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 2

HEARING ON EXPEDITED OBJECTIONS

Monday, September 4, 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 1:00 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:

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Secretary to the Tribunal

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P R O C E E D I N G S

PRESIDENT PHILLIPS: Good afternoon, everyone.

Are there any items of housekeeping?

MR. WILLIAMS: Mr. President, there's, I think, one issue that was flagged yesterday, which is the status of Ms. Audrey Williams, who, the Tribunal will remember, is a witness who the Claimants say is an expert witness, and the Respondent, I think, takes a different view and contends she'll be treated as a witness of fact. We touched on that matter yesterday in our oral submissions, and I think it was suggested that the Respondent would deal with that at the end, but I don't think we did, as it turns out, but there is that issue which remains, and there is a practical consequence, as I understand it, in terms of how Ms. Williams is to be sworn in, the terms of the oath, which would be different, according to whether she's treated as a witness of fact or an expert witness.

So, as a matter of practicality, it seems to me that that question--it would be useful for that

question to be grappled with today.

PRESIDENT PHILLIPS: Well, you, as I understand it, are seeking to call her as an expert witness?

MR. WILLIAMS: Yes, Mr. President.

PRESIDENT PHILLIPS: Well, let us hear what is said in opposition.

MR. DEBEVOISE: Mr. President, I think, just before we get into that issue in the true housekeeping sense, I would like to inform the Tribunal that we have with us here today several additional people, including Mr. Norman Harris, who is the National Director for Treaty Administration at the Ministry of Industry and Commerce of the Republic of Panama, a gentleman who has a considerable interest in the outcome of this case as it affects his daily life as a Treaty Administrator.

And also with us today is Ms. Marissa Lasso de la Vega, who is a non-testifying, independent Panamanian law expert from the firm of Alfaro, Ferrer & Ramirez. And then from the Arnold & Porter team, in addition to myself and my partner Gaela Gehring

Flores and Mallory Silberman and Katelyn Horne, whom you met yesterday, we also have Amy Endicott to my immediate left, as well as our legal assistant team.

So, I just wanted to get that little piece of housekeeping before we get into the back and forth on other things.

PRESIDENT PHILLIPS: Thank you very much. And welcome to all three of you.

MS. SILBERMAN: Mr. President, on the issue of Ms. Williams, we are a bit surprised to hear Claimants stating that they want to submit Ms. Williams's testimony as that of an expert because, in their Rejoinder, when the testimony actually was submitted, the Claimants stated expressly in Paragraph 37 that they hadn't had time to instruct an expert witness, an independent expert witness, which is required under the IBA Rules. For a person to qualify as an expert, independence is required. And then they stated that, because they hadn't had time to instruct an independent expert, they were providing a short Witness Statement by Ms. Audrey Williams, and the cover page of her

statement said "Witness Statement." It didn't say "Expert Report." And, in reality, it couldn't have been an expert report precisely because she's not independent. She is the counsel that represented Bridgestone Licensing, which is one of the Parties in this proceeding.

And under Article 5 of the IBA Rules, "a party-appointed expert must be independent from the parties, their legal advisors and from the arbitral tribunal." That's Article 5(2)(c) of the 2010 IBA Rules.

PRESIDENT PHILLIPS: So, the reason that you challenge her as an independent--as an expert witness is her lack of independence?

MS. SILBERMAN: Precisely.

There are aspects of her "Witness Statement" that purport to opine on Panamanian law issues. She's not testifying to those as a witness of fact. She's presenting an opinion on Panamanian law, and that is something that only an expert would be qualified to do.

Now, she has testified in some respects to

elements of fact, and we haven't objected to her being presented as a fact witness. We do ask that the Tribunal take into account that, in reality, Ms. Williams is neither someone qualified to testify as an expert or a true witness on Panamanian law issues because those aren't facts that she witnessed, that she experienced, but we still are going to cross-examine Ms. Williams because her testimony has been presented. We just ask the Tribunal bear in mind that she does not qualify as an expert and that her testimony really isn't the testimony of a fact witness for many portions of her statement.

MR. WILLIAMS: So, sir, in response to the points that were made--

PRESIDENT PHILLIPS: Yes.

MR. WILLIAMS: --first, the substance of Ms. Williams's statement is one of opinion evidence. It is not--in substance, if one goes through what she says, it is simply opinion evidence as to what Panamanian law is. She does not give evidence as to questions of fact.

I explained yesterday the circumstances as

to why it was that Ms. Williams is put forward in that capacity, and it was purely a question of timing.

PRESIDENT PHILLIPS: Yes, you explained that.

I'm trying to see what the significance of this issue is. If she's called as a witness of fact, she would be open to cross-examination on matters of fact. The evidence--the primary evidence that she gives is in the nature of expert evidence of Panamanian law. If there were going to be a big issue about Panamanian law, I would have thought there would be opposing evidence.

But is the significance of the capacity in which she's called the extent to which you would be open to cross-examination, or is it simply which is the right oath, or what?

MS. SILBERMAN: In our view, Mr. President, this raises a similar issue to the one that we were discussing yesterday, where testimony that has been submitted and documents that have been submitted can't really be unseen.

So, at this point, what Panama is proposing is that we be permitted to cross-examine Ms. Williams on all the testimony that has been submitted and that the Tribunal simply take into account when considering the probative value, if any, of this evidence that Ms. Williams isn't independent and, therefore, isn't--doesn't require the same type of approach that an independent expert would require.

MS. GEHRING FLORES: Sorry, just one more detail, Mr. President.

I think you also have to consider that the type of oath that is presented to an expert witness is the oath of an independent expert witness whose clients are not parties to this dispute. So, if you were to swear her in as an expert witness and she would say that she's going to give her opinion in an independent and objective manner, she can't. These are her clients.

PRESIDENT PHILLIPS: As I understand--

MS. GEHRING FLORES: She's counsel.

PRESIDENT PHILLIPS: She's not an in-house counsel. She's counsel who was retained in a

particular legal proceeding; is that right?

MR. WILLIAMS: Mr. President, that is right.

And the oath that would be required of an expert is that the individual "solemnly declare upon their honor and conscience that their statement will be in accordance with their sincere belief." And that's Rule 35(3).

And we say that there's no reason at all, in principle, why Ms. Williams cannot give that oath. If, when we see her tomorrow, if she has a problem, no doubt she will inform the Tribunal.

We do have a concern that, in response to the Tribunal's question, it does look as if Panama has it in mind to cross-examine her as a witness of fact in relation to matters concerning the underlying dispute. Ms. Williams, her statement is directed solely at questions of Panamanian law; and, in the circumstances I've explained, that's--the reason why she is doing so is because she was available to the Claimants.

It's a question of weight, what weight should the Tribunal put on her opinion evidence in

light of her background, and, of course, that's something for the Tribunal to decide once they've heard her testimony.

PRESIDENT PHILLIPS: Yes.

I'm trying to find the precise provisions of Article 5 of the IBA Rules.

MS. SILBERMAN: It should be Article 5(2)(c), Mr. President, of the 2010 Rules.

(Tribunal conferring.)

PRESIDENT PHILLIPS: Can you help me out? I think you said it was Article 5? 5(2)(c)?

MS. SILBERMAN: Yes. It states that: "Within any expert report, the expert needs to include a statement of his or her independence from the Parties, their legal advisors, and the Arbitral Tribunal." And presumably because the Expert Report needs to include such a statement, that needs to be true of the expert as well.

MS. GEHRING FLORES: And her statement did not include such an oath.

MR. WILLIAMS: We would--sorry.

PRESIDENT PHILLIPS: Yes?

MR. WILLIAMS: I mean, if a point--if a technical point is being taken as to whether particular words appear in her statement, then, of course, that is something which can be addressed in her oral testimony. She can be asked these questions in order that the Tribunal can understand whether she would satisfy the requirements of the IBA Guidelines.

PRESIDENT PHILLIPS: We'll just adjourn for the moment.

(Tribunal conferring outside the room.)

PRESIDENT PHILLIPS: We shall permit Ms. Williams to be called on the basis that she was originally proffered as a witness to give the evidence that is in her statement, which has not been objected to. She will take the oath of an ordinary witness, not of an expert witness.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MS. GEHRING FLORES: Good afternoon. I was about to say "good morning." I'm used to doing this in the morning.

Mr. President, Members of the Tribunal, counsel and colleagues, sticking with the theme from

the pleadings and from Ms. Silberman's presentation yesterday, today we plan to start at the beginning once more, this time with the events giving rise to this case.

In 2002, applications were filed in both the U.S. and Panama for registration of the RIVERSTONE trademark. Although the Panamanian application was actually filed first, the U.S. application was the first to be noticed by the Bridgestone group of companies; and, in December 2003, members of the group opposed the application for registration in the U.S., which had been filed by a U.S. company named L.V. International, and the application subsequently was withdrawn with prejudice.

In November 2004, attorneys for the Bridgestone group of companies sent a letter to L.V. International, putting it on notice of Bridgestone's objection to L.V. International's future attempts to register the RIVERSTONE mark and its use of the mark in the U.S. and worldwide. I have included the text of the letter in the next few slides for your reference, but I won't quote it here for the sake of

brevity.

A few months later, in February 2005, the Panamanian application for registration of the RIVERSTONE trademark was published in the Industrial Property Bulletin. Two members of the Bridgestone group--Bridgestone Corporation and Bridgestone Licensing--initiated an opposition proceeding in April 2005, and the applicant, a Panamanian entity called Muresa Intertrade, defended the opposition. L.V. International and the Tire Group joined the proceeding as third-party intervenors.

In July 2006, the opposition claim was rejected, and Bridgestone Corporation and Bridgestone Licensing appealed.

Even though Claimants now contend that there is a direct correlation between the ability to police a trademark and the value of a trademark, and that Bridgestone group therefore has a robust approach to maintaining and defending its "intellectual property" rights, Bridgestone Corporation and Bridgestone Licensing later decided to withdraw that appeal.

In September 2007, Muresa and Tire Group

then filed a damages claim against Bridgestone Corporation and Bridgestone Licensing, asserting that "the trademark opposition proceedings initiated by Bridgestone had caused them to cease sales of RIVERSTONE tires out of fears that their inventory would be seized if they lost the opposition proceedings," and that this resulted in a "loss of revenue in excess of $5 million."

During the course of the court proceeding that followed, L.V. International made a submission in support of the claim, "arguing that Muresa's and Tire Group's fears were justified on the basis of the November 2004 letter," which I showed you earlier. Notably, for their part, Bridgestone Corporation and Bridgestone Licensing at this time argued “that the mere fear of seizure was not enough to support a damages claim, particularly in the circumstances where there was no court order enjoining the sale of branded tires.”

They also argued "that neither Muresa nor Tire Group had proven that they had suffered any loss, given that they had continued to sell

RIVERSTONE tires without restriction while the opposition action was pending."

PRESIDENT PHILLIPS: Well, whilst the claim had resulted in loss or would result in a 5 million loss? On the screen, you put "would."

MS. GEHRING FLORES: I believe in that proceeding, they were arguing that it had resulted in $5 million of loss.

The claims by Muresa and Tire Group were rejected, and so was their subsequent appeal. In January 2014, Muresa and Tire Group appealed to the Supreme Court of Panama, requesting that the Court "review the evidence de novo and issue a finding that Bridgestone recklessly opposed the RIVERSTONE trademark, resulting in losses for Muresa and Tire Group."

On May 28, 2014, the Panamanian Supreme Court, by a two-to-one vote, found in favor of Muresa and Tire Group.

The Decision stated that the mere initiation of an opposition procedure does not automatically injure the Applicant. It “gave decisive weight” to

the November 2004 Notice Letter, which I showed you earlier, "on the issue of recklessness"; and stated that the letter was “intimidating” and had asserted, “without legal basis, at least within Panamanian law, that the plaintiffs should refrain from commercially selling a product.”

The Decision also “referred to the resolution of the Intellectual Property Appellate Court accepting Bridgestone's withdrawal of the appeal of the trademark opposition decision as evidence of bad faith,” and held Bridgestone Corporation and Bridgestone Licensing "jointly and severally liable" to Muresa and Tire Group for $5 million in damages, plus $431,000 in attorneys' fees.

At some point during the year following the Supreme Court Decision, the Bridgestone group of companies began contemplating bringing a claim under the U.S.-Panama TPA.

There was mention of this in a formal submission to the U.S. Trade Representative in February of 2015. Claimants' witness, Mr. Kingsbury,

spoke on behalf of Bridgestone Americas, and he stated that they believed that the Supreme Court Decision had implications under the TPA.

In March of 2015, Bridgestone met with Panama's Ambassador to the United States and mentioned the possibility of seeking redress through international options, such as under the U.S.-Panama FTA.

But there was a problem: The entities that owned the Panamanian trademarks and were involved in the Supreme Court proceeding were Bridgestone Corporation and Bridgestone Licensing. Bridgestone Corporation, a Japanese entity, could not submit claims under the TPA and had no other investment treaty to invoke.

Bridgestone Licensing, nominally a U.S. company, theoretically could submit claims under the TPA, but, to do so, would need to demonstrate loss. However, it had not suffered the loss that it had wanted to claim. The group wanted to submit claims for an amount of the Supreme Court Decision, but the two entities were jointly and severally liable for

the judgment. Until one of them paid, neither could claim the amount of the judgment as a loss.

In addition, Bridgestone Licensing--again, only a nominal shell entity--likely knew that it might draw a denial-of-benefits objection. The other entity that the group wanted to involve in the case under the TPA--which was Bridgestone Americas--was not a party to the Supreme Court proceeding, was not directly affected by the Supreme Court Decision, and did not have an investment in Panama.

So, what was the Bridgestone group to do? It tried to make do. On August 19, 2016, Bridgestone notified Muresa and Tire Group of its intention to pay the full amount of the Award.

Tellingly, this letter indicated that Bridgestone Licensing and Bridgestone Corporation--which, of course, had no rights under the TPA--"reserved their rights under international law, including the U.S.-Panama Trade Promotion Agreement."

And then Bridgestone Corporation, “through its subsidiary Bridgestone Licensing,” which up until

then was still jointly and severally liable for the judgment along with Bridgestone Corporation, paid the damages award that same day.

And then the lawyers tried to work a bit of magic. They took a right from here, an attribute from there, and fashioned a Frankenclaimant: Bridgestone. You can see it. You can see it in their Request for Arbitration. You can see it in the pleadings, this Frankenclaimant. It's pretty easy to spot, actually, because, despite the myriad of Bridgestone groups that are relevant to this narrative, whether it's Bridgestone Corporation, Bridgestone Americas, Bridgestone Licensing, Bridgestone Brands, Bridgestone American Tire Operators--I could keep going on and on and on--the Frankenclaimant shows up as the unadorned word "Bridgestone." Just "Bridgestone," an amalgamation--excuse me?

PRESIDENT PHILLIPS: Just go back a little.

Bridgestone Licensing, having paid the full 5 million of the judgment--

MS. GEHRING FLORES: Yes.

PRESIDENT PHILLIPS: --was it entitled to contribution from Bridgestone Corporation?

MS. GEHRING FLORES: By "contribution," what do you mean?

PRESIDENT PHILLIPS: Yes, two parties jointly liable. One party pays the lot. Does that party have a right to claim contribution from the other party?

MS. GEHRING FLORES: I presume it would have to do with what their agreement is between them. And I would presume to ask Claimants that question. We don't know. We don't know what their--

PRESIDENT PHILLIPS: Equally, if Bridgestone Corporation had paid the lot, the question would then arise would Bridgestone Licensing still be under a contingent liability to Bridgestone Corporation?

MS. GEHRING FLORES: That's--yeah, that's a question--

PRESIDENT PHILLIPS: You don't know?

MS. GEHRING FLORES: Right.

Obviously Bridgestone Licensing is a wholly owned subsidiary of its parent, the Japanese company

of Bridgestone Corporation. I assume one would have to dig into their particular agreements and financial arrangements to understand who would have a right to request contribution. That's probably a question better for Claimants.

In any event, you'll see in the pleadings the word "Bridgestone" a lot. It was certainly a frustrating exercise for us because we were trying to figure out who, which entity they're talking about, and a lot of times "Bridgestone" just shows up.

An amalgamation of all the rights and attributes and characteristics that any hopeful investment claimant would want, all in one convenient package.

But you can't do that in ICSID Arbitration. In this world, each claimant must be evaluated on the basis of its own attributes and its own rights; and, when that's not [sic] done, it is clear that there is no jurisdiction.

As Panama explained in its papers and again yesterday and will explain again today, there are at least five barriers to an exercise of jurisdiction in

this case, namely, that:

First, Bridgestone Americas does not have an investment;

Second, even assuming for the sake of argument that what Claimants have alleged is Bridgestone Americas' investment actually was an investment, the dispute does not arise directly out of it;

Third, Bridgestone Licensing--which is the other Claimant--committed an abuse of process that bars consideration of its claims;

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

Fifth, Claimants have asserted, but the Tribunal's jurisdiction does not extend, to claims based on hypothetical conduct or the conduct--hypothetical or not--of States other than Panama.

So, with that, Tribunal Members, I'll turn the podium over to my colleague Mallory Silberman, unless you have any more questions for me. And I'll

be back in a moment.

MS. SILBERMAN: Good afternoon, Mr. President, Members of the Tribunal.

I will be addressing the first of these two barriers to jurisdiction, the "no investment" and "no dispute arising directly out of an investment" issue.

And because of this Frankenclaimant phenomenon that we just mentioned, we thought it would be useful to begin the segment on why Bridgestone Americas doesn't have an investment -- with an explanation or a reminder as to what Bridgestone Americas is.

As Claimants explained in their Notice of Intent, Bridgestone Americas (which they abbreviate to BSAM) is a Nevada corporation licensed by Bridgestone Corporation (which is the Japanese parent company) and Bridgestone Licensing (the Second Claimant) to conduct sales and marketing activities related to BRIDGESTONE and FIRESTONE-branded tires in Latin America, including in Panama.

As best we can discern and as far as the record shows, Bridgestone Americas doesn't conduct

any of these sales and marketing activities itself. Instead, its “subsidiaries, [like] Bridgestone Costa Rica, manufacture, sell, distribute and market BRIDGESTONE and FIRESTONE tires into different markets in the region.” “In Panama,” Claimants explain, “BRIDGESTONE and FIRESTONE tires are sold to third-party distributors through Bridgestone Costa Rica,” which, as its name suggests, is a Costa Rican entity. Bridgestone Americas doesn't have any Panamanian subsidiary. It doesn't have offices in Panama. It doesn't even have employees in Panama.

So, that's Bridgestone Americas. Now, what's an investment?

Well, as we discussed yesterday, both the TPA and the ICSID Convention require that there be an investment, and the TPA defines investment as follows: It states that: "'Investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of

risk."

Now, the Parties agree that, for purposes of this case, the TPA required that the investment be an investment in Panama.

The ICSID Convention, on the other hand, doesn't define the term "investment," but that doesn't mean that the Convention simply punts the issue over to the TPA. Why not? Well, the term "investment," like any other word, has an objective meaning, and just as one cannot define the word "dog" to mean "cat," the parties to a dispute cannot just define the term "investment" to mean something that it isn't.

And so, as Professor Schreuer has stated in his seminal commentary on the ICSID Convention: "The drafting history of the Convention leaves no doubt that the Centre's services would not be available for just any dispute that the Parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction, no matter how far-reaching the Parties' consent might be."

Mr. President, it seems like you had a question.

