BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

Wednesday, September 6, 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 9:00 a.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

Court Reporter:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT PHILLIPS: Good morning, ladies and gentlemen. Shall we begin the last day's proceedings.

MR. WILLIAMS: Mr. President, before we begin, I just had two very short housekeeping matters.

PRESIDENT PHILLIPS: Yes.

MR. WILLIAMS: First, that the Tribunal in its questions yesterday afternoon raised the issue of Chapter Fifteen of the TPA, which I think was not previously on the evidential record or the record of the arbitration; and so, therefore, the Parties have agreed that it, of course, can go onto the record since it's a matter raised by the Tribunal, and so we will circulate copies of that.

PRESIDENT PHILLIPS: Thank you.

MR. WILLIAMS: The second point is that, Mr. President, you raised yesterday the possibility of there being a structure chart of--

PRESIDENT PHILLIPS: Yes.

MR. WILLIAMS: --Bridgestone group companies. What we've prepared overnight is a chart showing the entities which have been discussed in these last few days in this Hearing, which shows the relationship between those. And again, we will circulate that to the Tribunal and to the Respondent now.

If the Tribunal would find it helpful to have a full structure chart of the entire Bridgestone group, which I'm told is well over a hundred companies, that could be created for you, but it would take, I'm afraid, a few days, so please let us know if that would be helpful.

PRESIDENT PHILLIPS: I doubt we need that. Thank you very much.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

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

Now, throughout this Hearing and, really, this entire case, Claimants have ignored three fundamental realities.

First, that words matter;

Second, that rules matter;

And, third, that differences matter.

Claimants' disregard for these realities has manifested itself in many different ways, ranging from the plea that the Tribunal decide the evidentiary issues on the basis of equity instead of law to the attempt to hold Panama internationally responsible for the hypothetical conduct of other States.

You've heard from Claimants that pleadings don't say things that they very clearly do say. You've also heard from that exhibits, written testimony, and even the TPA say things that they clearly do not. You've heard them argue that “jurisdiction” means “law” and “merits” means “fact,” that counsel qualifies to serve as an independent expert, and that investments can be established by reference to the components of cross-border sales. They've also asserted that a direct relationship can be satisfied through an indirect one.

They're spinning their wheels, and it has to stop here. So, over the course of the next hour-and-a-half, Panama will explain once more why it is that the Tribunal lacks jurisdiction in this case, and along the way we'll answer the questions that the Tribunal posed yesterday, along with any others that you may have. I will address the first two defects (applying exclusively to Bridgestone Americas), and then Mr. Debevoise and Ms. Gehring Flores will address the other three.

Now, the first defect, as you know, is that Bridgestone Americas does not have an investment. It's engaging in commerce, in sales.

And, as we have stated time and again, it's widely accepted that cross-border sales do not qualify as "investments," and Claimants themselves accept this multiple times.

But they ignore the clear implications of the point, which is that, if sales don't qualify as investments, then the components of sales don't qualify as investments. The right to conduct sales plus the activity of sales do not equal an investment. They equal sales. And everything that Claimants have shown you are just rights and activities that are components of sales. They're utterly indistinguishable from the components of sales.

Now, let me show you. So, the investment alleged is the right to use trademarks -- the right to use the BRIDGESTONE and FIRESTONE trademarks in

Panama. That's what Claimants have stated both in their pleadings and at the Hearing. And using these trademarks means placing the trademarks on goods for sale.

The purpose of the right is to enable sales. Claimants admit this multiple times. “Bridgestone Americas is licensed to conduct sales.” “Bridgestone Corporation and Bridgestone Licensing licensed the use of the trademarks to Bridgestone Americas so that it can make money in Panama by selling tires.”

They also state the “’intellectual property’ rights . . . allow Bridgestone Americas to use those rights to generate revenues and the revenue, of course, is derived from . . . sales.”

Now, the activities they describe are sales activities. They say “Bridgestone Costa Rica is responsible for the sale of tires.” How does this work?

Well, Panamanian distributors place orders for tires. Bridgestone Costa Rica fills the orders; it creates an invoice requesting payment; the tires are shipped to Panama; and then payment is made. This is a sales transaction.

Now, you've heard and seen in various parts of the pleadings that Claimants say, “well, the right to use is a right to sell and manufacture and distribute and market.” And all of those other things really are just part of sales. Claimants' own witnesses--or witness -- admitted this. Mr. Kingsbury explained on cross-examination that the marketing expenses are connected to the sales. This also is borne out in the documents. For example, this is the now-expired Tambor Distribution Agreement, which, when it was in force, was between Bridgestone Corporation and Tambor, which is a Panamanian entity. It has since expired, and Bridgestone Americas was never a party to this Agreement while it was in force. You can find that in Mr. Hidalgo's statement, Paragraphs 8 and 16.

But, even in this document, which is a sales contract, it contemplates advertising, marketing. It also talks about manufacture and distribution. So, the Parties to the Agreement are the manufacturer and the distributor. The Agreement states in Section 2-1 that the relationship is that of seller and buyer.

PRESIDENT PHILLIPS: If the manufacture had been carried out in Panama, would that have made a difference?

MS. SILBERMAN: Certainly.

If something was being done in Panama, if there was a factory in Panama, manufacture would require a building. It would require all of the tools necessary to manufacture tires. It would require employees. It may even require a Panamanian-incorporated company. Those would be assets in Panama.

Here, there's nothing. All there is in Panama are the registered trademarks that are owned by Bridgestone Corporation and Bridgestone Licensing. Bridgestone Americas doesn't have anything in Panama. It set up shop in Costa Rica and is doing things from Costa Rica, but the only thing that gets it to Panama are sales.

Now, Claimants spent a lot of time walking you through the characteristics of sales; and, if you go through what they're saying about these characteristics--so, they've said "characteristics of an 'investment'"--it shows that they're characteristics of sales. They're talking about risk as to the volume of tire sales, capital expenditure in the form of corporate services to conduct sales, an expectation of gains, since profits from sales are paid to Bridgestone Costa Rica, and they say this has gone on for quite some time. Bridgestone Americas has engaged in commercial activity, has engaged in sales for quite some time. And they’ve tied these characteristics to sales multiple times.

This next quote from the Opening Statement at this Hearing is quite remarkable. It says: "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." In nearly every single investment treaty case, the claimant attempts to distinguish the risk from ordinary commercial risk. Here the Claimants are saying the risk is commercial risk -- whether or not there will be payment -- and that's why it's an investment? It doesn't work that way. Now, as I mentioned, Claimants stated this multiple times.

Now, when asked to distinguish these transactions from ordinary commerce, to distinguish the alleged investment from sales, Claimants couldn't do it. All they said was, “well, Bridgestone Americas has ’intellectual property’ rights, and "intellectual property" rights are covered by the TPA. So, therefore, there is an investment.” But it doesn't work that way.

There are two problems with this:

The first is that these "intellectual property" rights are the very same rights that we just discussed: The Licenses to use the trademarks. The Licenses to use the trademarks from use, manufacture, sale and distribution. Exact same thing.

Now, labeling these "intellectual property" rights as an "investment" isn't enough. Naming your dog "Cat" doesn't make it a cat; it's still a dog. These are still sales.

Now, no matter what item on the list the Claimants may try--and they have tried many--they cannot turn these sales into an investment.

And another reason for this is that the question here isn't whether there are "intellectual property" rights, whether there is a license. The question is whether there is an investment, and the TPA defines "investment" very specifically. It states that: "'Investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an 'investment.'" Claimants can't get past this first sentence.

And the other day, they started at the end. They started with the list that follows this sentence and said, "Well, there are 'intellectual property' rights, and 'intellectual property' rights have the characteristics of an 'investment,'" and they quickly glossed over whether there was an asset owned or controlled. But you can't read a document from the bottom-up. You can't read a treaty from the bottom-up. You start at the beginning. And Claimants can't get past the "assets controlled, directly or indirectly," point.

Now, an asset is "an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies.” And Claimants' promised during their opening on Page 296 of the transcript that Ms. Williams would testify that the right to use a trademark granted to a licensee by the owner of a trademark registered in Panama was a valuable asset.

But, on the stand, Ms. Williams stated that that wasn't what she was stating in Paragraph 15 of her Witness Statement and that she wasn't aware of any provision of Panamanian law that provides that trademark rights granted in a license agreement are assets.

ARBITRATOR GRIGERA NAÓN: Then, according to your position, what would make a trademark an investment? Because if mere sales--

COURT REPORTER: I'm not hearing you, sir.

ARBITRATOR GRIGERA NAÓN: Okay.

According to what we have heard from you, what would make a trademark an investment under the treaty? Because it is an intellectual right, it is mentioned in the Treaty, but there are additional requirements that, according to your presentation, should be present.

Now, in the question that was put to you by the Chairman you said, well, if there is a factory in Panama producing the very assets that could be covered in one way or another by the "intellectual property" right, that would make the "intellectual property" right an investment. What is the difference? Because it still would protect the market, the sales in the market, of the product that is being manufactured from other parties.

MS. SILBERMAN: So, the difference here is that Bridgestone Americas doesn't own or control the trademark. A trademark is an asset. A trademark is equal--

ARBITRATOR GRIGERA NAÓN: That's a different issue.

