raise whenever the Tribunal is ready for that.

PRESIDENT PHILLIPS: Yes?

MS. SILBERMAN: Which is that, under Section 19.9 of Procedural Order Number 1, it states that witnesses will not be admitted into the hearing room before their testimony; and, because this is being live-streamed, we'd like to just make sure that neither Mr. Kingsbury nor Ms. Williams will be watching the live stream until they're called to testify, if, assuming that the Tribunal allows Ms. Williams to be cross-examined.

PRESIDENT PHILLIPS: Yes. That, I think, follows from our direction.

MS. SILBERMAN: Excellent.

And then, just one final point for the sake of good order is that, should the Tribunal allow us to cross-examine Ms. Williams, we would like to cross-examine her first on Tuesday. We understand that there is a time difference in Panama, and it would, in effect, be requiring her to come and testify at 8:00 a.m., so we wanted to make sure--to make that clear so that arrangements could be made.

MR. WILLIAMS: We are fine for Ms. Williams to be cross-examined first.

PRESIDENT PHILLIPS: There is an unresolved issue as to the capacity in which she's going to give evidence. Shall we deal with that at the end of today?

MS. SILBERMAN: Yes, that will be fine on our end. Thank you.

MR. WILLIAMS: On the--

MR. WILLIAMS: I'm sorry. One further issue.

PRESIDENT PHILLIPS: Yes.

MR. WILLIAMS: Follows from what Ms. Silberman was saying, which is in terms of the Witnesses and the live stream. Of course, it's right

then that witnesses should not view the live stream, but then there's the Transcript; and so, there is a question as to whether the witnesses--it should be open to the witnesses to look at the Transcript of what is said. We, I think, don't feel strongly either way, but it seems to me right that the point is raised.

MS. SILBERMAN: In our view, Mr. President, not being permitted in the hearing room means not being permitted to hear what is happening in the hearing room, whether it be live stream or through reviewing the Transcript thereafter, so the idea would be that they do not have any access to what's happening in the room before they come and testify.

PRESIDENT PHILLIPS: Yes, that must be right.

MR. WILLIAMS: I agree.

PRESIDENT PHILLIPS: Good.

Well, if there's no other preliminary business, now over to you, Mr. Williams.

ARGUMENT ON THE PRELIMINARY ISSUE BY COUNSEL FOR CLAIMANTS

MR. WILLIAMS: Thank you.

So, the purpose of this Hearing, then, is to consider the two questions which the Tribunal have asked the Parties to address, the first concerning what, if any, approach should be taken to assumed facts or should the Tribunal make final and definitive findings at this Hearing; and then, second, in relation to the obligation under 10.20.5 to decide any objection that is not within the Parties--not within the Tribunal's competence, should that apply to all objections or only those which are factually not mixed issues of merits and competence.

So, what I'd like to do is to start just by giving the Tribunal a summary of how we see the lay of the land in relation to those issues, and then we'll go into the detail of why we say what we say.

And I think the starting point, as we see it, is that questions of deemed truth are closely associated with issues of burden of proof, and that those issues are pretty closely related; and those issues, then, of course, need to be looked at in light of the wording of the TPA and the ICSID Convention.

And, in particular, we say, in light of a

number of features of 10.20.5 under the TPA, specifically then that it's an expedited process, of course, so there's not the usual opportunity for factual inquiry and for assembly of evidence, that it is by its nature preliminary, and it is an opportunity to dispose of weak claims right at the outset of the process.

And, importantly, it is a process where, if the Preliminary Objections raised by the Respondent fail, it's got a second bite of the cherry. I'm told that, in the U.S., it's a second bite at the apple, but it's the same point; that there is another opportunity to come back, and the Respondent has indicated that that is what it intends to do. So, if it fails this week, it's going to have another go later, we're told.

And, lastly, then, we'd say that, actually, there are only two awards, at least that we are aware of, relating to objections brought under 10.20.5, the expedited regime, that deal with questions of burden of proof and assumed truth of allegations. We'll come to those, but those are the Pac Rim and the Commerce

Group Awards that I'm sure the Tribunal is familiar with.

And we say Pac Rim is authority that this must not be a mini-trial. I mean, it is what it is, but currently it is a four-day hearing, or it's spread over four days, but nevertheless it must not be a mini-trial under the authority of Pac Rim; and, under that authority, the Respondent does have the burden of proof, we say. And Commerce Group, we say, is authority that deemed truth should apply.

So, applying this to the exercise which the Tribunal has to perform, we say that the correct approach should be this: So, first, to what extent is it necessary to consider at all whether alleged facts should be assumed to be true, and we say that in two respects the question of assumed facts doesn't arise. Number 1, to the extent that Panama's objections are not properly brought under the competence limb of 10.20.5, in which case then the objections fail and we don't need to get into findings of fact; and then, second, where facts are not in dispute, and so, therefore, no assumptions fall to be made.

So, that's, we say, the initial step which should be undertaken in considering these questions.

Having gone through those, then, to the extent that a decision needs to be made as to assumed facts, then we say that, as a matter of interpretation of the TPA, or alternatively as a matter of the Tribunal's discretion, then the Tribunal should rule on these objections on the basis of the facts pleaded by the Claimants and on the assumption that those facts are assumed to be true, applying the approach at 10.20.4(c).

And, in relation to facts that aren't pleaded but are raised in submission, again the Tribunal likewise has a discretion as to the approach to take and whether or not to assume that those allegations are true, and we say that they should exercise that discretion, we respectfully submit, to ensure that the Hearing does not turn into a mini-trial and, therefore, that those allegations are, for these purposes, assumed to be true.

However, of course, a sensible and pragmatic approach needs to be taken to all of these matters,

and if the Tribunal would find it useful to consider the evidence, or to the extent that the Tribunal does not think it appropriate to deem facts to be true, then, of course, the Tribunal should consider the evidence, and a practical approach should be taken.

But the Tribunal, we say, should make final findings of fact only to the extent it feels able safely to do so on the basis of, Number 1, undisputed allegations of fact; Number 2, the Claimants' allegations of fact that the Tribunal is willing to assume to be true; and, Number 3, to the extent that the Tribunal wishes to look at the evidence, the evidence.

So, the final findings of fact must be made on the basis of those three elements.

And, to the extent that the Tribunal is not able to make a final finding of fact in relation--on that basis, or considers that a full procedure in a hearing is needed--i.e., not on a preliminary expedited procedure--then the Respondent's 10.20.5 application is not made out, and it follows that the Tribunal should not grant the Respondent's

application. And, as I said, in those circumstances, it is open to the Respondent to bring its objection again under the non-expedited process in ICSID Arbitration Rule 41.

PRESIDENT PHILLIPS: I have a little difficulty with the submission you just made. One can base final findings of fact on assumed facts. It seems to me either one proceeds on the basis for purposes of argument, we will assume the following facts and make a provisional decision of the implication of those facts, that they can be reopened, or we make final Findings of Fact which can't be reopened.

MR. WILLIAMS: Everything, of course, depends on the nature of the facts that we are discussing, and it might be that the Tribunal concluded that a particular alleged fact was irrelevant.

I mean, ultimately, what we're saying is that a practical, commonsense approach should be taken to this regime, and ultimately it falls to the Tribunal to decide is it safe to make final findings of fact or not, on the basis of the material before it. To the

extent that it is not, or that the material before the Tribunal does not support such a finding, then the Respondent's application must fail.

ARBITRATOR THOMAS: I understand the second point that you made, but I don't understand the first point, which is--

COURT REPORTER: Could you speak up a bit.

ARBITRATOR THOMAS: Yes.

I understand if the material before the Tribunal doesn't support the point for which it has been adduced, that's straightforward, but what do you mean by "it can't safely make a finding of fact"?

MR. WILLIAMS: Well, it's for the Tribunal to look at the material before it and to decide, in light of the nature of the issue, whether a finding of fact can safely be made.

ARBITRATOR THOMAS: You mean that more evidence could have been submitted?

MR. WILLIAMS: Perhaps.

ARBITRATOR THOMAS: Or and better evidence could be submitted?

MR. WILLIAMS: Perhaps.

Bearing in mind that this is an expedited process in which the Parties, and in this case of course we're really talking about the Claimants--the Claimants may not have had the usual opportunity to present the evidence in the case that it would have under a normal non-expedited process.

ARBITRATOR THOMAS: Thank you.

PRESIDENT PHILLIPS: Well, under the expedited process, the opportunity is the same, but it has to be done faster, so this less leisured approach or a more urgent approach to what might be said to be the same exercise. And your suggestion that we might say, well, we haven't really had a satisfactory hearing on the evidence and so this will have to go over, how do we reconcile that with what seems to be the mandatory requirement under 5 that we shall reach a decision within the mandated period, decision or award?

MR. WILLIAMS: The requirement is that the objection be decided and the Decision, therefore, can be that the objection succeeds or the Decision can be that the objection does not succeed because the

Tribunal is not satisfied that the burden of proof has been discharged; and we say that the Respondent and the--and the authorities are pretty clear on this--the Respondent has the burden of proof in making out its objections for this expedited preliminary stage.

So, if the Tribunal is not satisfied that that burden of proof has been discharged, then the Decision which the Tribunal should make, we say, is that the objection fails.

The second question that the Parties are asked to address today I think, to some extent, we've covered in the discussion that we've just been having. Where an objection is an objection as to competence is intertwined with the merits--for example, as to questions of causation--then we say, as just indicated, that it should still be decided; but, in order for the objection to succeed, the Tribunal would need finally to decide in the Respondent's favor both the objection and the issue on the merits, and any such decision would have to be made on the basis of undisputed allegations of fact and, to the extent the Tribunal considers it appropriate, the evidence. And

where the objection and the merits' issues cannot safely be finally decided on that basis, then the objection fails.

So, on the basis that the Respondent fails to discharge its burden of proof, then its application is not made out; and, therefore, the objection, the preliminary expedited objection, fails.

PRESIDENT PHILLIPS: Is the issue of whether there is a qualifying investment one that goes to the merits as well as to jurisdiction?

MR. WILLIAMS: We say "no," Mr. President, and I will come to it, but the document which I think was handed up to the Tribunal and to the Respondent tries because there are a number of different elements, and we thought it might be helpful simply to set out in the tabular form by objection what we say the position is in relation to these matters, and we'll come back to that, and we'll go through it in more detail. So--

PRESIDENT PHILLIPS: Well, could you help me, by defining what is an issue that goes to the merits? Because both 4 and 5, I think, require the Tribunal to

suspend any proceedings on the merits while the preliminary issue is dealt with, and it doesn't say what proceedings on the merits are.

MR. WILLIAMS: Mr. President, I agree. I agree. And what we're trying to do in the last column of the chart is to identify where the objection mixes competence and the merits; i.e., where, in order for the objection to be made out, in order for the Respondent to succeed, it requires a decision both on competence and the merits, we say.

And there is the problem which you identify, which is that, under this regime, proceedings on the merits are expected to be--to not continue. So, it's hard to see how findings on the merits, because, to the extent that it will be necessary to make findings on the merits in order for a decision on competence to be made, it's hard to see how such a decision could be made consistent with the TPA in that respect.

So, what I would like to do now is to run through whether objections are properly objections as to competence and whether there are facts in dispute, and it's probably helpful to run through it objection

by objection. But, as a start, it's worth just recalling the history of how this has developed.

So, at the outset, in its initial objections, the initial objection document, the Respondent did not at the start provide any explanation as to the basis upon which each of the objections was brought. They were all entitled "Jurisdictional Bars," but there was no discussion at all as to how each of those objections were said to fit within the regime of 10.20.5 or what the relevant evidentiary or pre-standards are said to be.

And as the Respondent said in its objections and in its Reply, substance must prevail over form; and, therefore, merely because the Respondent referred to Jurisdictional Bars does not mean that that's what they are. Indeed, it appears that some of the objections, perhaps, could have been brought--perhaps--under 10.20.4 limb of 10.20.5, but we're now told that they haven't been and that all of the objections we're told are brought under the competence limb.

So, I'd like to run through each of the

objections in turn, and it's probably helpful to have the little table that we've passed up to one side as we do so.

So, Objection 1 is as to whether there is a qualifying investment here, and this does, we think, pretty clearly go to a question of competence. But, as we see it, there are no factual disputes here, so actually the preliminary issues around deemed truth does not arise.

So, the Claimants made various pleaded factual allegations about BSAM's investment in their pleadings, in the request, and the letter to ICSID of 25 October 2016, alleging that BSAM has "intellectual property" rights, "revenue sharing" rights, license rights in Panama and that these involve various aspects, an assumption of risk, substantial capital expenditure and an expectation of profit or gain, and there was reference there to the investments having been in place for over 16 years. And in response to the Respondent's objections, the Claimants submitted further evidence of BSAM's investment. As far as the Claimants understand it, the evidence that they have

submitted is not disputed by the Respondent, with the exception of Ms. Williams's evidence, and we will come back to that.

The Claimants' evidence on BSAM's investments comprises a number of aspects, so we've got Trademark License Agreements--just for the Transcript, those are at C-48 and C-52--which are the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement, and the Claimants say that these "intellectual property" rights are BSAM's investment in Panama. The Respondent disputes that these are "intellectual property" rights, and it disputes that these are investments in Panama, and it disputes that these are investments. So, the Respondent disputes the meaning and relevance of this evidence, but, as we understand it, they do not appear to dispute the evidence itself.

In addition, witness evidence by way of statement was put in from Mr. Calderon and Mr. Hidalgo, and the Respondent has indicated that this evidence, in its view, is inapposite--irrelevant, I suppose--but it does not appear to dispute what is

said factually in those statements.

And, lastly, there's documentary evidence which has been submitted, including BSAM's corporate documents, distribution agreements, marketing materials, records of sales of tires, records of trips made to Panama. And, again, the Respondent does not appear to dispute any of this factually. I think the position is that the Respondent simply says it's irrelevant.

So, on that footing, we say it looks as if there are no factual disputes as to BSAM's investments. There are legal disputes as to whether the definition of "investment" in the TPA and whether the evidence put forward by the Claimants falls within that definition, but the Tribunal need not spend time on the issue of whether the pleaded facts should be deemed to be true or how to deal with facts that have not been pleaded because it can simply accept, we say, the Claimants' allegations and the evidence and decide the issue as a matter of law. Of course, it is free to consult the evidence, as I said, if it would find that helpful.