Now, you had heard a lot from Claimants throughout this case about trademarks, about the BRIDGESTONE trademark and the FIRESTONE trademark. And, as Claimants explain, "the purpose of a trademark is to identify the rightful brand owner of a particular product to the public." But Bridgestone Americas, the Claimant that we're talking about here: it doesn't own the BRIDGESTONE trademark; it doesn't own the FIRESTONE trademark. As Claimants explain, Bridgestone Licensing is the owner of the FIRESTONE trademark, and Bridgestone Corporation holds the BRIDGESTONE trademark.

PRESIDENT PHILLIPS: Could I just ask a question about your statement, that the object of the trademark is to identify the owner to the public, to suggest that the object and benefit of the trademark relates to the goods to which the trademark relates, and, so far as the public are concerned, it gives them a reassurance in relation to the quality of the goods? Who is the ultimate owner of the trademark is

not of any interest to the public, is it?

MS. SILBERMAN: Well, Mr. President, as you can see, this is actually a direct quote from the Claimants' Request for Arbitration. They stated: "The purpose of a trademark is to identify the rightful brand owner of a particular product to the public." And given how adamant Claimants were that the statements contained in their Request for Arbitration were true and that they should be accepted as truth in this proceeding, perhaps that question should go to them.

PRESIDENT PHILLIPS: Well, are you accepting--you made the proposition.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: Do you accept it as correct?

MS. SILBERMAN: Sure. The purpose of a trademark is to identify the rightful brand owner, and the issue here is that the brand owner isn't Bridgestone Americas. The brand owner is Bridgestone Licensing in one situation and Bridgestone Corporation in the other. And, with that issue --

with ownership -- comes certain rights. And according to the Claimants, these rights include things like the exclusive right to use the trademarks and the ability to prevent unauthorized use of the trademark. That's something that's associated with ownership.

And what do they mean by "exclusive right to use the trademark"? Well, using the trademark means placing the trademark on goods for sale. So, it's no wonder that Claimants asserted in their statement--their Submission to ICSID on Registration that Bridgestone Licensing, as the owner, has rights that permit the sale of tires bearing the FIRESTONE brand in Panama.

ARBITRATOR GRIGERA NAÓN: My understanding of the Claimants' case is that the use of the trademark is an investment, it has been defined in the Treaty as an investment, so that that also carries the notion of property, of rights that may have an economic value. Whether the economic value is the consequence of sales seems to me to be a different issue.

Now, you could address that issue.

MS. SILBERMAN: Sure.

So, the Claimants have asserted that they hold certain rights, that they hold a right to use, which is, in this situation, a right to use for sales. So, the rights that Bridgestone Americas has are the rights to sell, market and distribute. It got those rights from the owner, and the owner stated that--well, at least according to Claimants--the reason that the owner gave these rights, these limited rights (as we'll discuss letter) to Bridgestone Americas was so that Bridgestone Americas could make money in Panama selling tires.

ARBITRATOR GRIGERA NAÓN: But isn't the term of ownership what is called an "open texture term"? Because ownership may be ownership of rights, which is use of the right, and that may have a value and may qualify as an investment. How do you address that?

MS. SILBERMAN: Well, not every right is a right that's capable of ownership. For example, the right to free speech is something that I, as an American citizen, have. It's a constitutional right.

But I don't own the right to free speech. I don't control the right to free speech. I have it.

And certain of the rights that Claimants have are just rights that aren't capable of being owned or controlled, or at least they aren't owned or controlled by this particular Claimant. And that's the issue here: is that when we get to particular Licensing Agreements, irrespective of whether you think that these rights actually could theoretically qualify as assets, they still need to be assets owned or controlled, directly or indirectly, by the relevant Claimant here, which is Bridgestone Americas. And, as I'll show you, we're going to walk through the Licensing Agreements--it's quite clear that Bridgestone Americas doesn't own or control these rights.

And, in fact, the very fact that there has to be a Licensing Agreement in the first place demonstrates that Bridgestone Americas doesn't own the rights. It had to get the rights from someone else. It had to get the rights from the owners of the trademark because these are rights that are

associated with ownership that the owner needs to give to someone else. As you'll see, the owner of the trademarks has maintained control, has maintained ownership, really, because they aren't exclusive licenses to use. They're non-exclusive, heavily conditioned rights, and the owners of the trademarks control every single aspect of the use.

So, perhaps we should skip ahead to that issue.

Actually, let me pause here very quickly because I just want to explain that, when Claimants are talking about these "intellectual property" rights that they have, they're talking about rights associated with sale. We know that because when they talk about exercising the rights, they talk about sales. When they're talking about the purpose of the rights, they talk about sales. And every single time they mention the rights, they say the right to sell.

And just to explain how this works in practice: so, Tambor, which is a separate Panamanian entity, “place[s] orders for tires with Bridgestone Costa Rica. Bridgestone Costa Rica fills these

orders and then ships the tires to distributors in Panama under the FCA Incoterms." What are those? Those are terms that are established by the ICC. It stands for international commercial terms. Commerce. Payment is made under these terms. This is a sales transaction.

But skipping ahead to this question of what the Claimants have: so you see here they say it's "intellectual property" rights. It's the rights that we have under these Licensing Agreements to use, manufacture, sell and distribute.

Okay. So, let's turn to the two agreements.

PRESIDENT PHILLIPS: Well, the rights, as I understand, the rights they're relying on are the rights under the Licenses.

MS. SILBERMAN: Yes. And the rights under these licenses they're saying are "intellectual property" rights and are saying are investments are the rights that we're going to discuss, and these are the rights to use BRIDGESTONE trademarks and FIRESTONE trademarks on tires for the purpose of selling those tires. And these rights to use to

sell: those aren't rights that are owned by Bridgestone Americas. They're rights that are, if they're capable of being owned at all, would be owned by Bridgestone Corporation and Bridgestone Licensing. Bridgestone Americas licenses the rights from these other entities, and you'll see when we go through these terms, they're very, very heavily conditioned, showing that there is no ownership and no control.

So, at this point in the arbitration, Claimants have--

PRESIDENT PHILLIPS: Well, the rights they say they have are the legal rights given to them by licenses. They're not claiming to own the trademarks.

MS. SILBERMAN: Well, if they're not claiming to own or control the trademarks, then they don't have an investment. Under the TPA, it states that: "An 'investment' means an asset owned or controlled, directly or indirectly, by the Claimant." If it's not an asset that they own or control--I mean, Claimants aren't even asserting that they own or control it--then there is absolutely no

investment.

And, in fact, Parties agree on this standard. Let's go back.

So, in the Rejoinder, Paragraph 36(d), Claimants noted that Panama had “set[] out what it consider[ed] Claimants must do to prove that there's a covered investment,” which is "‘identify an asset in the territory of the host State that an investor owns or controls, directly or indirectly, at the time of the alleged treaty violation.’"

“The Claimants agree with this.” How could they not? That's expressly what the TPA requires. There must be an asset that the particular Claimant at issue, Bridgestone Americas, owns or controls.

And the rights in the Licensing Agreement, even assuming for the sake of argument that they could be considered assets--and Claimants haven't put in any evidence that actually proves that, which I'll show you in just a second--even assuming that they were assets, they are not assets owned or controlled by Bridgestone Americas.

ARBITRATOR GRIGERA NAÓN: But would you

accept, as a matter of principle, that license rights qualify as an investment?

MS. SILBERMAN: Under the TPA, there is a provision--I believe it's Article 10.29(g)--that states that licenses conferred pursuant to domestic law are one of the forms that an investment may take. And if you look at all of the different examples that are given in that portion in subparagraph (g), they're all the types of things that are conferred pursuant to domestic law. And these Licenses are governed by U.S. law and they're governed by Japanese law. They weren't conferred pursuant to domestic law.

Now, we raised this point,and Claimants in their Rejoinder no longer bring up that subparagraph. Initially in their Request for Arbitration, they did. They said Subparagraph (e) applies and Subparagraph (g). At the time of the Rejoinder they said nope, they don't want anything to do with this Panamanian law issue because these rights are conferred pursuant to other laws, perhaps. They didn't say that expressly, but I suppose we can draw that conclusion,

and they abandoned that argument.

ARBITRATOR GRIGERA NAÓN: You interpret that "conferred" is the same as "granted"?

MS. SILBERMAN: It should be.

Because let me pull up the particular passage.

So, these are talking about licenses, authorizations, permits, and similar rights. It's not talking about "Licensing Agreements."

You know, if this was just talking about any old license: Let's say I have a Metro ticket, I have a license to use the Metro, paid $2 for it, made a contribution. I have my little ticket. It's a license. Would that be an asset or an investment? No. Not every license or licensing agreement qualifies as an investment.

And it should be a license from the Government. These are authorizations, permits, not just any old license that a private party confers.

So, I mentioned earlier that Claimants hadn't even put in any evidence to support the notion that they have an asset. An asset -- that particular

element of the Treaty definition -- is defined by reference to international law. And the ordinary meaning of the term "asset" is: "An item of property owned by a person or company regarded as having value and available to meet debts, commitments or legacies." That comes from the Emmis Award, and the Emmis Tribunal was citing the Oxford English Dictionary here.

Now, "property" is something that's defined by reference to domestic law. There is no international law of property, and Claimants haven't submitted any evidence that a limited, highly conditioned, non-exclusive, non-transferable right to use intellectual property is considered property under Panamanian law.

They have submitted some testimony from Ms. Williams stating that this type of thing is a right that might be recognized under Panamanian law, but not even Ms. Williams purports to address the property issue.

And, in any event, the Claimants have also failed to submit evidence that the rights

contemplated in the Licensing Agreements are available to meet debt, commitments or legacies; and, as you will see, the rights and Licensing Agreements clearly aren't available to meet debts.

ARBITRATOR GRIGERA NAÓN: You think that the rights under the Licenses cannot be sold in the market for a price?

MS. SILBERMAN: That's what the Licensing Agreements themselves state.

And let's turn to that language because it might be helpful to address these things in context.

So, at this point in the arbitration, there are just two Licensing Agreements at issue: They are Exhibit C-52, which was submitted with the Response, and Exhibit C-48. Claimants had submitted various other agreements at earlier points in time; but, by the time of their Rejoinder, this was their case: C-52 and C-48.

So, the first agreement, C-52, is a December 2001 Agreement between Bridgestone Corporation, which is the Japanese parent company, and Bridgestone/Firestone North American Tire, which

is the predecessor of an entity that is a wholly-owned subsidy of Bridgestone Americas, and the Agreement refers to that entity as "BFNT." For the sake of brevity, I will do so as well.

So, Article 2-1, which you see here on the screen, states: "BSJ [which is Bridgestone Corporation] hereby grants to BFNT the non-exclusive and non-transferable right and license, with the limited right to sublicense as identified in this Article, to use for the term of this Agreement BSJ [so Bridgestone Corporation] trademarks in relation to all tire products within the United States and elsewhere as provided in Article 2-2, provided that the designs, including trade dress, construction and quality of such Tire Products, were approved by Bridgestone Corporation."

Okay. A non-exclusive right to use, so this isn’t ownership. The owner would have the exclusive right to use. A non-transferable right to use, which means that Bridgestone/Firestone North American Tire, BFNT, doesn't own or control the right, and that the right can't be used in any debts. It can't even be

transferred, it can't be sold. And there's a requirement that there be Bridgestone Corporation approval on design, trade dress, construction and equality. So, the right is subject to Bridgestone Corporation oversight. Bridgestone Corporation has the control.

Now, there are other provisions in the Licensing Agreement that confirm this, so we turn to Article 4 which is titled "use of trademarks," and it states that: "BFNT shall furnish to Bridgestone Corporation, without cost, copies of all labels and signs as well as advertising and promotional literature using Bridgestone Corporation trademarks." It states that "use by BFNT inures to the benefit of Bridgestone Corporation and not to BFNT"; and it states that “the application for and renewal of Bridgestone Corporation trademarks shall solely be at the discretion of [Bridgestone Corporation].”

Now, all of these things confirm that there is no ownership or control. If BFNT owned or controlled the right to use the trademarks, then why would it need to send copies of any advertisements or

literature using the trademarks to Bridgestone Corporation? Why wouldn't use inure to its own benefit? And wouldn't it have some sort of recourse if the trademarks went away? Claimants don't answer any of these questions.

Now, let's turn to the next Article, Article 5. Article 5 shows that BFNT doesn't even get to decide what types of tire to put the trademarks on. Bridgestone Corporation gets to approve the material, the manufacturing, the product and the performance specifications. Bridgestone Corporation specifies the identifying symbols to use on the Tire Products. It established quality standards, and it gets to inspect the facilities at which the Licensee manufactures the Tire Products.

Bridgestone Corporation also controls the policing and enforcement of the marks. This is clear from Article 6-3, which imposes an obligation on the Licensee, an obligation on BFNT, to cooperate in efforts to police and enforce the trademarks, but it states that Bridgestone Corporation may take all necessary action to restrain infringement and unfair

competition and to recover damages therefore.

So, let's turn to the other Licensing Agreement. This is Exhibit C-48. And Exhibit C-48 is also a Licensing Agreement from 2001, but this one is between Bridgestone Licensing, on the one hand, and a predecessor to Bridgestone Americas on the other. Bridgestone Licensing is the Licensor and this predecessor entity is the Licensee.

Now, here again there is a limited, conditioned and non-exclusive license to use trademarks on a specific set of items in specific locations. Non-exclusive. The Licensee doesn't own the right.

Section 5 of the Licensing Agreement demonstrates that the Licensee has no control. Section 5 states: "Licensee may use marks only on licensed products after receiving the written approval of Licensor, and only after Licensor has seen, inspected, and approved a sample of the use of each of the marks as well as a sample of each of the Licensed Products provided by Licensee, at its expense, displaying the proposed usage of the marks.

Thereafter, until expiration of this Agreement, the marks must only be used in the style, font, color, and manner as required by the Licensor."

So, the Licensee must obtain approval from the Licensor. The Licensor will inspect and approve a sample of each use and each licensed product, and the marks must only be used in the style, font, color and manner as required by the licensor. The Licensee doesn't have control.

Now, Section 11 offers additional confirmation that the Licensee doesn't own the right to use the trademarks. It states: “Licensee agrees that Licensor owns the marks and all the goodwill associated therewith. Licensor shall retain all right, title and interest in and to the marks, the goodwill associated therewith, and all registrations granted thereon. Any and all uses of the marks by Licensee shall inure to the benefit of Licensor." Again, why would use inure to the benefit of Licensor if the Licensee owned the right?

Section 14 requires the Licensee to cooperate with the Licensor for the purposes of

securing and preserving the Licensor's rights, including rights in the trademarks and rights in any dispute, including specifically but not exclusively, a dispute involving Section 11, which, as you just saw in the last slide, is a section relating to ownership.

In other words, Section 14 imposes an obligation on the Licensee to cooperate with the Licensor for its own licensing, and the Licensor's efforts to police the trademarks.

And finally, Section 27 states that the Agreement may not be assigned or delegated by the Licensee without the Licensor's consent, but the reverse isn't true. The Licensor, Bridgestone Licensing, can assign the Agreement to other entities simply by giving notice. Bridgestone Americas doesn't own or control this right.

And because there is no ownership or control of these rights -- the only rights that the Claimants have asserted that constitute an investment by Bridgestone Americas -- there is no investment under the TPA.

Now, assuming that Claimants could somehow get past all these barriers in their own Licensing Agreements, there still would be another barrier that they can't pass, which is that assuming for the sake of argument that this qualified as an investment, the dispute doesn't arise directly out of that alleged investment.

As I explained yesterday, the requirement that the dispute arise directly out of the investment comes from Article 25(1) of the ICSID Convention, which establishes the limits of the Centre's jurisdiction. And it is undisputed between the Parties that, to demonstrate that the dispute arises directly out of an investment, Claimants would need to establish that there is a direct relationship between (1) the government conduct at issue, which in this case is the Supreme Court Decision; and (2), the alleged effects on the alleged investment, which, as we've just discussed, are the limited rights to use the trademarks.

Now, what is a "direct relationship"? It's an immediate relationship, a relationship without any

steps or stops in the middle. It's like a direct flight or direct ownership. Nothing in between.

What doesn't constitute a direct relationship? Well, yesterday on the slide, when I was explaining to you that there had been cases in the past that have declined jurisdiction on the basis that there was no dispute arising directly out of an investment, I cited the Burimi Case, which has been in the record as RLA-14 since the time of Panama's First Submission. And the circumstances of that case were the following:

In 2011, two companies, one of which was named Burimi and the other of which was named Eagle Games, asserted claims against Albania at ICSID based on certain measures that Albania allegedly had adopted in respect of Eagle Games' business operations. Eagle Games was sort of a gambling company. I believe it had lottery tickets. Now, Burimi, one of the Claimants, didn't own shares in Eagle Games, but it had entered into certain private contractual agreements with one of the shareholders of Eagle Games, that related to Eagle Games.

Essentially, the idea was that Burimi was going to finance the investment of this shareholder in Eagle Games. So, Burimi invested about €204,000 toward the development of Eagle Games pursuant to the Agreement and, in turn, it was supposed to receive a percentage of Eagle Games' profits. And as collateral for this financing agreement, Burimi received a pledge of Eagle Games' shares.

But the Tribunal declined jurisdiction on the basis that the dispute between Burimi and Albania didn't arise directly out of an investment. The Tribunal said in reality Burimi's claims arise out of its agreement with this woman, with the shareholder, and they do not arise out of the investment in question -- the investment that allegedly had been affected by the Government measures, which was the enterprise of Eagle Games.

Now, this sounds very much like the present case. The conduct in question was a Supreme Court Judgment in a proceeding in which Bridgestone Americas was not and could not have been a party. It was a judgment that Bridgestone Americas did not

and--did not have any obligation to pay. There is no direct connection between the Supreme Court Decision and Bridgestone Americas' alleged investment.

Now, Claimants have tried to argue otherwise, but their arguments don't withstand scrutiny. Let me show you why. And they have, at this point, three theories, but I'm going to show you all four theories that they have advanced throughout these proceedings.

Their first theory was that there is a direct relationship because "the Supreme Court Decision has effectively deprived Bridgestone Licensing of the ability to oppose confusingly similar trademark applications which in turn has resulted in diminution of the value of the FIRESTONE and BRIDGESTONE trademarks. And even though Bridgestone Americas doesn't own the trademarks, allegedly, a potential diminution in value might, in turn, affect Bridgestone Americas and its subsidiaries because they licensed the BRIDGESTONE and FIRESTONE trademarks. Claimants insist that Bridgestone Americas and its subsidiaries "ultimately

stand to lose if the trademarks that are at the center of their investment are devalued."

Now, I should mention, where you see the ellipsis on the screen and the Request for Arbitration, Claimants have said "and Bridgestone Americas" -- they've alleged that the Supreme Court Decision had effectively deprived Bridgestone Americas of the ability to oppose confusingly similar trademarks applications.

But as you have just seen in the Licensing Agreements, and as Claimants concede in Paragraph 38 of the Rejoinder, Bridgestone Americas didn't have the right to oppose these things. If it did, it presumably would have been a party to the proceeding with Muresa, but it wasn't. So, it's for that reason that we have ellipsis over that.

Now, let me give you a graphical representation of what this argument is. So, this is what the relationship should look like if there were a dispute arising directly out of an investment. They're right next to each other. Nothing in between.

Here is what actually happens under the first theory. There are multiple steps in the process.

Now, let's go on to Claimants' second theory.

The second theory is that the Supreme Court Decision may possibly be followed in other countries either as a matter of policy or precedent, that that allegedly would lead to a reduction in trademark protection; that this, in turn, would cause cheap tires to flood the market; that that supposedly would lead to--ultimately to a reduction in sales and market share; and that that purportedly would dilute the value of Bridgestone Americas licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama. Again, entirely indirect.