MS. SILBERMAN: Right. So, I understand--

ARBITRATOR GRIGERA NAÓN: That's a different issue.

MS. SILBERMAN: Okay. So, the rights here are derivative of a trademark. They are very, very limited rights that are not owned by Bridgestone Americas, they're not controlled by Bridgestone Americas, and that's the problem here. They are not capable of being sold by Bridgestone Americas or even by its subsidiary--and they're owned--these rights, to the extent they are owned at all, they're owned by the trademark owner. They're rights that come with ownership of the trademark. And the mere fact that Bridgestone Americas needs to license the rights shows that it doesn't own the right to sell.

ARBITRATOR GRIGERA NAÓN: That's a different issue, isn't it? So, what you're telling me is that the rights of Bridgestone Americas under the License do not qualify as "intellectual property" rights. That's your perspective. That's a different issue from what kind of sales are being made in Panama, isn't it?

MS. SILBERMAN: No. I think it doesn't matter whether they qualify as "intellectual property" rights. The point is they don't qualify as an asset, and they're not owned or controlled by Bridgestone Americas. What you call them doesn't matter.

So, remember the other day I gave the example of a Metro ticket. I could call that a license to use an asset. It is something that I have paid for, I made a contribution, I received something in return that has value, it allows me to use the Metro, but that doesn't make it an investment. I don't own the right to use this asset. Same thing with a hotel.

A hotel, which is real property and has a business associated with it, is an asset. If I spend a night in a hotel, I have the right to use the hotel for the night, but I don't own the asset. The person who owns and controls it is the owner of the asset. Same thing with the trademark.

And when you think about it, merely looking at use in the context of IP doesn't always work. For example, if I downloaded an application on my phone, that's a license to use someone's intellectual property, but that doesn't mean that I have made an investment somewhere simply because I purchased a limited right to use.

And it also doesn't mean that wherever I go the person who owns the intellectual property has an investment. That doesn't work either.

And the point of this isn't to say that "intellectual property" rights can never qualify as an investment. The Treaty states expressly these are one of the forms that an investment may take. The issue is that you only get to the forms that an investment may take after going through the definition of "investment." You can't start at the bottom. You have to start with "asset owned or controlled," and Claimants haven't proven that. They said that Ms. Williams would do it for them, but she didn't. She stated that she wasn't saying that in her Witness Statement, that she wasn't aware of any Panamanian law provision that would qualify these things as an asset.

And then she also agreed that they couldn't be used, the License Agreements or the rights set forth in the License Agreements, couldn't be used to satisfy debts. They couldn't be transferred without the consent of the Licensor.

And she stated that there was no ownership. She stated that in her Witness Statement. She referred to possession -- possession of "intellectual property" rights that the Licensee has. But she clarified that the Licensee isn't the owner of those rights. There are plenty of rights that someone can have without owning or controlling, and that's the issue here.

ARBITRATOR GRIGERA NAÓN: Thank you.

PRESIDENT PHILLIPS: Why can't the licensing rights qualify as a right? You don't own the trademark, but you do have rights to use the trademark. If those rights were coupled with manufacturing in Panama, would you still say there's no investment there?

MS. SILBERMAN: No, because they're--so, as the Claimants mentioned in, I believe it was their Response, an investment often includes multiple aspects to it. There still needs to be a core asset around which the rest of the activities and rights revolve, and here there is no asset.

So if, for example, there was a factory or manufacturing plus these rights, that would amount to an investment because it relates--it’s rights related to this core asset. Here the Claimants are saying this is the core asset, these rights set forth in the License Agreement. And to figure out what those rights mean, including under Panamanian law and just as a matter of common sense, you look at the document.

PRESIDENT PHILLIPS: Well, your submission would apply equally to owning a trademark, wouldn't it, if you simply owned the trademark but had nothing to which--no activity to which it attaches?

MS. SILBERMAN: Well, a trademark is an asset. A trademark is something that can be used to meet debts. It is an intangible form of property.

PRESIDENT PHILLIPS: How does it have the characteristic of an "investment"?

MS. SILBERMAN: How does a trademark have a characteristic of an investment?

Well, so on that issue the Tribunal also asked us to address whether we were objecting for purposes of this expedited proceeding as to whether Bridgestone Licensing has an investment in Panama, and the Tribunal was correct to note that, for purposes of this proceeding, Panama is not objecting. And there is a possibility, based on some of the testimony that we heard yesterday from Mr. Kingsbury, about how the FIRESTONE trademark isn't available to meet debts; that that doesn't actually qualify as an asset.

And for that reason, without having gone into every angle, I don't want to make any statements that could prejudice us at a future time, but the general notion is that a trademark is something that can be used to meet debts; it creates value; it comes with ownership rights; it's intangible property. You can own it, you can control it, and perhaps Bridgestone Licensing does. Perhaps the normal owner of a trademark does.

The point here is that Bridgestone Americas doesn't own or control those rights, and the Licensing Agreements themselves state that. They show that it is a non-transferable right, that it's subject to oversight at every single step of the way.

And, by the way, if you think about a trademark, the purpose of a trademark is--well, the purpose of a trademark license is so that the Licensee can use some of the goodwill associated with the brand. But the Licensing Agreements here state expressly that the Licensee, so Bridgestone Americas and its subsidiaries, do not have any rights to the goodwill. They do not own the goodwill.

So, these rights exist. They're capable in theory, of forming an investment, but the rights that Bridgestone Americas has just don't pass muster.

ARBITRATOR GRIGERA NAÓN: Last question so you can continue.

I'm a little bit troubled about the fact that you are--that apparently, it has not been accepted, from what I hear, that the possessory right is not capable of property rights. You know, you can be expropriated in your possessory to rights and you could be entitled to compensation. Why is it not an asset, from a strictly legal standpoint?

MS. SILBERMAN: Well, from a legal standpoint, almost always you need to look at the nature and terms of the right. There is no one-size-fits-all asset. Real property differs. Intangible property differs.

So, to discuss in the abstract why certain rights are or not assets doesn't really work. And, as

I mentioned, "intellectual property" rights can qualify as "investments." The question is whether the particular rights at issue in the case actually do so qualify, and here they don't. And that's because, as a matter of Panamanian law, as Ms. Williams stated the other day, you need to look at the terms of the License Agreements, and the Licensing Agreements state that there is control by either Bridgestone Licensing or Bridgestone Corporation, and there is ownership by Bridgestone Licensing or Bridgestone Corporation, not by Bridgestone Americas or its subsidiary.

So, it's not just a matter of the theoretical nature of one right versus another. It's these rights in this particular case that just don't qualify.

Now, we talked about this the other day. We walked through both of the Licensing Agreements that Claimants mentioned, and we challenged them to explain why these rights qualify as assets that Bridgestone Americas owns or controls, directly or indirectly. We pointed out all of the restrictions that showed that there was no control. We pointed out all of the language that showed that there was no ownership.

And their answer was, "Yes, the rights are restricted," they said, but that was just “a reality that needed to be taken into account.” They said “one has to be real about it.” The rights are subject to the owner's control. That's just the way they are. But that's also why they can't be considered an investment. Not every right is an asset, not every right is an investment. Sometimes rights are just rights.

And, again, if you think about this from a practical perspective (like the Metro ticket example, the application on my phone), the right to use an asset isn't necessarily an investment. The right to sell something is just sales, and that's not an investment, either, and that's all Claimants have demonstrated here.

Now, I do want to briefly mention this BANDAG distraction, because the idea behind this was that if there is an "intellectual property" right in the United States and someone in some other country uses that intellectual property, that qualifies as an investment in that country. Sometimes that might work. Here it doesn't. When might it not work? Again, let's say I download an application on my phone and the application is somehow recognized as an "intellectual property" right in the United States. If I go use it in Panama, I'm using the intellectual property there, but that doesn't mean that that person who owns the intellectual property has an investment wherever I go.

And with BANDAG, this seems to be what Claimants are saying. We're a little bit surprised that they mentioned this BANDAG issue in their opening to begin with -- stating that there were "revenue sharing" rights that qualify as an investment. And we're surprised because the "revenue sharing" rights that they're talking about are royalty payments that are associated with what appears to be an expired U.S. patent; and they're royalty payments that, if Claimants are to be believed, one of the Bridgestone Americas subsidiaries is still demanding from a Panamanian entity, which would seem to be in violation of U.S. law.

Now, we pointed this out in the Reply,

Claimants had no response in the Rejoinder, and we assumed that the matter had been settled. But since they raised this issue again, I just want to mention that these rights that they're talking about here don't qualify as the type of "revenue sharing" rights that TPA is talking about.

Now, the TPA does mention in Article 10.29(e) the words "'revenue sharing' rights," but it states: "Forms [of an investment] . . . may include turnkey construction, management production, concession, revenue-sharing, and other similar contracts." Those are public contracts -- contracts with the Government and government agencies. They're not private contracts that have royalty payments associated with them.

And, in any event, Claimants have utterly failed to explain how this has anything to do with the Supreme Court Decision that's here in issue.

So, if we do the same “reality check” exercise that Claimants encourage the Tribunal to do, these rights should be a non-issue.