PRESIDENT PHILLIPS: Well, if we proceed on that basis, the first question: Is there any problem in doing that, any practical problem?

And, secondly, if we do it, why don't we do it finally?

Most of these--it seems to me on this most common jurisdictional challenge whether or not there is a qualifying investment, I think there is only one case where that's been dealt with on an expedited basis. But I've been thinking about it, and it seems to me that that is an issue that goes both to jurisdiction and to merits, and I was trying to formulate what goes to merits. It seemed to me anything that you would have to prove in order to succeed, if you just forget about jurisdiction altogether, it seems to me one of the most fundamental things in any claim you have to prove is, first of all, is that you haven't had--that you have material time and investment.

On your submission, it seems to us, it would be sensible for us to determine that issue now, just as it has been determined so often in the past, in an

unexpedited determination.

MR. WILLIAMS: I mean, there is a problem, as, Mr. President, you identified right at the outset in terms of the wording of the TPA and the requirements that proceedings on the merits are not to proceed at the present stage, and that does seem to be a problem in terms of the TPA itself and the regime under the TPA. And, in relation to Objection 1, we accept that this is, in principle, brought under the competence limb, but there are, so it appears, no facts in dispute. It's effectively a question of law, and that there are no--well, that in principle, then, as a competence question, it is capable of being decided.

But you're right, to the extent that actually it necessarily involves issues as to the merits, it would appear that the TPA precludes that, which does then present the Respondent with a problem.

PRESIDENT PHILLIPS: Apart from that technical issue, no reason why we shouldn't go ahead and decide this issue?

MR. WILLIAMS: Apart from that technical

problem, yes.

PRESIDENT PHILLIPS: Thank you.

MR. WILLIAMS: I mean, it may be sensible--Mr. President, you suggested that we deal at the end with Ms. Williams's evidence, but since we're there and we're talking about Objection 1 and Ms. Williams's evidence goes to Objection 1, I'm going to briefly touch on that, if that would assist the Tribunal, briefly.

So, Ms. Williams addresses the issue of Panamanian law, which is raised by the Respondent for the first time in its Reply at Paragraph 37, and the point which the Respondent made was that a limited and non-exclusive right to use a Panamanian trademark conferred by means of a contract between two U.S. incorporated entities that was created under and is governed by and is performed under U.S. law is not an asset in Panama. And Ms. Williams gives a three-page statement that solely addresses that question under Panamanian law, whether a right to use a Panamanian trademark is an asset.

We say that's clearly opinion evidence. It's

not fact evidence. It's an opinion as to Panamanian law. But the dispute between the Parties in relation to that evidence appears to be that Ms. Williams is not independent because she acted for the Claimants in the Panama Supreme Court litigation, which underlies the present action.

And, in relation to that, we would make four points:

First, that we accept that, of course, she worked previously on the Panamanian litigation, and we've been entirely open about that, and we made that absolutely clear at the outset of raising her evidence. And there's an entirely reasonable and unavoidable explanation for why Ms. Williams, then, has given evidence, opinion evidence, as to Panamanian law, notwithstanding that she acted in the litigation, and the reason is that we had only seven days in order to put together responsive opinion evidence on this matter.

So, in its objection, the Respondent stated that, if such rights existed, the Claimants must demonstrate that such rights exist under Panamanian

law. So the Claimant, in response, cited the applicable provision of Panamanian law, which demonstrated that these rights were recognized under Panamanian law. But, in its Reply, the Respondent did not engage with that, but it just continued with an assertion that, if the rights are an asset, then they're not an asset in Panama.

So, in order to deal with the issue, then, the Claimants consider that it was going to assist the Tribunal to have a Panamanian lawyer who could present opinion evidence as to that question.

And so, therefore, Ms. Williams, who had been previously acting in the litigation, as I said, then was asked to produce a report. The Claimants just simply didn't have time in those seven days to find a new Panamanian lawyer, to instruct that lawyer, and for the lawyer to produce a new report. It just couldn't be done.

And so, we say the issue, really, is that what weight should the Tribunal put on her evidence in light of the fact that she previously acted in the Panamanian litigation?

The Panamanian litigation, and what she previously did there, had nothing to do with the relevant issue now as to is this an asset under Panamanian law. And the Respondent refers to the IBA Guidelines, and the IBA Guidelines require a statement as to the independence of the expert, and Ms. Williams's statement contained a statement explaining her connection with BSLS and BSJ at Paragraph 4. So, the relevant issue is one of weight. What weight should the Tribunal should put on her evidence, we say, but she's not a witness of fact. She's giving opinion evidence.

Turning to Objection 2, which is the dispute that--the suggestion that BSAM's dispute does not arise directly out of an investment, as this was originally put, this was that claims--that the claims related to the Supreme Court Judgment which did not involve BSAM and for damages that were not paid by BSAM, and so BSAM's dispute did not arise from an investment, and this was initially put as an objection under Article 25.1 of the ICSID Convention, that disputes must arise out of the investment, which is a

dispute, an objection as to competence. But it looks as if that is now--that issue has now narrowed. It looks as if that issue is now a factual one.

In their Response, the Claimants explained that BSAM's loss arose out of the Decision because the Decision directly affected its investment; i.e., its "intellectual property" rights that had been licensed to it by BSLS and BSJ, even though BSAM was not party to the litigation and did not pay the damages award.

So, the Claimants explained, therefore, how the dispute did arise directly out of the investment. And the Respondent, in its Reply, says that the Claimants' argument does not work because the Claimants need to show--and this is the words that they used--the Claimants need to show "immediate cause and effect between the actions of Panama and the effects of such actions on the protected investments."

So, we say this is a dispute of fact--i.e., causation--and, in substance, as it is now, as the position has now emerged, is not one of competence.

It is, therefore, intertwined with the disputes of fact. It is intertwined with disputes on

the merits. The only way for the Tribunal to establish whether there has been an immediate cause and effect between the Supreme Court Decision and the loss suffered by BSAM--

PRESIDENT PHILLIPS: You're posing that question as though it's one of fact that we have to answer; but, in relation to this area, I have the impression the Respondent is prepared to assume that damage occurred but simply challenge the nexus--that's as I read their pleadings--not that we are going to have to reach a decision as to whether, in fact, the alleged damage occurred or not.

MR. WILLIAMS: Mr. President, if that is right, then the question which the Respondent is asking the Tribunal to decide would not, therefore, involve a question of fact. It would be limited to a question of law. And, if it is limited to a question of law, we are--we've indicated that we accept that it, in principle, can be brought under 10.20.5; and, therefore, in those circumstances, that limited issue is something which could be capable of being decided by this Tribunal, but no question of assumed facts

arises.

Well, I suppose you're right. I suppose on their footing, as you put it, Mr. President, that they're asking the Tribunal positively to assume facts; and therefore, it may be that the Parties, to that extent, are agreed that assumed facts in relation to Objection 2 can be made.

PRESIDENT PHILLIPS: Yes, it is the dispute that has to arise out of the investment; and, if a claimant says, "because of what happened to my investment I have suffered damage," and the Respondent says, "we don't accept that you've suffered any damage at all," there is a dispute as to whether or not damage has flown from the investment, which doesn't have to be resolved when you ask the question: Does the dispute arise out of the investment?

MR. WILLIAMS: Yes.

Objection 3 does not concern us today, I think, because we have agreed at a preceding stage then that is something which the Tribunal can deal with on the basis of the evidence which is before it.

Objection 4, this is the one--this is the

abuse-of-process objection; i.e., the argument that BSLS, by paying that which the Panamanian Supreme Court ordered it to pay, engaged in an abuse of process in terms of accessing the TPA.

Abuse of process, we say, is not properly a competence issue, and the objection is, therefore, not properly brought under the competence limb of 10.20.5; and, in that respect, we refer to two authorities, which I think are not presently in the Hearing Bundle. The first is Rompetrol and Romania.

Do you have it?

(Pause.)

MR. WILLIAMS: I'm told it's to go on the screen. And there will be hard copies coming around.

This Award considered the claim or an objection that there was an abuse of process, and that objection was raised at a preliminary-issue stage. And it's at Paragraph 115 that we say that there is a finding by the Tribunal in that case that may be of assistance.

And at Paragraph 115, it was that the Award stated: "That it remains, therefore, to consider the

Respondent's final fallback argument that the Claimants' application for arbitration constitutes an abuse of process and should not, therefore, be entertained by the Tribunal. Marshaled as it is as an objection at this preliminary stage, this is evidently a proposition of a very far-reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at least prima facie) that the Parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute."

And then a little later on in that paragraph, it said: "It may or may not be appropriate for an ICSID tribunal to inquire into the question whether either a claimant or a respondent Party is actuated by a proper motive in advancing or defending its interests in prosecuting or defending an arbitration. That question remains at large, and the tribunal expresses no view on it now. But, if it were appropriate to do so, the decision would obviously be very closely dependent on the special circumstances of

the particular case."

And then in another decision, Paushok and Mongolia, which again considered arguments of abuse of process which the respondent had raised and whether those rendered the claimants' claims inadmissible and deprived the tribunal of jurisdiction, the tribunal held, at Paragraphs 224 to 225: "This is a matter which may have some influence on the conclusions of the Tribunal as to the conduct of a party in a particular case, but this goes to the merits of the case, not to jurisdiction or admissibility." So, we say that this is not properly a question which goes to competence; this is an issue which goes to the merits.

It's unclear to us, if there is a relevant factual issue in dispute here that the parties are agreed on who was liable for the damages awarded by the Supreme Court, and the Respondent has raised suggestions that the payment was not really made by BSLS, but in response to that argument the Claimants have submitted documentary proof that it was, indeed, BSLS that made the payment, and so we assume that that point is no longer in dispute.

So, it isn't clear whether there is a factual dispute or whether there is a dispute perhaps as to motive, and that's hinted at at Paragraph 85 of the Reply, but it's not clear whether there is a factual dispute or whether there are assertions made by the Respondent as to motive. If such assertions are made--and it's certainly not clear that they are, not clear from what has been submitted to date--then that probably is a factual dispute, but otherwise not; in which case, then the only question are legal ones, whether it can be said that the payment of the damages award somehow constitutes an abuse of process by BSLS. But, again, we say the objection is not properly under the competence limb; and, therefore, those questions are not for this Hearing.

PRESIDENT PHILLIPS: It's a fairly narrow point, isn't it, whether because there is an abuse of process, the Tribunal should say "we're not going to deal with this because this abuse takes it out of our jurisdiction," or whether the Tribunal says "we have jurisdiction, we're going to exercise it by refusing to entertain the claim because there has been an abuse

of process." That, it seems to me, are the two alternatives.

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: And the next question arises: If we were in a position to deal with this point now, would it be sensible to do it, whichever is the right approach?

MR. WILLIAMS: So, under the TPA regime, of course, then, it's open to the Tribunal to determine questions--objections as to competence and objections as a matter of law--that's what the regime is that has been invoked--currently, it's being invoked on the basis of competence--it may have been wrongly invoked. But I suppose the question then is, well, we're here. Should the Respondent be allowed to advance this on the basis of it being a question of law as to whether an award can properly be made, and whether its objection then can be disposed of on that basis.

Now, whether BSLS engaged in an abuse of process, whether there was--whether it's motivation, if that is the issue, in paying that which the Panamanian Court had ordered it to pay, whether that

is something that could amount to an abuse of process; and whether, on that footing the Claimants' claim, BSLS's claim, should be stopped at that stage, is that properly a question of law, which prevents an award being made? It seems to me that that is quite questionable. It seems to me, actually, really what this is is a question as to fact, if motive is being impugned here, and that's pretty unclear, but if it was, it's a question of fact which then falls for the Tribunal to consider as it looks at the merits.

For the reasons I've indicated, I don't believe it is really properly a question either of competence. It's not obvious to me it's a question of law, either.

PRESIDENT PHILLIPS: Well, abuse of process is a question of looking at facts and deciding whether they cross a particular line and where the line is, may or may not be categorized as a question of law. But looking at this particular issue quite simply, if you have two Parties who are corporately linked against whom a judgment has been given and under which they are jointly and severally liable, and one is

covered by a guarantee and the other isn't, the obvious thing would seem to be that the company that's covered by the guarantee pays. So, there might be a simple issue as to whether, if that is a true analysis, that is an abuse of process. But it might be that this issue is rather more complex than that.

MR. WILLIAMS: And we would say that if we're getting into motive, if that is what is required, then what would be--we need to understand what exactly is alleged because that's not been articulated, we need to understand what precisely is said to be this abuse of process, what is it in terms of factual allegations that BSLS has done, which it is said it should not have done. And at the moment, that has not been articulated; and, therefore, BSLS has not been put into a position to be able to deal with those allegations. So, in my submission, it is very hard to see how this objection properly can succeed at this preliminary expedited stage.

And, lastly, Objection 5--and this is the objection as to loss which has been suffered outside Panama, and the issue is as to whether that is

properly something that can be brought under the Treaty.

Now, the Respondent has tried to characterize this as an issue of consent, that Panama did not consent to the arbitration of disputes related to measures taken by third States, but, in fact, it is a dispute on the merits as to causation; i.e., did or did not the Claimants suffer loss as a result of the steps taken by Panama that we say breached the TPA. So, we say properly, this is a question of causation. It is a factual question. It is not the question of competence.

ARBITRATOR GRIGERA NAÓN: To which extent Objection 5 and Objection 2 can be differentiated one from the other? Are there any connections, or are they self-standing?

MR. WILLIAMS: Objection 2 is that, as we understand it, was originally that BSAM was not part of the litigation and so cannot have suffered a loss, but now it appears to have narrowed down to what is characterized by the Respondent as "cause and effect"; so, therefore, in practice, has BSAM, as a result of

the Measures taken by Panama, suffered harm, has it a claim.

And, likewise, Objection 5 is also one which appears, then, to be a dispute as to causation, which is, in practice, have the Claimants suffered this particular aspect of loss which is impugned here, this does not go to the damages award awarded by the Panamanian Court. It relates to the loss above and beyond those damages. In truth, have the Claimants suffered loss or damage as a result of those steps by Panama?

So, you are right, that there is a linkage here that both involve questions of causation, which, of course, must be questions of fact and must, therefore, go to the merits.