Here's what it's supposed to look like. The Supreme Court Decision and the alleged injury right next to each other; here, all of the steps that Claimants put you through. It's too tenuous, too remote to be considered direct. It's plainly indirect.

Now, the third theory is that there's a direct relationship because it supposedly is likely that there will be more trademark applications that are similar and confusingly similar to the BRIDGESTONE and FIRESTONE marks by Muresa's group of companies and unrelated competitors. And even though Bridgestone Americas doesn't have the right to oppose any of those applications, for some reason that Claimants don't explain, this apparently has made it much more costly for Bridgestone Americas to maintain its investment in Panama and other countries in the region.

Here is this one graphically: not direct. We also have a big question mark in the middle.

Those are the three theories that Claimants are still advancing.

As I mentioned, there was initially a fourth theory in the pleadings as well, and that fourth theory was that the Supreme Court Decision imposed damages on Bridgestone Licensing and Bridgestone Corporation and that the payment of damages by Bridgestone Licensing--so, the non-payment

by Bridgestone Americas--somehow affected the ability of both Bridgestone Licensing and Bridgestone Americas to reinvest in their business.

We pointed out in the Reply that this didn't make sense; and, in the Rejoinder, Claimants "clarify[ied] that the reference to the U.S. Bridgestone entities here was to Bridgestone Licensing." So, this fourth theory no longer exists, and that means that none of Claimants' theories on directness survive scrutiny.

And so, with respect to Bridgestone Americas, Claimants have utterly failed to demonstrate the dispute arises directly out of an investment.

Now, unless the Tribunal has any more questions for me, I will turn the microphone back over to Ms. Gehring Flores to continue with the other three issues.

MS. GEHRING FLORES: Thank you.

As Panama has explained, and Claimants have not contested, it is considered an abuse of process for a claimant to take steps after a dispute has

arisen to create jurisdiction.

As Ms. Silberman explained yesterday, while the words "abuse of process" may conjure notions of bad faith, in the jurisdictional context, it is subject to an objective test, whether the Claimant took steps after the dispute arose, or is foreseeable, to shape a claim so that it meets the requirements of an investment treaty. You can find this objective test in Respondent's Authority 44. That's the Philip Morris Case, at Paragraph 539.

Typically, this involves playing around with the nationality of a claim. There is someone involved, some desiring Claimant who would like to sue a State, but perhaps they're actually a national of that State. That's what a lot of the abuse-of-process cases involve: Changing the nationality of the Claimant or the nationality of the investment.

Here, it involved playing around with the alleged injury and taking steps after the dispute had arisen to align the alleged injury with the requirements of the TPA.

Mr. President, do you have a question?

PRESIDENT PHILLIPS: I was going to ask, in relation to the other cases to which you referred, were those cases where the only motive for the change of nationality was in order to attempt to take advantage of ICSID guarantees?

MS. GEHRING FLORES: I don't think the tribunals in every instance found that the only motive was to orchestrate jurisdiction under an investment treaty. I believe they found that, given the timing and the context, that first a dispute arose, and then only after the dispute arose did the Claimant take some sort of action to essentially backfill and make it so that they could bring a claim when otherwise they wouldn't be able to.

PRESIDENT PHILLIPS: I'm just trying to identify what the test is of abuse of process. It's a tough phrase.

MS. GEHRING FLORES: Yes, I must admit, if you read all of the abuse-of-process cases, it is rather a broad test. They say they look at "all factors." It's a holistic test. It has a lot to do

with timing and the context. And what's of particular importance is when the dispute arose.

Also, it's important to remember that, in abuse-of-process cases where they've held in favor of the Claimant, they've said it's perfectly legitimate and perfectly fine before a dispute arises for an entity to plan to maximize its investment-treaty coverage.

So, for instance, if Bridgestone Corporation would have wanted to maximize its treaty coverage before this dispute arose, if it decided to do corporate restructuring and place an actual company--perhaps not a shell, but an actual company--with substantial business activities in the United States and make sure that that is the entity with the investment in Panama, that is considered a completely legitimate exercise.

What's not legitimate in all of the abuse-of-process cases, the fundamental point or the focus is when did the dispute arise and when did the Claimant take action to make sure that they could bring the claim.

PRESIDENT PHILLIPS: Well, let's just think about that. Imagine Bridgestone Licensing had been solely liable--

MS. GEHRING FLORES: I'm sorry, you said imagine Bridgestone Licensing--

PRESIDENT PHILLIPS: --had been held solely liable, but not jointly liable--

MS. GEHRING FLORES: Yes.

PRESIDENT PHILLIPS: --but hadn't paid anything, started these proceedings and then, a year after starting the proceedings, paid the judgment debt. Would that have been an abuse of process?

MS. GEHRING FLORES: I don't think so, and this is why in this case. I think this case involves a particular question of first impression for this Tribunal.

PRESIDENT PHILLIPS: Well, if that's right, the temporal test can't be the right one, can it?

MS. GEHRING FLORES: No, because, in that case, if Bridgestone Licensing is the sole entity that is liable for this debt, when the final court judgment comes down against Bridgestone Licensing,

that is a point where Bridgestone Licensing could say that it incurred loss. In this particular case, the Award was issued against Bridgestone Licensing and Bridgestone Corporation jointly and severally, which brings a very unique set of facts to this Tribunal.

Once that happened, these two entities are enmeshed, one who can bring an investment treaty claim if it experiences loss and one who cannot. So, in this case, really until one of the corporations paid, this Tribunal can't determine who actually experienced the loss.

And I think, given your question earlier about contribution, again, it raises lots of questions about who is actually experiencing the loss here when you have this enmeshed relationship. And remember: Bridgestone Corporation is the parent who wholly owns Bridgestone Licensing.

PRESIDENT PHILLIPS: Well, I'm inclined to agree it raises quite a lot of questions, but it also seems to me that we're going to have to answer them.

MS. GEHRING FLORES: Agreed.

PRESIDENT PHILLIPS: So, we're hoping for

some help.

MS. GEHRING FLORES: Yes, and I hope I do that.

ARBITRATOR GRIGERA NAÓN: If I could follow up on the Chairman's question because I could assume that the general principle is good faith, and you have to prove bad faith. I assume that that is the standard. And in the Philip Morris Australia Case, what happened is that the Shell Company was the--the only purpose that it was created was to create the possibility of filing a claim in Hong Kong. That's my recollection of the facts. I may be wrong.

Do we have such a clear situation here? Because it's not unusual in a group of companies, different companies play a different economic role because it's part of the general politics or policies of a group of companies. So, should we rule out that possibility? Do we have sufficient evidence before us to come up with a conclusion of bad faith? Because abuse of rights is tied up with the principle of good faith.

MS. GEHRING FLORES: I'm glad you asked that

question because the Philip Morris Tribunal very expressly stated that no finding of bad faith is required. No finding of bad faith is required. You're simply doing a cold, temporal analysis of what happened. When did the dispute arise? Did the Claimant take action after the dispute arose to allow for jurisdiction when otherwise there wouldn't have been any?

In this case, you have two enmeshed entities: One who can and one who can't bring an investment claim. And the lynchpin that allows Bridgestone Licensing to actually bring this claim is payment. When? After the dispute arose.

And I can go through the timing, if you wish.

ARBITRATOR GRIGERA NAÓN: Sorry.

MS. GEHRING FLORES: No, no, please.

So, in May of 2014, the Supreme Court found against Bridgestone Corporation and Bridgestone Licensing in the amount of $5,431,000. The TPA requires, and “the Parties . . . agree[] that the Claimants must show both breach by the Respondent and

loss incurred by the Claimant in order to submit a claim to arbitration." Because Bridgestone Corporation and Bridgestone Licensing were jointly and severally liable, only once payment was made would it become clear which entity had actually suffered the loss.

At one point in the Rejoinder, Claimants contended that Bridgestone Licensing incurred loss on the day that it was ordered to make payment, and it occurred on the same day as the breach on 28 May 2014. But they concede in the very same paragraph that Bridgestone Licensing and Bridgestone Corporation incurred liability on that same date, and they accept that loss is linked to payment.

Claimants admitted that loss is linked to payment on several occasions. For example, they stated that the Supreme Court awarded $5.4 million against Bridgestone Corporation and Bridgestone Licensing, who were held jointly and severally liable for the total. Thus, according to Claimants, it is Bridgestone Licensing who has lost the $5.4 million, and Bridgestone Licensing claims the return of that

particular sum.

Claimants also argued that “there is nothing illogical about Bridgestone Licensing paying a sum for which it is liable and suffering loss accordingly.” Payment and loss.

Claimants later assert that “payment of the damages has had a direct impact on the ability of U.S. Bridgestone entities” which, as Ms. Silberman just mentioned, are now recognized as just Bridgestone Licensing, to reinvest in their business.

Now, in the Rejoinder, Claimants link loss to payment in referring to Mobil Investments Canada versus Canada, in which “the Tribunal held that ‘damages are incurred and compensation is due when there is a firm obligation to make a payment and there is a call for payment or expenditure, or when a payment or expenditure related to the implementation of the 2004 guidelines has been made.’”

When Panama mentioned in its Reply that Claimants appeared to be asserting that an entity which had not paid the Supreme Court Judgment suffered a loss as a result of payment, Claimants

clarified in their Rejoinder that it was the only entity which had paid that suffered that alleged loss. Payment and loss.

PRESIDENT PHILLIPS: And you accept that that's correct?

MS. GEHRING FLORES: I accept, yes, yes. That they are conceding that payment is associated with loss in this case, yes, absolutely.

PRESIDENT PHILLIPS: But they're asserting that. I want to know whether you agree with them.

MS. GEHRING FLORES: Absolutely. Absolutely.

PRESIDENT PHILLIPS: What if Licensing has a legal right to recover 50 percent from its parent?

MS. GEHRING FLORES: Then that's a fact of which we're not aware in this case.

PRESIDENT PHILLIPS: No, but I'm asking you to assume that. What would Panama say about being asked to pay the lot?

MS. GEHRING FLORES: What if Bridgestone Licensing were able to--right.

PRESIDENT PHILLIPS: Just take the simple

situation, and it's a common one, of two legal entities being held jointly and severally liable in the judgment. Normally, I apprehend if one of them paid the lot it would have a right over to claim contribution from the other.

MS. GEHRING FLORES: Right.

PRESIDENT PHILLIPS: And if it was insured against loss and went to its insurance and said, "I want you to pay me the lot," the insurer would say, "no, you haven't lost the lot because you have a right to contribution from the other wrongdoer of 50 percent."

MS. GEHRING FLORES: Right. And then it would be a question of, well, is the loss truly Bridgestone Licensing or Bridgestone Corporation--

PRESIDENT PHILLIPS: Or both.

MS. GEHRING FLORES: Right. Or both.

PRESIDENT PHILLIPS: And if you're rendered liable jointly with somebody else, the proposition that that is no loss at all until somebody has paid is one that I would question.

MS. GEHRING FLORES: Right.

I think, in the case of contribution and when we're considering abuse of process, that particular scenario might make it even worse. If you're talking about abuse of process, if you're talking about "treaty-shopping," which is the colloquial term for this, States don't want entities who are not of Party countries in their treaties to be able to sue them. That's not why the U.S. and Panama entered this Treaty so that an entity from Japan, a non-party, could then sue it through some sort of mechanism, particularly not through a shell.

So, if there is some sort of contribution mechanism which could be completely reasonable and common, then I think that makes the situation even worse.

Yes, Mr. Thomas?

ARBITRATOR THOMAS: The joint and several liability issue is kind of an interesting aspect of this case because Licensing was a party to the dispute and in law could have been called upon by the successful claimant to pay the entirety of the damages owed.

Is it your position that, due to the ultimate tracing back of the ownership to Japan, is it abusive--I think you would say this, but I want to make sure I understand what you're saying--would be abusive if Japan said, "Here is the money, you pay it," so the money is actually from Japan or made available to Licensing to pay because then you would say the non-party, non-State Party's investor is affecting payment so as to make nominally paid by the one that could have treaty rights. Is that your position?

MS. GEHRING FLORES: Yes, absolutely.

And, according to Claimants, that's what happened. According to their payment letter, Bridgestone Corporation, through Bridgestone Licensing, paid.

ARBITRATOR THOMAS: Can you show us that document?

MS. GEHRING FLORES: It's in the Request for Arbitration at Paragraph 53. And I believe...

Yes, I can read it. It's Paragraph 53 of the Request for Arbitration: "Accordingly,

Bridgestone, through its subsidiary, Bridgestone Licensing, which was jointly and severally liable for the judgment, paid the damages award to Muresa and Tire Group on August 19th, 2016."

ARBITRATOR THOMAS: And Bridgestone, in this sentence, you mean Bridgestone Japan or Bridgestone group? What is it?

MS. GEHRING FLORES: That would be a question for Claimant.

But, again, we have--so, the Frankenclaimant rises its head.

ARBITRATOR THOMAS: But it may be that this is a question of evidence, and what's before the Tribunal.

MS. GEHRING FLORES: Right, but in the context of this sentence, it says "through its subsidiary Bridgestone Licensing." Bridgestone Licensing is Bridgestone Corporation's wholly-owned subsidiary. So, in that--in this particular instance, you can tell from the context of the sentence that they must mean Bridgestone Corporation. As far as I know, Bridgestone Licensing is only a

subsidiary of Bridgestone Corporation Japan.

And you can see that in Paragraph 1 of the Request for Arbitration.

Let's see. It says in the second sentence: "The Claimants are wholly-owned subsidiaries of Bridgestone Corporation"--and they give it the acronym, BSJ--"a Japanese-incorporated company headquartered in Tokyo, Japan."

ARBITRATOR THOMAS: Yes, but if you go back to Paragraph 53--

MS. GEHRING FLORES: Fifty-three.

ARBITRATOR THOMAS: --Bridgestone which is defined in Paragraph--

MS. GEHRING FLORES: Oh, okay. And then in the next sentence, they say: "Together, Bridgestone Licensing, Bridgestone Americas, Bridgestone Corporation, formed part of the Bridgestone group of companies, collectively Bridgestone, which is the world's largest manufacturers of tire and rubber products."

But going back to Paragraph 53, "Accordingly, Bridgestone," and then it says "through

its subsidiary Bridgestone Licensing," but again, the only entity that has a subsidiary--whose subsidiary is Bridgestone Licensing in this case is Bridgestone Corporation, regardless of how they defined the term earlier.

ARBITRATOR THOMAS: Thank you.

MS. GEHRING FLORES: Okay. Let's not forget the very nature of Claimants' Request for Relief reveals that their alleged loss is fundamentally linked to payment, the payment of $5,431,000 in satisfaction of the judgment of the Supreme Court. Their primary claim for damages is for $5,431,000, the exact amount of the damages award that was paid.

To illustrate the significance of this, let's consider what would happen if Claimants had not paid the damages before initiating this ICSID proceeding.

According to Claimants, they could have satisfied the jurisdictional requirements of the TPA even before making this payment because the alleged loss they suffered occurred when the judgment was issued. But, if they had not made the payment of

$5,431,000, what damages would they claim before this Tribunal today? Surely not the $5,431,000 that in this hypothetical scenario they had not paid.

PRESIDENT PHILLIPS: Well, imagine they were solely liable, I question that. There must be many situations where you have a company that's insured, suffers a liability, hasn't got the assets to discharge its debt, goes to its insurers and says, "I have suffered a loss in the sum of this liability."

MS. GEHRING FLORES: Yes.

PRESIDENT PHILLIPS: And the insurers pay up.

MS. GEHRING FLORES: In that case, where someone is solely liable, yes, that does happen.

PRESIDENT PHILLIPS: Well, if you have two companies that are jointly liable, then there are interesting questions as to the liability of the insurer, but I query whether it would be considered colorable for one company to say to the other, "Put me in funds so that I can discharge the debt because that may well prove advantageous at the end of the day." At the end of the day, you work out what the

liabilities are and whether the totality of the payment can be recovered.

So, is it possible that we are facing here a situation where the issue is really quantum of damage and not whether there has been any loss at all?

MS. GEHRING FLORES: No, I don't think so because, first, the TPA requires that loss actually be incurred, past tense, that it actually be incurred, but also the entire doctrine and concept of denial of benefits is to stop companies, corporations, multinational corporations from orchestrating claims and treaty-shopping in this manner after a dispute has arisen.

It might be perfectly logical and reasonable as Claimants say to kind of make these arrangements, "you pay it; we'll work it out later. But if you pay it"--okay, but now we know there is a dispute. Now we know that there is a dispute under this investment treaty: "If you pay it, then we have a claim; if I pay it, we don't." That is what abuse of process is meant to prevent. That's what denial of benefits is also supposed to prevent as well. They're somewhat

related.

So, here, there can be no question that the payment was made only after the dispute arose. This is made evident by Claimants' own admissions after events after the judgment was issued. Claimants admitted that Bridgestone communicated with its U.S. and Japanese embassies in Panama regarding this troubling decision--this is at the Request for Arbitration, Paragraph 48. Claimants noted that, in February of 2015, the Bridgestone group stated in a public hearing that it was contemplating an investment treaty claim against Panama. So, you have these two enmeshed entities. Now they are very aware of and know of this dispute. They're contemplating this dispute, and they're very actively orchestrating how they will go forward with this dispute.

Claimants also noted that Claimants' counsel raised a potential investor-State arbitration matter with Panama's Ambassador to the United States in March of 2015, before payment was made.

And if that's not enough evidence of the existence of a dispute before the date of payment,

Claimants submitted a formal Notice of Intent in September of 2015, almost a year before the payment was made. Claimants have tried, and may try again, to argue that Bridgestone Licensing eventually made the payment because they had been asked to do so. Based on the evidence of the record, however, that can't be the case.

Claimants assert that a request for payment was made by Muresa representative via LinkedIn. I don't know if you're familiar with this. It's kind of a social media business Web site.

First, Panama notes that Claimants failed to adduce any evidence of this alleged payment request via LinkedIn, and it certainly seems odd, an odd way for representatives of opposing Parties in litigation to communicate.

But, in any event, second, Claimants themselves describe this alleged communication as a request for contact details so that a payment request for damages could be made. In other words, even if they had proved the existence of a LinkedIn message from Muresa, which they haven't, the evidence still

shows that there was no formal request for payment at the time Claimant Bridgestone Licensing satisfied the Award. It, therefore, is untenable for them to claim that payment was made as a result of pressure from Muresa or from Panama.

Still, in the absence of a formal request for payment, and having plainly stated in its intent to arbitrate the existence of a dispute, Bridgestone Licensing conveniently decides to make payment on August 2016. Their local counsel even stated their motives in that letter to Muresa, and this is Claimants' Exhibit 36. The letter makes clear that Bridgestone Corporation and Bridgestone Licensing reserve their rights under international law, including the U.S.-Panama Trade Promotion Agreement. What business does that language have in a letter to Muresa? Why are they quoting international law and the U.S.-Panama TPA in a letter to Muresa if not to orchestrate jurisdiction in this claim? "Hey, by the way, we're paying so that we can have jurisdiction in this claim after the dispute arose."

MS. GEHRING FLORES: And let me just

clarify, I know that I mentioned that denial of benefits is related to or can be related to abuse of process. Certainly in a lot of articles and decisions discussing the denial of benefits, treaty-shopping is invoked. Also, in abuse of process, treaty-shopping is invoked. I don't want to give the impression that an abuse-of-process claim is dependent, however, upon a denial-of-benefits claim. That's not the case.

In this case, the facts are very related. They're related claims because they basically have to do with the policy of not wanting to encourage treaty-shopping, but then the association ends there. One is not dependent on the other. I just wanted to clarify that.