Now, with that background in mind, we'll turn to the Tribunal's questions, and we're going to address the Bridgestone Americas-related questions and the general question before getting to the one about Bridgestone Licensing. And the first question was, does Bridgestone Americas' license in relation to the FIRESTONE trademark constitute an "intellectual property" right? Maybe.

The important thing here is that it doesn't matter. You cannot determine whether something is an investment solely by looking at whether it qualifies as a license, or an "intellectual property" right, or a revenue-sharing contract. The TPA is clear. There is a definition, and the definition states that whether or not there's investment depends first and foremost on whether there is an asset in Panama that Bridgestone Americas owns or controls, directly or indirectly. You need to start at the beginning at the chapeau, and Claimants can't get past that first part. They can't even get to characteristics of an investment because there is no asset owned or controlled, directly or indirectly.

And it's for that same reason that the

arguments regarding the FIRESTONE-related trademark license and the BRIDGESTONE-related trademark license fail: because Claimants cannot establish that the rights set forth in those Licenses amount to an asset owned or controlled by Bridgestone Americas or one of its subsidiaries.

Now, that should take care of the questions between two and seven. I just want to touch briefly on Question 8 which is: how, if at all, does Bridgestone Americas distinguish its position from that of a company selling goods to a Panamanian distributor in respect of which a Panamanian trademark exists? It doesn't. You've seen that. They talked about rights to sell. They talked about activities associated with sales. Everything is sales. There is no investment here.

All Claimants said the other day was: “they're intellectual property rights.” Again, you can label something whatever you want. That doesn't make it an investment.

Now, with regard to the ninth question about Chapter Fifteen: the Tribunal, of course, is welcome to examine Chapter Fifteen. That's what we did, of course, when trying to determine what "intellectual property" rights meant. But, as you do, you should bear in mind a few things.

The first is that Chapter Fifteen doesn't contain a definition of "'intellectual property' rights," and that it wouldn't make sense to simply adopt the entire chapter and incorporate it wholesale into the words "'intellectual property' rights" in Article 10.29.

(Pause.)

MS. SILBERMAN: Excuse me. I've been talking a lot the past few days.

Now, the reason why the Tribunal can't simply pick up Chapter Fifteen and fit it into the words that are in Article 10.29 is that there are ways in which that wouldn't make sense. For example, many of the rights contemplated in Chapter Fifteen are international law rights.

And, as Zachary Douglas has explained, investment disputes are about investments, investments are about property, and property is about rights that are cognizable under domestic law. International law knows no rights of property. So, if you were to just take all of the treaty rights and incorporate them wholesale -- including the ones that relate to international issues -- incorporate them wholesale into Chapter Ten, it would produce some perverse effects.

There also are some of the rights that are described in this particular chapter, in Chapter Fifteen, that have no territorial nexus whatsoever. So, domain name rights: there is no connection to the territory. And for an investment, there has to be an investment in the territory. So, because of that, we say you, of course, are entitled to look at this chapter; the Article 31(2) analysis on the Vienna Convention will allow it even if the Treaty didn't expressly refer to the entire agreement in the governing law provision. But just bear in mind that not everything can come in, and that the question first and foremost is, “is there an investment,” not “are there intellectual property rights,” because, at the end of the day, "intellectual property" rights don't necessarily get you to an investment if there is no asset owned or controlled, directly or indirectly, by the investor with the characteristics of an "investment."

So, we'll turn to the Bridgestone Licensing issue. And as I mentioned earlier, the Tribunal is correct that, without prejudice to raise an additional objection at a later date, for purposes of this particular proceeding, Panama isn't contesting that Bridgestone Licensing has an investment in Panama. We do note, however, that Claimants' Request for Arbitration suggested that Bridgestone Licensing didn't make any contribution; it just received the trademark. And Mr. Kingsbury, yesterday, on cross-examination, stated that Bridgestone Licensing "is not at liberty to sell the FIRESTONE trademark to pay debts," which was interesting because the definition of "asset" is a property right or a property that is available to meet debts. We'll just leave those for later.

Now, turning to the second jurisdictional defect: that even assuming for the sake of argument that Bridgestone Americas did have an investment, the dispute doesn't arise directly out of it.

Here, there is not too much to say. Claimants try to call this a causation issue, but it really isn't. It's a question of whether the rights that were the subject of the Supreme Court Decision and the rights that Claimants are alleging constitute Bridgestone Americas's investment are the same.

Now, it's clear from their pleadings that they aren't the same -- that there is no direct relationship between the Supreme Court Decision and the rights that Claimants are alleging constitute the investment. And, at the Hearing, Claimants stated: "In this case, as we've seen, Bridgestone Americas's investment is its 'intellectual property' rights, which it derives from its Licensing Agreements. Those rights derive from the registered trademarks, which are the subject of the Supreme Court Decision and, hence were," they say, "directly affected."

Here that is graphically. So, they're saying that the Supreme Court Decision was about registered trademarks of Bridgestone Corporation and Bridgestone

Licensing, and Bridgestone Americas derived its rights from those registered trademarks, so this creates a direct relationship between the Supreme Court Decision and Bridgestone Americas's "intellectual property" rights. This is classic indirect. This is an indirect relationship. The dispute doesn't arise directly out of an investment.

Now, one other thing that the Claimants tried to do in their pleadings was to make a direct connection by saying that Bridgestone Americas had the right to oppose trademark applications, and they said that the Supreme Court Decision was about opposition of trademark applications. And they said Bridgestone Americas had that right by itself, so this was a right in issue, and there was a direct relationship.

And you saw this at Paragraph 38 of the Rejoinder. They stated: “A trademark license holder may sue under its agreement in the Panamanian courts and enforce its rights against third parties. In disputes as to use of intellectual property in the Americas, Bridgestone Americas or one of its wholly-owned subsidiaries is, in fact, the Party that brings or defends claims on the basis of the BRIDGESTONE Trademark License Agreement.”

And they attempted to attribute this to Ms. Williams. But that's not what Ms. Williams said. She said: "The right to use the mark granted to the Licensee will also allow the Licensee to participate in opposition and annulment actions against identical and/or confusingly similar trademarks as either a co-plaintiff or as a collaborating party of a plaintiff." It doesn't have the right by itself.

And she also explained and confirmed on cross-examination that she was not saying what Claimants had attempted to attribute to her; and that, as a matter of Panamanian law, the Licensee could never bring the case on its own. That's at Page 386 to 388 of the Transcript.

Now, just to mention one last thing about Ms. Williams: you may have noticed yesterday that she explained that she had been working with Claimants since last year, or perhaps the year before, in connection with this case. Claimants have stated time and again that the Tribunal should take pity on them on issues of Panamanian law because they didn't have time to talk to a Panamanian law expert. They were talking to a Panamanian lawyer for months and, perhaps, years. They had plenty of time to ask about this issue. And, as you'll recall, there was a discussion of some Panamanian law issues in the Request for Arbitration and a passage of the trademark law, which Claimants later discussed in this--

PRESIDENT PHILLIPS: How is this of any materiality at all?

MS. SILBERMAN: Just to point out that the issue of burden of proof: Claimants keep attempting to shift it to Panama because they are saying they didn't have enough time to prepare evidence. Their argument on that issue is unfounded.

Now, with that I will turn the floor over to Mr. Debevoise to begin discussing the issues regarding Bridgestone Licensing.

MR. DEBEVOISE: Good morning.

Like Bridgestone Americas, Bridgestone Licensing has failed to establish that the Tribunal has jurisdiction to hear its claims. Panama has denied the benefit of the TPA to Bridgestone Licensing because Bridgestone Licensing does not engage in substantial business activities within the United States.

As Panama explained, under Article 10.12.2 of the TPA, Panama has the permission to deny the benefits of the TPA to enterprises that have no substantial business activities in the United States. In other words, Panama's consent to jurisdiction in an investor-State proceeding is conditional. If the condition of "substantial business activities" in the territory of the United States is not met, this Tribunal lacks jurisdiction over Bridgestone Licensing's claims and must dismiss them.

PRESIDENT PHILLIPS: If the benefits have been denied?

MR. DEBEVOISE: Yes. And Panama has denied the benefits--

PRESIDENT PHILLIPS: Yes.

MR. DEBEVOISE: --because Panama sent a notice to the United States denying the benefits.

PRESIDENT PHILLIPS: But it's a condition subsequent which removes our jurisdiction. We have jurisdiction unless there is a valid denial of benefits?

MR. DEBEVOISE: You have jurisdiction to hear the question whether the denial of benefits is validly invoked or not, yes.

PRESIDENT PHILLIPS: But, if there was no denial of benefits at all, the fact, if it be a fact, that there is no substantial business activity in the United States would not be a bar to our jurisdiction?

MR. DEBEVOISE: That's correct because it could be waived. And Panama could not invoke it, but there is a procedure for invoking, which Panama pursued.

And Claimants tried to raise some--blow some smoke about how we didn't do that procedurally correctly. I think you heard in the submission for the United States that that was not the case, and so here we are.

This question of conditionality is also present in the Rurelec versus Bolivia case, which is Respondent's Legal Authority 19 at Paragraph 373.

Now, Panama and Claimants are in agreement that "substantial" should be afforded its ordinary meaning. I think if you look at the Rejoinder at Paragraph 49, you'll see their agreement to that.