PRESIDENT PHILLIPS: Is there not also a legal issue in relation to this particular head of claim as to whether the protection that is given under ICSID relates only to the investment or whether you--a claimant can recover compensation for consequences that take place outside the Respondent's country? And you have alleged that there is no bar in law to

bringing a claim in relation to consequences that take place outside the Respondent's country.

MR. WILLIAMS: Mr. President, that's right. And, in a sense, we're grappling with the fact that these objections are not very well-focused on what really properly can fall within the regime of 10.20.5.

And as you rightly say, that there are aspects of this that might be said to be questions of law. It may well be actually that those are questions of law that properly fall under 10.20.4 rather than 10.20.5 competence limb.

But put that to one aside, there are aspects of the objection here that might be said to fall into that. But the way that this has been put and the objections that the Claimants are having to deal with here are very intertwined with the facts; and the position that is put against us is, therefore, quite difficult to disentangle and quite difficult to see how they can properly be resolved at the Hearing this week.

And, as you rightly said, Mr. President, at the outset, there is the problem around the regime

under the TPA and the fact that the TPA requires that proceedings on the merits shall not proceed during the course of these objections.

ARBITRATOR THOMAS: May I just follow up on these questions.

Am I right that the loss above and beyond the 5.4 million is anticipated in the sense that it's a loss that might or might not occur, depending upon actions taken by other States. Is that correct?

MR. WILLIAMS: Perhaps it would help to look at the Request for Arbitration. The Request for Arbitration, Paragraph 54 to 58.

And, there, the Claimants plead that they've suffered loss, of course, because of the damages, the 5.4 million; but, in addition, that loss has been and will be incurred as a result of the Decision and that such resulting loss arises from a number of factors, and four--which is said to include the four which are described at Paragraphs 55 to 58.

ARBITRATOR THOMAS: Those are the points that I was thinking about, and I noted that, in each of these paragraphs, they're expressed in the

conditional, that the Decision, for example, may be followed by other Latin American States. In one paragraph, it says "likely to be followed." Imposing damages for good-faith use of trademark opposition is likely to result in the--Paragraph 59, "other decisions may be issued." So, I had anticipated--I understood this to be loss that the Claimant alleges might happen.

And let me be specific about the question: The submission of a claim to arbitration under Article 1016 requires the claimant to specify not only the obligations it alleges has been breached, but also that it has incurred, speaking in the past tense, loss or damage, by reason of or rising out of that breach.

So, the question I have for you is: Is it not a legal question for the Tribunal at this stage if the damage, leaving aside any objection about the fact that the measure might be taken by another State and Panama ought not to be liable for that, but leave that to one side, the way that it's been expressed in the Request for Arbitration, appears to me, to be anticipating something which has not yet occurred,

which then raises the question of whether or not we can hear it since it might not be temporally within the jurisdiction of the Tribunal because it's not loss or damage which has been incurred.

MR. WILLIAMS: So, I think there are two aspects to your question. So, the first was as to whether all of this loss was suffered by reason of actions of third-party States, which is I think the point in fairness that the Respondent has taken. The answer to that is "no," and so the first example given at Paragraph 55: "That the damages awarded in this case represented over 65 percent of Bridgestone's annual sales in Panama. This has a direct and substantial impact on the ability of the U.S. Bridgestone entities to reinvest in their business and grow their brands as they had intended to do before the Supreme Court Decision."

That has, of course, nothing to do, we say, nothing to do with issues raised by--nothing to do with third-party States.

Paragraphs 56 and 57 do refer to matters outside Panama.

And at Paragraph 58, that is something which is said to apply both in Panama and outside Panama, so that is mixed at Paragraph 58.

And your second question, which is, as it happened, so in relation to Paragraph 55, as we've been looking at, we say absolutely yes, that this has happened, and that the Claimants have immediately suffered the loss and are continuing to suffer the loss.

In terms of the other matters, these are ongoing issues, so these are matters of prejudice and damage, which the Claimants have suffered and are continuing to suffer, and that is both outside Panama and within Panama in the way that I have explained.

Now, evidentially, how is that to be made out? That is something which the Claimants at this stage have not been in a position or had time to present their evidence to their case as they would in the usual course.

ARBITRATOR GRIGERA NAÓN: But do I understand correctly that, for instance, Paragraph 56, does not just refer to other State's actions but also to

actions of private operators, not limited, apparently, to State action?

MR. WILLIAMS: I'm sorry, sir, I was looking at the wrong paragraph.

Yes. Yes.

ARBITRATOR GRIGERA NAÓN: All right.

MR. WILLIAMS: I was going to--unless the Tribunal has further questions on this aspect, I was going to turn to the particular nature and context then of the 10.20.4 and 10.20.5 regimes, and the Tribunal will be familiar with that, and it's probably not going to be helpful to run through the wording of it, but I did want briefly to take the Tribunal to the Pac Rim award which is I think a useful award because it's an award which concerns CAFTA which is on identical terms to the TPA that is in issue in these proceedings.

It's before a very distinguished tribunal, and it considers objections brought under 10.20.5 and then how the tribunal is to go about dealing with those. And that is at the Claimants' Authorities Bundle at Tab 19. And there are a number of aspects

of this that I think are of assistance to the Tribunal.

So, perhaps starting at Paragraph 90, and we can then quickly flick through the consideration by the tribunal of the Article 10.20.4 and 10.20.5 regime. But at Paragraph 90, then, the tribunal makes clear that it is only the notice or amended notice of arbitration which benefits from the presumption of truthfulness. And at Paragraph 91, it is also only factual allegations that are assumed to be true. I think that is not controversial.

And over the page, Page 51 at Paragraph 105, the tribunal then indicates that it proposed to approach the procedure under 10.20.4 tempered by a lack of formalism with an emphasis on substance and practical common sense. I think that there can be no objection to that.

And then over the page, Paragraph 107, the point is made that it is significant that several deadlines under the expedited procedure, the Paragraph 5 procedure, are stringent both for the parties and for the parties' legal representatives and

also for the tribunal, it is not intended to be a mini-trial, even without evidence.

And then at Paragraph 110, in other words, returning to the negative language of Article 10.20.4 to grant a preliminary objection, "A Tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the Claimants' claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide to not to exercise such a power against a Claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of Preliminary Objection."

And then, at Paragraph 111, at all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.

Given the tight procedural timetable and

deadlines under CAFTA, Article 10.20.5, as already indicated above, it is clear that an expedited preliminary decision is not intended to lead to a mini-trial.

And halfway down that paragraph, the procedure under CAFTA at 10.20.4, is clearly intended to avoid the time and cost of a trial and not to replicate it: "To that end, there can be no evidence from the Respondent contradicting the assumed facts alleged in the Notice of Arbitration, and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact."

Then, at the bottom of that page, Paragraph 114, the point is repeated, that the burden of proof is on the respondent.

So, in terms of burden of proof, we say that, for five reasons, the Respondent has the burden of proof in relation to its objections at the present hearing:

First, it is a preliminary expedited process,

the usual process for evidence collection has not been gone through, and the Respondent is given the opportunity to knock out claims right at the start if they are obviously bad claims. If the Respondent invokes that mechanism, as the Applicant, it has the burden of satisfying the Tribunal that the claims should be thrown out right at the start.

Second, if the Respondent's Preliminary Objections fail, it has a second chance under ICSID Arbitration Rule 41. Indeed, once Panama initially said that it would not take that second chance, it's now confirmed that, if it fails at the present hearing, it will. So, if the present objections fail, the Respondent has a second chance to raise all of its current objections; but, if the current objections succeed at this stage, then, of course, the Claimants' claims are finally rejected.

PRESIDENT PHILLIPS: Where do we find this change of stance, or is it only in correspondence between the Parties that we haven't seen?

MS. HYMAN: It's in the Reply at Note 56--Footnote 56, I'm sorry.

PRESIDENT PHILLIPS: In the Reply, where?

MS. HYMAN: Footnote 56, which is Page 10 of the Reply.

MR. WILLIAMS: So, Panama--

PRESIDENT PHILLIPS: I don't read that as suggesting that, if we proceed as Panama invites us, that Panama will have a second bite at the cherry, if unsuccessful, or second bite of the apple, if unsuccessful on particular issues.

Panama is saying that if the Claimants are right that we proceed on assumed facts, then we would have to go over it all over again if we don't succeed. If we are right, we have a once and for all hearing of the particular issues, and there is no danger of wasting time and dealing with them twice.

MR. WILLIAMS: The Respondent appears to have reserved its right to seek at a second stage a bifurcated process and to proceed with further jurisdictional objections.

Now, precisely what those will be and what those will be formulated, and if it will happen, we don't know. Our point is just to flag that the

Respondent has indicated that it reserves its right, then, should it not get the outcome for which it contends at this Hearing, that it may proceed with a second jurisdictional challenge at a later stage.

A further point, we say, on burden of proof, is that the Respondent accepts that, with respect to its denial-of-benefits objection; that it has, at least, an initial burden of proof. It says that it must first provide cogent evidence that BSLS has no substantial business activities, and that it must bear the burden of proving its positive objections such as denial of benefits.

So, the Respondent having accepted that it has the burden of proof on denial of benefits, we say it's hard to see why it would be a different case for other aspects of the present objections.

The Respondent does not say which Party bears the burden of proof for its abuse-of-process objection, but there is case law that the Respondent does bear the burden of proof in relation to abuse of process, and that's the Philip Morris and Australia Award which is in the Claimants' Bundle at Tab 22.

As we've looked at, the only authority which is squarely on--

PRESIDENT PHILLIPS: Are the Respondents suggesting that the Claimant has the burden of proof that it hasn't abused the process, or do you accept that you have the burden of proving abuse of process?

MS. SILBERMAN: Well, for that issue, Mr. President, the question comes down to an objective standard. There are many different types of abuse of process, and this is a very specific type which we will discuss later today. And as the Claimants themselves noted in their Reply, this particular type is subject to an objective standard. That simply has to do with the timing of a particular set of events, which we will discuss later.

And so, it's not so much that the Respondent is required to prove anything. The facts essentially speak for themselves once you look at the timing.

MR. WILLIAMS: We've looked previously at the Pac Rim Decision and what the Pac Rim Decision says about burden of proof, and we say that that is pretty conclusive authority for the proposition that the

Respondent does have the burden; and, for all of the reasons we've been looking at, we say that that simply makes sense.

There are a number of other decisions that the Respondents and the United States have referred to which are said to--which they rely on, in contending that the claimant has the burden of proof; but, in so doing, both the Respondent and the United States ignore the Pac Rim Decision. They don't deal with that, and we say that all of the decisions cited by the Respondent and United States are to be distinguished.

I will briefly run through them.

So, first, there is the Tulip Real Estate and Turkey decision in the Respondent's Bundle at Tab 48. And, in that decision, after the claimant had submitted its memorial on jurisdiction and merits and damages--i.e., its full statement of its position and evidence on all matters--then the respondent filed a request for bifurcation asking to have three matters as to jurisdiction heard as preliminary questions, and that request was granted, and the proceedings were

bifurcated. But these were not expedited preliminary objections heard at the outset of the claim before the claimant had even put in its memorial and assembled its evidence, so we say that Tulip is to be distinguished.

And in the same way, the same point applies to the second authority, which is the National Gas and Egypt Award, Respondent's Bundle Tab 49, and there the claimant filed its memorial on the merits, and the respondent filed a counter-memorial on the merits and objections to jurisdiction. The respondent requested bifurcation, which was granted. Therefore, again, these were not expedited preliminary objections.

And the United States refers to Apotex and the United States, and the same points apply. The parties had submitted full statements of claim; and, then following that, the United States filed a memorial on objections to jurisdiction.

Same point on Phoenix and the Czech Republic, a full memorial before any jurisdictional points were taken.

And tellingly, the United States also cites

the Pac Rim decision, but it's not the Pac Rim decision that we were looking at a moment ago. There are two Pac Rim decisions in the bundle. The one that we were looking at a moment ago concerned an objection under CAFTA 10.20.5, but the decision that the United States refers to relates to a subsequent award, a second bite of the cherry, that was taken in that case, which was an objection under ICSID Arbitration Rule 41.

And, in that case--in that case--the tribunal concluded that the claimant had had a full opportunity to present its evidence, that the tribunal was presented with a wealth of evidence, and that, therefore, the tribunal was in a position to decide the matter, and that the tribunal held that a different standard was applicable to that which had applied at the expedited stage. So, the "prima facie" test, if you like, was no longer appropriate.

The issue that remains to be addressed briefly is where there is a dispute of fact--where there is a dispute of fact--should the Claimants' allegations be deemed to be true, and the Claimants

say that assumed truths should apply to the competence limb either as a matter of interpretation or pursuant to the Tribunal's discretion.

In terms of a matter of interpretation, it applies to non-expedited objections as to matters of law under 10.20.4, and we say that it would make no sense for deemed truths to apply to non-expedited objections but not for expedited ones. Assumed truth also applies to expedited objection as to matters of law under 10.20.5, and again it would make no sense for it not to apply to the competence limbs, and there's no reason why assumed truth would apply to one and not to the other.

PRESIDENT PHILLIPS: Well, it all depends, doesn't it, on whether the regime for dealing with an issue of competence is different from the regime under which a respondent is trying to show that the claim is so hopeless it's got no chance of success at all, and that's the issue between the Parties: Is an issue as to competence, which the TPA requires us to decide under an expedited regime, an entirely different kind of exercise from the exercise a respondent undertakes

in seeking to show that the claim is completely hopeless.

MR. WILLIAMS: And we say--we say that in an expedited preliminary process, that it is very hard to see why there should be a difference of approach in terms of deemed truth as between the two elements upon which an objection can be made. Because, ultimately, the purpose of deemed truth is, at a preliminary stage, which is not intended to be a mini-trial, on the basis of what the Claimants actually say themselves is it hopeless, even on the basis of what they say themselves--and we say that that should apply to either limb--it's hard to see, we say, why it should apply to one and not to the other.