So, according to Claimants, Bridgestone--this is what we talked about earlier--Bridgestone, through its subsidiary, Bridgestone Licensing, which was jointly and severally liable for the judgment, paid the damages award to Muresa's and Tire Group on August 19, 2016, through that letter or with--on the same day of that

letter that they sent to Muresa that invoked international law and the TPA.

Then, just one week later, the financial records showed that Bridgestone Licensing made a payment of over $200,000 to Akin Gump, Claimants' counsel in this proceeding. That is pretty clear evidence that the dispute has not only arisen but Claimants had already been in the process of strategizing for this arbitration.

Six short weeks later, Claimants submitted the Request for Arbitration. The time line alone demonstrates an abuse of process. There is no bad faith that needs to be found. The dispute arose. Bridgestone Licensing couldn't assert a claim. Bridgestone Licensing did something to put itself in a position to bring a claim, and then submitted the claim. That's improper.

Claimants tried to explain the timing of payment by stating that it was only after March 2016, when the Supreme Court dismissed the second and final appeal motion, that Bridgestone Licensing and Bridgestone Corporation considered that they had no

further option and so made the payment rather than leave a judgment debt unpaid.

However, this argument is inconsistent with Claimants' assertion that Bridgestone Licensing suffered loss in the amount of the judgment on the day the judgment was rendered years earlier.

It also shows that as of March 2016, a year after the Bridgestone group stated publicly that it was contemplating claims under the TPA, the possibility remained that either Bridgestone Licensing or Bridgestone Corporation could make payment and, therefore, be in a position to claim the loss. Panama has put it to Claimants multiple times that the reason why Bridgestone Licensing made payment was because Bridgestone Corporation could not assert claims under the TPA. Claimants have not explicitly denied this.

PRESIDENT PHILLIPS: Is this motive that you allege an essential part of your case?

MS. GEHRING FLORES: No. No. It's not. It's the timeline. It's really the timeline.

We find it interesting, however, that

Claimants have not denied what we've put forward to them.

PRESIDENT PHILLIPS: Is it your case that Licensing should never have paid anything?

MS. GEHRING FLORES: No.

PRESIDENT PHILLIPS: We haven't got evidence but this is a hypothesis. What if there had been a meeting of the group to discuss what to do about this debt and the parent company said, "Well, it won't be enforceable in Japan"? Licensing would say, "Well, we've got a lot of assets in the United States. It will be enforceable there." And so, the decision had been taken, "Well, you better pay it because, otherwise, you're going to have enforcement proceedings against you." Would that make a difference?

MS. GEHRING FLORES: Not if the timing is the same and a treaty, an investment treaty claim is made after they know that they have a dispute.

But let me put it this way: So they're jointly and severally liable. The judgment comes down in 2014. If before the Parties had basically

formulated this dispute in their heads, before the dispute arose, if Licensing had paid, fine, they paid. And Licensing could bring this claim and there would be no abuse-of-process question. You could draw the line there. But what happened is they were jointly and severally liable. They clearly discussed this particular claim, and then Licensing took an act to make sure that they could bring this claim. It's really about the timing of when the dispute arose.

PRESIDENT PHILLIPS: Well, I think you're suggesting it's not just that. It's about the inferences that we draw, and I'm trying to see what test you're putting forward as abusive conduct which disentitles Licensing to what would otherwise be their rights.

Would the test be, if the payment they made would not have been made but for the fact that they had a potential claim? Is that a test?

MS. GEHRING FLORES: That would certainly meet the test, but at least, in accordance with the Philip Morris case, I don't believe that you need to find a but-for test.

PRESIDENT PHILLIPS: Well, we're trying to find what test you do say we should apply.

MS. GEHRING FLORES: Right.

PRESIDENT PHILLIPS: You suggested a temporal one, that that won't, as we explored, always apply. It can't just be a matter of timing. So, what is the test?

MS. GEHRING FLORES: So, the test--so there may be something, a logical act on the basis of one party or one entity. For instance, Bridgestone Licensing, it could be logical because someone has assets in the United States. Someone doesn't or does in Japan. It might be logical for BRIDGESTONE Licensing to pay. In this case, abuse is simply based on timing of when the dispute arose. That's the test. When did the dispute arose, and when did the action take place that allowed the claim to happen?

There is no ascription of motive. It's simply timing.

And granted, in the different abuse-of-process cases, the tribunals discuss

considering the timing and the context. I think here we're giving you context to see what could possibly have been happening. It certainly seems as if there was some active orchestration of this investment treaty claim. There was active backfilling after the dispute arose.

ARBITRATOR THOMAS: But this goes back to the point about joint and several liability.

If you flip what you're arguing on its head and say it was open to Bridgestone Licensing, on advice of counsel, you preserve its right of access to potential right of access to the Tribunal by effecting payment? It was brought into the suit by the plaintiffs, presumably, the original suit named--presumably named Bridgestone Japan and Bridgestone Licensing.

MS. GEHRING FLORES: Yes.

ARBITRATOR THOMAS: It didn’t choose to be sued, probably.

So, if that's the situation in which it finds itself, what's abusive about one of the two parties that might have a claim saying, "If the other

party pays it all, I won't be able to show that I've incurred any loss or damage"? That's the point that I have trouble with. I have trouble with the fact that they were jointly and severally liable.

MS. GEHRING FLORES: Right. And I do think that that is the unique circumstance presented by this case.

ARBITRATOR THOMAS: So, then, you have to tell us, well, what is it that tips it over the line, and what's the evidence that we look at, other than simply just the chronology that tips it over the line, from your perspective?

MS. GEHRING FLORES: I think for us, it is the timing. And in most--

ARBITRATOR THOMAS: Exclusively the timing?

MS. GEHRING FLORES: Yes. It's when the dispute arose, and when the unilateral act--there is one unilateral act of a party to create jurisdiction.

ARBITRATOR THOMAS: Well, I think you need to go further than that. I think that you need to show--if you can, you have to show that essentially--and I don't see how it can be done on

joint and several liability, but I can be persuaded otherwise--but you have to show that somehow it's the Bridgestone Japan which is calling the shots in this, and which effectively is using Licensing in order to manufacture jurisdiction. On the temporal aspect, I don't think you do that.

MS. GEHRING FLORES: Okay. I guess respectfully, I believe that the timeline shows that these Parties, the Bridgestone Corporation/Bridgestone Licensing, were very aware of this dispute.

ARBITRATOR THOMAS: That's clear.

MS. GEHRING FLORES: And that Bridgestone Licensing took an act, a unilateral act, to create jurisdiction after the dispute had arisen, after they were contemplating this dispute under this particular treaty. They actively orchestrated this dispute.

SECRETARY TORRES: Mr. President, you want to me to read the timing into the record?

So, I'm going to read two times separate and then only to do math, so bear with me a minute. But so far, in this presentation, Respondent has used 50

minutes and a half for actual presentation time, and we have used 34 minutes and 41 seconds, to be exact, on Tribunal questions and answers to those questions.

So, give me one minute to add that up.

PRESIDENT PHILLIPS: We thought you might like to know how much time you've got left.

MS. GEHRING FLORES: Yes, please, and if I may point you to Claimants' Exhibit 1 on Page 4, the final page.

SECRETARY TORRES: To add that up, those two numbers add up to an hour 25 minutes and some seconds, but an hour and 25 minutes.

MS. GEHRING FLORES: Right. But Tribunal time is not coming out of our time; correct?

SECRETARY TORRES: I read the time separately so that you know--the time is, as I read, 50 minutes and 28 seconds Respondent and 34 minutes and 41 seconds Tribunal's questions to Respondent, Respondent and the answers to those questions.

MS. GEHRING FLORES: Okay. Thank you.

And I can hurry along the rest of my presentation. I know that we want to get out of here

sooner rather than later, and I know that there are a lot of questions about this, but let me point you to Claimants' Exhibit 1 on the last page, where the second paragraph reads: "Bridgestone Licensing, in consultation with Bridgestone Corporation and Bridgestone Americas, has been contemplating legal action following the above-referenced Supreme Court action." This is a Power of Attorney.

So, again, there are certainly--I think the evidence is plain that they were orchestrating this claim and that it was a very decided effort to have Bridgestone Licensing pay.

COURT REPORTER: Would it be possible to take a break pretty soon for personal reasons?

PRESIDENT PHILLIPS: Certainly would. Five minutes.

(Brief recess.)

MS. GEHRING FLORES: Thank you, Mr. President.

I'm going to move off this topic unless you want to discuss it more, but I know that people don't want to be here all afternoon listening to me yammer

on and on.

But just to note, this is our Opening Statement. There is more to come, and I'm sure we'll revisit this in our Closing Statement as well.

So, moving on to our denial-of-benefits objection, I think there has been some back and forth between us and Claimants as to whether or not Panama provided sufficient notice with respect to denial of benefits. Let me just state that a failure to notify the other party does not preclude a denial of benefits under the Treaty. And, in any event, did Panama notify the United States? Absolutely. Within 25 days of the date that this arbitration commenced. And was Panama required to provide notice either at the time of the Notice of Intent back in September of 2015, something like that, that was certainly before we were instructed in the case or registration of Claimants' Request for Arbitration? No. Denial of benefits can be effected as late as the deadline established for a Counter-Memorial on the Merits. Notice is not an issue here.

So, what does "deny the benefits" in this

chapter of the Treaty mean? To deny the Party the substantive and dispute resolution protections afforded therein. In practical terms, to quote the Ulysseas versus Ecuador Tribunal, a denial of benefits has the effect of depriving the Tribunal of jurisdiction.

Moving on, what is an enterprise? Article 2.1 of the TPA defines the term "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

What is the enterprise of a party? According to Article 10.29 of the TPA, the term "enterprise of a party means an enterprise constituted or organized under the law of a party and a branch located in the territory of a party and carrying out business activities there." Claimants actually argue that BRIDGESTONE Licensing is an enterprise duly constituted under the laws of Delaware of the United States.

Furthermore, the language of Article 10.12.2 makes clear that you must consider the activities of the enterprise itself, just that enterprise. As noted by the Pac Rim Tribunal, this serves to exclude the activities of other enterprises in the same business family. So, what Bridgestone Americas does or whatever other Bridgestone group companies does really doesn't matter with respect to what Bridgestone Licensing is doing. Here, we're looking at Bridgestone Licensing.

What does Bridgestone Licensing do? It must be shown that the single enterprise itself--in this case, Bridgestone Licensing--standing on its own, has substantial business activities in the territory of the State Party.

Now, I think I've skipped over a few slides, and just to go back a second, Bridgestone Licensing is the Claimant that is the subject of the denial-of-benefits provision. Bridgestone Licensing is the wholly-owned subsidiary of Bridgestone Corporation, which is a Japanese company.

What are "substantial business activities"?

The TPA doesn't define this term, but it's clear that more than just some business activities are required. This follows from the use of the word "substantial." It can't be just anything. The Oxford English Dictionary defines "substantial" as relating to size or quantity and of ample or considerable amount or size or sizable," a definition exhibited at Respondent's Exhibit 15. Claimants accept this definition at Paragraph 49 of their Rejoinder.

And it shouldn't also be forgotten in this mix of terms that the word "business" is used, and presumably business should be linked to buying or selling of commodities or services. It actually has to be a business activity, not just any activity.

PRESIDENT PHILLIPS: Sorry, I must question that.

MS. GEHRING FLORES: Yes, yes.

PRESIDENT PHILLIPS: If you're right on that, I would have thought you're home, but the picture we have here is of a group of companies; and, in the group, different functions are allocated to different companies, and Licensing, as its name

suggests, is allocated the job of looking after the Licenses. That's its activity.

Now, you say that's not an activity that could possibly qualify as a business activity?

MS. GEHRING FLORES: I think it depends. I think it depends on how that activity is executed, and I think we're going to show you how, certainly tomorrow, how Bridgestone Licensing actually executes its mission, and whether or not the conduct that they engage in really can be considered business activity, leaving aside the question of substantial, is what they're doing actual business activity, and that's something just to keep in mind, particularly when we're hearing from Mr. Kingsbury.

But also, passive ownership and receipt of income is not sufficient. This would follow from the use of the word "activities," and as already stated, the activities must be those of the enterprise itself.

What is a person of a non-party? The term "person" means a natural person or enterprise, and a "Party" means any State for which the TPA or the

agreement is in force. Accordingly, a person of a non-party is a natural person or an enterprise of any State for which the TPA is not enforced. Claimants concede that Bridgestone Licensing is wholly owned by Bridgestone Corporation, an entity incorporated in Japan, a non-party, to the U.S.-Panama TPA.

With this background in mind, let's look at Bridgestone Licensing.

What is Bridgestone Licensing? Bridgestone Licensing is a Delaware-incorporated company wholly owned by its Japanese parent, Bridgestone Corporation, that owns the FIRESTONE trademark in all countries outside of the United States. According to Claimants, Bridgestone Licensing has a principal place of business located at 535 Marriott Drive, in Nashville, Tennessee.

Does it own that property or lease office space there? No. It does not.

Does Bridgestone Licensing have any employees at that location? No. And Claimants have not argued otherwise.

Does it have employees anywhere? No.

Again, Claimants have not argued otherwise.

In fact, Bridgestone Licensing not only has no employees and no office, it has no sales revenue. In their Rejoinder to the Objections, Claimants attempt to establish their business as "substantial" by claiming to have a greater income than the average income for U.S. companies surveyed in a 2012 Census.

But their tax returns tell a different story. Claimant Bridgestone Licensing reports only income from royalties and interest. Their returns include no income from gross receipts or sales, returns and allowances and other categories, nor does Bridgestone Licensing report any deductions for compensation of officers or salaries and wages, or any deduction for rent.

Does it have a Board of Directors? Yes. Its members change from time to time, as Claimant states. The current Board of Directors consists of Mr. Mitsuru Araki, Mr. Tomoki Akiyama, and Mr. Michinobu Matsumoto, all three of whom are Japanese citizens.

The majority of the Board lives in Japan.

Does the Board meet in person in the United States? No. The members of the Board of Directors participate in teleconferences at least three times a year.

What does Bridgestone Licensing actually do? Claimants contend that Bridgestone Licensing "registers trademarks, monitors its trademarks and registration of competing trademarks," and it protects its trademarks by engaging in court processes in various jurisdictions.

Does Bridgestone Licensing have registered trademarks in the United States? No. Claimants contend that Bridgestone Licensing is the owner of the FIRESTONE trademark in all countries outside of the United States.

Is it engaging in court processes in the United States? No. Instead, as Claimants admitted, Bridgestone Licensing's role is merely to register, maintain and protect the FIRESTONE trademark held in foreign jurisdictions. According to Claimants, Bridgestone Licensing does so from the United States.

Bridgestone Licensing is thus an entity and

doesn't have any employees. So, who actually is doing these things? Claimants themselves provide the answer to this question. For instance, they state in their Response that Bridgestone Licensing has retained the New York law firm Ladas & Parry to monitor its trademarks and to supervise any necessary local proceedings. According to Mr. Kingsbury, this covers a number of services, including securing services needed to file and renew trademark registrations, filing trademark oppositions with the assistance of local counsel, initiating clearance investigations, monitoring trademark registration filings for competing marks through a service called "Watch Services," and sending cease-and-desist letters. That's in the Kingsbury statement at Paragraph 12.

Is there a Bridgestone Licensing employee who supervises Ladas & Parry? No. Bridgestone Licensing does not have any employees.

Claimants submitted two witness statements from Thomas Kingsbury. Who is he and what does he do? Mr. Kingsbury is Assistant Secretary of

Bridgestone Licensing.

Is he an employee of Bridgestone Licensing? No, Bridgestone Licensing does not have any employees. Didn't Mr. Kingsbury testify that he spends approximately 7 to 10 percent of his time working for Bridgestone Licensing? Yes. He did.

What else does Bridgestone Licensing do? According to Claimants, it pays Federal and State taxes in the United States and holds a bank account with JPMorgan Chase Bank in the United States. Is this determinative? No. Any entity incorporated in the United States is likely to have a bank account there and required to pay taxes. If this were sufficient to demonstrate substantial business activities, any paper company would pass the test. Remember, the TPA authorizes Panama to deny the benefits of Chapter Ten to an enterprise of the United States, meaning a company incorporated in the United States, if the enterprise has no substantial business activities in the U.S. Doing the bare minimum required either as a practical matter or legally, of a company incorporated in the United

States cannot be equated with "substantial business activities."

In December 2001, Bridgestone Licensing and Bridgestone Americas, which are two "sister companies with a common parent," entered into a Support Services Agreement, which Claimants have submitted as Exhibit C-77. In essence, it shows that most of the operations and responsibilities of a normal business were actually discharged by Bridgestone Americas.

The portion of the document that was submitted, which does not include the annexes referred to in the main text, states that Bridgestone Americas will provide financial services, tax services, and legal services. The legal services are to come from the Legal Department in Akron where Mr. Kingsbury is based, not in Nashville where Bridgestone Licensing's purported offices exist.

Should the work of outside lawyers and consultants qualify as "business activities" by Bridgestone Licensing itself as Claimants contend? No. Because most shell companies hire lawyers and accountants in the State of incorporation, a finding

to that effect would mean that a denial-of-benefits objection could never succeed.

Moreover, Claimants accept that, as the Pac Rim Tribunal held, the "substantial business activities" criterion relates not to the collective activities of a group of companies but to the activities attributable to the enterprise itself, what Bridgestone Licensing is doing. If that enterprise's own activities do not reach the level stipulated by Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities. Those would not be the enterprise's activities for the purpose of applying Article 10.12.2. That's from Pac Rim at Paragraph 4.66. I know there's two different Pac Rims, so that's Respondent's Authority 17.

To allow Bridgestone Licensing to evade this rule on the basis that it would have retained and paid these other entities or that it paid these other entities and retained them would be to put form over substance. And, as we've stated before,

international law does not tend to permit formalities to triumph over fundamental realities.

The only thing that Bridgestone Licensing does during this entire process is sign a contract. That's it. And who signs it? Someone in Japan, as shown by this contract for legal services and these Licensing Agreements. Thus, Bridgestone Licensing--and Claimants concede that it does not sell tires, it does not earn royalties on many of its Licensing contracts, lease office space, draft its own Board Resolutions, hold in-person Board Meetings, employ internal legal counsel, prepare its own taxes or conduct its own accounting services. In sum, Bridgestone Licensing, wholly owned by Japanese entity Bridgestone Corporation, does not have substantial business activities in the United States. Because of this, the Tribunal must decline jurisdiction over Bridgestone Licensing and its claims.

In their submissions, Claimants have encouraged you to bear in mind that they have had a limited opportunity to adduce evidence because of the

expedited nature of these proceedings. The Claimants have had two-and-a-half months since the expedited proceedings began to gather evidence on this issue. And, frankly, if Bridgestone Licensing did have substantial business activities in the United States, presumably it wouldn't need to take two-and-a-half months to prove it.

As discussed yesterday, moving on to the fifth barrier to jurisdiction, Claimants requested an award ordering Panama to pay an amount in excess of $16 million in damages. Although they fail to specify the basis for this amount, they assert that they are owed $10 million for hypothetical, future conduct and the conduct of third States. It's clear from the face of their pleadings, shown by the copious conditional language highlighted here, the nature of this conduct is hypothetical. And, as Ms. Silberman already went over this with you yesterday, I won't belabor the point.

This next point I won't belabor either, which is Article 10.17 of the TPA, requiring that the Respondent, and not any other State, has

breached--past tense--an obligation under Section A.

Likewise, in Article 10.1, this Article states that this chapter applies to measures adopted or maintained--there is that past tense again--by a party, the host State.

With respect to whose conduct is at issue, so, putting aside the hypothetical for the moment, it's clear that hypothetical conduct is not the type of claim that Panama consents to under the TPA--let's move to the second point, and this is who is doing the conduct.