Claimants further agree that Bridgestone Licensing itself must engage in substantial business activities and cannot satisfy the requirement by pointing to the activities of other Bridgestone group companies. I know this is hard to do in today's--in the context of this Hearing and this case, but you really need to focus on just Bridgestone Licensing, and you'll hear that there are thousands of agreements being administered. That's thousands of agreements around the whole group, but how many are actually Bridgestone Licensing, for example? And, similarly, on item after item.

But, despite agreeing on the standard, on Monday during Opening Argument, Claimants backpedaled, contending that there is insufficient prior jurisprudence to understand the standard as articulated in Pac Rim. As an initial point, it bears noting that, while prior arbitration awards and decisions may be instructive to the Tribunal, they're neither binding rules of decision nor a substitute for the principles of treaty interpretation, a reality that Claimants appear to overlook.

Counsel for Claimants argues that, because there are only a few cases to interpret "substantial business activities" language contained in U.S. agreements like the ones we have here--and it's worth pausing to really emphasize this point. The United States has negotiated a series of agreements in which this question is treated differently than it's treated in hundreds of other agreements and particularly different from the way it's treated in the Energy Charter Treaty, which seems to give rise to much of the decisional jurisprudence here.

But, if you look at the Central American Free Trade Agreement, the U.S.-Peru, the U.S.-Panama, the one that concerns us here, they follow a template, and they are different.

Counsel for Claimants argues that because there are only a few cases, as I said, it's appropriate to derive the rule of interpretation from the Energy Charter Treaty cases; particularly they emphasize Amto versus Ukraine, but the Pac Rim Award was very explicit, and it says that ECT jurisprudence is not instructive on these questions.

That said, even if the Decision on interpretation of the Energy Charter Treaty in Amto were informative, Claimants haven't really even met that standard. But I think the point is that they seemed to take the Pac Rim standard as an extreme case and say, "If we can't meet the precise facts of Pac Rim, we're lost. We need to go all the way over to Amto," and I don't think that is the case by any means.

In Amto, the tribunal found that the term "substantial" in the phrase "substantial business activities" in the context of the ECT means substance and not merely a form. It does not mean large, but that's where the two treaties and their interpretation differ, and this Tribunal should note that.

So, in Amto, the claimant presented evidence of financial investments as shareholders in companies in Europe, share certificates, a project for a real estate acquisition, tax certificates, and employment of two full-time staff, and a lease.

So, there was some substance because it did have some investment-related activities conducted from premises in the country involving the employment of a small but permanent staff.

But Bridgestone Licensing, as we've established, has no employees, no lease, no evidence of the conduct of a substantial revenue-generating business as opposed to passive activity. Perhaps this is why, rather than comparing itself to the successful claimant in Amto, Bridgestone Licensing prefers to make this contrast with the Pac Rim facts.

PRESIDENT PHILLIPS: Is revenue-generating an essential element in business activities?

MR. DEBEVOISE: Yes.

PRESIDENT PHILLIPS: If you have a whole group of companies and one company is concerned with a substantial aspect of the group's business but it's not revenue-generating, wouldn't that be a business activity?

MR. DEBEVOISE: Mr. President, with all due respect, you have just fallen into the trap that was identified in Pac Rim, and we can go back a few slides and look at that standard, but it's very explicit in Pac Rim that you don't look at the sum of all the business of the group.

PRESIDENT PHILLIPS: I wasn't suggesting that. Imagine you have a big oil company--

MR. DEBEVOISE: Yes.

PRESIDENT PHILLIPS: --and you have a subsidiary company whose solely responsible for anti-pollution measures around the world--

MR. DEBEVOISE: Right.

PRESIDENT PHILLIPS: --and it has a huge staff solely concerned with anti-pollution. Generates no revenue at all. On the contrary, it costs money. Isn't that a business activity?

MR. DEBEVOISE: I think we disagree within the meaning of the Treaty. What they're really looking for, and if you look at a definition of "business," it really means commerce and trade which is revenue-generating.

In your hypothetical the Company is free to organize itself any way it likes, but the question for us today is: Does that give rise to rights under the Treaty? What is really important here is to focus on that question.

And you could have a very large organizational chart, but the point here is that you cannot just selectively pluck one box from the org chart and say, "Now, this box is going to invoke the Treaty." So that's the important distinction.

In their presentation on the denial-of-benefits issue, Claimants focused first on the allegation that Panama could not satisfy the burden of proof on denial of benefits because it had relied upon its own searches of corporate and legal databases in which licensing had little presence. This really has more to do with who put what evidence in the record, and we're beyond that now because it's been clear, it's been conceded by Claimants, and the Tribunal has ruled that you're going to determine this issue based on all of the evidence.

But I didn't want to leave unmentioned the fact that you can't just brush aside all these database searches we did, because the database searches are rather telling in that they demonstrate that there is no "there" there. There are things that you would expect to find for a real substantial business which are not there.

So, I think the United States also had something to say about this in their non-disputing party submission in the Pac Rim Case, which is Respondent's Legal Authority 16, and they repeated it in this case in their own submission, that assessing an investor's substantial business activities on the basis of publicly available information, it's possible only up to a certain point; and, beyond that, it's really the State which would have to find confidential and nonpublic information, and that really is not readily available to the State. And it's at that point that the burden does shift; and, as I said, the burden has shifted, and we're all agreed now that we're going to decide this issue based on all of the evidence which is in the record today.

So, any inquiry into "substantial business activities" has to start with an inquiry as to whether the Claimant conducts business in the United States, and we maintain that the proper standard is that "substantial business activity" is the buying and selling of commodities and services. And Claimants' counsel actually recognized this point on Monday in its Opening Argument, and I think the quote is here on the screen: "As with most businesses, most businesses ultimately sell something."

So, this goes to your question, Mr. President, about the pollution services company. They're not selling anything. They're providing an internal service to that company. If they sold it to third parties, that would be a different situation.

And you'll remember, I asked Mr. Kingsbury yesterday whether they just sort of offer the FIRESTONE trademark to any comer, and he said no, that that's not really what they do. They do it strategically when they think it will serve some other interests of the group.

Anyway, as I said, this is from the Transcript.

So, as Mr. Kingsbury confirmed, the problem is that Bridgestone Licensing doesn't ultimately sell anything. Mr. Kingsbury testified that BSLS licenses the FIRESTONE trademark. That's the only product it has to offer. But selling to oneself is not a business; that's not commerce if you just sell to yourself.

In fact, Mr. Kingsbury confirmed that Bridgestone Licensing licenses to entities outside the group, but that they generate only one-tenth of 1 percent of Bridgestone Licensing revenue in 2016, and that was in the financial document that they provided in the record for the grand total of $15,738 in 2016. This is not substantial. And this is where the difference between Charter Treaty cases and U.S. Free Trade Agreements is important because, if you believe the standard in the Energy Charter Treaties, it doesn't matter if it's just sort of small, the volume doesn't matter. But, for the United States, "substantial" really means substantial. That's why it's there.

And I know you're going to come with hypotheticals and questions about what if it was just a "mom and a pop" business. And, of course, we have to recognize that it has to be substantial in context. But, in the context of Bridgestone Corporation, this is not substantial.

So, what, if anything, is the business of Bridgestone Licensing in the United States? Counsel for the Claimants explained that Bridgestone Licensing has two main functions. They said, first, it manages trademarks, it files registrations, it monitors registrations by competitors, it protects its trademarks by engaging in court proceedings as necessary like the one in Panama, and it retains law firms to do that.

And, second, they said that it licenses the use of the trademarks to numerous companies, both within the Bridgestone group and without, within the United States and without. And then they said that all this generates royalty payments that go into their U.S. bank account.

And then they said, but some of them don't generate royalty payments because their purpose is marketing. That's really what we're talking about here: It's marketing. That's in the Hearing Transcript on Day 2, Page 325, Lines 8 to 22.

So, Bridgestone Licensing undertakes other administrative activities, but they are not business in the sense of buying and selling commodities. Administering trademark licenses within the group is not a business activity when the two licenses at the core, at the absolute core of their claim, because they finally narrowed it down. They said it's Exhibit 48 and Exhibit 52. Those two licenses have not changed since 2001. Not one word has changed. What's been negotiated? What's been administered? It's all the same.

So, as confirmed by Mr. Kingsbury yesterday, Bridgestone Licensing, itself, doesn't do any of this stuff. There may be lots of ministerial back-office activity, accounting and running money through accounts which they outsource, under Exhibit C-77, to BSAM, Bridgestone Americas. But, as I said, that's all ministerial back-office activity.

Bridgestone Licensing does not engage in the business of managing trademarks in the United States.

Counsel for Bridgestone Licensing suggests that the fact that licensing only supervises the work rather than engaging its own employees should not matter. It's okay to outsource, but that's still business.

But the fundamental problem with that statement is that Licensing doesn't manage the contractors performing the work. BSAM does all of that, under the auspices of the Services Agreement (C-77).

And Mr. Kingsbury admitted that all of the legal work is done in Akron, Ohio. They have been telling you that Licensing is in Nashville, Tennessee. This is in Akron Ohio, and it's not a case where Licensing has a small but permanent staff like in Amto. They don't even have a single employee to manage this work. They have no employees. That's why BSAM does the work.