I mentioned earlier the Commerce Group and El Salvador Case; and, in that case, the Tribunal applied the 10.20.4(c) regime to a 10.20.5 "competence limb" objection. And you will find that at Paragraph 55 of that decision, which is at Tab 42 of the Claimants' Authorities Bundle. At Paragraph 55, it said: "As an initial matter, the tribunal notes that, in accordance with Article 10.20.4(c) of CAFTA, when deciding on the

Respondent's Preliminary Objections, the Tribunal shall assume to be true Claimants' factual allegations in support of any claim in the request. In light of this, the Tribunal does not purport to make any findings of fact in this section, but rather sets out what it understands to be this matter's factual background in light of the factual allegations in the Request, which the Tribunal assumes to be true in this phase of the proceedings."

PRESIDENT PHILLIPS: The problem is, isn't it, that you can have a lot of objections to competence where there aren't any facts that have been alleged by the claimant at all. It's only where there's an overlap between what the claimant has to establish in order to prove his claim and jurisdiction, that the facts alleged by the claimant are relevant on the issue of competence.

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: So, if, as the TPA requires, there is an issue of competence, which doesn't overlap with merits, your thesis simply doesn't work. One has to look at evidence which would

not otherwise be before the Tribunal at all.

MR. WILLIAMS: If there are no--well, the 10.20.4(c) regime applies to pleaded facts, so you're right. If there are no pleaded facts, then the 10.20.4(c) regime, as a matter of interpretation of the TPA, is not applicable because there are no pleaded facts to be deemed to be true. I agree. The United States and the Respondent rely on the Renco and Peru Decision, which is at the Respondent's Bundle Tab 46, but in that case the tribunal made no finding as to whether facts should be deemed to be true for the purposes of Article 10.20.5 competence objections. In that case, preliminary objections were only made under Article 10.20.4, and the claimant objected that a number of these objections were, in fact, competence objections, and thus could not be brought under Article 10.20.4.

The tribunal was not asked to, and stated specifically that it would not make findings as to the Article 10.20.5 regime. It determined the competence objections under Article 10.20.5 were separate from 10.20.4 objections brought on an expedited basis under

10.20.5, but did not make any finding as to whether facts should be deemed to be true for the purposes of 10.20.5 competence objections.

We say that it remains open to the Tribunal as a matter of its own discretion as distinct from interpretation of the TPA to assume facts to be true as a matter of discretion on a preliminary and expedited process such as this. If 10.20.4(c) does not apply as a matter of interpretation, then that means that 10.20.5 is silent as to the approach to be taken, hence it is a question of the Tribunal's discretion. And we say that there are a number of reasons why the Tribunal should exercise its discretion in that way.

First, it's a preliminary expedited process, as we've discussed, and the usual process for evidence collection has not been gone through. The same points apply as we've discussed earlier, that it would make no sense, we say, for objections as to matters of law to be treated differently from objections of competence.

And as we've already discussed, if the

Respondent's Preliminary Objections fail, then it has an opportunity, regardless of whether it would choose to use that opportunity, but nevertheless there it is, but it has an opportunity for a second bite under ICSID Arbitration Rule 41. And 10.20.4 and 10.20.5 is intended to avoid the time and cost of a trial and not to replicate it: And again, you see that from the Pac Rim Decision.

So, we say, for all of those reasons, the Tribunal, we say, should exercise its discretion in order to ensure that the present process is manageable, is not a mini-trial, and reflects the fact that this is a preliminary and expedited process. But to repeat--and it's a point that I made at the beginning--that, of course, it is open to the Tribunal as a matter of their discretion to consider facts and evidence.

And that was the approach that was taken in Corona Materials and the Dominican Republic. In that case, the tribunal considered, as a matter of its discretion, that it was appropriate to consider the evidence, and to decide matters that it was able to

decide. It felt that it was able to do so. And at Paragraph 249 of that Decision, which is in the Claimants' Authorities Bundle at Tab 6, it was found that CAFTA's expedited procedure does not preclude a tribunal from considering an issue going to the substance of the case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the claimant.

ARBITRATOR THOMAS: Mr. Williams, going back to your point about this being a matter of the Tribunal's discretion under Article 10.20.5, just thinking about the Renco case, it seemed to me that, in the Renco case, the position of Peru and the position of the United States was not the same. There was some disagreement between the States party to the Treaty as to what was entailed by these two different procedures. In this case, it seems to me that the position of the United States Government and the position of the Respondent seemed to be more closely aligned.

So, the question I have is, to what extent does the apparent similar approach taken by the two

States party to the Treaty constrain the Tribunal's jurisdiction, given the basic approach taken in the Vienna Convention on the Law of Treaties with respect to a shared understanding of the two Parties as to the meaning of the Treaty?

MR. WILLIAMS: Mr. Thomas, we say that what matters is the position that was taken by the Parties, Panama and the United States, at the time of the Treaty and what might be said now subsequently, in the present circumstances, political and otherwise, is not relevant to the proper interpretation of the Treaty because, were that to be the case, then interpretation of a treaty would vary over time, depending on what individual governments of particular countries might consider was in their interests at any particular time; and that, we say, could not be the right approach to interpreting a treaty.

Mr. President, Members of the Tribunal, I think that I've covered what I had it in mind to cover, and I'm conscious that time is running out. I'm obviously available if there are any further questions that the Tribunal have; but, subject to

that, I think I've said what I wish to say.

PRESIDENT PHILLIPS: Thank you very much.

We will break for quarter of an hour.

(Brief recess.)

PRESIDENT PHILLIPS: Yes, Ms. Silberman.

ARGUMENT ON THE PRELIMINARY ISSUE BY COUNSEL FOR RESPONDENT

MS. SILBERMAN: Thank you, Mr. President, and good afternoon again to you and to the other members of the Tribunal.

I'd like to echo what Mr. Debevoise said earlier, which was thank you for agreeing to hold this session today.

Now, as the Tribunal may recall, in both its pleadings to date, the Republic of Panama has begun with a brief discussion of certain basic points that Claimants have confused, disregarded, complicated or simply overlooked. And today, in our answers to the Tribunal's questions, we're going to do the same. In fact, we'll start at the very beginning.

On October 7, 2016, Bridgestone Licensing and Bridgestone Americas wrote to ICSID requesting

institution of an arbitration proceeding against Panama. And, ICSID, as you well know, is not itself a court or tribunal. It's an institution that administers a very, very particular type of dispute.

As Article 25(1) of the ICSID Convention explains, the jurisdiction of the Centre--in other words ICSID's jurisdiction--"shall extend to any legal dispute arising directly out of an investment, between a Contracting State, and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre."

Now, the Convention itself does not give anyone the right to assert a claim against a State. And the starting presumption is that no one has that right. It's widely accepted that, as the ST-AD tribunal explained, as Panama has noted in its submissions, and as Claimants have not contested, that no participant in the international community, whether it be a State, an international organization, or a physical or legal person has an inherent right of recourse against a State.

Each State has a sovereign right to decide

whether and, if so, in what circumstances to subject itself to suit. And, if a State does consent to suit, the terms of its consent bind both the claimant and any tribunal.

Why any tribunal? Because an arbitral tribunal, just like the International Court of Justice, or any other International Court, does not have general jurisdiction. Its competence is given to it, and it's given to it by the States. And every tribunal, just like the International Court of Justice and international courts, has to respect the limits provided for it by the States.

Now, in their Request for Arbitration, the Claimants observed that Panama, which is a Contracting State Party to the ICSID Convention, had consented in its Trade Promotion Agreement with the United States to the arbitration of certain types of dispute, and Claimants contended in their Request for Arbitration that "the prerequisites for commencement of arbitration have been met." They stated that their claims therefore should be heard.

But there are at least five jurisdictional

problems with that argument, five jurisdictional defects. There are two that apply to one Claimant, two that applied to the other, and one that applied to both. I'm going to list them briefly now, and then we'll discuss each one in turn, because the two questions that the Tribunal put expressly to the Parties also relate to an implicit question about the nature of these defects.

The five defects were as follows:

First, that Bridgestone Americas does not have an investment;

Second, that, even if one were to assume for the sake of argument that what the Claimants have alleged is Bridgestone Americas' investment actually did qualify as an investment, the dispute did not arise directly out of it;

Third, that Bridgestone Licensing, the other Claimant, had committed an abuse of process, which barred consideration of its claims;

Fourth, that Bridgestone Licensing is not entitled to the benefits of TPA Chapter Ten in any event;

And, fifth, that Claimants have asserted, that the Tribunal's jurisdiction does not extend, to claims based on the hypothetical conduct of States other than Panama.

Now, the important question: Why are these considered jurisdictional defects? We're going to discuss that next, taking each one in turn. But while we're on this slide, I just want to mention that the order that we have listed the objections here and the jurisdictional defects here is slightly different from the order that was used in the pleadings, and the reason for that is because Claimants have asserted, for some reason, that the abuse-of-process issue is somehow dependent on the denial-of-benefits issue. It's not. And to prove it, we're going to address the abuse-of-process issue first both today and tomorrow.

Okay. So, back to the nature of the defects.

The first item on the list is that Bridgestone Americas does not have an investment. Is this a jurisdictional issue? Quite clearly, yes. This is an investment arbitration, and that means that, without an investment, there can be no

arbitration.

PRESIDENT PHILLIPS: I think you're tilting against the windmill because I haven't heard any suggestion that this is not a jurisdictional issue.

MS. SILBERMAN: Excellent. And, as you mentioned earlier, Mr. President, during the call there was a question as to whether this issue was at all related to the merits. There have been many decisions on that, including the one in an expedited proceeding that you mentioned, which was Global Trading, which is in the record at RLA-4.

Now, the second question, if assuming for the sake of argument that Bridgestone Americas has an investment, whether the dispute arises directly out of that investment is also a jurisdictional issue.

Now, first, how do we know that the dispute doesn't arise directly out of the investment that Bridgestone Americas alleges? Well, the dispute here is about a May 2014 Panamanian Supreme Court Decision, and Bridgestone Americas wasn't a party to the underlying proceeding. The decision itself was about conduct that entities other than Bridgestone Americas

took, based on rights that those other entities had. It had nothing to do with Bridgestone Americas. And, in order to connect Bridgestone Americas to the Supreme Court Decision, you have to go through leap after jump after step. And, if there is any connection at all, it's tenuous and indirect.

And the ICSID Convention requires that there be a dispute arising directly out of an investment. It says so in Article 25(1), which is the very first Article underneath the heading "Jurisdiction of the Centre." This is a jurisdictional issue, and tribunals have declined jurisdiction on this basis in the past.

Now, that brings us to the third defect, which is that Bridgestone Licensing has committed an abuse of process. What do I mean by this? Well, as Claimants' discussion demonstrated earlier, there are many different types of abuse of process. For example, they cited Rompetrol and Paushok. And in Rompetrol, the abuse of process alleged was that the claims were premature, that they were about an ongoing Romanian court proceeding, and that it was an abuse of

the Arbitral process to try to assert claims while that domestic litigation was ongoing.

In Paushok, the abuse alleged was that the claimant engaged in certain allegedly improper conduct before the arbitration arose, things like tax evasion; that the claimant was a bad actor.

Here, the issue is different. Here, what we're talking about is a very specific type of abuse of process that has been referenced many times in the case law, including in a decision that Claimants themselves quoted expressly in their Response. And the type of abuse of process here isn't bad faith or bad action. The notion here is just that there is an objective test: Did the claimant do something after the dispute was foreseeable to improve its jurisdictional case?

Now, an example of this might be: let's say there is a dispute between a national of the fictional country of Ruritania and Ruritania itself. Most likely, because of the requirement of diversity of nationality, the Ruritanian national wouldn't be able to sue Ruritania under an investment treaty. This is

international arbitration, after all. If, after the dispute arose, the Ruritanian national moved to another country, obtained nationality, and then tried to use that nationality as the basis for asserting a claim against Ruritania, that would be an abuse of process. There was no jurisdiction. The claimant unilaterally did something in order to create jurisdiction.

Now, the issue that we have here is this--

Yes, Mr. President?

PRESIDENT PHILLIPS: I was going to say, it seems to me that the obvious motive, paying the 5 million, was to bring that payment as the head of loss that could be recovered under a guarantee rather than have the payment made by a party that would have no such claim.

MS. SILBERMAN: Yes, and that's exactly--

PRESIDENT PHILLIPS: More fundamental in trying to establish jurisdiction.

MS. SILBERMAN: So, the issue here, Mr. President, is that the Treaty expressly requires that, in order to bring a claim, in order to submit a

claim to arbitration, which is what the Parties have consented to, under Article 10.17 of the TPA, it states: "Each party consents to the submission of a claim to arbitration under this section in accordance with this Agreement." And then Article 10.16 is titled "Submission of a Claim to Arbitration." It states there that, to submit a claim to arbitration, the claimant must identify breach by the Respondent and loss.

And the Claimants themselves agree in one of the paragraphs of their Rejoinder, Paragraph 62, that in order to submit a claim to arbitration, which is what consent requires, they would need to demonstrate both breach of an obligation and loss. That's what the consent requires, and the Tribunal's jurisdiction is dependent on consent.

So when after the dispute arose--

PRESIDENT PHILLIPS: It's more fundamental. In order to recover for a loss, you've first of all got to sustain it.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: That's the fundamental.

MS. SILBERMAN: Sure. And they hadn't sustained the loss is the issue.

PRESIDENT PHILLIPS: Well, that is the issue.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: It's one that could occur in a completely different field. You have two Parties held jointly and severally liable by the Court; one party has the benefit of a guarantee against loss and the other doesn't, and it's up to them to decide who pays.

MS. SILBERMAN: Sure. But, in making the choice here -- what the Claimants did was, as you mentioned, chose voluntarily between the two Parties: one that didn't have a claim and one that needed to be able to establish loss in order to be able to bring a claim in the first place. They chose the entity that possibly might have a claim under the TPA if it established loss. They chose a situation that wasn't already covered by the TPA at that point in time because the loss wasn't suffered. They chose voluntarily to assume that loss; and, in doing so, committed an abuse of process.

PRESIDENT PHILLIPS: Well, that's the last step in your argument, is or might be the one in issue, as to whether, in fact, to act in this what would seem a very sensible way, is an abuse of process.

MS. SILBERMAN: Yes, and we will discuss this in more detail tomorrow.

The point simply for now was this is treated as a jurisdictional issue. Tribunals have declined jurisdiction on this basis in the past.

PRESIDENT PHILLIPS: When they decline it, do they decline it because they say "we haven't got jurisdiction" or they decline it because they say "we have got jurisdiction, but on these facts, it would be an abuse if we exercised it"?