Paragraph 2 of that Article states that a party's obligation under this section shall apply to a State enterprise or other persons when it exercises any regulatory, administrative, or governmental authority delegated to it by that party. There is no mention of other States, nor is there any mention of any rights or investments outside the host State, which presumably is what the hypothetical policy and court decisions underlying Claimants' claims would involve.

Claimants have asserted that the only

measure in question is the Supreme Court Decision and that they are merely claiming consequential losses, and that that loss need not be confined territorially. The problem with that is Claimants' case relies upon the evaluation of, putting the hypothetical conduct problem aside for the moment, the conduct of third States.

So, even if you can get beyond the hypothetical problem, you have the problem that their claims involve the evaluation of third--of other States' conduct.

The only way that the conduct of other States, assuming it ever materializes--again the hypothetical problem--could be attributed to Panama would be if they, those other States, had committed an internationally wrongful act, and Panama had aided, assisted, directed, controlled the commission of or coerced that act. This comes from the Articles on State Responsibility, which you can see here. And, as Panama has explained, the Tribunal cannot evaluate the conduct of third States without their consent.

This was affirmed by the International Court of Justice in the famous Monetary Gold Case. The ICJ in that case held that when it is necessary for purposes of deciding a claim to determine whether a third State (a State which has not consented to suit) has committed an internationally wrongful act, a tribunal should decline jurisdiction.

Claimants attempt to avoid this inconvenient jurisdictional bar by arguing that they're not evaluating the conduct of other States, there are other bases for additional damages claims, and Panama's objection is really about causation. Yet the fact remains that they have brought damages claims on the basis of hypothetical future conduct and the conduct of third States.

For this reason, the Tribunal does not have jurisdiction over the additional damages claimed beyond the 5.4 million asserted by Claimants. And, in light of everything that we've discussed today and Claimants' serious jurisdictional defects, Panama requests that this case be dismissed in its entirety on the basis of all of our objections.

Thank you.

PRESIDENT PHILLIPS: Thank you very much.

We will now take the break.

(Brief recess.)

PRESIDENT PHILLIPS: Right. We continue.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. WILLIAMS: Thank you, Mr. President.

So, the Respondent started its oral submissions this afternoon by referring to the substance of the dispute and the underlying facts, and I'd like, just very briefly, to touch on that because I think some aspects of what the Tribunal was informed were not entirely right.

So, there was a reference to a letter that was sent, and it was said that that letter sent by Bridgestone caused the plaintiff in the Panamanian litigation to fear that it was at risk and that, therefore, it had to stop selling tires. And you may remember that the Respondent skipped over looking at the terms of that letter.

But I think it's just worth briefly looking at it--and it should be up on the screen now--and the

important point to note is that this letter is not sent to the entity which was the plaintiff in the Panamanian litigation. It was sent through an entirely unrelated entity, an entity in America. And so, therefore, that the suggestion that a letter sent by Bridgestone to somebody else might cause Muresa, which was the Panamanian plaintiff entity in the Panamanian case, to fear that it had to then stop selling we would say is not a realistic suggestion and was not something that the Respondent drew to your attention.

The plaintiff in the Panamanian litigation, Muresa, submitted to the Panamanian Court that it had sold no tires, but that was shown not to be true. It did not "not sold" any tires; that was false. There was no evidence submitted to the Panamanian Court that Muresa had suffered any loss at all as a result of anything that Bridgestone did. There was no evidence submitted to the Panamanian Court that Muresa had suffered a $5 million loss, regardless of whether it may have been as a result of anything that Bridgestone did or not.

The Decision, we say, of the Panamanian Court, was extraordinary and it was arbitrary, and we say it breaches the protections under the treaty. But, of course, this goes to the substance and the merits of it. But, because of the Respondent's submissions earlier, it seemed to me right that we should put some of that into its proper context.

So, turning to the objections--and we'll deal with them, of course, in turn--I'll start with the first two, and my colleague, Ms. Hyman, then will take up the baton, so you don't have to hear my droning on for too long.

So, the first objection which is as to a suggestion that Respondent makes that BSAM does not have an investment in Panama within the meaning of Article 10.29 of the TPA or Article 25(1) of the ICSID Convention, and it's probably worth just looking quickly, then, at 10.29.

So, as we see there, it includes "every asset that an investor owns or controls, directly or indirectly, that has characteristics of an investment. Forms of an investment may take

include," and then it lists a number of features; and (f), then, is "intellectual property" rights; and above that, at (e), "revenue-sharing and similar contracts."

There is no definition in the ICSID Convention, to be clear, of what "investment" means. The Tribunal would be aware of the body of case law considering the meaning of "investment" under Article 25(1) of ICSID and various other investment agreements.

Read together with the detailed definition in the TPA that we'd looked at in interpreting Article 25(1) of the ICSID Convention, "in accordance with its natural and ordinary meaning," we'd say, would cover a wide range of economic operations, and that was from the Tribunal in the Philip Morris and Uruguay Case.

So, the Respondent argues that BSAM's activity in Panama is nothing more than cross-border sales which cannot be investments. But the point, of course, is that the Claimants don't say that BSAM's investment is its cross-border sales. BSAM's

investment in Panama is, in large part, its "intellectual property" rights.

Not exclusively that--that's why I say it's "in large part"--and the Tribunal will recall that at Paragraphs 122 and 123 of the Claimants' response there is reference to other investments in Panama, and BSAM owns indirectly Bridgestone Bandag, which has "revenue sharing" rights with a Panamanian company, Bandag de Panama. And that BANDAG franchise agreement is at C-065, and it is a retreading business in Panama, a business which recycles and reuses tires, and that is a revenue-sharing agreement, and that falls within, then, (e) of the definition at 10.29, we say, a revenue-sharing agreement.

PRESIDENT PHILLIPS: Could you please identify the specific "intellectual property" right or rights that you say BSAM owned at the material time in Panama?

MR. WILLIAMS: Mr. President, yes. I was referring to a different sort of investment just now. The Bandag business.

PRESIDENT PHILLIPS: Yes, I know that.

MR. WILLIAMS: Turning, then, as you rightly say, then, to the "intellectual property" rights.

So, in essence, what has happened here is that BSJ--Bridgestone Japan corporation--and BSLS own the trademarks in Panama, and they have licensed the right to use them in Panama to BSAM.

PRESIDENT PHILLIPS: Both rights directly to BSAM? I thought in one case it was to a subsidiary of BSAM.

MR. WILLIAMS: It is. In one case it is indirectly via a subsidiary.

PRESIDENT PHILLIPS: Indirectly via a subsidiary is a somewhat tendentious description of what's happening, or at least you ought to make plain to us what are the principles that you say we should apply in relation to a group of companies, of parents and subsidiaries?

MR. WILLIAMS: Let me run through them, the facts. Let's look at that in more detail. And we'll look at the Contracts, but, in short, it is that under the License arrangements, BSAM has the right to

use certain "intellectual property" rights, and it uses those rights to achieve revenue. It would not be able to sell tires without the "intellectual property" rights that it has; but its investment, we say, is the "intellectual property" rights.

Now, the Respondent denies that BSAM owns "intellectual property" rights, so we need to look at, as you say, Mr. President, each element. So, we need to look at: Do the relevant Licensing Agreements confer on BSAM "intellectual property" rights within the meaning of 10.29(f)? If so, are such "intellectual property" rights assets in Panama within the meaning of 10.29? Do those "intellectual property" rights have the characteristic of an investment? And are such "intellectual property" rights owned or controlled, directly or indirectly, by BSAM, again within the meaning of Article 10.29?

So, that's just the course of inquiry that we say needs to be undertaken.

ARBITRATOR GRIGERA NAÓN: I put a question to the Respondent concerning the definition of "investment" under subparagraph (g) concerning

licenses. You are referring to subparagraph (f), "intellectual property" rights. How do these two subsections interact with each other? Because the argument that has been made by your opposing Party is that under subparagraph (g) only licenses "conferred pursuant to domestic law" could qualify as investment. Apparently, you're not relying on (g). You're relying on (f). But obviously license rights are at the core of your argument, so I would like to understand exactly where we stand there.

MR. WILLIAMS: You're right that we rely on (f), the provision which specifies that forms an investment may take include "intellectual property" rights, and we say that BSAM has "intellectual property" rights. Pursuant to the agreements that we will look at, it has rights in relation to the relevant trademarks, and those are, by definition, we say, "intellectual property" rights. They are rights which concern and relate to intellectual property.

So, we say that we fall within (f).

ARBITRATOR GRIGERA NAÓN: Irrespective of the applicable law governing the Licensing Agreement,

for instance?

MR. WILLIAMS: Well, I mean, you're right, that it's interesting that (g), which refers to licenses, authorizations, permits and similar rights conferred pursuant to domestic law, that is a requirement of (g); but (f), "intellectual property" rights, does not have the qualification which is included at (g), which it says "conferred pursuant to domestic law."

There is--I mean--and we'll come on to this.

ARBITRATOR GRIGERA NAÓN: Okay, sorry.

MR. WILLIAMS: But there is in any event, we say, the point that essentially to the extent that rights have been conferred on BSAM pursuant to the relevant agreements, that BSAM stands in the shoes of BSLS in respect of those rights. It's subject to qualifications and restrictions, and we looked at those, and the Respondent took the Tribunal through some of those restrictions, but nevertheless we say that they stand in the shoes as licensee of those rights; and therefore, actually, those are assets in Panama, and we'll come on to that, assets pursuant to

Panamanian law, but we'll come on to that.

So, as we've seen, then, there are two relevant License Agreements which the Claimants say are at the core of BSAM's investment in Panama: The FIRESTONE Trademark License Agreement, which is at C-48; and the BRIDGESTONE one, which is at C-52.

So, the FIRESTONE Trademark License Agreement, so that agreement dated 1 December 2001, it's between BSAM, a Nevada-incorporated company, and Bridgestone/Firestone Americas Holding, which is now known as BSAM. The name change occurred in 2002. I don't think we need to trouble ourselves with that.

And at Section 1 of the License Agreement, then, it specifies that, subject to the Terms and Conditions that follow below, licensor grants to licensee a non-exclusive license to use the marks on terms of the type identified in Exhibit B.

And we've looked at restrictions, and there are restrictions, but we would suggest that in looking at "intellectual property" issues, one has to be real about it, and the arrangements here are entirely normal arrangements. If you are the owner

of a trademark, of course, the owner of the trademark, BSJ/BSLS, is going to want to control the final use of the trademark and to have its say-so in relation to the final use of that trademark on a final product.

Now, you'll find that in any "intellectual property" arrangement where you have an owner that licenses rights to use the trademark to another entity. That is always the case. It is always going to be subject to a degree of control, but we say that that does not mean that the Licensee has no "intellectual property" rights. It certainly does have "intellectual property" rights, but those rights are subject to certain restrictions. But it does not mean that they're not "intellectual property" rights, we say, and that, therefore, that they fall within 10.29, as we've been looking at.

ARBITRATOR THOMAS: Can I just push that a little bit?

Am I right to conceive of your argument as being the following: That you refer to Article 10.29(f) and you say "intellectual property" rights

as a category of rights. In this particular case, the trademarks are not owned by the Licensees, for obvious reasons. They're owned by, in this particular case, the Licensor. So, under our treaty regime, we have a Japanese company which owns the trademarks.

MR. WILLIAMS: Well, BSLS--and BSJ. So, yes.

ARBITRATOR THOMAS: Okay. So, they pass it through BSJ.

But are you saying that, for BSAM, their "intellectual property" rights, their license falls within the general penumbra of a number of "intellectual property" rights? It just doesn't happen to be the trademark itself? It's rights derivative of the trademark that have been licensed to them. Is that the gist of it?

MR. WILLIAMS: We do say that, and it's important, we say, that at 10.29(f), the words used are "'intellectual property' rights." It does not say "intellectual property." It could have said "intellectual property." And had that form of words

been used, it may be that that could have been said to have been limited, perhaps arguably, to ownership of the trademark, but we say that the use--I'm so sorry. We said that use of the word "rights" is important in this context.

So, forms an investment may take include "intellectual property" rights; i.e., rights which relate to "intellectual property" or "intellectual property" rights. And, of course, we, as the Licensee, do not have unconstrained rights. They are rights in accordance with the terms of the Agreement, but that, we say, does not prevent them being "intellectual property" rights.

ARBITRATOR THOMAS: I understand your point now.

Can I ask you this: There is no definition in Chapter Ten of "intellectual property" rights, but there is a separate chapter in the Treaty on "intellectual property" rights. Should the Tribunal, in applying Chapter Ten, be influenced, taking the Treaty as a whole, by the way in which "intellectual property" rights are treated by the other chapter?

And if you haven't turned your mind to this, Mr. Williams, because it hasn't been something which has been the subject of pleading, but you need not answer the question now, but it's a question which has occurred to me.

MR. WILLIAMS: Well, and I think it's an interesting question, and you're right, it's not something that has been raised by any of the Parties in this dispute so far. So, perhaps it's probably something that would be sensible for us to give thought to, perhaps something that we can address in closing.

ARBITRATOR THOMAS: Yes. That's entirely appropriate.

ARBITRATOR GRIGERA NAÓN: Before engaging in that challenging exercise, as you are today here on the basis of your pleadings and the evidence you are presenting to this Tribunal, which will be those rights that the licensee has that are, how could I say, not identical with the ownership of the trademark but that would fall within some concept of ownership of the licensee. You follow me?

MR. WILLIAMS: Well--

ARBITRATOR GRIGERA NAÓN: Because the term "ownership," is, you know, if you go to the Constitution of any country, you're going to find a very broad definition of property, of title, can be tangible, intangibles, you may have title to an asset, to an immovable, and you may have at the same time intangible rights that are connected, so that's also ownership. So, I want to understand what kind of "rights" could be "owned" by the Licensee as a result of these Licensing Agreements, if you can think about it.

MR. WILLIAMS: So, the rights granted--and again, it's Clause 1 of the Agreement--the rights granted are to use the marks on the terms of this agreement. It has the right to use the marks, so it has the right, then, amongst other things, to sell products using the mark. It has that right. And so, the asset it has, therefore, is that "intellectual property" right.

ARBITRATOR GRIGERA NAÓN: What happens with the royalties? They pass through?

MR. WILLIAMS: Yes, to the owner. To the owner of the trademark.

ARBITRATOR GRIGERA NAÓN: Nothing stays with the Licensee?

MR. WILLIAMS: Well, royalties are paid up to the owners of the trademark, BSLS and BSJ, but revenue from the sales of products which utilize the mark, then, are BSAM's.

ARBITRATOR GRIGERA NAÓN: Okay. Thank you.

MR. WILLIAMS: And there was discussion about sales and the suggestion that our asset is just--or investment is just sales and cross-border sales. It's not. The assets have been special property; and, through ownership of the "intellectual property" rights that we've been discussing, then, that allows BSAM to use those rights to generate revenue; and the revenue, of course, is derived from the sales. As with most businesses, most businesses ultimately sell something.

PRESIDENT PHILLIPS: Yes. I have one or two questions on this topic.

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: First of all, I'm wholly unclear on this evidence as to what BSAM itself actually does and where. That's the first question.

MS. HYMAN: BSAM is the company--it does a number of activities. And some of those are activities in relation to--some of those activities it does itself, and some of those activities that its direct subsidiaries do, so--sorry.

PRESIDENT PHILLIPS: Please keep close to the microphone.

MS. HYMAN: I'm sorry.

PRESIDENT PHILLIPS: I have the impression that, in the past, BSAM did much more actively than it does now--that may be wrong--but I haven't got a picture of BSAM doing anything at all in Panama and I have not much idea of BSAM doing anything positive anywhere else as opposed to being a conduit in a chain of licenses that stretch back to the trademark.

MS. HYMAN: BSAM isn't part of the chain of--isn't part of that chain. BSAM has these rights, these assets or, in the case of BSJ, its direct

subsidiary that owns the--that has the Trademark License Agreement. So, BSAM, mostly through its direct subsidiaries like Bridgestone Costa Rica--

PRESIDENT PHILLIPS: I'm sorry, mostly through. I'm not at the moment concerned what its subsidies are doing.

MS. HYMAN: Okay.

PRESIDENT PHILLIPS: I'm concerned with whether it's anything else what--the chain that leads to subsidiaries who do the action.

MS. HYMAN: Well, BSAM does--BSAM controls things like marketing and sales strategies which it then sends down to its subsidiaries and tells them what to do with those. So, BSAM is the Company that devises how it would market Bridgestone tires all over the world. And Bridgestone Americas tells Bridgestone Costa Rica or whoever, which subsidiaries, how to do that in the different jurisdictions in which it sells the tires.

PRESIDENT PHILLIPS: Thank you. That is very helpful. I have a clearer picture now of its role.

ARBITRATOR THOMAS: That's clear. That makes things clearer, but you used the word "it" controls sales and marketing strategies. Does "it" develop the sales and marketing strategies?"

MS. HYMAN: Yes, sorry, it does. I mean, I say "controls" because it's the company that's setting the strategies is what I mean. And not all of the strategies of BSJ in Japan also decides some strategies and marketing too, but the strategies for marketing in the Americas are almost, I think, entirely done by Bridgestone Americas. That's what Bridgestone Americas does. It decides how BRIDGESTONE tires and FIRESTONE tires will be sold in the region of the Americas, including Latin America.

ARBITRATOR THOMAS: Thank you.

MR. WILLIAMS: I don't know whether the Tribunal would find it helpful to go through the contracts again. I mean, the Respondent took you through some aspects of it. We don't dispute, as I said, that the rights are subject to restrictions and limitations.

PRESIDENT PHILLIPS: Sorry. We've looked at

one license, which is a license that BSAM itself has. It's a license which would entitle it, itself, if it wished to do so, to sell tires and so on in Panama. As I understand it, it doesn't take advantage of that license to do anything in Panama but has taken advantage of that license to exercise rights to sublicense. Is that correct?

MS. HYMAN: Yes, that's correct. There is still the marketing point that I made, that it's still doing that which is then done in Panama; but, yes, the actual sales and marketing in Panama is done by subsidiaries.

PRESIDENT PHILLIPS: My next question is quite different--it's a question of law--and that is how is a license under a trademark which is not actually used by the Licensee for commercial activities in Panama properly described as having the characteristic of an "investment"?

MR. WILLIAMS: So, the characteristics which are stated at 10.29, as the Tribunal will have seen, are stated to include such characteristics as the "commitment of capital or other resources, the

expectation of gain or profit with the assumption of risk."

I note those characteristics echo the components of the Salini test, which has been applied by numerous Tribunals in defining "investment"; and, as the Tribunal will be aware, there is some debate as to whether all of the components of the Salini test need to be satisfied or whether it is sufficient for only some to be present. However, the TPA contains its own definitions within its own wording and makes clear that the investment must have one or more of the three criteria listed.

And perhaps may also have other characteristics of an "investment", and that is the ordinary meaning of the words "including and all" in the definition, we say.

Now, the Claimants in their Response--and that's at Paragraphs 94 to 101--identified the characteristics that must appear and discussed in some detail how BSAM's "investment" satisfies the requirements, and those submissions were supported by evidence, including the witness evidence of Roger

Hidalgo and Erick Calderon, and those witness statements do not appear to be disputed.

Now, as to commitment of capital or other resources, BSAM has committed a substantial amount of capital to its "investment" as well as non-monetary resources, and the capital takes the form of marketing spend in Panama and training and sales-related trips to Panama.

PRESIDENT PHILLIPS: Are these expenditures by BSAM itself?

MS. HYMAN: No. Most of these are by--I think all of those sales trips are by the direct subsidiary, Bridgestone Costa Rica. Most of the marketing is also the direct subsidiary; some is Bridgestone Americas.