And the nexus of this work to the United States is also tenuous because any oppositions, registrations, or court proceedings in which Licensing would engage is, by definition, outside the United States. Licensing holds the trademarks outside the

United States, not inside the United States. They only own foreign trademarks.

So, counsel for Claimants asserted on Monday that a licensing company does not hold licensing agreements; it has to negotiate them, draft them, and, if necessary, litigate. That was on Page 328, Lines 16 through 19 of the Transcript.

But as I said, Licensing doesn't do any of this stuff, it's all BSAM.

We heard yesterday from Mr. Kingsbury that Bridgestone Brands negotiates the Licensing Agreements that actually go to third parties. Remember we had that discussion about how, well, because there's so much more Firestone activity in the United States--it's 80 percent of the activity of Firestone--it's Bridgestone Brands that takes the lead on those third-party negotiations, and Bridgestone Licensing is a follower, not a leader.

And an examination of the License Agreements in evidence, included in Exhibit C-89, demonstrates that most of them are form contracts. To the extent that they require any drafting--and that's done under the Services Agreement, again, C-77, which Mr. Kingsbury explains remains in force--that legal work is performed by BSAM or by outside lawyers, outside lawyers approved by Bridgestone Corporation in Japan and supervised by BSAM attorneys.

Remember we looked at the Agreement where they hired the woman who works three days a week on this work, and it said that she would be supervised by Mr. Kingsbury from BSAM, and he would be supervised by Mr. Kitamura in Tokyo. So, this is not Licensing doing this.

And, as shown in the table earlier, Licensing is not engaged in any litigation in the United States. They don't have any marks here to defend. And, to the extent that there is litigation, under the Service Agreement, those disputes are litigated by BSAM and the lawyers it supervises outside the United States.

And remember, we showed you in the Board of Directors' Resolution about the authority that these people have. Any litigation likely to require a legal spend of more than $30,000 requires approval of the full Board of Licensing, which, at the time of the events in dispute in this case, consisted only of Directors in Japan and even now includes only BSAM and Bridgestone Japan employees.

So, even if Bridgestone Licensing's receipt of royalties under the Agreements negotiated by BSAM could be considered "business," it can hardly be called "substantial," and it could hardly be called "activity," as revealed in Bridgestone Licensing's Tax Returns and confirmed by Mr. Kingsbury, Bridgestone Licensing profits from these Agreements through receipt of passive income. Passive income. It's not activity. They don't have people out on the street hawking things. It's just in the form of royalties, which is passive income. They don't produce a good or render a service in commerce.

The passive nature of Bridgestone Licensing's involvement in the licensing business is highlighted by its heavy dependence on intra-company loans. As we saw yesterday in Exhibit C-97, Bridgestone Licensing received an initial cash infusion of $31 million, which even Mr. Kingsbury admitted is a lot of money. That's at Page 461, Line 10 of the Transcript.

Mr. Kingsbury also explained that Bridgestone Licensing took out a $6 million loan from BSAM to pay the Panamanian Supreme Court Judgment at issue in this case. And that's on Page 482, Line 16, of the Transcript.

As we've seen, any significant decisions about finances of the Company are resolved by a rotating cast of Bridgestone Corporation Japan executives, more often than not exercising authority from Tokyo.

Even a decision to retain Mallory Smith--the three-day-a-week outside contractor--to supervise day-to-day legal services from Akron, Ohio, to filing of this claim against the Government of Panama, has been made by Bridgestone Licensing management in Japan. The idea that Bridgestone Licensing somehow plays an active role in this process is simply unsupported.

Claimants maintain, however, that even their de minimis presence is sufficient for Bridgestone Licensing to establish "substantial business activities." And in their attempt to persuade you of this, they circulated a demonstrative with 14 different assertions that they allege prove their presence.

In the interest of time, I'm not going to walk you through all of them; but, as you can see on this slide, Bridgestone Licensing has admitted that it doesn't lease office space or have any employees. This is also clear in the Tax Return that we looked at, C-123. The lines for all of those items are blank, zero.

Instead, all services performed by Bridgestone Licensing are performed by employees at other Bridgestone companies or the Contractors that those other Bridgestone company employees supervise. As we've discussed, under the Pac Rim standard, which Claimants did agree to in the briefing but now try and backslide on, "substantial business activity" cannot be established through the examination of the activity of sister companies, parent companies, subsidiary companies, et cetera.

They cannot show a significant financial operation, either. They earn some royalties, nearly all of them from the Bridgestone group, and such intra-group transfers cannot qualify as business in the true sense.

They do have a bank account, and the statements are, interestingly enough, addressed to Bridgestone Americas, and they reflect only sporadic and minor activity. This is far, far away from what they would need to demonstrate "substance."

So, we ask you to conclude--

PRESIDENT PHILLIPS: Could I just ask you about the size of the loan that you mentioned?

MR. DEBEVOISE: Yes.

PRESIDENT PHILLIPS: Doesn't that seem to indicate that they needed a lot of money for something, some activity?

MR. DEBEVOISE: Yes.

PRESIDENT PHILLIPS: It was paid off over a long period.

MR. DEBEVOISE: Yes.

PRESIDENT PHILLIPS: It certainly supports your case that they're not generating much income of their own.

MR. DEBEVOISE: Right.

PRESIDENT PHILLIPS: But equally, it raises the question of why do they need all of this money?

MR. DEBEVOISE: I come back to your hypothetical about the pollution services company. That company, that subsidiary and that big oil company, is going to need a lot more money than this one did, and that, to me, doesn't make it a substantial business activity. They're not offering that service to the general public.

PRESIDENT PHILLIPS: The cornerstone of your case is that business means making money?

MR. DEBEVOISE: It means dealing with third parties, not just intra-group activity.

And so, as I said, this all turns on consent by Panama, which was conditional, and Panama has invoked the denial-of-benefits provision, and that means that you should dismiss Bridgestone Licensing's claims.

And this conclusion that their claims should be dismissed might be thought harsh by some people, but I think it's worth recalling the explanation that the tribunal in the Rurelec versus Bolivia case gave, when it pointed out that it was up to Rurelec, the claimant in that case, to organize its own affairs. There was no prohibition--that case had to do with a special-purpose vehicle and so forth, and there were allegations that it was required to be a special-purpose vehicle. It had no other activity, and the tribunal ultimately found that that was not the case. So, there was no prohibition on Rurelec owning additional assets or conducting business beyond holding the shares that they held. That was the choice of Rurelec.

Similarly, in this case, as we saw in Exhibit C-97, Slide 11, containing the Assignment History of the FIRESTONE marks--it sprawls across the page all the different changes they made--it was Bridgestone Corporation's choice following the Firestone acquisition to separate ownership of the FIRESTONE trademarks from the operational tire business. That is their privilege, but it has consequences for eligibility for investor-State dispute settlement, and Bridgestone must bear those consequences.

This Tribunal must dismiss Bridgestone Licensing's claims for lack of jurisdiction under the TPA denial-of-benefits provision 10.12.2.

And one concluding thought--well, I think I will end there. Thank you very much. My colleague, Ms. Gehring Flores, will now address the remaining issues.

MS. GEHRING FLORES: Thank you. And good morning to everyone.

Bridgestone Licensing has committed an abuse of process by manufacturing loss after the dispute arose; and, therefore, this Tribunal does not have jurisdiction over its claims. It is well-established that there is a sequence of conditions of consent under investment treaties, including Chapter Ten of the TPA. These include breach, which is from Article 10.16.1; loss or damage, Article 10.16.1; dispute, Articles 10.15 and 10.16.1; notice, 10.16.2; waiting period, 10.16.3; and submission of claim, 10.16.4.

If and when those conditions are not satisfied, a tribunal does not have jurisdiction. Let me focus on the "when" for a moment, because that detail, the sequence in which these conditions are met is of critical importance here. These conditions to consent cannot happen out of order. If these conditions to consent occur out of order or out of the sequence, there is no consent; therefore, if a Claimant has foreseen or has raised a dispute without having first suffered breach and loss and that Claimant subsequently takes steps to try to bring its claim within the Tribunal's jurisdiction, an abuse of process has occurred.

So, how far does a Tribunal or--sorry--how does a Tribunal find abuse of process? There were questions on Monday about the exact standard to be applied, and I wanted to provide you with some clarity. I do note that Claimants would have you believe that there is no standard, an unusual position which they base on an out-of-date decision, the Rompetrol versus Romania decision. The reality is that there is case law on the subject, and previous tribunals have articulated a standard. In fact, the Philip Morris tribunal, decided in 2015, conducted review of the case law and found that previous tribunals had "articulated legal tests on abuse of right that are broadly analogous." That's at Respondent's Legal Authority 44, Philip Morris at Paragraph 554.

As to the standard, the tribunal found: "It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, 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." That's at Paragraph 539 of the Philip Morris Case.

Let's take a look at each of these sentences in turn.

The first is clear. Establishing an abuse of process does not require a showing of bad faith. In other words, the respondent does not need to show and the tribunal does not need to find or to make any findings of fact on the motivations of the abusing party. Motive is not necessary to the standard.