MS. SILBERMAN: Well, what tribunals have said, including one like the Phoenix Action tribunal, and you see this quote on the screen, is that it would be an abusive manipulation of the system to allow this to go forward, and they stated: We don't have jurisdiction because, inherent in the notion of the jurisdictional requirements is the good-faith

performance of those requirements. And it's one thing for all of the different components of jurisdiction to come up in the ordinary course. You're a national of one State and you invest in another State, and that State does something. You go back to your home State and invoke your nationality to bring an investment treaty claim.

If a dispute arises and you are a national of the host State, all of the pieces for jurisdiction aren't there. So, if you go about trying to make jurisdiction and trying to manufacture it, that's not good faith. That's not what the Treaty was designed to do, and tribunals have said: "We don't have jurisdiction in the first place because you haven't complied. Your compliance was an abuse of process."

Now, that brings us to the fourth jurisdictional objection, and, here, Claimants have agreed that this can be decided on evidence, so I'm just going to briefly note that this, too, is treated as a jurisdictional issue, and denial of benefits has been the basis for declining jurisdiction in the past.

PRESIDENT PHILLIPS: That's because one of the benefits that are denied is the benefit of going to arbitration.

MS. SILBERMAN: Precisely.

As the United States has explained, each of the State Parties is entitled to deny the benefits both to the substantive protections like expropriation and National Treatment, and also to the dispute-resolution protections, and that's why, precisely, this is a jurisdictional issue.

Now, this brings us to the fifth and, for now, the final defect, which has to do with the fact that Claimants are seeking damages for the hypothetical conduct of other States. And the problem is that there is simply no consent to arbitrate those claims.

Now, for this defect, I'm going to put up some quotes from the Request for Arbitration on the screen since Claimants have sown a lot of confusion on this issue.

At the end of their Request for Arbitration, Claimants made a request for relief, and one of the

items that they requested was an award ordering Panama to pay an amount in excess of $16 million in damages; and the Request for Arbitration explains that, in addition to the amount of the Supreme Court judgment, the $16 million "sum includes . . . an estimate of the loss that [supposedly] has been and will be incurred by Bridgestone Licensing and Bridgestone Americas as a result of the Decision." According to Claimants, "[s]uch loss arises from a number of interrelated factors," including the possibility that other Latin American countries may, as a matter of government policy, adopt similar decisions, and Claimants' belief that the decision somehow establishes a precedent that is likely to be followed in other Latin American legal systems.

They conclude this section of the request for arbitration by stating that there is a "risk that similar decisions may be issued in other countries."

So, in essence, the claim that Claimants are advancing here would be like one of the Claimants in the Spanish solar cases asserting a claim against Spain, based on the possibility that another

State--let's call it Ruritania again--might in the future make some changes to its own regulatory system. That's not allowed. There is no consent for that.

And, from a consent perspective, there are three problems here. While we have the Claimants' pleadings on the screen, I'm going to point them out to you, and then we'll discuss why they're problematic.

So, the first problem is that Claimants are talking about hypothetical future action: "The decision may be followed," "is likely to be followed," "similar decisions may be issued." Hypothetical future conduct.

The second problem, as you readily noted, Professor Thomas--

PRESIDENT PHILLIPS: That is an objection which you might make even if they were saying that they might suffer damage in the future because of damage to their reputation as a result of the Supreme Court's decision, isn't it? You could be making exactly the same point. It's a hypothetical future loss?

MS. SILBERMAN: Yes. So, there is hypothetical future action and hypothetical future loss, both of which are outlawed by the Treaty.

PRESIDENT PHILLIPS: Well, is it or is it not the essence of your submission that they're talking about a State causing them this loss or can you make the same submission whether or not it's a State?

MS. SILBERMAN: There are two aspects to this, and we have mentioned in both the original May 2017 submission and in the Reply -- that the problem is the hypothetical future conduct of States. And it's a compound problem: in part, because of the hypothetical future conduct, hypothetical injury; and because it's the States that are involved. And, again, here are the States that are all involved in these claims.

Now, why is this problematic? Well, Article 10.17 states that each party consents to the submission of a claim to arbitration under this section in accordance with this Agreement. Article 10.16 is titled "Submission of a Claim to Arbitration." And it states that “the claimant, on

its own behalf, may submit to arbitration under this section a claim that the respondent has breached an obligation under Section A and that the claimant has incurred loss or damage by reason of or arising out of that breach."

That the respondent--not any other State---has breached (past tense) an obligation under Section A, and that the claimant has incurred loss or damage (past tense again). And you see the words "an obligation under Section A" there. The obligations only apply to measures that have already been adopted and maintained.

This comes from Article 10.1, which is titled "Scope and Coverage," and states that “this chapter” (meaning Chapter Ten) “applies to measures adopted or maintained” (past tense) “by a party” (which is the host State), “relating to” either “investors of the other party” (which are foreign investors who attempt to make, are making or have made an investment in the Party's territory); to “covered investments” (which are investments in the territory); and “with respect to Articles 10.9 and 10.11, all investments in the

territory of the Party."

And then Paragraph 2 states that: "A Party's obligations under this section shall apply to a State enterprise or other person when it exercises any regulatory, administrative, or governmental authority delegated to it by that Party."

There is no mention here of other States. Nor is there any mention of any rights or investments outside of the host State, which is presumably what Claimants are talking about when they're referring to the hypothetical court and policy decisions underlying their claims: investments or rights in other States.

Now, the Claimants have tried to get around this by asserting that the only measure at issue is the Panamanian Supreme Court Decision: Panama, and it already happened. They are saying that all they're doing is claiming consequential loss and that it doesn't need to be a loss that is incurred in Panama.

But one problem with this is that there are States involved in their causal chain, and the only way that the conduct of other States could be attributed to Panama and the only way that their

causal chain could work -- assuming that the conduct of other States ever materializes, of course -- would be if those States committed an internationally wrongful act. And the Tribunal doesn't have jurisdiction to decide if another State has committed an internationally wrongful act. The Articles on State Responsibility make this clear, that this is what would be required.

So, Chapter 4 of the Articles on State Responsibility, which is titled "Responsibility of a State in Connection with the Act of Another State" identifies the only circumstances in which a State is responsible for the actions of another State. And the articles listed in that chapter provide that a State is responsible for the actions for another State when it "aids and assists" the second State "in the commission of an internationally wrongful act," when it "directs and controls" the second State "in the commission of an internationally wrongful act," and when it "coerces" the second State to commit an act that "but for the coercion would be an internationally wrongful act."

An internationally wrongful act of another State is required, and the Tribunal doesn't have jurisdiction to decide that issue. As Panama has explained, the Tribunal cannot evaluate the legality of a State's conduct without its consent. You've seen this quote before at the beginning of the slides, so I'm not going to read it again, but I will mention the Monetary Gold principle, which is a principle that comes from an ICJ case of the same name. And the principle is that, when it is necessary for purposes of deciding a claim that is before you, whether a third State, a State that has not consented to suit, has committed an internationally wrongful act, the Tribunal should decline jurisdiction over the claim before it.

Now, all of these defects prompted Panama to submit -- make a submission under Article 10.20.5 of the TPA. I'd like to read Article 10.20.5 now because you didn't hear anything about it earlier today.

It states: "In the event that the respondent so requests that in 45 days after the tribunal is constituted, the tribunal shall decide on an expedited

basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objections, stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days."

Now, there should be at least three things that are immediately apparent from this text. The first is that, if within 45 days from the date on which the tribunal is constituted, the respondent so requests, the tribunal must decide certain objections on an expedited basis. This is clear from the word "shall" -- as in "the tribunal shall decide on an expedited basis"; “the tribunal shall . . . issue a decision or award on the objection.”

As the United States observed in its non-disputing party submission, Article 10.20.5 provides for extensions of time as may be necessary to accommodate this result.

Now, Claimants asserted earlier this afternoon that, it falls to the Tribunal to decide whether it's safe to make final findings. That's not what the TPA says. It says "shall decide." And when Claimants were pushed on this issue, they asserted that the Tribunal shall decide whether it's safe to make final decisions based on whether the Claimants have put in enough evidence. That puts all of the power in the claimant’s hands. Simply by withholding information, or not putting forward its full case, it could convince the tribunal not to decline jurisdiction when it should be declined. The Treaty doesn't allow for that possibility. It says "shall decide."

Now, the second thing that should be immediately apparent is that "expedited basis" means either within 150 days of the date of the request, within 180 days, or within 210 days of the request,

depending on whether a hearing requested or there is extraordinary cause for delay.

PRESIDENT PHILLIPS: How do you fit into this the mandatory requirement to suspend any proceedings on the merits when the proceedings on the merits overlap the issue of jurisdiction?

MS. SILBERMAN: Well, so I think there was a lot of confusion sown on this issue earlier. The Claimants have stated again and again that it is not a question of whether there is an overlap between jurisdiction and the merits. They stated there is an overlap between jurisdiction and the facts. And jurisdiction isn't a question of whether there is an issue of facts or not an issue of facts. It's a question of whether the tribunal has authority to hear a claim.

So, for example, as you mentioned at the outset of the Claimants' presentation today, Mr. President, the existence of an investment is a prerequisite to be able to assert a claim. You cannot decide whether there has been any expropriation of an investment or a violation of National Treatment in

respect of an investment until you've first determined that there is an investment.

PRESIDENT PHILLIPS: But it's also a fundamental prerequisite to establish in your case on the merits.

MS. SILBERMAN: Yes, but jurisdiction comes first. A tribunal can't even get to the merits until it has determined its jurisdiction. And--

PRESIDENT PHILLIPS: Well, what you're inviting us to do is, when dealing with the issue of jurisdiction also to deal with the merits or that aspect of the merits because you can't divorce the two.

MS. SILBERMAN: Well--so, when there is a question that is a jurisdictional fact that must be established before a tribunal can even get to the question of the substance of the claims -- of the question was there an expropriation, was there a violation of National Treatment -- a tribunal is required to decide those facts. And this is the rule under international law, and there is nothing in the Treaty that says otherwise. A tribunal must decide

the facts that are relevant to jurisdiction if they come up in a preliminary jurisdictional context.

PRESIDENT PHILLIPS: Well, one way of resolving the issue--and that's why we put the second issue before you--is to interpret "and any objection that the dispute is not within the tribunal's competence" as being any objection that doesn't involve continuing to try the merits because there's an express requirement to suspend the Hearing on the Merits.

MS. SILBERMAN: Well, so in--

PRESIDENT PHILLIPS: So, your denial of benefits would fall nicely into the challenged competence but not an issue that is fundamental to the merits, as have you got an investment?

MS. SILBERMAN: I understand the issue. But what the Treaty seems to be saying there is consistent with what the ICSID Convention says, which is: an argument on the substance of the merits arguments, an argument on the claims, an argument on the question of whether there has been a breach, is what most likely is intended by “the merits” there. Because, for

example, if there were an objection under Paragraph 4 -- which, as we'll discuss in just a second, is an objection that a claim is so legally deficient, a merits claim is so legally deficient that it should be rejected at the outset -- on that issue, there is a merits issue, too. That is precisely a question on the merits.

PRESIDENT PHILLIPS: Say that again?

MS. SILBERMAN: So, the objection under Paragraph 4, which is an objection under Article 10.20.4, is an objection to the sustainability of a merits claim. So let me show you this.

So, the objection under Paragraph 4--Paragraph 4 is a reference to Article 10.20.4--and an objection under that Paragraph is this: "Any objection by the Respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26." And that is the challenge to the sustainability or legal sufficiency of a claim. It's an objection that, as a matter of law, the merits of the claim cannot be accepted--they don't work out.

And we even have an example of this, just to show in practice. Now, just to be clear, we're not asserting this objection right now. This is purely for illustration.

So, an example of this might be that Bridgestone Americas's denial-of-justice claim fails as a matter of law because, as the Arif versus Moldova tribunal explained: "A claim for denial of justice can only be successfully pursued by a person that was denied justice through a court proceeding in which it actually participated as a party," and Bridgestone Americas wasn't a party to the court proceeding at issue.

So, here you look at the subject matter of the claim, the denial of justice. And you're saying that the merits fails as a matter of law. The Tribunal would still be instructed to look at the merits of that issue in order to decide the objection. You're deciding that the merits fail as a matter of law, even though you are suspending--

PRESIDENT PHILLIPS: Yes, but you're making a provisional finding under 20.4 on assumptions, which

is not final. You're not trying the merits. You're applying a test of law on an assumption that the Claimants' case on the merits is made up.

MS. SILBERMAN: Yes.

And the type of objection that's being asserted here, an objection to competence, is something different.

PRESIDENT PHILLIPS: Yeah--

MS. SILBERMAN: It is a threshold question.

PRESIDENT PHILLIPS: Do you accept that what the Respondents are inviting us to do is to have a mini-trial?

MS. SILBERMAN: No.

PRESIDENT PHILLIPS: Why not?

MS. SILBERMAN: Because--well, yes, having a mini-trial.

PRESIDENT PHILLIPS: That's just what you're asking us to do?

MS. SILBERMAN: Absolutely, because that's what the Treaty requires.

PRESIDENT PHILLIPS: Does the Treaty require us to have a mini-trial?

MS. SILBERMAN: It does, indeed.

PRESIDENT PHILLIPS: It goes to the merits when it says in terms that we suspend hearing the merits.

MS. SILBERMAN: That it goes to the merits, no. But what the Treaty requires is for you to hold a trial on the questions of competence; on the questions of jurisdiction; the questions of the merits have been suspended; the questions as to whether there has been a breach of the treaty provisions has been suspended.

And even in the jurisdictional context, in all of the preliminary jurisdictional objections that the Claimants were saying before were inapposite, in all of those situations, the tribunal assumes for the sake of argument that the claimant’s merits case is true, but it's still able to decide the jurisdictional issues, and it decides them definitively and finally on the basis of the facts and the law. It holds a mini-trial on jurisdiction, and that's what the Treaty requires here, and that's what international law generally requires. And I can show you why the Treaty requires this.

So, what the Treaty says is that “the tribunal shall decide on an expedited basis an objection under Paragraph 4 and any objection that the dispute is not within the tribunal's competence." "And any." It doesn't say "and any objection, but if there is an overlap, you don't need to decide it." It doesn't say, "and any objection but if the tribunal feels it doesn't have enough evidence, it shouldn't decide it." It says "and any objection." And the words "and any," and the fact that these are two separate things separated by the word "and" means that they're mutually exclusive. It's one of the fundamental principles of treaty interpretation.