PRESIDENT PHILLIPS: Thank you.

So, it does seem to me your case raises a fundamental issue as to whether the owner of an asset said to be an "investment" can take credit for activities of subsidiary companies when seeking to demonstrate that the asset has the characteristics of an "investment."

MR. WILLIAMS: Well, we say that the activities of BSAM do satisfy the requirement. The witness evidence of Mr. Calderon and Mr. Hidalgo explain in some detail what precisely is done, and the marketing activities include costs which BSAM itself and through its subsidiaries has costs nearly half a million dollars since early 2013, and also non-monetary resources including know-how equipment and personnel provided to local distributors and customers.

The second criterion or the second characteristic that is identified is expectation of gain or profit. Now, BSAM's "investment" was, of course, made with the expectation of gain or profit, and it has done so with sales in Panama of around $18 million since 2013.

But, plainly, we say, the "investment" of "intellectual property" rights is made with the expectation of gain or profit. That's why it acquired the License in the first place so that BSAM could use the trademark to manufacture and sell branded tires. It would be surprising if BSAM had,

as the Licensee, had acquired those rights without an expectation of gain or profit, we say.

PRESIDENT PHILLIPS: But am I right in concluding that the expectation of gain or profit was gain or profit that would be earned by subsidiary companies?

MS. HYMAN: Yes, which rolls straight up to BSAM. That's how it works in those companies. But yeah.

ARBITRATOR THOMAS: Mr. Williams, going through the characteristics of an "investment," what changes the situation here to distinguish it from a trading exercise that is not an "investment"?

For example, if I'm in State A and I serve State B and I export goods to State B, I do it over a long period of time. I have marketing people who travel into State B to effect sales. Without having taken a step in State B to incorporate or otherwise, establish a more conventional investment, what is it that changes it from a trading relationship into an "investment" within the meaning of the definition?

MR. WILLIAMS: Well, we say that it is the

express statement in the Treaty that forms of an "investment" may take include "intellectual property" rights. That's what the TPA says.

And for the reasons that we've looked at and we will develop further, we fulfill the requirement of "intellectual property" rights, and those are "intellectual property" rights in Panama.

ARBITRATOR THOMAS: Yes, you're quite right that the sentence at the end of the opening definition or the chapeau of this particular set of definitions says that. You're quite right. But one gets to that after discerning whether the asset, which is owned or controlled, directly or indirectly has the characteristics of an "investment."

So, my question is, what is it that takes it from a trading relationship from, for example, Costa Rica into Panama to an "investment" in Panama by BSAM?

MR. WILLIAMS: It is BSAM's ownership of "intellectual property" rights, which we say go beyond mere trading or cross-border trade. It is ownership of that asset.

ARBITRATOR THOMAS: Thank you.

ARBITRATOR GRIGERA NAÓN: Let's take the example of the Costa Rican subsidiary. The Costa Rican subsidiary sells tires in Panama under the license rights of Bridgestone Americas in Panama. You say that the sales, the revenue from those sales, ends up in Bridgestone Americas.

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: There is also a capital ownership in the Costa Rican Share Capital which is held by Bridgestone Americas; is that correct?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: But the "investment" is not the share participation in Costa Ricas America. It is the "intellectual property" rights under the License?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: So, is there any connection between those "intellectual property" rights under the License and the fact that the revenue of the sale of tires in Panama ends up in

Bridgestone Americas?

I'm trying to understand what is the economic structure of this to see, when you say the ownership of the Licensee or license rights is the "investment, to understand what is the substance of that "investment" and really to which extent that substance connects with Panama because this is what we have to understand.

MR. WILLIAMS: Yes.

So, the "intellectual property" rights are rights in Panama, rights to use the trademark or rights relating to the intellectual property, rights to use those in Panama. And the fruits of those rights, if you like, is the revenue as with any "investment", any "investment," the investors hope, would generate revenue. And the fruits of BSAM's "investment", its "intellectual property" rights, the fruits of those investments, then, are the sales and the revenue that it derives in Panama which then makes its way back up to BSAM through its subsidiary.

ARBITRATOR GRIGERA NAÓN: Do I understand correctly that all of that economic structure, which

ends up in benefits to Bridgestone Americas, wouldn't be possible without Bridgestone Americas holding those rights under the License?

MR. WILLIAMS: Correct.

ARBITRATOR GRIGERA NAÓN: That's what you're telling us?

MR. WILLIAMS: Correct. Because we're talking about, in terms of the fruits of the "investment," the fruits are that the sales of products we utilize the mark, the mark which BSAM is entitled to use pursuant to the Licensing Agreement.

PRESIDENT PHILLIPS: If BSAM had exercised its power to sublicense not to a subsidiary but to an independent company for a large fee and that independent company had taken advantage of the sublicense to sell tires in Panama, would BSAM be entitled to point to its license as being an "investment"?

MR. WILLIAMS: Well, as we've looked at, there are characteristics of an "investment" that we have been looking at, and one of those characteristics is an expectation of gain or profit.

So, I suppose if the License rights had been subleased down, then that would result in a gain or a profit. An assumption of risk in those circumstances, perhaps not so much. Perhaps there would not be such an assumption of risk in those circumstances, if it had simply sold those assets down. Perhaps not in those circumstances.

But, as it is, that there is risk in that, BSAM, through its commercial activities in Panama, is exposed to risk, commercial risk; for example, in relation to payment, as to whether it will be paid, for example, for the products which are sold.

So, we've looked at commitment to capital, which BSAM has committed, we say, expectation of gain or profit, and, again, we say that BSAM does have an expectation of gain or profit; it would be surprising if it did not.

Assumption of risk, the previous tribunals have held that the existence of an "investment" dispute itself is an indication of risk, and that's the authority Fedax and Venezuela at Claimant's Authorities Tab 8, and the Supreme Court Decision in

this case gave rise to immediate financial loss for BSAM, specifically the risk of dilution of the trademark value, which would then have an impact. And in its activities in Panama, generally, as I've said, BSAM faces risk, such as payment risk. It ships tires to Panamanian distributors before being paid for them.

And then, lastly, duration, although not a characteristic specifically included in the TPA, many tribunals have considered the duration of an activity is part of the determination of whether there is an "investment." BSAM has held its investments since 2001 and has been selling tires in Panama since then based on the "intellectual property" rights that we have been looking at. Other Bridgestone and Firestone entities were in Panama decades before that, but, of course, we're are looking at BSAM for these purposes.

Lastly, are the "intellectual property" rights owned or controlled, directly or indirectly, by BSAM? And as we've looked at, BSAM's investments in Panama are the "intellectual property" rights that

it holds under the two License Agreements. It owns and controls those rights in accordance with those Agreements. The rights are owned directly in the case of the Firestone license and indirectly in the case of the Bridgestone license, which as we've looked at is held by a wholly-owned subsidiary.

I should also cover the other issue, which I skipped over, Mr. President, in answering one of your questions, and the other feature to look at, then, are these rights--are these "intellectual property" rights assets in Panama? And the Respondent accepts that the trademarks are an asset but says that the rights granted under them are not an asset, and it says that if--even if they are an asset, they are not an asset in Panama.

So, first that the rights held by BSAM are an asset, and we've looked at 10.29, which as we've seen, specifically refers to "intellectual property" rights, and that they may be an "investment" for those purposes and, hence, an asset.

And, second, the "intellectual property" rights conferred on BSAM under the License Agreements

have economic value. They are the basis, as we've looked at, on which BSAM and its subsidiary is able to carry out most of their activities and to make money. And, as we've looked at, without the Licenses, they could not manufacture, sell and market products with the FIRESTONE and BRIDGESTONE trademarks, so clearly they are valuable assets. The "intellectual property" rights are valuable assets.

And the second aspect of the objection under this head is that the Respondent says that the Claimants must demonstrate that such rights exist under Panamanian law. And we looked earlier at 10.29, and (g) which refers specifically to licenses, authorizations, permits and other similar rights conferred pursuant to domestic law. But for "intellectual property" rights in (f), there is no such specification. But, nevertheless, in their Response, the Claimants cited applicable provisions of Panamanian law which demonstrated that the rights that it has are recognized by Panamanian law, and that's at Paragraph 116 of the Response.

And the Respondent did not engage with that

but asserted that the rights are not an asset in Panama because they are under a contract between two U.S.-incorporated entities created under entities governed and performed under U.S. law.

So, the Respondent then asserted that point in its Reply but chose not to put forward any expert evidence of Panamanian law. So, as we've looked at--and I don't want to belabor the point, but the Claimants were then left to put together their responsive evidence in a very short period of time.

Now, Ms. Williams, then, who will give testimony tomorrow--and the Tribunal has decided that her evidence is to be treated as fact evidence, but, in substance, she deals with opinion, and she opines, then, in her statement, at Paragraph 15, that the right to use a trademark granted to a Licensee by the owner of a trademark registered in Panama is a valuable asset and constitutes an "intellectual property" right under Panamanian law. And she says that her opinion is based on Article 121 of Law Number 35 of 1996, which she sets out in translation at Paragraph 8, and that says that the owner of a

registered trademark can grant, by means of a contract, a license to use the trademark in favor of one or several persons in connection with all or part of the goods or services covered by the registration. The owner of the registered trademark can reserve the right to simultaneously use the trademark.

So, therefore, under Panamanian law, it need not be an exclusive license. It can be a non-exclusive license, and it can be a license in relation to all or part of the goods covered by the registration.

And the reference to registered trademark means a trademark registered in Panama, that the use of a Panamanian registered trademark may be licensed to a Licensee, and the person to whom those rights have been licensed possesses those rights and, thereby, possesses a thing of value. And the License Agreement itself, that the means, then, by which those Panamanian law rights are conferred on the Licensee, in this case BSAM, that agreement itself need not be governed by Panamanian law.

And Ms. Williams goes on to explain that a

Licensee, holding a license to use Panamanian-registered IP, then possesses IP rights under Panamanian law, which includes the right to use the trademark in the Panamanian market, and that's at Paragraph 10 to 11, and the right to enforce the License in the Panamanian courts against a third-party infringer, and she says that at Paragraph 14.

So, we say that the "investment" here, the primary "investment"--not the only "investment" but the primary "investment"--that we're dealing with are "intellectual property" rights, which amount to an asset, and it amounts to an asset which is recognized under Panamanian law, and amounts to Panamanian law "intellectual property" rights. It's owned or controlled, directly or indirectly, in this case by BSAM; and, for the reasons we've looked at, we say, it has the characteristics of an "investment."

So, turning to Objection 2, and Objection 2 is that the suggestion that BSAM's "investment" does not arise--sorry, sorry, that BSAM's dispute does not arise directly out of its "investment".

So, the starting point is Article 25(1) of

the ICSID Convention, which provides that the Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an "investment."

So, the Respondent's objection is that, even if BSAM's "intellectual property" rights in Panama are an "investment," nevertheless, it is said BSAM does not have a dispute arising out of that "investment" because the claims in this arbitration arise out of the Supreme Court Decision, and BSAM was not a party to those proceedings and did not pay the damages. The Respondent says that BSAM, therefore, could not have been harmed by the Supreme Court Decision.

Now, the Claimants have explained that BSAM's dispute is not that it was found liable to pay damages because it wasn't but rather the Supreme Court Decision has made it more costly for BSAM to maintain its "investment" in Panama and in other countries in the region. And those are as explained at Paragraphs 54 to 58 of the Request and at Paragraphs 134 to 136 of the Response. Those are allegations of causation and loss.

Now, at yesterday's Hearing, the Respondent said that it was going to assume for these purposes, for the sake of argument that those causation arguments, those allegations of fact, are correct, and I think that that is how today's Hearing has been proceeding.

The relevant standard here, then, the Respondents say, is that the dispute must arise out of an "investment" and there must be an immediate cause and effect between the actions of the host State and actions of--and the effects of such actions on the protected "investment." This means that there must, the Respondents say, be a causal link between the "investment" and the actions of the host State that produced the harm. The Respondent say that BSAM cannot satisfy this test because the Supreme Court Judgment does not directly affect BSAM.

Now, in response to that, we make three points:

First, the requirements of Article 25(1) are not to be interpreted narrowly, and that is well-established as a principle, and we have

authority on this.

Do we have it here? Can you get it up?

And the authority, then, in this regard, is the AES Corporation-Argentine Republic Decision, which will appear on your screens shortly.

And, in that regard, then, at Paragraph 60, the Award says this: "As to the interpretation of the terms 'any legal dispute arising directly out of an investment' used in Article 25 of the ICSID Convention, it is well-established by commentators relying on constant practice that it should not be given a restrictive interpretation. Under this provision, directness has to do with the relationship between the dispute and the investment rather than between the Measure and the investment."

Second, whilst BSAM's "investment" must be directly affected by the Supreme Court Decision in order for BSAM to be able to bring claims, that does not mean that the Supreme Court Decision must have been directed specifically against BSAM's assets.

MS. GEHRING FLORES: Sorry, I don't mean--sorry to interrupt, but is the AES Decision on

the record? Has that been submitted in this case?

MR. WILLIAMS: I'm told the answer is no.

Is there an objection to that authority?

MS. GEHRING FLORES: Well, I had--I know that we had been given license from the Tribunal to submit new authorities yesterday on the preliminary questions, but I had thought that the record was closed when--consistent with the Procedural Order, on submitting new authorities.

(Tribunal conferring.)

PRESIDENT PHILLIPS: Well, could you please produce a copy of this for the benefit of your opponents and the Tribunal.

MS. GEHRING FLORES: Mr. President, are we to understand that the Parties should--

PRESIDENT PHILLIPS: Sorry?

MS. GEHRING FLORES: Are we to understand that the Parties are allowed to submit new authorities despite the Procedural Order on this topic, or have we misunderstood the Procedural Order?

(Tribunal conferring.)

MS. GEHRING FLORES: I think, as a general

matter, the provision is 17.4, and the definition of "documents" is in 17.6.1.

(Tribunal conferring.)

MR. WILLIAMS: Mr. President, I should say that we had understood that to relate to evidence rather than authority, but it may be that we have misunderstood.

(Tribunal conferring outside the room.)

MS. GEHRING FLORES: Mr. President, just as a point of clarification, it's not necessarily that we object to new authorities being introduced, but the Procedural Order has a process that you're supposed to go through. You're supposed to request, and it's supposed to put us on notice that new authorities are coming in to avoid surprise. It's not as if we have any particular substantive objection to this case. It's just to avoid surprise, and the fact that the Procedural Order has a procedure to follow. That hasn't been followed here.

PRESIDENT PHILLIPS: Yes. Well, it's always desirable if additional authorities are going to be referred to that the opposing Party is given as much

notice as possible.

So far as the Procedural Order Number 1 is concerned, at 17.4, the reference to documents does not encompass nor was it intended to encompass Legal Authorities, if that's the reference that you're relying on.

MS. GEHRING FLORES: Sorry. Well, that, in 17.4, it refers to documents.

PRESIDENT PHILLIPS: Yes.

MS. GEHRING FLORES: And 17.6 it says, "the document shall be submitted in the following form, exhibits and Legal Authorities," and it moves on from there, so documents are to be understood as exhibits and Legal Authorities, and then 17.7 states that the Parties shall file all documents only once by attaching them to their pleadings.

And, frankly, we had the discussion about submitting new authorities on the call, and the reason why that was raised was because the Procedural Order limits the Parties' ability to introduce just freely new legal authorities, so that's why we had the discussion on the call, and the Tribunal actually

allowed us to submit new legal authorities on the preliminary questions that we discussed yesterday.

I guess, you know, for us, the bottom line is we're okay with these particular authorities being submitted today, but we request that, from this point on, the procedure provided in the Procedural Order be followed, and they can't simply be submitted during a hearing after all of the pleadings have been submitted.

PRESIDENT PHILLIPS: Well, I've given our interpretation of the order that we made. If anyone wishes to adduce any further authorities, they should ask the Tribunal for leave to do so.

MR. WILLIAMS: So, before the issue that the Tribunal has been addressing, I was looking at the relevant standard in Article 25(1), and we were looking at whilst BSAM's investment must be directly affected by the Supreme Court Decision in order for BSAM to be able to bring claims, that does not mean that the Supreme Court Decision must have been directed specifically against BSAM's assets.

And, in that regard, we rely on Article

25(1) itself, which simply refers to a dispute arising directly out of an investment.

And, in the bundle of authorities that was handed up just now--and apologies, this is another new one, and I apologize for the misunderstanding earlier, if that's what it was; but, in that bundle of authorities then is a further Award in Continental Casualty and Argentine Republic.

And, at Paragraph 71 of that award, the Tribunal found that the Measure of the host State can affect directly an investment, "so that the dispute as to the international legality of that measure arises directly out of that investment, even if the Measure is not specifically aimed at that investment. In this case, as we've seen, BSAM's investment is its "intellectual property" rights, which it derives from its Licensing Agreements. Those rights derive from the registered trademarks, which were the subject of the Supreme Court Decision and, hence, were, we say, directly affected. The question is a factual one, whether BSAM's investment has been adversely affected by Panama's measure; i.e., the Supreme Court's

decision.

The obligation at this stage of the proceedings is simply to make out a prima facie case for this, and the authority for that is CMS and Argentina, and at Paragraph 35: "For the time being, the fact that the Claimant has demonstrated prima facie that it has been adversely affected by measures adopted by the Republic of Argentina is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible, and that it has jurisdiction to examine it on its merits." And we say, of course, that we satisfy that "prima facie" test.

And then, third, for the reasons we've discussed, we say that BSAM's "intellectual property" rights are an investment. Now, those rights derive immediately and directly from the trademarks registered by BSLS and BSJ; and, as I said, BSAM stands in the shoes of BSLS in respect of the Licensed rights, for example, where there are disputes about the use of the trademark, it is BSAM that litigates. The Respondent does not dispute that

BSLS has an investment or that its dispute does not derive directly out of its investment. The challenge relates not to BSLS in that respect, but to BSAM.

But it follows that BSAM, standing in BSLS's shoes, likewise has a dispute deriving directly out of its investment.

That's all we wanted to say about Objection 2, and Ms. Hyman, then, will take on the baton for the following objections.

MS. HYMAN: So, we're going with the original order in which the objections are put in the objections, so Number 3 is denial of benefits, and Number 4 will be abuse of process, just to avoid confusion.

So, denial of benefits, that objection is under Article 10.12 of the TPA, which as Respondent told us, authorizes each State Party to deny the benefits of the Chapter Ten of the TPA to an investor of the other party that is an enterprise of such other party if the enterprise has no substantial business activities in the territory of the other party, and persons of a non-party or the denying

Party own or control the enterprise.

So, Respondent alleges that BSLS's wholly owned by a Japanese corporation, which we accept, and does not have any discernible operations in the U.S. And, therefore, Panama has elected to invoke Article 10.12 and deny the benefits of the treaty to BSLS.

Panama was required to notify the U.S. of this measure, and it did so on 22nd May 2017, eight days before the objections of its intention to deny the benefits of the TPA to BSLS.

The Claimants made various points in their response regarding the timing of Panama's notification of their reported denial of the benefits to the USA, and these issues are primarily relevant to the question of whether denial of benefits is appropriate for determination under an Article 10.20.5 procedure, but since it's been agreed that we're going to do that, we don't have any further comments to make on that, and we'll go straight to the point in dispute, which is whether BSLS has substantial business activities in the U.S.

Before I do, although the President has

indicated that burden of proof is not material, I wanted to briefly touch on that because we say that for a preliminary expedited application where a decision is required, it is important to establish which Party bears the burden of proof, and Respondent has accepted an initial burden of proof on this objection. Respondent says it must first provide cogent evidence that BSLS has no substantial business activities in the U.S.