So, what is the standard to be applied? This is found in the second sentence displayed on the screen. As we made clear during our Opening Statement on Monday, this is not a case involving restructuring in order to bring an investment within the scope of the protection of a treaty. That's one form of abuse of process that was presented in Philip Morris, for instance. What we have in this case is an act by an investor to bring a treaty claim or a loss--the loss within the scope of protection of a treaty.

If we plug this type of abuse into the standard articulated by the Philip Morris tribunal, it would read: “It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test, and is seen in the fact that an investor whose claim is not protected by an investment treaty takes action in such a fashion as to ensure that its claim falls within the scope of protection of a treaty in view of a specific foreseeable” or, in this case, actual dispute. That is the standard supported by case law.

A claimant cannot take steps to bring its claim within the scope of the Treaty once the dispute has arisen. If, before that point the claim did not fall within the scope of protection of the Treaty, that is abuse of process. This means that the Tribunal has two simple questions to ask:

When did the dispute arise?

And did the Claimant take action after that time to try to bring its otherwise insufficient claim within this Tribunal's jurisdiction?

The answers to these questions lie in the timeline of events. That is how previous tribunals have approached these questions, including the Philip Morris tribunal and the Levy tribunal. Quoting from the Philip Morris case:

"Both Parties have presented long timelines of events which need to be taken into account. In the following paragraphs, the Tribunal will juxtapose developments occurring at the corporate level within the PMI group of companies and events arising at the political level within the Australian Government. Doing so, it will focus on occurrences which the

Tribunal considers particularly relevant to place the Claimants' restructuring into temporal perspective.”

In this case--and this is from the Levy case, at Paragraph 188. That previous quote is from Paragraph 555 of Philip Morris:

"In this case, the Tribunal has found that the events giving rise to the dispute occurred on 18 October 2007. If one reviews the unfolding events, you can see that the timeline is important, and the context of events is important."

This is what we emphasized on Monday. The Tribunal must consider how and in what context the events unfolded.

And let's recall on Monday, after our discussion of the standard and how it might apply to the facts of this case, I presented you with what we knew then, on Monday, before testimony.

In May of 2014, the judgment of the Panamanian Supreme Court was issued. In February of 2015, Bridgestone Americas presents its U.S. Trade Representative Special 301 Hearing in which it announces that it believes it has a claim under the

TPA.

In March of 2015, Bridgestone Americas meets with the Panamanian Ambassador where it discusses, again, this claim.

In September of 2015, Bridgestone Americas and Bridgestone Licensing submit a Notice of Intent to Arbitrate.

PRESIDENT PHILLIPS: Can I just interrupt you--

MS. GEHRING FLORES: Yes.

PRESIDENT PHILLIPS: --to ask where in this timetable could Licensing properly have paid the judgment without giving rise to the argument you're advancing?

MS. GEHRING FLORES: Right.

So, if you consider the sequence of conditions to consent, they are: breach, loss, dispute, notice--those are the first four. With those conditions of consent and in that sequence, Licensing--or this Tribunal would properly have jurisdiction over this case if Licensing had paid before the dispute arose, and certainly before it submitted notice.

Right here in this timeline, you have the judgment coming down of the Supreme Court in May 2014. Presumably when they started articulating a claim in February of 2015, that's when the dispute had arisen, and they hadn't paid yet. They hadn't suffered the loss yet.

PRESIDENT PHILLIPS: Well, if they were really bright before articulating any claim, they get together and say, "Hey, we had better pay this off." That's all right, isn't it?

MS. GEHRING FLORES: That would be in the order of condition of consent. If Licensing had paid before the dispute arose? Yes.

PRESIDENT PHILLIPS: And the other question I was going to ask is, just forgetting about this jurisdiction question, what is it that you suggest these two companies should have done, faced with the judgment given against them?

MS. GEHRING FLORES: Right. And I think this is an issue that came up in Claimants' Opening Statement at some point. They said: "Well, what else could we have done? What else could we have done? We really wanted to bring this claim, and we couldn't." What could they have done?

PRESIDENT PHILLIPS: What should they have done?

MS. GEHRING FLORES: Right. What should they have done? They should have realized that bringing an investment treaty claim against a sovereign State is not a right. It's not a right. You have to meet certain conditions that the sovereign State has consented to to sue that sovereign State, and they should realize, if they hadn't met those conditions, then they can't bring a claim against a sovereign State.

PRESIDENT PHILLIPS: I'm sorry, I'm not asking what should they have thought.

There's two companies with a judgment against them.

MS. GEHRING FLORES: Right.

PRESIDENT PHILLIPS: What should they do in relation to the judgment?

MS. GEHRING FLORES: I think they should pay it, if they think that they need to pay it. They should pay it.

PRESIDENT PHILLIPS: Who should pay it?

MS. GEHRING FLORES: Exact--well, if--

PRESIDENT PHILLIPS: If Licensing said we can't possibly pay this judgment because we would have a good claim if we do that.

MS. GEHRING FLORES: Right. Right. And that's exactly what--so, these are the facts that existed before yesterday. Yesterday, we found out that what you're talking about, Mr. President, is actually what happened. The judgment came down in May 2014. Immediately thereafter, as Mr. Kingsbury testified, they started speaking with their international counsel Akin Gump, and they started devising a way that they might be able to bring this investment claim. They started orchestrating it. They started thinking, "How can we do this?"

The thing is, once they started orchestrating--once they started planning, the dispute had already arisen. They figured out, "Oh, wow," Licensing--in the normal course of business, Licensing would not pay this judgment. Licensing doesn't have the money because, in 2016, Bridgestone Licensing takes out a loan from Bridgestone Americas. Why? To pay the judgment.

And Mr. Kingsbury explained well, because Bridgestone Licensing didn't have the funds to pay the judgment, and they realized that if either Bridgestone Americas, who did not have a denial-of-justice claim, didn't have an investment in Panama, if Bridgestone Americas paid, then they wouldn't be able to bring the claim. And if Bridgestone Corporation paid, they wouldn't be able to bring the claim because Bridgestone Corporation isn't covered under the Treaty. It's not a national of a party to the Treaty.

So, what we talked about on Monday was the objective test, but what we have now--we--I think we had proven the objective test. We had proven that a dispute arose before there was loss. Then they manufactured--the loss happened after the dispute arose. That meets the objective test. But Panama has now proven motive. We now actually have the motive. We only needed to meet the objective test but

Claimants' own witnesses have testified to motive.

So, Ms. Williams and Mr. Kingsbury testified. Ms. Williams testified--remember when we spoke on Monday, I said there's something curious about this timeline, and you were asking me about motive and why do you think they did this. One of the things, what was curious to us, was that payment letter, that August 2016 payment letter from Bridgestone's local counsel Benedetti & Benedetti that was signed by Ms. Williams, and at the very end mentioned international law and protections under the TPA. That's Claimants' Exhibit 36. Remember that? I mentioned that. I said why, that's curious. Why would a letter from local Panamanian counsel going to local Panamanian entities all of a sudden invoke international law and a TPA? Well, Ms. Williams talked about why, and Mr. Kingsbury talked about why. It's because Akin Gump wrote that part of the letter because they wanted to make sure--they wanted to assure that Claimant Bridgestone Licensing would be able to invoke this claim.

So, let's look at these facts that we found out through testimony. That Special 301 Hearing, that was done on the advice of Akin Gump. That meeting with the Panamanian Ambassador was also done on the advice of Akin Gump.

When Bridgestone Licensing--they didn't have sufficient funds to cover the judgment amount. When they took out a loan from Bridgestone Americas to pay the judgment, Mr. Kingsbury spoke about that--that's at Transcript 482, starting at Line 12.

And, in August 2016, when Bridgestone paid the damages award to Muresa, they did so at the urging of Akin Gump because there was no case for Bridgestone Licensing to bring it otherwise, to bring this claim otherwise.

And so, what did they do? They drafted a letter for Benedetti & Benedetti to send, manufacturing the claim after the dispute arose. They manufactured this claim for Bridgestone Licensing because before that point they knew that Bridgestone Licensing did not have a claim. It didn't have the loss. Who had suffered the loss? They wanted to make sure that Bridgestone Licensing suffered the loss.

I think Mr. Kingsbury probably articulated Bridgestone's post-dispute orchestration of jurisdiction most succinctly. Let's look at the Transcript from yesterday:

"So, who suggested that Bridgestone Licensing should pay the full amount?"

"It was a joint discussion between us and Bridgestone Americas, Bridgestone Licensing Services."

"'Us' is the same; right? It's the same people? Bridgestone Licensing and Bridgestone Americas, you're the same people?"

Mr. Kingsbury says: "Yes, in combination with legal counsel. And the tax group, I mean, cross-functional."

And then we asked about tax: "And were there people in Tokyo involved in this conversation?"

Mr. Kingsbury says: "Yes."

"Okay. And did counsel tell you that if Bridgestone Corporation paid this, you would have no case to bring under the Free Trade Agreement?"

And Mr. Kingsbury says: "I don't want to say that there was no case to bring because they're not the only Claimant, but certainly it was a factor, sure."

Bridgestone Licensing did not have the money to pay this judgment. They were told by counsel to pay. They took out a loan from Bridgestone Americas to pay to make sure that they could bring this claim when otherwise they could not, and this is all post-dispute; this is post-notice. They manufactured the loss, and it's not in the sequence of the conditions of consent.