Now, just quickly, Claimants have stated time and again that they didn't understand these were jurisdictional issues; but, given the nature of the objections, we're not really sure how they could have made that argument, especially given all the context clues in the pleadings.

We started by explaining that the Tribunal cannot entertain these claims; requested that the Tribunal render an award declining jurisdiction;

reserved the right to raise additional jurisdictional objections; underlined and put in bold, in italics, the portion of the TPA that we were relying on, which was the competence portion; stated there were jurisdictional bars; and, in every single scenario for every objection, explained with authority why these were jurisdictional issues.

And then the Claimants came up with this notion that Panama had disputed issues of fact, and they cited this provision that we'll get to, 10.20.4(c), and said: "Accordingly, the objection cannot possibly or properly dispute allegations of fact," and invited Panama to agree.

But Panama didn't agree, and the reason that it didn't was because it wasn't asserting the type of objection that Article 10.20.4(c) applies to, and it wasn't disputing the facts that that article ties to you, either.

So, finally, let's turn to what Article 10.20.4 says because this answers your question, Mr. President.

It states that: "In deciding an objection

under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute."

What does this mean?

Well, the words "this paragraph" are a reference to Paragraph 4 of Article 20, so Article 10.20.4. And, as we discussed, an objection under this paragraph is an objection to the sustainability or legal sufficiency of a claim, and that means that the assumption of truth applies when deciding an objection to the sustainability or the legal sufficiency of the claim. It doesn't apply in any other scenario, because it's a well-accepted canon of treaty interpretation that when the text expressly mentions one scenario, like an objection under one paragraph, all other scenarios must be deemed excluded. This is known as the "expressio unius"

principle.

PRESIDENT PHILLIPS: Am I right in thinking that 10.20.4 also has the provision requiring the tribunal to suspend the hearing on the merits?

MS. SILBERMAN: I believe so. I believe it's in 10.20.4(b), but I can have someone on the team confirm that for me.

PRESIDENT PHILLIPS: So, it's implicit that this exercise is not regarded as a hearing on the merits?

MS. SILBERMAN: Yes. And let me pull up the Treaty.

So, in Article 10.20.4(b), it states "on receipt of an objection under this paragraph, the tribunal shall suspend any proceeding on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question and issue a decision or award on the objection stating the grounds therefore."

Now, both the United States and the Corona versus Dominican Republic tribunal have endorsed the

conclusion that Article 10.20.4(c) only applies in the context of an objection under Article 10.20.4. That is, only applies in the context of an objection to the sustainability or the legal sufficiency of a claim. The United States has done this explicitly, and the Corona Tribunal did this implicitly.

The United States stated in its non-disputing party submissions, both in this case and in the Renco case, that the language of Article 10.20.4(c) does not address and does not govern other objections such as objections to competence.

And, in Corona, which the Claimants themselves submitted into the record--it's at CLA-6--the Respondent asserted a jurisdictional objection under Article 10.20.5 of DR-CAFTA, which has a corollary here in the TPA.

And, to decide the objection, the tribunal examined the documentary evidence, it examined testimonial evidence, and it reached a final determination on the jurisdictional issue. It didn't simply assume the claimant’s factual allegations to be true. So, that's one problem with the Claimants'

notion that Article 10.20.4(c) applies here.

The second problem is with the remainder of the sentence.

So, Article 10.20.4(c) goes on to state that, when deciding an objection to the sustainability or legal sufficiency of a claim, "the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)."

Now, in the Commerce Group Corporation Decision that Claimants cited earlier, these were the allegations that the tribunal assumed to be true. Paragraph 55, which they put on the screen earlier, that's what it says at the end of the sentence. The tribunal is assuming the factual allegations in support of the claim to be true. The tribunal did consider the record on other issues. You find that at Paragraphs 103 and 106.

Now, what constitutes a factual allegation in support of a claim? Well, the term factual allegations isn't defined, but as the Pac Rim versus El Salvador tribunal explained in the decision that

Claimants are so fond of, “the phrase doesn[']t include any legal allegations . . . nor could it include a mere conclusion unsupported by any relevant factual allegation.”

And Article 10.16 tells us that a claim is an assertion that the respondent has breached an obligation and that the claimant incurred loss or damage by reason of or arising out of that breach. Panama hasn't disputed those allegations.

And so--sorry, I wasn't sure if you had a question, Mr. President.

Now, in light of this, in light of the plain text of Article 10.20 and in light of the plain text of all of the context clues of Panama's May 2017 submission, it should have been clear to Claimants that Article 10.20.4(c) doesn't apply. But Claimants prefer the standard, naturally, and refused to let the issue go. So, they insisted (contrary to the rule--of the first rule of treaty interpretation) that the TPA couldn't possibly mean what it says, and they demanded (contrary to normal practice) that Panama opine on an objection that they hadn't yet made. And when Panama

declined to do so, which was well within its rights, Claimants called this a failure to cooperate, they asked for costs, and they made such a big deal of this issue that we've ended up here today.

So, let's put their arguments to the test. What do they have to say?

According to the Rejoinder, “Claimants' position is that their pleaded allegations of fact are to be subject to the 'deemed truthfulness' provision that Article 10.20.4(c) either as a matter of construction," so, as a matter of interpretation, "or pursuant to the Tribunal's discretion under Rule 34 of the ICSID Arbitration Rules."

Now, earlier today, Claimants essentially abandoned any construction argument. They didn't even quote to you the language of Article 10.20.4 or 10.20.5. They just cited Pac Rim. And, in Pac Rim, the objections were based primarily on Article 10.20.4 of CAFTA. There were five objections in that case, four were to the sustainability, the legal merit of the claims.

There was a fifth objection, to competence,

but that objection wasn't one where there was a real question of fact because the objection was that the claimant, in its request for arbitration, had asserted claims based on an investment law in addition to CAFTA. And CAFTA includes an exclusivity clause. So, there was no real question of fact there.

And in any event, when considering the jurisdictional issue, the tribunal considered expert evidence. It didn't just accept the claimant's factual allegations as gospel. It carefully considered expert evidence from both parties.

And in the subsequent jurisdictional decision, which is also in the record, the tribunal said that questions like abuse of process, denial of benefits, for things like that, the burden of proof is on the claimant.

Now, Claimants did at one point make a construction argument--oh, I should mention, when the Claimants say that their pleaded allegations of fact need to be accepted as true, they mean all of them, not just the factual allegations in support of the claims, but factual allegations in support of

jurisdiction and competence as well. And that clearly is inconsistent with the text of the Treaty.

So, let's go back and see what their argument is.

PRESIDENT PHILLIPS: I'm sorry, which are these factual allegations that don't go to the merits of the claim?

MS. SILBERMAN: The allegations in the support of the notion that there is an investment; the allegations in support of the notion that the connection between the dispute and the alleged investment is direct; the question as to perhaps what the timeline is for the abuse of process; whether the claimant has substantial business activities in connection with the denial of benefits. And, on the final objection, it's just the facts, that on their pleadings, other States are involved. Those are the factual allegations relevant to jurisdiction.

On the merits, the factual allegations would be things like you saw earlier -- the allegation that somehow Bridgestone Americas, which wasn't a party to the Panamanian Court proceeding was denied justice in

that proceeding or the allegation that the Claimants have been the victims of an alleged expropriation because they supposedly have suffered a loss in profits. Those are factual allegations relating to the merits, as opposed to jurisdiction.

So, what is Claimants' argument? It focuses on Article 10.20.5, and they state that “Article 10.20.5 is to be construed such that any objection raised thereunder is to be subject to the 'deemed truthfulness’ provision at Paragraph 4(c) of Article 10.20,” and their argument goes like this:

So, first they begin with “the tribunal shall decide on an expedited basis an objection under Paragraph 4,” and they state that those words “can only mean that, under Article 10.20.5 Respondent may require that an objection under Paragraph 10.20.4 be expedited. It follows that under this proceeding the provisions of 10.20.4 (including Subparagraph (c)) apply, save to the extent that 10.20.4 is inconsistent with the requirements of 10.20.5."

Fine. With them so far. Okay. So what about the next part of the sentence -- the words, "and

any objection that the dispute is not within the tribunal's competence?" Claimants say, “[T]he following words, ’and any objection that the dispute is not within the tribunal's competence’ are added to Paragraph 5, making it clear that there are two sorts of expedited objection.” Again: with them. This is fine, too.

But then comes the part where we lose them, because Claimants assert that “it would not be sensible for objections as to competence that are brought on an expedited basis to have a broader scope than objections brought on an expedited basis under Article 10.20.4.”

Now, as a threshold matter, this is sensible. There are different types of objection. One is that the merits claim fails as a matter of law; and, for that, it makes complete sense that you take the facts as alleged by the claimant, and then apply those facts to the law.

The second type of objection is an objection that the tribunal cannot even hear the merits in the first place. And for that type of objection, that is a

threshold question before you get to the merits, it makes sense to apply a different standard.

But, in any event, Claimants' view as to whether the approach set forth in the TPA is sensible is entirely inapposite. It's too late to be debating this issue. The TPA contains the rules. And as the HICEE versus Slovak Republic tribunal explained: "An investment tribunal is not entitled to substitute its own extraneous opinion, arrived at after the event, as to whether the policy reflected in the Treaty was a sensible one or not. A tribunal takes a BIT as it is; its task is one of interpretation, not criticism."

Remember, there is a really good reason for this. States have the sovereign right to determine whether, and, if so, in what circumstances, to subject themselves to suit. The rules they adopt have to be accepted by both the claimant and the tribunal, even if they don't like them.

Now, there is a provision of the Vienna Convention on the Law of Treaties -- which has been submitted by the Claimants at Exhibit C-115 -- which states that recourse may be had to supplementary means

of interpretation, including the preparatory work of the Treaty and the circumstances that its conclusion, when the interpretation, according to the ordinary meaning analysis, leads to a result which is manifestly absurd or unreasonable.

Claimants haven't used the words "absurd" or "unreasonable," and haven't really referred to any supplementary means of interpretation. But just in case this is what they were trying to argue, we'll close the loop.

So, is it manifestly absurd for an objection that a tribunal lacks jurisdiction and an objection that a claim fails as a matter of law to be subject to different evidentiary standards? No, not at all. In fact, that's the rule under international law. Under international law, the general rule is that, for purposes of a preliminary objection to the sustainability or legal sufficiency of a claim, like the type of objection contemplated in Article 10.20.4, a tribunal should accept pro tem the claimant’s merits related factual allegations as true.

However, “when a particular circumstance

constitutes a critical element for the establishment of jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction." Now, if there were something manifestly unreasonable here, it would be the interpretation that the Claimants advance. How so? Well, first, Claimants' interpretation would arrogate to the claimant the ability to survive a jurisdictional objection simply by asserting that jurisdiction exists, and that would contravene one of the foundational principles of international arbitration, which is the Kompetenz-Kompetenz principle. It's the principle that the tribunal is--

PRESIDENT PHILLIPS: I'm sorry, I don't follow this point you're making, because an assertion that jurisdiction exists is an assertion which at least includes an assertion of law.

MS. SILBERMAN: Yes.

So, if all the tribunal is going to do is to determine, based on the assertions that the claimants have made, if the claimants simply said there is an investment.

PRESIDENT PHILLIPS: I don't understand that to be the Claimants' case.

MS. SILBERMAN: Taken to its logical extreme, this is the conclusion that would follow -- that a claimant would have the power to decide jurisdictional issues instead of a tribunal -- even if the Claimants themselves aren't asserting it. It's a very slippery slope.

Now, the thing that Claimants do seem to be asserting, at least more specifically in this case, is that the words “the tribunal shall decide on an expedited basis” should be construed to mean that the Tribunal must wait to decide an already-pled issue of jurisdiction until some subsequent phase of the proceeding, following additional rounds of pleadings. And that's contrary to the plain text of the provision, and it's also contrary to the object and purpose of Article 10.20.5, which, as the United States explained in its non-disputing submission, is to promote efficiency and to avoid repeating the Methanex scenario, which is a case where the tribunal declined to rule on an objection at an early stage,

and the respondent was forced to endure "three more years of pleading on jurisdiction and merits and millions of dollars of additional expense before the tribunal ultimately dismissed all of the claimants' claims for lack of jurisdiction."

Now, that--

Professor Thomas?

ARBITRATOR THOMAS: I just want to try to understand the full implications of what you're saying. You had responded earlier to the President's question about the mini-trial, you said there should be a mini-trial. The question I have is this: Is that the Treaty in Paragraph 5 uses the word "any objection," and I just want to understand what you say the Treaty does by stepping back once.

A broad distinction could be drawn between jurisdictional objections which are capable of being carved off for merits objections and can be dealt with easily in the preliminary stage. And sometimes you will see tribunals saying we find having considered the submissions of both Parties and having looked at the evidence in the pleadings, that a particular

jurisdictional objection is so bound up in the merits that it's necessary to defer determination of that until the merits phase.

Is it your position that Paragraph 5 essentially has, in light of Methanex, had the effect of pushing any and all jurisdictional objections into the expedited process phase if the Respondent has opted to pursue that and, therefore, requires a decision on all of a range of jurisdiction objections; or is it open still to the Tribunal to say we can decide some of these because we think we have a sufficient factual record and it doesn't make any difference, we wouldn't learn anything more from additional evidence. But, on others, we think they're intertwined with the merits.

So, what is the effect of the treaty language in terms of the shifting of the range of potential jurisdictional objections to the expedited phase?

MS. SILBERMAN: So, the United States has indicated in its non-disputing Party submission that the effect of Article 10.20.5 essentially is to supersede what is set forth, for example, in Rule 41

of the ICSID Arbitration Rules; and, under the ICSID Arbitration Rules, a tribunal is expressly authorized to make a decision that the jurisdictional objections are too intertwined with the merits that the decision or that the issue needs to be joined to the merits for a subsequent decision.

And the United States has stated that this supersedes that, by stating expressly that the Tribunal is required to decide any jurisdictional objection.

Based on the Treaty text, it does say "any," any jurisdictional objection, and I understand that that could put a tribunal in a tough spot, but that's what the Treaty states.