It then says that the burden shifts to the Claimants to prove that BSLS has substantial business activities in the U.S.

Now, Respondent doesn't say what it means by "cogent." It may be that Respondent means that, once a Party with the burden of proof has adduced evidence, which by itself would be sufficient in principle to prove a fact, then that fact will be found to have been proved, unless the other party can adduce evidence the other way. If so, then that's uncontroversial.

But if, instead, Respondent means that the Party with the burden can adduce evidence that is not

sufficient to prove a fact, but that fact can thereby be found to be proved, then that's not accepted, and the authority doesn't support that view.

If the Respondent wants to deny benefits to BSLS, it must prove that it is entitled to do so, as the Tribunal held in Amto and Ukraine, which is at CLA-13, and at Paragraphs 64 to 65. The fact that the Claimant may be more likely to have relevant evidence on its business activities doesn't shift the burden away from the Respondents.

And it says in those paragraphs, "however, when a respondent alleges that the Claimant is of the class of investors only entitled to the feasible protection so the Respondent can exercise its power to deny, then the burden passes to the Respondent to prove the factual prerequisites of Article 17 on which it relies." Article 17 is the Article in the Energy Charter Treaty, with denial of benefits.

And then later it says: "Nevertheless, the relative accessibility of evidence would not seem to justify any modification to the normal rules regarding the burden of proof."

The Tribunal in Pac Rim held similarly, and that's CLA-18. I think it's also a Respondent Exhibit, but I have the Claimants' Number 18, at Paragraph 4.60.

And there it says it is primarily for the Respondent to establish both as to law and fact its positive assertion that the Respondent has effectively denied all relevant benefits under CAFTA to the Claimant pursuant to CAFTA Article 10.12.2, and that conversely, it is not primarily for the Claimant here to establish the opposite as a negative.

In another Energy Charter Treaty case, which is one of our new authorities, Generation Ukraine and Ukraine, at Paragraph 15.7, the Tribunal said--I'll just wait for it to come up because you don't have it. "Furthermore, the burden of proof to establish the factual basis for third country control, together with the other conditions, falls upon the State as the party invoking the right to deny conferred by Article 1(2). This is not, as the Respondent appears to have assumed, the jurisdictional hurdle for the

Claimant to overcome in the presentation of its case; instead, it is a potential filter on the admissibility of claims which can be invoked by the Respondent State."

"The Respondent's assertion that the Claimant has failed to provide sufficient evidence with regard to third country control and substantial business activities is therefore inapposite; and, when coupled with the paucity of the Respondent's own factual submissions on these issues, demonstrates the weakness of this admissibility objection."

The authorities the Respondent relies on to support its contention that it's the Claimants who must prove denial of benefits does not apply to--sorry, he must prove that denial of benefits does not apply to BSLS don't assist it because they don't deal with burden of proof on denial of benefits, and they've got RLA-60, which is Tokios Tokelés and Ukraine, and that case concerns circumstances where the Tribunal found that it had to take a view necessarily based on secondary and circumstantial evidence, since direct evidence is out of reach

because the evidence in question related to personal actions of the President of Ukraine, which was not available to the Claimant.

But, in any case, it was not necessary for the Tribunal to make any final determination about the actions of the President of Ukraine because that evidence was just part of the Claimants' case on the State actions generally.

And that's not the case here. Respondent needs to clearly make out its case on BSLS's business activities, and the Tribunal needs to make a final determination on its activities.

Direct evidence is not out of reach. Some direct evidence was included in the request, and in the submission to ICSID of 25th October 2016, such as the FIRESTONE Trademark License Agreement, which is BSLS's License Agreement, C-48, and the Agreement--and that agreement is governed by U.S. law, subject to the jurisdiction of U.S. courts and is clear evidence of activity in the U.S. by BSLS. And, of course, much more evidence has since provided by the Claimants.

Exhibit RLA-60 is Alpha Projektholding and Ukraine. Respondent refers us to Paragraph 236, which restates the generally accepted principle that the burden of proof rests upon the Party alleging the fact. This is, of course, correct, that the Claimants bear the burden of proving the claims they have made, and they will do so at the merits stage of these proceedings, but at this stage, Respondent has alleged that BSLS is not entitled to the benefits of the Treaty.

And as the authority in denial of benefits makes clear, the burden of proof, therefore, rests on the Respondent to prove that this is the case.

In RLA-62, that's an ICJ decision, the case concerning Ahmadou Sadio Diallo, Guinea and Republic of Congo. That case is authority for the proposition that parties should not be expected to prove a negative.

COURT REPORTER: Please slow down. You're speaking too fast.

MS. HYMAN: I'm sorry.

RLA-62, it's an ICJ Decision, the Case

Concerning Ahmadou Sadio Diallo-Guinea and the Republic of Congo, and that case is said to be authority for the proposition that a party should not be expected to prove a negative. Respondent refers us to Paragraph 55.

This section of the judgment deals with burden of proof; and, at Paragraph 54, repeats the general rule; it is for the Party which alleges a fact in support of its claims to prove the existence of that fact, so it is Respondent that has the burden of proving that it is entitled to deny the benefits to BSLS.

The Court continued: "The determination of the burden of proof is in reality dependent on the subject matter and the nature of each dispute brought before the Court. It varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case."

Paragraph 55: It cannot, as a general rule, be demanded of the applicant that it prove the negative fact which it is asserting. Presumably, Respondent's point here is it can't be asked to prove

a negative. If BSLS has no substantial business activities, then Respondent wouldn't be able to produce evidence of them, and, indeed, that is what Respondent attempts to do when it produces results of database searches in which BSLS doesn't have much presence. But Respondent can't discharge its burden of proof by ignoring the evidence that Claimants do submit, and as I stated, Amto and Ukraine directly considers this issue and states that the burden does not shift to the Claimants just because the Claimant is more likely to have relevant evidence on this than the Respondent.

The Claimants have submitted a substantial quantity of evidence to demonstrate BSLS's substantial business activities, but it's not for Claimants to prove that it has such activities; rather, it's for the Respondent to prove that the evidence put forward by the Claimants does not amount to substantial business activities in the U.S., such that the benefits of the TPA can be properly denied to it, and they can't do this.

There is some debate as heard this

morning--rather this afternoon, actually--between the Parties on the level of activity required to be substantial. Respondent says that the level of activity is important, consistent with the ordinary meaning of the word "substantial," but it cites no authority and what the appropriate level is.

In Amto Ukraine, CLA-13, the Tribunal determined there at Paragraph 69 that "substantial," in this context, means of substance and not merely of form. It does not mean large, and the materiality not the magnitude of the business activity is the decisive question.

Although the wording of the denial-of-benefits provision in the ECT is not identical to that under the TPA, the standard is the same. The ECT Article 17(1) provides that a contracting party can deny the advantages or the relevant part of the ECT to a legal entity if citizens or nationals of a third State own or control such entity, and if that entity has no substantial business activities in the area of the Contracting Party in which it is organized.

While it is true that the Tribunal in Pac Rim decided that decisions on denial of benefits under other treaties such as the ECT did not assist this Decision because the wording of provisions in the other treaties was different than that in CAFTA, the Pac Rim Tribunal did not provide any guidance on the level of activity required, so Amto is all we have on that.

What sort of activities is to be taken into account? Well, the Parties have broadly agreed on the factors that previous tribunals have considered in denial-of-benefits cases, and these includes the existence of a Board of Directors, employees, a bank account in the relevant country, payment of taxes in the relevant country, place of incorporation and where there is a physical address with a telephone number and contact details provided to third parties.

These factors, however, are not a checklist of items of which all need to be satisfied before substantial business activities can be found, so if it is found that BSLS does not have one of the items on that list, that doesn't mean that it hasn't

established that it has substantial business activities. The purpose of the criteria is for the Tribunal to get a general sense of what it is that BSLS does and whether all of the activities taken together amount to activities that are substantial. Respondent relies heavily on its own searches of corporate and legal databases in which BSLS has little presence, and ignores the evidence put forward by the Claimants. Yet, presence in the Respondent's selection of databases isn't necessary or conclusive and it's not--and particularly in light of the evidence that the Claimants have put forward which clearly demonstrates that BSLS's activities in the U.S. There's quite a lot of that, so we're not going through all of it, but I'm going to pick out some of the highlights and I'm going to use the chart that I gave out earlier.

Pac Rim is the authority of denial of benefits with the Treaty with language similar to our Treaty, so it's helpful to look at that one, and it's helpful to look at Paragraph 4.69 to 4.70, which is where they have the oral testimony of the Claimants'

parent company, and that--I'm just waiting for it to come up.

(Pause.)

MS. HYMAN: I think it's helpful to look at that testimony and then consider how that contrasts with the evidence that we have here for BSLS.

And that's where Mr. Shrake testifying orally. Now, how many employees did Pac Rim came in--the Claimant have while it was registered in the Cayman Islands. It's a holding company. It doesn't have employees.

Did it lease any office space? No.

Did it own anything other than the Shares in the Company it held on behalf of Pacific Rim Mining? The verb is "being held." It's a holding company. Its purpose is "to hold." But it did nothing else. It held those Shares. It didn't own any. That's what a holding company does.

Did it have annual Board Meetings? Yes.

Although later in 70, Mr. Shrake confirms that he clarifies as evidence there was no Board of Directors, there were no resolutions, there were no

meetings. It had no physical existence other than on the documents that exist.

And in its previous--previously, it was registered in the Cayman Islands before it was registered in the U.S., and nothing had changed in its new registration in the U.S.

By contrast, looking at our chart, corporate identity, the fact that -the company has its own governing mind, Pac Rim had no Board of Directors, no meetings, no resolutions. BSLS has a Board of Directors, one of whom is based in the U.S., the other two are in Japan. The Board of Directors regularly meets by phone because they're in different places, and they approve budgets, they discuss, and they take actions and agree resolutions to be passed on behalf of BSLS.

Bank account: Pac Rim had no bank account in the U.S. BSLS has a bank account at JPMorgan Chase in Texas. And one of Claimant's Authorities goes to that bank account. Respondent says that just stating that BSLS has a bank account does nothing to demonstrate the substantial business activities, that

it had substantial business activities at the relevant time.

But the authority they refer to, which is RLA-41, Alps Finance and Slovak Republic, helpfully provides that Paragraph 223, to substantiate real economic activities, he should have attached the bank account documents relating to the time of the events giving rise to the dispute; i.e., relating to the time when the receivables were acquired in Slovakia, and the acquisition was followed by the bankruptcy proceedings. These or other similar documents would have established that at the time the entity was actually conducting real economic activities in Switzerland. So, a bank statement of the relevant time--and we have bank statements at Exhibits C-93, C-120, and C-126, for June 2017, October 2016, and August 2016, they show substantial business activities at the time.

Employees, Pac Rim had none. BSLS does not itself employ individuals. That's because BSAM is the entity in the U.S. that does payroll and Human Resources for all of the U.S.-incorporated

Bridgestone group of companies, so their employees paid by BSAM who are engaged to spend a certain amount of their time doing BSLS work. That's Tom Kingsbury and Jim Crothers.

BSLS has officers, like Assistant Secretary and Assistant Treasurer who play active roles in the administration of BSLS, and they hire independent contractors to do their work, lawyers and external law firms rather than hiring employees to do it.

Office space: Pac Rim had none. BSLS's office is at 535 Marriott Drive, Nashville, Tennessee.

Mr. Akiyama and Mr. Crothers, the Director and Officer of BSLS, respectively, - worked from that office. The office address, phone number were given external parties, like on BSLS's tax returns, and while space is not formally leased to BSLS, space is used. Hard copy documents are stored there and in other Bridgestone offices in Tennessee.

Assets: Pac Rim held shares, did nothing other than that in relation to their shares or otherwise. BSLS, as I will explain further, owns

many assets, trademarks, revenue in U.S. dollars in a U.S. bank account, and has numerous Licensing Agreements.

As we've been saying a number of times, BSLS holds the FIRESTONE trademark in jurisdictions outside of the U.S. There is another Bridgestone entity that hold the FIRESTONE trademark in the U.S., and it performs activities in the U.S. related to this.

- -It has essentially two main functions in relation to its trademark assets: First, it manages the trademarks. It files the trademark registrations, it monitors trademark registrations by competitors, it protects its trademarks, for example, by engaging in court proceedings as necessary, like the one in Panama. It retains and pays for law firms to do that.

Second, it licenses the use of the trademarks to numerous companies both within the Bridgestone group of companies and outside it, within the U.S. and outside it. Most of those agreements generate royalty payments which are paid into BSLS's

U.S. bank account. Some of them don't generate royalty payments because their purpose is marketing and brand enhancement.

The Respondent doesn't say too much about the trademark Licensing Agreements Claimants' exhibit because they're very clear evidence of substantial business activities in the U.S. So, those are at C-89. We have a whole lot of them.

I don't plan to go through all of them, but just to have a look at maybe the first one just to show you what it does and how it works because that's the core of the BSLS's business, and that's how it generates income. It licenses the FIRESTONE trademark for use by other Bridgestone companies such as BSAM to use the FIRESTONE mark to manufacture and sell FIRESTONE-branded tires, and non-Bridgestone companies, and those include agreements with die-cast model makers, video game producers, and some of the Licensing Agreements generate income of over five million dollars a year, and others provide non-monetary benefits to BSLS such as brand enhancement and advertising. They're all governed by U.S. law

and they're all subject to the jurisdiction of U.S. courts, and we say that those License Agreements alone are sufficient to demonstrate that BSLS has substantial business activities in the U.S.

So, looking at the first one, it's dated 1st of January 2016. In Clause 3 it states that it will continue for a period of three years, so it was an agreement in place as at the relevant date of 7th October 2016.

The Agreements between BSLS and Bridgestone Brands, Bridgestone Brands is the U.S. entity that owns the FIRESTONE trademark in the U.S. and ACME Trading Co. on the other hand. ACME is a U.S.-incorporated company that makes die-cast models.

In Clause 1, the Agreement grants ACME the non-exclusive right to use FIRESTONE trademarks on its die cost models and packaging and advertising materials related to the models anywhere in the world, and you can see an example, if you're interested, at Page 7 of what the model will look like. In Clause 4, ACME has to account for the products it sold and traded and paid Firestone and

provided models to Firestone; it has to pay a royalty to Firestone every year.

And Clause 30, the governing law is the State of Tennessee and the United States, and ACME agrees that the courts of Davidson County in Tennessee will have jurisdiction to hear any claims.

So, it's an agreement made between three U.S. parties in the U.S., governed by U.S. law, subject to the jurisdiction of U.S. courts, generating U.S. dollar income payable by ACME to the two U.S. entities. And it's clear evidence of substantial business activities in the U.S.

The Respondent says that a license company--licensing company holding License Agreements is the same as a holding company holding shares; and, in both cases, the Companies could exist only on paper without any substantial business activities. But they're not equivalent at all. A Licensing company does not hold Licensing Agreements. It must negotiate them, draft them, and if necessary, litigate them. A company that merely holds shares may simply be named on Share Certificates or in a

Company register. That's why it's a holding company. It holds shares. The word "licensing" necessarily implies activity, the process of granting a license in something, here trademarks, to someone else.

In any event, the Tribunal in Pac Rim at CLA-18, Paragraph 4.72, specifically did not decide that a traditional holding company could never meet the first condition in CAFTA Article 10.12.2 as to substantial business activities, noting that the purpose of holding companies is to be passive, owning shares in subsidiary companies. There is a specific commercial purpose to such companies, and it will usually have a Board of Directors, board minutes, a continuous physical presence and a bank account.

This sort of company which the Pac Rim Tribunal considered could not meet the requirements as to substantial business activities would not have any of those things, and the Claimant in Pac Rim did not, and was more akin to a shell company with no geographical location for its nominal, passive, limited, and insubstantial activities.

It doesn't appear that Respondent disputes

the fact that there is work to be done by BSLS, arising out of its trademarks, and trademark License Agreements. Instead, Respondent's complaint is that because BSLS retains external legal providers to do the work, it doesn't do it itself, so they can't be attributed to BSLS. This doesn't make sense, and this is unsupported by the authority.

The only authority on the question of whose activities can be considered by a tribunal for the purposes of establishing substantial business activities in the context of denial of benefits is in Pac Rim, in which the Tribunal found that the activities of the group companies of which the Claimant was part could not be attributed to the Claimant. This situation is different. BSLS hires and pays for lawyers to do its work, to perform the tasks related to its business activities.

The Claimants aren't asking the Tribunal to attribute activities undertaken by BSAM or BSJ or other Bridgestone entities to BSLS. They're hiring law firms in the U.S. to perform work, and that demonstrates, number 1, that BSLS has work that needs

to be done by someone; number 2, that it has assets and income available to pay for the work to be done; and, number 3, that it pays for such work to be done on its behalf. The alternative to hiring law firms to do the work would be to employ its own lawyers to do it, and BSLS could do that, but it doesn't. Instead, it hires independent contractors.

First, BSLS has retained Emerson Thomson Bennett, and you can see the Agreement at C-86. Emerson provides a lawyer, Mallory Smith, to work for BSLS at BSLS's offices eight hours a day, three days a week. That agreement was entered into in 2013 for an initial term of one year, and Mr. Kingsbury has explained in his Witness Statements that, although there is no formal document extending the Agreement, Ms. Smith continues to work three days a week for BSLS.

BSLS has retained Ladas & Parry, a New York law firm which monitors trademarks in jurisdictions relevant to BSLS, and provides BSLS with information on competing registrations. They sometimes supervise necessary legal action taken in other countries to

protect the FIRESTONE trademark. On other occasions that supervisory work is done by Mr. Kingsbury and Ms. Smith.

BSLS also retains Pillsbury Winthrop Shaw Pittman in New York to provide corporate legal services like State reporting, filing requirements and filing report resolutions. Payment to all of those law firms can be seen in BSLS's bank statements. At C-120 for October 2016, you can see payment of over $60,000 to Ladas & Parry and about a small amount to Pillsbury Winthrop.

Taxes, Claimants initially provided Form 8453(c), which shows that taxes have been filed in the amounts for BSLS, which we pretend to show that taxes were filed in the U.S., but Respondent asked for the full documents, so we provided those for 2013, 2014, and 2015. For 2016, that is still being prepared and not yet available.

Respondent says that payment of tax in the U.S. doesn't reveal the existence of substantial business activities, but Pac Rim said that it did. The Claimant there didn't pay taxes in the U.S., and

it was found that that entity didn't have substantial business activities, so payment of tax alone may not amount to substantial business activity, but the Respondent in Pac Rim argued that non-payment of taxes was useful evidence that the Company had no substantial business activities, and determined that it was a factor in assessing whether the denial-of-benefits clause had been properly invoked.

So, just to conclude this area, the Respondent has the burden of proving that it is entitled to deny the benefits of the Treaty to BSLS. It must prove that BSLS has no substantial business activities in the U.S. It failed in its objection to provide evidence of this, simply ignoring what Claimants have stated and evidence in their request and letter to ICSID 25 October 2016, and putting forward irrelevant database searches instead.

When Claimants responded with a large volume of evidence demonstrating BSLS's substantial business activities, Respondent ignored most of it, and its objection now turns on two points, both of which cannot succeed.

Number 1, the Respondent accepts that Trademark License Agreements do constitute evidence of substantial business activities, but not sufficiently. And they say in their Reply at Paragraph 76: "The mere existence of Licensing Agreements between BRIDGESTONE Licensing and other entities does not alone constitute evidence of substantial business activities. As discussed, they generate revenue and/or non-financial benefits of BSLS, and there are many of them. There are U.S. law governed agreements, between U.S.-incorporated BSLS and some non-U.S. entities. They're more than sufficient on their own, we say, to demonstrate substantial business activity in the U.S.