Claimant Bridgestone Licensing had satisfied almost all of the conditions to consent in mid-2016. It had identified an alleged breach, a dispute had been articulated, and notice of the intent of this dispute was sent, and a waiting period began.

Importantly, Bridgestone had articulated the nature of its alleged loss in its notice. It was claiming damages associated with the amount of the judgment, but Bridgestone Licensing didn't actually have loss corresponding to that claim as it articulated it. It couldn't claim $5,431,000 without paying the judgment.

This bears emphasizing. It might have been different if Bridgestone Licensing had made some other kind of claim or had sought some other type of relief from the 2015 judgment, but it didn't. Instead, it specifically sought in its Request for Arbitration the amount of loss it incurred after it paid the $5,431,000 Supreme Court Judgment, but that particular loss had not been incurred before the Notice.

And, in order to satisfy the conditions of consent under the TPA, Bridgestone Licensing must have incurred that loss before it sent its notice in September 2015, almost a year before the specific loss that we're talking about that was articulated in the claim was actually incurred.

So, having already raised the dispute with Panama and having sent notice of that dispute--and, again, despite Bridgestone Licensing's lack of funds to pay the judgment amount, Claimants' counsel advised it to backtrack and pay the Supreme Court Judgment, hoping against hope that Panama and, eventually, the Tribunal wouldn't notice. This is an abuse, and Panama asked the Tribunal to take notice.

The evidence and the recent admissions from yesterday plainly demonstrate that there has been an abuse of process in this case.

Finally, the Tribunal does not have jurisdiction over Claimants' claim of more than $10 million in additional damages. As a preliminary matter, there seems to be some lingering doubt as to the nature of Panama's objection. To be clear, Panama is objecting that there is no consent because the additional damages claim is based on hypothetical conduct and is based on the conduct of third States.

In their Opening Statement, Claimants' counsel complained that Panama's objection to the hypothetical future conduct upon which this damages claim relies, is a new one, introduced by Panama for the first time on Monday. This is not true. Panama explicitly raised the issue in its expedited objections and in its Reply, and even cited the Achmea versus the Slovak Republic award in support of its arguments that the Tribunal does not have jurisdiction to evaluate claims based on hypothetical future conduct. This objection is not new, and the hypothetical nature of their claim is evident from the face of their pleadings, I think, as everyone has noticed from that conditional language.

Rather than respond on the substance of Panama's objection, however, Claimants resorted to objecting to our objection. We thought that phase of the Hearing was over. The simple truth is that Claimants have been unable to cite circumstances transforming their damages claim from one based on hypothetical events to one based on actual events in the more than three years since the judgment of the Supreme Court was issued.

Panama also objected to the additional damages claim on the basis that the Tribunal would be forced to evaluate the conduct of third States, a task wholly outside the jurisdiction conferred upon it by the Parties. After receiving questions from the Tribunal on Monday, Mr. Williams conceded that the Monetary Gold principle does apply, and that the loss "caused by the Measures of other States and, therefore, not caused by the Measures that we say were taken in Panama, would not be recoverable."

We, therefore, understand that Claimants have admitted that their claim for damages based on third State conduct is not sustainable. However, Panama does wish to clarify one issue raised by the Tribunal on Monday.

Claimants' counsel received a question asking whether they were attempting to attribute the conduct of third States to Panama rather than to third States, and Panama wishes to reiterate that there are strict rules governing the attribution of conduct by one State to another State under international law.

As previously explained, the ILC Articles on State Responsibility provide the framework for attribution. They require, first, that there be an internationally wrongful act by a third State; and, second, that the State to which the conduct is being attributed aided or assisted, directed or controlled, or coerced the third State.

Panama notes that Claimants have not alleged that Panama assisted, directed or coerced a third State into behaving a certain way. Claimants refer only to a so-called "system of precedents."

Let me be clear on this point: There is no system of precedent across and between Latin American countries. Latin American countries do not adopt the same policies or jurisprudence simply because they are Latin American. Claimants have not pointed to a single rule of law to support their alleged fear of precedents.

Moreover, their witness, Mr. Kingsbury, admitted that they have had mixed results in trademark proceedings in Latin America. I wonder what's happening with this omnipresent system of precedents there. The biases underlying their sudden concern that all Latin American States are now going to act the same way are problematic, to say the least, but the point is they have not put forward any basis for that attribution.

Furthermore, and this goes to the heart of Panama's objection, the attribution of conduct applies to the internationally wrongful acts of third States. This Tribunal would be forced to first evaluate the lawfulness of the conduct of third States and then consider whether or not it could be attributed to

Panama, which it cannot. And it's for this reason that the Monetary Gold principle applies.

And for these reasons, the Tribunal does not have jurisdiction over the additional damages claims asserted by Claimants.

In conclusion, Panama has proven all five jurisdictional defects, necessitating the dismissal of Claimants' case in its entirety. Panama is gravely disturbed that Claimants submitted a Request for Arbitration that was the product of their concerted manipulation of the investment-treaty system, wasting the Tribunal's time and public resources. Panama thus urges the Tribunal to halt this waste here and now. Particularly because, this case--if this case does not stop here, the waste will only continue.

Just consider what would be left to decide, should the Tribunal determine that it does have jurisdiction? Just consider it for a moment. Even a cursory review of the claims on their merits reveals that they are not claims for which an award that Claimants may be granted an award. Each claim is more absurd than the next. You have a denial-of-justice claim where one party, Bridgestone Americas, was not even a party to the proceeding of which they're complaining. Bridgestone Licensing was a party to that proceeding.

However, consider the mere superficial nature of their allegation of a denial-of-justice claim. It is the textbook of a meritless denial-of-justice claim.

Expropriation. Their expropriation claim is a claim based on an alleged increase in costs, all the while they're still able to sell their tires. That's absurd.

National Treatment. Not even the most basic criteria of that claim have been pled. There is not even a comparator.

This is not the first time that Panama has been forced to defend itself against abusive investment claims. Rather unfortunately, this is the third. It is time for this abuse of the investment-arbitration system to stop. Claimants orchestrated a meritless investment claim over which this Tribunal has no jurisdiction, and Claimants, despite early and repeated warnings from counsel for Panama about the objectively frivolous nature of their claims affirmatively decided to push forward. This is something that should not go unnoticed, nor is this conduct for which Panama should foot the bill.

Panama, therefore, respectfully requests that, along with the full dismissal of Claimants' case, the Tribunal award Panama full costs and attorneys’ fees.

Thank you.

PRESIDENT PHILLIPS: Thank you very much.

We shall adjourn for 15 minutes.

(Brief recess.)

PRESIDENT PHILLIPS: Mr. Williams.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

MR. WILLIAMS: Mr. Chairman, Members of the Tribunal, I'd like to start and to concentrate on the questions that the Tribunal asked the Parties to address; and, in these submissions, I'm going to try to avoid repeating what we covered in opening submissions. So, that's the broad approach that we're planning on taking.

And I think, perhaps, it was the last question, but I'd like to start with it first, which is the general interpretation question, Chapter Fifteen of the TPA and to what extent does Chapter Fifteen provide assistance to the Tribunal in interpreting Article 10.

And we say that Article 15 is of assistance. Article 15, of course, is headed "Intellectual Property Rights," and the broad proposition, as the Tribunal will know, of course, under the Vienna Convention is that the Treaty is to be interpreted and in accordance with the ordinary meaning to be given to the terms of the Treaty in their context. And so, therefore, in looking at Article 10, we say it's relevant as context to consider, then, as Professor Thomas perhaps raised as a question, it's relevant to consider what is said in Chapter Fifteen in relation to "intellectual property" rights.

So, Article 15.2.10 of Chapter Fifteen concerns specifically trademark licenses--and it deals with--effectively, it's a requirement that neither Party may require registration, I suppose, of trademark licenses.

And the specific wording is: "Neither Party may require recordal of trademark licenses to establish the validity of the License, to assert any rights in a trademark, or for other purposes."

And that wording then specifically contemplates that trademark licenses may confer rights in a trademark. And since, of course, this is dealt with in a chapter that is headed "Intellectual Property Rights," we say it follows that Parties must have contemplated that rights in a trademark conferred under a license would comprise "intellectual property" rights.

Turning on, Article 15.11.6 says--and this is under the heading "Civil and Administrative Procedures and Remedies"--it says: "Each party shall make available to right holders civil and judicial procedures concerning the enforcement of any 'intellectual property' right."

And there is a footnote there, Footnote 20, and at the bottom of that page, the footnote reads: "For the purpose of this Article, the term 'right holder' shall include federations and associations as well as exclusive licensees and other duly authorized licensees, as appropriate, having the legal standing and authority to assert such rights. The term 'licensee' shall include the licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property."

So, the footnote we say is interesting in terms of what the Parties contemplated then by "intellectual property" and "intellectual property rights."

We say, it's clear from the last sentence of Footnote 20 that the Parties contemplated that "intellectual property" encompasses various exclusive "'intellectual property' rights." And, indeed, that "'intellectual property' rights'" may be different from "intellectual property" per se because they're dealt with separately. The sentence refers to one or more of the exclusive "'intellectual property' rights" encompassed in a given intellectual property.