PRESIDENT PHILLIPS: It can put the Claimants in a tough spot as well because it means that they have got to deal with matters which normally they would have much more time to deal with expedition.

MS. SILBERMAN: Yes, but remember--

PRESIDENT PHILLIPS: It seems to me that the clear purpose of these provision is to avoid the expense and the time taken to deal with issues of

merits by short circuiting, but you simply don't do that, if the objection to jurisdiction is one which applies equally to the merits and facts that have to be determined to deal with the merits.

MS. SILBERMAN: Well, the issue of putting the claimant in a tough spot is certainly one that the Claimants have emphasized over and over again. But bear in mind that the Claimants chose to invoke this particular treaty and must be presumed to have read it before doing so.

And they don't get to make the rules. The States get to make the rules. They decide in what circumstances they can be sued. And if the claimants don't like it, they don't have any other option because the States have this sovereign right.

And, in fact, the Claimants have had quite a considerable amount of time to consider their jurisdictional case; and, if one considers the elements of jurisdiction and the facts that you have, you might understand where there are weaknesses and start to plan on how to do this type of thing.

And the Claimants have been considering

bringing a case under the TPA since at least February 2015. They had at very long time. They've had at least ten months since the time they submitted the Request for Arbitration and must have done some preparation before then, because the ICSID Convention states in Articles 36 and 37 that, if a dispute is manifestly outside of the jurisdiction of the Centre, the Request for Arbitration doesn't even get in the door. They have to have considered jurisdiction. It's their burden to establish that jurisdiction exists.

And even if they couldn't have anticipated the particular objections that the Respondent might raise, they still know that the Treaty includes the opportunity for the Respondent to make objections, either to the substance of the claims or to jurisdiction, and has the opportunity to request that the objections be decided within as little as 150 days, so they can and should have planned for that. It's not a situation where they were surprised all of a sudden because they came up. This was embedded into the Treaty that they chose to invoke and had to have

planned for it. They assumed the risk.

And that sort of leads to the question of whether the Tribunal has discretion to apply the Article 10.20.4(c) standard, and if it does, it should apply that standard. And Claimants never quote Arbitration Rule 34, and the text actually doesn't matter because the Tribunal doesn't have discretion, as we will discuss, but just for the sake of good order, let's put it up on the screen. It states: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

The reason that you can't even get to Arbitration Rule 34 is because, as we've discussed, the TPA addresses this issue. It states that for purposes of an objection under Paragraph 4 of Article 20, the tribunal shall assume the facts to be true. And the interpretive and logical corollary of that is that, in other scenarios, the tribunal doesn't assume the factual allegations to be true. That comes from the text of the Treaty.

Now, both the ICSID Convention and the TPA state that the TPA wins in the event of any

inconsistency between the Arbitration Rules and the TPA. In the ICSID Convention, this is explained in Article 44; and, in the TPA, it appears in Article 10.16.5. And because this rule is governed by the TPA, you don't get to the question of discretion under Arbitration Rule 34.

Now, even assuming that Arbitration Rule 34 did apply, the argument that the Tribunal should exercise discretion in Claimants' favor is based on the notion that Claimants didn't have enough time to gather evidence on jurisdiction and that the Tribunal doesn't have enough time to evaluate it. But as I mentioned, Claimants have had since at least February ‘15 or maybe October of last year, to put together their case on jurisdiction. They've had plenty of time.

And given what the TPA states, which is the fact that the Respondent, at its option, can have an objection expedited and decided within as little as 150 days, they should have known that they might have to put together a response to a jurisdictional objection within the span of a couple of months. Even

though the TPA states 150 days or 180 or 210 days, realistically, given the amount of time that it takes to draft a decision or an award, Claimants couldn't have expected to have had all of that time. They couldn't have expected more than the two-and-a-half months that they had.

And you should bear in mind that, over the course of those two-and-a-half months, Claimants have been able to submit 80 pages of single-spaced argument, approximately 75 exhibits, and five statements from "witnesses."

And the notion that Claimants should have had more time doesn't square with the text of the TPA; the reality that the Tribunal would need a large portion of the time contemplated in the TPA for drafting, or even Claimants' own past behavior because, as you'll recall, there have been two occasions in this case where Panama has tried to find a way to give Claimants more time.

First, it tried to find a way within the rules of the TPA, the rules of the ICSID Convention, and as applicable, the Arbitration Rules, to have a

hearing in December, giving the Claimants more time. And they objected. They disagreed. They didn't like that.

Panama also proposed that the Claimants take ten days for their Rejoinder. They said no, they only wanted seven days.

And Claimants' explanation as to why they supposedly needed more time just doesn't withstand scrutiny. For example, Claimants asserted that they needed more time because they couldn't retrieve documents from their own alleged offices and their own alleged storage facility in two-and-a-half months.

They also assert that they only had seven days to locate an expert on Panamanian law. But Claimants discussed Panamanian law in their Request for Arbitration, and quoted it expressly in their Response. They presumably were talking to someone about that, and could have approached an expert at any time, but they didn't do so.

And the Tribunal, for its part, has had the past several months to review exhibits and testimony, and it will have a few months after the close of this

Hearing to subject the evidence to more scrutiny. Prior tribunals have been able to meet these deadlines.

So, for all of these reasons, the Tribunal should reject the Claimants' arguments, and it should adopt the following answers to the questions set forth in Procedural Order Number 2:

Now, the first question was: "Should the Tribunal rule on Panama's objections under Article 10.20.5 of the TPA as a matter of law on assumed facts, applying (either as a matter of law or as a matter of discretion) the approach laid down in Article 10.20.4(c), or instead, should the Tribunal make final and definitive findings of fact and law in relation to those objections"?

As we've discussed, because Panama's objections under Article 10.20.5 are objections to jurisdiction, there is no basis for applying the approach laid down in 10.20.4(c). And, consistent with the general rule under international law, the Tribunal must make final and definitive findings of fact and law in relation to those objections.

The second question was: "Does the obligation under Article 10.20.5 to decide on an expedited basis any objection that the dispute is not within the Tribunal's competence apply to any objection, or all objections to competence or only those that do not require the Tribunal to determine the merits of the Claimants' substantive claim?" This is a gloss that we just discussed briefly in response to a question, but the answer is: first, as indicated by the words "any objection (to competence)," the obligation applies to all objections to competence; and in any event, none of the objections here requires the Tribunal to determine the merits of the Claimants' substantive claims, which as we've explained, would require--the merits of the Claimants' substantive claims would require the Tribunal to ask questions like what did Panama do? Did Panama's conduct amount to a violation of the Treaty standards that the Claimants have invoked? None of the objections here requires the Tribunal to conduct that exercise.

Now, one final question that we would like to address is where do we go from here? And we

understand from the pre-hearing call--a simple question; right?--we understand from the pre-hearing call that the Tribunal intends to decide, based on the presentations that were just given by the Parties, whether exhibits can be referenced during the Opening and Closing Statements and whether Panama can cross-examine Ms. Williams. And for the reasons that we've explained, there should be no question that the Hearing can and should proceed in that manner.

But, in case the Tribunal is still minded to limit in some way the universe of what can come next, it seems useful to consider what would happen if Claimants' approach were followed.

And their approach has evolved somewhat over the pleadings, so we'll take it step by step.

Claimants' position in the Response was that the Tribunal needed to accept the factual allegations set forth in the Request for Arbitration and the Claimants' Submission to ICSID on Registration, and that everything else, including the exhibits appended to those documents, should be ignored.

But, if that were true, that would mean that

the Tribunal couldn't even look at documents that ICSID examines when exercising its screening power, and it would also produce some absurd results. For example, it would mean that the Tribunal couldn't even confirm which entity that the Claimants were referencing--Bridgestone Americas, Bridgestone Licensing, or some other Bridgestone entity that isn't a claimant--which one they were referencing each time the word "Bridgestone" is used.

Now, more recently, the Claimants contended that the Tribunal must accept the factual allegations set forth in the Request for Arbitration, the Submission on Registration, the Response, and the Rejoinder as true, and to ignore all of the exhibits and statements that Claimants have submitted.

But ignoring the record at this point may well be impossible. Is it possible for exhibits and statements that have been reviewed to be unseen? No. This is why, for example, that Section 17.4 of Procedural Order Number 1 states that, if a Party wishes to request leave from the Tribunal to file additional documents after its last written

submission, that Party may not annex the documents that it seeks to file to its requests -- because documents can't be unseen.

And we're assuming that the exhibits and the statements have been seen because it seems very unlikely that an arbitrator would walk into a hearing room without having reviewed a single exhibit or statement at any point previously. And the notion that someone could entirely rid his mind of every single tidbit learned during exhibit or statement review seems doubtful. But luckily there's nothing in the ICSID Convention or the TPA that requires the Tribunal to completely ignore the record.

There is one rule that the Tribunal should bear in mind, though, which is the rule set forth in Article 52(1)(d) of the ICSID Convention. Article 52(1)(d) authorizes the annulment of an award in circumstances where there has been a serious departure from a fundamental rule of procedure, and allowing a claimant to present evidence but preventing the respondent from testing it -- for example, through cross-examination -- is precisely the type of thing

that can get an award annulled. Unless the Tribunal is willing to certify that it didn't review Ms. Williams's statement before now, which might create its own set of problems, the only fair thing to do at this point is to allow Panama to cross-examine her, as Procedural Order Number 1 allows it to do. Otherwise, a question could remain as to whether each Party had a full and fair opportunity to present its case.

Now, if the Tribunal ultimately decides to accord less probative weight to certain exhibits or testimony for present purposes, so be it. The Tribunal has that right. It should not prevent Panama from discussing or examining those things at this Hearing.

Now, unless you have any other questions for me, that concludes Panama's presentation on this issue.

PRESIDENT PHILLIPS: I've got one question. Looking at your little--the Claimants' little schedule, am I right in concluding that, in relation to Objection 2 and Objection 5, you argue your case on

the assumption that the allegations made in relation to the consequences of the Supreme Court's decision are correct. You're simply saying, assuming we don't accept, in fact, that they've had these consequences, but assuming that they have, as a matter of law, they don't--the dispute in relation to those does not arise directly from the investment.

MS. SILBERMAN: So, we assume for the sake of argument that the causation arguments are correct.

PRESIDENT PHILLIPS: They're saying these in the future--well, they're saying, first of all, in the past, they've had some effect; and, furthermore, in the future, there is a real risk that they are going to be detrimental.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: That's what they're saying.

Your case, as I understand it, is not that we've got to decide whether those allegations are right or wrong, but we assume for purposes of argument that they have or might have the effect alleged. Your case is that, even if that were right, they would not

constitute elements of a dispute arising directly from the investment.

MS. SILBERMAN: Yes, because the disputed factual issue on the "arising directly" objection is whether there is a direct connection. It's not a question of the causation. And for purposes of the last objection, the issue is, assuming that's true, the only way it could possibly be true, is if there had been some other State that, in the future, might commit an internationally wrongful act, and the Tribunal doesn't have jurisdiction to decide that issue.

PRESIDENT PHILLIPS: We're quite close to the 20.4 approach in relation to those two objections. Even if these allegations of fact are right as a matter of law, you're outside the jurisdiction.

MS. SILBERMAN: There are many aspects that the Tribunal can accept of the Claimants' arguments, the merits related aspects the Tribunal can accept. Yes.

PRESIDENT PHILLIPS: Thank you very much.

MS. SILBERMAN: Thank you.

PRESIDENT PHILLIPS: Could we just please have, for the record, confirmation that the United States is not taking advantage of the opportunity to make oral submissions at this stage?

MS. THORNTON: Yes, that's correct. We will decline to make an oral submission for today, although we greatly appreciate the opportunity to do so.

PRESIDENT PHILLIPS: Thank you.

We're doing well on the time. We're going to have our 15-minute break now, and then ten minutes each for responses.

(Brief recess.)

PRESIDENT PHILLIPS: Sorry we were a little longer in the adjournment than the timetable should have permitted us.

REPLY ON THE PRELIMINARY ISSUE BY COUNSEL FOR CLAIMANTS

MR. WILLIAMS: Mr. President, Members of the Tribunal, so, in closing, on behalf of the Claimants, we would restrict our observations to this:

The first point is that the Respondent in the oral submissions that we have just heard, did not deal

with the question of burden of proof. I don't believe it was mentioned. And this is fundamental to the question of can the Tribunal make a decision, and what is the nature of the Decision that the Tribunal is asked to make.

PRESIDENT PHILLIPS: I'm sorry, I do question that.

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: In my very long experience, burden of proof hardly ever matters. It only matters at if at the end of the day the Tribunal is simply evenly balanced.

MR. WILLIAMS: The burden--we say the burden of persuading the Tribunal to grant the application to accede to the objections, we say that that burden rests with the Respondent for the reasons we have gone through.

And because this is an expedited and preliminary process in which necessarily there is limited evidence to the extent that the Tribunal looks at the evidence, we say that in terms of a Decision, then a decision that the Tribunal is required to make

is have the objections been established? Is the Tribunal satisfied that the burden has been discharged? And, in that respect, we say that this is important. It is for the Respondent to satisfy the Tribunal that it is appropriate at this stage to grant the objections to dispose of the case at this stage.

And, in circumstances where the Claimants, as we have been looking at, have had limited time--I know that the Respondent makes comments that the process has been ongoing for some time, but in reality, in terms of the current objections process, time has been abridged, it is an expedited preliminary process, if the Tribunal is not satisfied in that context that the objection should be granted, then the Decision to be made is that the objections fail. And, therefore, we would urge upon you that burden matters in that respect.

In terms, then, of the specifics of the four objections that we're looking at today, so the first, whether BSAM has a covered investment, we say that this does involve issues as to the merits.

PRESIDENT PHILLIPS: Could I just interrupt

you?

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: I think we're with you on that; but, when you look at this little schedule, are facts in dispute? No. Is a decision on assumed truth needed? No. Does the objection mixed competence, and there you say "no," we would say "yes."

But our thinking is, we're now in a position to determine this issue. There are situations in which the issue of whether you've got an investment or not that qualifies involves an enormous investigation and conflict of fact. And it may well be that, on true interpretation of Point 5, a decision on competence implicitly means a decision on competence doesn't involve determining merit. But we don't need to decide that, whether that's right or wrong. The sensible thing would be to go on and decide issues here and now.