Some non-U.S. entities, they're more efficient on their own, we say, to demonstrate substantial business activity in the U.S.

Second, Respondent accepts that some work needs to be done to BSLS: Trademark management, and monitoring and work associated with Licensing Agreements. Respondent's objection here is that the work is not done by employees of BSLS. Instead, it

is primarily done by U.S.-based Contractors who are retained by and paid for by BSLS out of BSLS's U.S. bank account.

It cannot be the case that, whether or not a company has substantial business activities comes down to whether or not they choose to have employees or hire contractors. Either way, there are tasks that need doing, and BSLS pays for them to be done.

Unless there are questions, I'm going to go to--

PRESIDENT PHILLIPS: I'm just going to ask you, can we deduce from all this evidence why it is that BSLS should choose to carry out its activities in the United States rather than, say, in Japan?

MS. HYMAN: I think originally it was historical because the Firestone company, which is what BSLS originally was, was a U.S. company, and that's how they did it, and that's how it continues to be once the Firestone company was taken over by Bridgestone. BSJ and Firestone agreed when they had that merger that America would continue to be the hub of Firestone activities, and that's just how it is.

PRESIDENT PHILLIPS: Thank you very much.

MS. HYMAN: Turning to abuse of process, the objection here is based on Panama's extraordinary argument that BSLS acted abusively by paying an amount that Panama ordered it to pay. And it's not based here on any treaty provision. There is a treaty provision which is like this, which is denial of benefits, and that's the treaty provision that normally deals with treaty-shopping. So, this is an objection outside of the Treaty.

And the objection has been difficult for us to understand, and it's not being very clearly articulated, but yesterday Ms. Silberman said that the abuse-of-process objection is confined to one narrow issue. Did the Claimant do something after the dispute was foreseeable to improve its jurisdiction? What remains unclear is still what BSLS is said to have done after the dispute was foreseeable to improve its jurisdiction that is abusive.

The situation we have here is that, before this dispute arose, in 2001, BSLS was incorporated in

the U.S., and the IP owned by previous Firestone entities was assigned to it. So, from that day, BSLS had an investment in Panama. It owned the FIRESTONE trademark in Panama.

The U.S. and Panama began negotiations on the TPA in around 2005. It was signed in 2007, and it came into force in 2012. So, although it would have been permissible for BSLS to have been incorporated in the U.S. in order to be able to benefit from the TPA before a dispute was foreseeable, that is not what happened here because BSLS was incorporated before the TPA was even contemplated.

We don't understand that there's been any suggestion by the Respondent that BSLS does not have a qualifying investment in Panama. So, the date of entry into force of the TPA in October 2012, at that date, BSLS had the benefits of the TPA with regards to its investment in Panama.

Now, Panama is purported to deny the benefits of the TPA to the BSLS, and that's why we say that these two objections are linked because,

other than the denial of benefits which is based on BSLS's activities in the U.S. and which obviously only arose in the context of this arbitration, BSLS considered itself and was protected by the benefits of the TPA with regards to its investment in Panama. As Respondent points out, BSJ, a company incorporated in Japan, which owns the BRIDGESTONE trademark, does not have the benefits of an investment treaty.

So, when the Panamanian Supreme Court held BSJ and BSLS jointly and severally liable for the damages--the judgment is at C-27, and you can see the jointly and severally liable part at Page 53, but I think you're aware of it--BSLS and BSJ, after spending two years trying to overturn the Supreme Court Judgment, had to decide between themselves which entity would pay. There are a number of reasons why it makes sense for BSLS to pay, and I will briefly mention those shortly, but I think we say, and I think the Respondent says, that the Tribunal doesn't need to consider those because the fact remains that BSLS was ordered to pay and it did pay.

The only question for the Tribunal is the very narrow one, which the President set out yesterday: If you have two Parties who are corporately linked, against whom a judgment has been given and under which they're 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, you said, as to whether if that's a true analysis, that's an abuse of process.

I think the Respondent says that simply making the choice was abusive. Yesterday, they said, in making the choice here, what the Claimants did was to choose 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, and they chose the entity that possibly might have a claim under the TPA if it established loss. They chose the 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. It's still unclear what is abusive.

Is it the fact that two Parties jointly and severally liable chose between themselves which Party would make the payment? If so, is it said that someone other than those two companies should have made that choice? If so, who? What would have been the non-abusive choice? Is it no payment by BSLS at all? Is it payment of half? If the answer is that only payment by BSJ would have been non-abusive, why? Presumably because Respondent says BSJ is the more logical choice. That's what they said in their objections at Paragraph 41, because it's the parent company that has more money or on their denial-of-benefits case because BSLS is just a shell company with no activities at all. They said that in their objection at 41 as well. But as we believe we have shown, that's not the case.

At the very least, BSLS has a U.S. bank account which has the funds to pay, and it did pay, and you can see that at Exhibit C-126.

PRESIDENT PHILLIPS: Does that exhibit show that it paid out of its own funds rather than provided by the parent?

MS. HYMAN: Yes. Yeah, the funds were not provided by the parent, but that doesn't show that in the exhibit. It's just a bank statement of BSLS.

PRESIDENT PHILLIPS: And the further question: Do you accept that there may be an issue when, if and when quantum comes to be dealt with, as to whether the subsidiary has a right in law to recover part of the payment it made from its parent, in which case it might be arguable that it cannot expect to recover that portion of its payment under the ICSID guarantee?

MS. HYMAN: I think that is something that could come up. I think that that will depend upon terms of what's been agreed between BSLS and BSJ, which is not in evidence right now.

PRESIDENT PHILLIPS: Thank you.

MS. HYMAN: Is it, then, the fact that the payment was voluntarily made by either Party rather than following enforcement proceedings? But it can't

be right that a party that pays a court-ordered sum can be accused of abuse of process if they pay it as ordered before enforcement proceedings are commenced.

Is it the fact, and I think that this is what the Respondent was getting to earlier, that payment was made by either Party two years after the court decision? If so, the Claimants have explained what they were doing in those two years and actually Panama knows very well what the Claimant was doing in those two years because the Claimants were trying to overturn the court decision by filing two appeal motions. The first was filed on the 16th of June 2014, a month after the judgment. That's Exhibit C-28. The second was filed on 30 September 2014. That's at C-29. The First Appeal Motion was denied on 28 November 2014. That's at C-30. And the Second Appeal Motion was held up in the Panamanian courts for months, and it was not until 16th of March 2016, almost two years after the Supreme Court Judgment, that the Decision was issued and the Appeal Motion was dismissed. That's at C-31. Following that, in June 2016, Muresa's lawyers

contacted Bridgestone's lawyers in Panama requesting payment, and then payment was made two months later.

The Respondent says that “under the objective standard that the Claimants encouraged the Tribunal to adopt, the Tribunal doesn't need to consider the reason why Bridgestone Licensing and not Bridgestone Corporation chose to pay. But if, in fact, it considered that issue, it would find that the only plausible explanation is that Bridgestone Licensing was attempting to bring itself into compliance with the TPA's requirements”, and that was at Reply Paragraph 85.

And the Respondent spoke this morning about the objective test in Philip Morris. We have it at CLA-22, Paragraph 539. The abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific, foreseeable dispute.

And Ms. Silberman told us yesterday that “there are many different types of abuse of process,

and this is a very specific type, which we will discuss later. 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." We still don't know what the objective test is, but it's something like: Did the Claimant do something after the dispute was foreseeable to improve its jurisdictional case? That's what we were told yesterday.

But even if the Tribunal did consider that question the Respondent asked at Paragraph 85 of its Reply, "Why did BSLS pay?" And their answer: Because it was attempting to bring itself into compliance with the TPA.

What is it that BSLS is said to have done after the dispute was foreseeable? It paid the amount it was ordered to pay. According to Respondent, it did nothing else because, according to Respondent, BSLS does nothing and never did, and we've shown already that this is untrue. And the evidence we submit, we say, in relation to denial of

benefits shows that all of the activities that BSLS did--the License Agreements, instructing law firms, receipt of royalty payments into its U.S. bank account--all of that had been done for years. There is nothing new that BSLS did in the last two years to bring itself into compliance with the TPA.

In any case, BSLS's protections under the TPA were breached before it made payment, and it already had the right to bring the claim. Article 10.16 of the TPA provides that Claimant may submit a claim to arbitration if the Respondent has breached an obligation under Section A of Chapter Ten of the TPA, an Investment Authorization, or an Investment Agreement and the Claimant has incurred loss or damage by reason of or arising out of that breach.

Respondent says that BSLS only incurred that loss when it made the payment to Muresa; and, since, on Respondent's case, BSLS didn't need to make that payment because BSJ should have made it, BSLS chose to incur loss, but Respondent doesn't offer any authority to support this concept of loss because

there is none.

And they took us this morning to Mobil Investments Canada, and just to return to that, to the same paragraph, because that's Paragraph 469. The authority on this makes it clear that losses incurred when a liability accrues, not when the liability is discharged. The tribunal held there that damages are incurred and compensation is due when there is a firm obligation to make payment and there is a call for payments or expenditure or when a payment to expenditure related to the implementation of the 2004 guidelines has been made.

The first applies here. There was a firm obligation to pay and a call for payment because the Supreme Court ordered the payment, and that's when the liability accrued to BSLS.

We've said already that it's not relevant to consider why BSLS paid instead of BSJ, and the Respondent seems to agree with that, but to be complete, the factual allegations Respondent seems to raise in support of its assertion that the payment was somehow abusive or artificial are just wrong.

Respondent's argument is based on an assertion that BSLS has no substantial business activities in the U.S. Respondent says BSLS is a shell company and so it could not or should not have paid the damages. But we say BSLS is not a shell company, and we've explained that in relation to the denial-of-benefits objection.

BSLS is the owner of the FIRESTONE mark which in Panama and Central and South America generally is a key brand for Bridgestone. BSLS did not only therefore have an obligation to pay the damages but in order to protect its asset in Panama, the trademark, from enforcement action, it had a natural commercial incentive to pay. The bank statement from August 2016, C-126, the month when BSLS paid the damages award, shows payment from BSLS's U.S. bank account in the amount of 5.43 million to Muresa. It ended the month still with 4.67 million in its account. It's not a shell company.

And finally, Respondent says that just the two-year delay, that alone is sufficient to

demonstrate an abuse of process, but we've said what we were doing in that time. Panama knows what we were doing in that time. We were trying to overturn the Supreme Court Judgment. Once all domestic routes to overturning the Judgment were exhausted, that's when BSLS and BSJ realized they had no further recourse, so they paid--well, BSLS paid.

The issue of burden of proof, I talked about it in relation to denial of benefits, but just to remind everyone that this is Respondent's objection. Respondent's got to prove it. It's not for Claimants to prove that the BSLS did not engage in an abuse of process. Respondent seemed to suggest yesterday that nobody has the burden of proof on this, saying “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,” but that's nonsense. Respondent must make out a positive case that the Claimants have abused process.

In addition, as an allegation of abuse of process is a particularly serious one--

The Respondent must make out a positive case

that the Claimants have abused process. In addition, as an allegation of abuse of process is a particularly serious one, the Respondent must meet a correspondingly high bar to prove it. Baseless assertions unsupported by evidence and authority won't do.

MR. WILLIAMS: We're nearly there. We just have Objection 5.

But, yesterday and today, Objection 5 has developed a new head, so there are now, it is said, two bits of Objection 5, whereas when we started yesterday, there was just one, but now we're told that there is a new aspect or a new head of Objection 5, which is that the Respondent has not submitted to hypothetical facts or hypothetical claims, the hypothetical.

Now, this is entirely new. This is not something that has been asserted. This is not something that appears in the objections. This is something that was thought about yesterday and is now asserted in the Respondent's oral submissions.

Now, we say that that is not an appropriate

way for an objection to be raised. An objection must be raised at the outset in order then that there is a proper due process for dealing with it. This is something that has been dreamt up on the hoof.

But, putting that to one side, it is also a merits issue. It's a fact issue. It's not an issue of competence.

And, in any event, if you actually, we say, look at the terms of the Request for Arbitration, where it is said that these are--at Paragraphs 55 to 58--hypotheticals, it's necessary to look at the preceding Paragraph 54, and the first sentence of that paragraph reads: "As a consequence of the Supreme Court Decision and the penalty imposed therein, BSAM and BSLS have suffered loss and damage in excess of $16 million."

So, we say that the hypothetical objection which raised its head for the first time yesterday has not been properly raised as an objection, is not a question of competence in any event even if it were to be admitted, and is wrong on the facts.

The original head of Objection 5 was that

we're told that Panama had not consented to arbitration in relation to measures adopted by other States; and, in relation to that, then, we would make five points:

Number 1: The TPA does not say that loss needs to be sustained within the host State to be recoverable.

PRESIDENT PHILLIPS: Are there any precedents for recovery of loss outside the home State?

MR. WILLIAMS: Well, at Claimant's Authority 31, which is the S.D. Myers and Canada Case, that case considered loss and whether loss may be suffered outside the host State. And, in that case then, at Paragraphs 117 and 118, it was found that, where there is a breach of Chapter Eleven, which was the relevant Treaty in--relevant provision in that case, and interference with the economic activity of an investment: "The overall damage to the economic success of the investor arising from the Measure adopted by the host State must be examined. An investor may submit to arbitration a claim that a

provision of Chapter Eleven has been breached and that the investor has incurred loss or damage by reason of, or arising out of, that breach. To be recoverable, a loss must be linked causally or interference with an investment located in a host State. There is no provision that requires that all of the investor's losses must be sustained within the host State in order to be recoverable. The test is that the loss to the (foreign) investor must be suffered as a result of the interference with the investment in the host State."

So, we say that is authority that, indeed, loss which is suffered outside the host State is, in principle, recoverable, and, indeed, that issue is a factual one of causation. It is actually not a question of competence.

And that is the third ground, then, that we would rely on, that the S.D. Myers and Canada Case is it is a question of competence. As the Claimants explained in their Rejoinder, they will accept that they will only be entitled to recover loss to the extent that they can prove causation and loss, so at

the merits stage, of course, that is what they will need to prove. They will need to prove that the Panamanian Supreme Court Judgment caused loss in other States. And they are. That is the issue. That is a merits issue. But that, we say, is not something which is properly a question for Expedited Preliminary Objections.

Fourth, as we've discussed, these issues are innately intertwined, factual issues of causation on the merits. It's not really amenable to preliminary summary determination.

And then, lastly, that the fifth point I would make is that the objection that is raised in relation to this matter really can only be said to arise in relation to two of the four factors which are cited at Paragraphs 55 to 58.

It might be said to relate or rise in relation to Paragraphs 56 and Paragraph 57, but it cannot arise in relation to the factors outlined at Paragraphs 55 and 58. And, if it was the case, which we say it isn't and cannot be, but were it to be the case that the Tribunal concluded that the factors

identified at Paragraphs 56 and 57 were not properly factors that could be taken into account, they were not properly factors to which Panama had submitted itself to, nevertheless, the Claimants would have claims under the factors identified at Paragraphs 55 and 58. It would then be a matter for the Claimants to show causation and loss relating to those factors. And again, that is a matter for the merits stage. It's not a question for now.

ARBITRATOR THOMAS: Just on that last point, I have been struggling with this point.

As I understand the objection, the point is that the terms of the submission to arbitration before this Tribunal are exclusively concerned with the actions taken by the Respondent, and you correctly point out that if there were to be found to be a breach, then whatever damage is proximately caused by that would be the subject of a quantum analysis.

But isn't it also a question of law that can be determined at the jurisdictional stage as to whether or not certain types of loss cannot be

recoverable because the allegation of fact that you're making is predicated upon the act of some other sovereign State? In other words, Panama can't control the other State and Panama isn't internationally responsible for the other State unless it falls into quite specific situations contemplated by the ILC rules on State Responsibility.

So, is that not a question of law that can be determined at this point which has jurisdictional consequences?

MR. WILLIAMS: Sir, the Claimants would accept that if there is, to the extent that loss were to be suffered by reason of actions or measures of another State, not Panama, were that to be the case--we do not accept--but were that to be the case, then we accept that such loss would not then be recoverable by the Claimants. But it is a question of fact, then, as to what has caused the loss, to what extent had these measures resulted in loss, and that is a factual inquiry.

ARBITRATOR THOMAS: Back to my question.

The Tribunal can only embark on a consideration within the four corners of the jurisdiction which is being vested in it, and if the terms of the Treaty say that the Tribunal is concerned with the question of breach by the Respondent and no other State and there is currently before the Tribunal no evidence of any other State acting at the behest of Panama, I must confess that I have difficulties understanding what the extent of our jurisdictional remit is.

It seems clear from the terms of the Treaty that we focus on what has been done or not done by Panama, if we have jurisdiction, but I don't understand how the submission of a claim to this Tribunal seized under this Treaty authorizes the Tribunal to engage in an inquiry as to the acts of other States that might or might not happen as contemplated in your Request for Arbitration.

Does that help in terms of clarifying my concern?

MR. WILLIAMS: Of course, I understand the point. And, as I said, we would accept that, to the extent that loss could be said to have been caused by

the Measures of other States and, therefore, not caused by the Measures that we say were taken by Panama, we accept, then, that such loss would not be recoverable. We accept that.

The question is the factual one: Well, what loss has been caused by reason of Panama's measures?

PRESIDENT PHILLIPS: Could I just take that a little further?

One reading of your claim is that the wrongdoing of Panama's Supreme Court may lead other supreme courts to do wrong as well. Now that, it seems to me, would fall straight into Mr. Thomas's suggestion that it would be quite wrong for us to be awarding damages on the hypothesis of wrongdoing by other States.

But let me give you an alternative example. Let's say that a State has a rule that no company can do business in its State if it has had a judgment given against it or any other member of its group in any other State. Then it seems to me it might be arguable that a wrongful judgment, which is going to have the consequence that the Claimant won't be

allowed to do business in another State, might be within the realm of recovery. It wouldn't involve any assertion that that other State was doing anything wrong. It was simply exercising its sovereign right to decide who came within its boundaries.

MR. WILLIAMS: Yes.

And, in relation, though, to the first example you gave of the courts of another country following the Decision, there is a pattern within Latin American countries of precedent and of courts in one country following a precedent established in other Latin American countries, and we would say then that that example actually is a question where the Measure adopted by Panama, therefore, by reason of that precedent, then operates to result in loss which can be attributed to Panama.

Now, that is the suggestion.

PRESIDENT PHILLIPS: Well, isn't that a suggestion that other supreme courts may start acting perversely as well?

MR. WILLIAMS: It would be a suggestion that

other courts would adopt the precedent of what has happened in Panama. They would follow the precedent.

Mr. President--

ARBITRATOR GRIGERA NAÓN: Excuse me. So, what you're saying is that it is not attributing the damage or the loss to an organ of a foreign State because it follows specific course of action. You're attributing that to Panama and not to the other State.

MR. WILLIAMS: In that example, yes.

ARBITRATOR GRIGERA NAÓN: Okay.

MR. WILLIAMS: Unless the Tribunal has any other questions, those were the Claimants' opening submissions.

PRESIDENT PHILLIPS: No, we do not have any other questions. Thank you.

(Tribunal conferring.)

PRESIDENT PHILLIPS: Is it right that we should recall that the United States did not wish to take advantage of its opportunity to make oral submissions at this stage?

MR. BLANCK: Yes, Mr. President, that's

correct. We do not wish to make an oral statement, but we thank the Tribunal for the opportunity.

PRESIDENT PHILLIPS: Thank you very much.

All right. Then it's time to go home and come back tomorrow.

(Whereupon, at 5:50 p.m., the Hearing was adjourned until 9:00 a.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