Do you follow?

MR. WILLIAMS: I do.

And, of course, I entirely understand that

the Tribunal has in mind efficiency. We're all here, costs have been incurred, let's get on with it, of course. I suppose the question that we have, Mr. President, is one that you've raised, which is that in the context of the TPA itself and what the TPA says about merits and proceedings on the merits not advancing during this stage, whether that is permitted within the regime. And having looked at it again, it appears to us that in circumstances where a decision would necessarily involve aspects of the merits, then that would not conform with what the regime of the TPA requires. Having looked at it again, that's our submission.

If the Tribunal is satisfied, however, that it can deal with matters which involve aspects of the merits, and if it's right, then, that the facts, as to the extent they go to the covered investment point in Objection 1 are not disputed, the facts as alleged by the Claimants and the evidence that have been put in, then, in those circumstances I agree that the Tribunal, on that footing, could go ahead and decide the point. But there is that threshold question which

I raise.

In terms of Objection 2, does BSAM's dispute arise directly out of an investment, and it was offered that there could be an assumption made as to all of the facts relating to this matter in terms of the consequences that we say have arisen from the Decision of the Panamanian Supreme Court. And if an assumption is made on that footing, then it was suggested that the Tribunal could limit itself to the question of would that arise directly out of an investment, a question of law?

The concern that we have is that, in order to decide that, in order to decide whether or not those matters directly amount to a dispute arising directly out of an investment, and necessarily you have to look at what the facts are, in order to decide whether it is direct or whether it is not direct, what do we mean by "direct" and in the circumstances the facts here as they are is that or is that not something which directly arises out of an investment? And so, it seems to us as a practical matter, to be very difficult to divorce those questions.

So, it appears to us that Objection 2, even with the assumptions that were offered, is not something which is really susceptible to determination other than through a trial.

PRESIDENT PHILLIPS: What is the area of factual investigation that's needed?

MR. WILLIAMS: It would be as to the matters which is asserted should be assumed. So, in terms of what are the consequences precisely of the Decision of the Panamanian Supreme Court? So, exactly what are the facts which flow from that?

Now, those have been--we looked at those earlier in the Request for Arbitration. Those have been asserted. But, if the Tribunal is being asked to look at do those directly or do they not directly arise out of an investment, it seems to me that there is a danger that the Tribunal will not have the material that it would need in order to safely determine that question?

PRESIDENT PHILLIPS: Well, if it's determining it on the averments that have been made without ruling on whether they are accurate or not,

which as I understand the Respondents are content that we should do, I don't at the moment see the difficulty.

MR. WILLIAMS: I mean, I think I've made my point, and I think repeating it won't improve it.

Objection 4, if Objection 4 is to be dealt with on the basis that it is simply whether a claimant that is jointly and severally liable, whether one party discharging that liability and, thereby, accessing the TPA, whether that is an abuse of process, if it's simply that, then it seems to us that that probably can be dealt with. But that's on the assumption, then, there are no disputes of fact and, for example, issues of motivation, to which evidence ordinarily then would be applied, would not be considered, would not be relevant to that exercise.

And then Objection 5, it seems to us again necessarily it does require consideration of the facts. It is, as we said, a question of causation, and the question that the--the factual questions, it seems to us, cannot be divorced, the merits questions cannot be divorced from the objection that is being

raised. We say that this is not a competence objection at all.

And so, for that reason, we say this should not be dealt with at this Hearing.

REJOINDER ON THE PRELIMINARY ISSUE BY COUNSEL FOR RESPONDENT

MS. SILBERMAN: Thank you, Mr. President.

Just a few brief comments responding to what Claimants have just said.

The first is that we did respond earlier regarding the burden of proof; I mentioned that during my discussion. But the corollary to what the Claimants have just argued about the burden of proof supposedly being on the Respondent to disprove jurisdiction is an assumption that jurisdiction exists, and there is no assumption that jurisdiction exists. Jurisdiction must be proven by the claimant. The claimant has the affirmative burden of proof. The respondent doesn't have to say anything at all if the claimant cannot establish that jurisdiction exists.

The second is that the Claimants continued to discuss an apparent blurring of the lines between

jurisdictional issues and factual issues. Merits and facts aren't necessarily synonymous. There is a question of jurisdiction on the one hand and merits on the other, and we challenged Claimants to identify any merits issue that the Tribunal would be required to decide at this point. There really is none.

And just to illustrate the difference--

PRESIDENT PHILLIPS: Why isn't the question of whether there is an investment a merits issue?

MS. SILBERMAN: Well, let me show you.

So, we'll take, for example, the question of an expropriation. An expropriation is either the direct taking of an investment or some sort of indirect interference that is so substantial that it amounts to the virtual destruction or annihilation of the investment.

Now, there are situations in the past where tribunals have considered plainly as an issue of jurisdiction some aspect relating to expropriation -- considered the equivalent of Article 10.20.5 objection to competence; where tribunals have considered the equivalent of an objection under Article 10.20.4; and

then situations where jurisdiction and merits are intertwined.

So, let me explain.

The first example is in the Emmis versus Hungary case. In that case, the Respondent objected that the claimant didn't own the alleged investment that the claimant said had been expropriated, and the tribunal decided that that issue -- the question of ownership of the investment -- needed to be decided first in a separate jurisdictional proceeding before the Tribunal got to the question of the merits of the substance of whether that alleged investment had been taken. The tribunal made definitive findings of fact on that issue, and concluded that the claimant didn't have an investment -- didn't have the investment it said had been expropriated-- and declined jurisdiction.

Now, in Telenor versus Hungary, the issue--

PRESIDENT PHILLIPS: I'm sorry, I don't see what that demonstrates. It simply demonstrates that one part of the case was taken as a preliminary issue, which may have been very sensible. It doesn't

demonstrate that the preliminary issue was not an issue that went to merit.

MS. SILBERMAN: Well, the issue that does go to merits is the question of whether the respondent has breached an obligation. And the obligation is not to expropriate without compensation, not to take without compensation, not to interfere to such an extent that it virtually amounts to a taking without compensation. And in a situation where there is an objection that a claim -- an expropriation claim -- is unfounded as a matter of law, for example, in the Telenor versus Hungary case, it looks something like this.

So, the respondent in that case asserted that, even assuming that everything that the claimant said was correct, the tribunal could not conclude that an expropriation had taken place, because, in that case, the claimant was alleging just a little bit of loss; not the virtual annihilation, not the destruction, of the investment.

Now, there are some situations where jurisdiction and merits might overlap to some extent.

That happened for example in the Pey Casado case. There, the question was when the expropriation took place: Did it take place before the treaty entered into force, which would mean before the respondent had any obligation under the treaty not to expropriate without compensation, or did it take place after?

And the tribunal said that, to decide that issue, it was intertwined with the merits because you were considering the essence of the expropriation: what constituted an expropriation, when did it take place, when was there this taking. That is a situation where it intertwines with the merits. The initial threshold question of whether the claimant even owns an investment is that: It's an initial threshold question that doesn't go to the substance of the claim, which is that the respondent allegedly has taken or virtually taken the investment.

And, finally, I just want to the mention that Panama doesn't accept the arguments that are put forth in this table. We might need some additional time to look at it, but the Tribunal should know that these are things and characterizations that Panama does not

accept.

PRESIDENT PHILLIPS: I'm sorry, I didn't quite follow what it is.

So, this Table--

MS. SILBERMAN: Yes, and Panama just doesn't accept the characterizations that have been put forward in that table.

PRESIDENT PHILLIPS: Well, this is quite important, so I'm going to intervene and maybe take some more time.

Objection 1, Panama would agree, is brought under the competence limb?

MS. SILBERMAN: Yes, it is brought under the competence limb.

There are facts in dispute. Claimants, for some reason, just said there weren't facts in dispute, but there are facts in dispute because the documents don't say what Claimants say they do. Claimants either haven't submitted certain evidence that they refer to in their Rejoinder. For example, the Claimants say that there are registered "intellectual property" rights owned by Bridgestone Americas. There

is no evidence of that in the record.

And the Claimants also state that the Licensing Agreements amount to investments that Bridgestone Americas owns or controls, directly or indirectly; and, based on the exhibits themselves, they cannot make out that assertion.

So, what Panama is asking the Tribunal to do is simply to look at Claimants' own exhibits and determine whether they say what Claimants say they do. They don't. This isn't a factual dispute where Panama has put in additional evidence, but we do dispute the characterization that Claimants put forward.

PRESIDENT PHILLIPS: You don't challenge the evidence. You do challenge the interpretation of that evidence?

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: Yeah.

MR. WILLIAMS: Sorry to interrupt, and just to be clear, is there a challenge on the pleaded issues around this?

MS. SILBERMAN: I'm sorry, I'm not quite sure what you mean by that.

MR. WILLIAMS: Was it to the extent that the matters arise in the pleading on this, there are other allegations on the pleading on this, so those are disputed?

MS. SILBERMAN: Yes. That's precisely what is disputed. We don't accept the legal characterizations of the evidence that the Claimants have submitted.

ARBITRATOR THOMAS: Just so I understand this clearly, the evidence that has been adduced by the Claimant, you're not taking issue with any of the documents. What you're saying is that the characterization of the meaning of the document or what has been effected by the documents, if it's a transaction, you disagree with that; and, therefore, it's not really, strictly speaking, a contested issue of fact. It's a question of the proper appreciation of the fact.

Is that putting too fine a point on it?

MS. SILBERMAN: I'm still just trying to think it through. Let me take a quick look at the Transcript to make sure that I followed it.

ARBITRATOR THOMAS: Let me say it again.

You have a licensing agreement. You don't dispute the existence of the Licensing Agreement. You say it doesn't say what the Claimant says it says.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: You're asking the Tribunal to prefer your interpretation to that interpretation offered by the Claimants.

MS. SILBERMAN: Yes. There is that angle, and there is the question of whether the document could even possibly be construed as an investment, so I suppose the legal conclusions to be drawn from--

ARBITRATOR THOMAS: Another consequence to be drawn from the document.

MS. SILBERMAN: Yes.

ARBITRATOR THOMAS: But, first of all, you're saying this is held out as a particular type of investment; it isn't, for the following reasons. It doesn't say what they say it did. That's your point; is that it?

MS. SILBERMAN: Yes. It doesn't say what they say it does, and you cannot draw the legal

conclusions that would need to be drawn from that document.

ARBITRATOR THOMAS: Now, going back to the question which the President put to you, which is Objection 1 to the facts in dispute, you said yes, there are, am I now correct--I wrote that down.

Now, it's not the facts that are in dispute, it's characterization of the facts and the legal significance of the facts which is in dispute?

MS. SILBERMAN: Yes.

On some issues, at least as far as the Licensing Agreements are concerned. There have been some allegations of fact that, for example, were made by Claimants in the Rejoinder, like this notion that there Bridgestone Americas owns registered "intellectual property" rights in Panama. There is no evidence of that in the record. None.

So, for that, Panama does dispute that factual allegation.

ARBITRATOR THOMAS: So, that goes to the point about pleading. They pled that, but you're saying the evidence doesn't support what they have

pleaded?

MS. SILBERMAN: Yes.

And as the Pac Rim Tribunal said, in the Decision that the Claimants keep emphasizing, mere conclusions without any supporting facts cannot be considered factual allegations, even under the Article 10.20.4(c) standard.

ARBITRATOR THOMAS: Thank you.

Mr. Williams, does that answer your question about the pleading?

MR. WILLIAMS: In the 25 October letter that the Claimants sent to ICSID, which I think is accepted as being part of the pleading because it was clarification of the Request for Arbitration, on Page 4, then, there are--in the middle paragraph, there are a number there of allegations of fact. And I'm not clear, then, to what extent it is said that those allegations of fact are disputed. And there is, then, a question, to the extent that they are disputed, as to whether the Respondent should be entitled to dispute those or whether those pleaded allegations of fact should be assumed to be true.

MS. SILBERMAN: Mr. Williams, could I ask you to identify which, in here, are the factual allegations that you're talking about? Because there are various legal conclusions, unsupported legal conclusions, in this paragraph, so it would be helpful to know which are the factual allegations you're referring to.

MR. WILLIAMS: You're right, that there are in that paragraph conclusory statements, but there are also concrete allegations of fact. It's mixed. And so, there is an issue that arises as to what extent the allegations of fact are disputed by Panama as contained in that paragraph because it has the character of pleading.

(Tribunal conferring.)

MR. WILLIAMS: We could go through the paragraph. It would just involve--it would involve going through each element of it to identify whether Panama disputes those allegations.

I mean, in a sense, it's for you to tell us what is disputed and what is not.

PRESIDENT PHILLIPS: The Tribunal is of the

opinion that the issues here are fairly clearly drawn, and what was said in that letter is considerably elaborated subsequently. And issues that will arise, for instance, are whether or not Americas can take credit for the activities in Panama of their subsidiary companies. That's an allegation that they have made as part of their case. They're relying on what their subsidiaries were doing as part of the evidence that establishes, so they say, that they have an investment in Panama. It seems to me that that is going to be one of the issues that we will be debating, on the basis of the evidence.

MS. SILBERMAN: Well, I suppose that's one of the issues that will be debated tomorrow, and that it will be quite difficult and time-consuming and will take away from the arguments tomorrow to go point by point through every single allegation, and I trust that's not what the Tribunal was asking to do.

Again, I just want to mention that there are perhaps some factual allegations in here; there are legal conclusions; there are inferences that could be drawn therefrom; and it doesn't seem like an efficient

exercise at this point in time to put the Respondent on the spot to go through those.

(Tribunal conferring.)

PRESIDENT PHILLIPS: Unless there are any further submissions, I think it's now up to us to decide what's going to happen next. We need to have a little further discussion about that.

MS. SILBERMAN: Mr. President, could I ask one quick question?

PRESIDENT PHILLIPS: Yes.

MS. SILBERMAN: The Procedural Order wasn't clear as to whether the Parties should stay and wait for the Tribunal's decision or if it was going to come later at night, so we will await your instructions in that regard.

(Tribunal conferring.)

PRESIDENT PHILLIPS: You could all go home; and, as long as we've got means to communicate with you, we will convey our decision once we've reached it.

(Whereupon, at 5:03 p.m., the Hearing was adjourned until 1:00 p.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

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.

DAVID A. KASDAN