And the footnote also, on its terms, then, clearly contemplates that one or more of such rights may be licensed to Licensees and that a right-holder may include Licensees of "intellectual property" rights.

The term "right holder" in the footnote is stated to include various things, so "shall include federations and associations as well as exclusive licensees and other duly authorized licensees." So, it appears as if, then, that the second category would amount to non-exclusive licensees, because if you have exclusive licensees and then other duly authorized licensees, it would suggest that the other must be non-exclusive licensees.

So, Article 15.11.6, therefore, specifically requires that the Parties make available civil judicial procedures for enforcement of any "intellectual property" right to persons that hold "intellectual property" rights, including Licensees. Therefore, under this chapter, Panama has an obligation to allow BSAM, we say, to enforce its "intellectual property" rights.

And we say that the discussion that we've been having around those provisions of Chapter Fifteen are informative, then, when we turn to Article 10.

So, the Tribunal's second question that was put to us yesterday was this: Does BSAM's license in relation to the FIRESTONE trademark constitute an "intellectual property" right? And we say "yes." The FIRESTONE Trademark License Agreement, which is C-48, licenses to BSAM rights in the FIRESTONE trademarks? BSAM do not own the trademark, but they have the right to use the trademark in accordance with the terms of the License Agreement. So, Section 1, as we've seen, grants a non-exclusive license to use the marks. That right is subject to limitations, as we've seen, and is non-exclusive, but that does not mean it isn't a right. It is a right, but it is a right subject to limitations, and it is a right in respect of intellectual property and, therefore, we say is necessarily an "intellectual property" right. And that, as we've seen, is consistent with what the Parties appear to have contemplated in Chapter Fifteen, which confirms that one or more "intellectual property" rights held by a licensee may comprise an "intellectual property" right.

Therefore, we say BSAM's rights under C-48, the FIRESTONE License Agreement, do constitute an "intellectual property" right, in answer to the Tribunal's second question.

But the third question that the Tribunal raised was, if so, i.e., if the FIRESTONE trademark does constitute "intellectual property" right, if so does that right of itself constitute an investment, or is more needed? And, if so, what? And we say that more is needed, and that is in accordance with the definition of "investment" at Article 10.29.

So, we need to look at each element, then. So, "investment" means every asset that an investor owns or controls, directly or indirectly. That portion of the definition refers to the assets. The assets are the "intellectual property" rights conferred by the FIRESTONE Trademark License Agreement. But, to be an investment, the requirements of the whole definition need to be satisfied. So, for the IP rights is to be an asset, the asset must be owned or controlled by the investor and the assets must have the characteristics of an "investment."

So, the Tribunal's fourth question, on the assumption that more is required, how does BSAM satisfy those requirements? So, first, it must be established that the "intellectual property" rights are an asset. And the important point, or an important point to bear in mind, we say, is that an asset and an investment need not be tangible. It may be intangible. And there's been a lot of discussion by reference to factories and tangible assets, but assets need not to be tangible.

Ms. Williams was asked some questions on this subject yesterday, and we'll look at what she says, but just at the outset, it seems to me right to note that Ms. Williams, in my submission, came across as very credible, straightforward and frank as a witness. She was asked whether IP rights in the FIRESTONE License Agreement constituted assets, and she said--and it's in the Transcript, Day 3, Page 392, Lines 6 to 9--she said, in answer to that question: "I mean, that it's definitely a valuable thing. It's an investment for the Licensee. So, having value, in my opinion, it's an asset for the Licensee."

And then the Respondent's question: "I'm trying to figure out--are you saying that a licensee or a license agreement, a trademark license agreement--excuse me, let me start again.”

"That the "intellectual property" right and a trademark license agreement are property that can be converted to cash?"

And Ms. Williams's answer was: "That would be something that would depend on what the trademark License Agreement specifies because if a Licensee can assign its rights upon written approval of the Licensor and if he gets that approval, he can definitely assign his rights for compensation."

And that is the situation here. As Ms. Williams went on to say, the FIRESTONE Trademark License Agreement contains such a provision at Clause 27. That's for the Transcript C-48, Page 6. This Agreement may not be assigned or delegated by the Licensee without obtaining the prior written consent of Licensor.

The Respondent this morning raised an argument or an analogy by reference to staying the night in a hotel or Metro tickets; but these are not, we say, really appropriate comparisons. These are not commercial activities in which the user is using them, using the hotel or using the Metro for commercial activities, that there is no profit motive.

We say a more analogous example of a license in this context might be, say, an oil exploration and production license. So, typically, interests under such licenses can be farmed out or assigned but only with a State's consent. Typically, that's what Exploration and Production licenses require.

PRESIDENT PHILLIPS: But does it matter whether the License can be assigned or sold for cash or not? If it does matter, why?

MR. WILLIAMS: Mr. President, I agree, and I was addressing the point that was raised by the Respondent where they were saying that a characteristic that an investment should have is be the ability to assign or to sell.

But, you're right. We say that that need not be a necessary characteristic here. We say the point is that the Firestone license creates the opportunity for BSAM to generate revenue and profit. It is that that makes the License an asset.

But the consequence or the fruit of that asset, that investment, the IP rights, the fruit is the opportunity, then, to make profit, to make revenue, to sell. That is the fruit of it.

And, in essence, it is this: It is the opportunity--using the mark to manufacture, sell, distribute market tires on a branded basis, if you like, rather than an unbranded basis.

And, of course, there's a very substantial difference in the value of a branded tire, with a mark such as BRIDGESTONE or FIRESTONE, as opposed to an unbranded tire.

So, Mr. President, I respectfully agree that actually that should be enough. But, as it turns out, the License that we're looking at here, the Firestone license, is capable of being assigned, but being assigned with consent. There's nothing unusual about that. License Agreements always, in my experience--always--confer on the holder of the trademark residual control. That's what you would expect.

The second aspect is that the "intellectual property" rights are owned or controlled by BSAM.

Now, from Ms. Williams's testimony yesterday and from her Witness Statement, indeed, it's clear that, in Panamanian law, the terms "possession" and "ownership" are used in relation to intellectual property; and, under Panamanian law, it seems that the trademark registration is capable of "ownership," as that word is used in Panamanian law, but rights arising from that registration that are licensed are possessed by the Licensee. That appears to be the distinction. There appears to be a different label put on those two different aspects.

So, that's why Ms. Williams said, at Paragraph 9 of her statement: "A trademark registration holder may, therefore, transfer their 'intellectual property' rights with respect to the use of the trademark to a Licensee. It follows that the whom the trademark rights have been licensed possesses those trademark rights of use."

And in her oral testimony yesterday,

Ms. Williams was asked about that statement--and that's Day 3, Page 380, Lines 8 to 12--and she said: "By the word 'possess'"--I'm so sorry. The Respondent asked: "By the word 'possess' or 'possesses,' do you mean that a trademark licensee is the owner of the 'intellectual property' rights in the License Agreement?"

And her answer was: "No."

However, it is clear that, under Panamanian law, "intellectual property" rights may be licensed and that the Licensee then has the use and benefit of those rights. That is what Ms. Williams says at Paragraph 9 of her Witness Statement.

In substance, therefore, the holder of those rights owns them. Regardless of what label Panamanian law chooses to apply, in substance, that is the position.

And, in deciding whether the criterion of ownership, as that term is used in the TPA is satisfied, we say that the Tribunal should look to the substance and not to the nomenclature of Panamanian law. The TPA is to be interpreted in accordance not with Panamanian law but with the Vienna Convention.

In Emmis and Hungary, which is in Respondent's Legal Authorities 54, the Tribunal said this at Paragraphs 162 to 163, and it's a fairly lengthy quote. It's probably best to get it up on the screen, if you can.

Well, why don't we press on.

So, what was found in that decision was this: "In order to determine whether an investor Claimant holds property or assets capable of constituting an investment, it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law. There is no doubt, as the Treaty definitions emphasize, that the notion of property or assets is not to be narrowly circumscribed. For this reason, tribunals have rejected a restriction to tangible property, emphasizing that expropriation may equally protect intangible property. So, too, tribunals have held that the rights protected from expropriation as not limited to rights in rem. This is confirmed by the treaties which include within their definition of 'assets' qualifying as investments numerous other rights in addition to movable and immovable property as well as any other rights in rem. This is unsurprising since the definition of 'investment' must apply compendiously to assets created under the law with the different municipal legal systems of the Contracting States."

And this is the important bit.

"It is not to be circumscribed by technical distinctions that may have a different import under different municipal legal systems. The test is substantive, not technical."

And, as I said, in substance, we say, then, the rights, the "intellectual property" rights, are owned by BSAM.

As to control, well, the requirement is either own or control, and we say BSAM does both. As we've said, it owns because the "intellectual property" rights were conferred on it by means of the License Agreement, and it controls the asset because of the terms of the License. As we've looked at--we're not suggesting that the control is absolute, that it is unfettered, that it can do precisely what it likes. No, no License Agreement for "intellectual property" rights would be--would confer an entirely unfettered right or control on the Licensee. That's not how intellectual property works. The owner of the trademark always retains a degree of control.

However, there is a degree of control which the Licensee has. The Firestone License Agreement gives BSAM control over how to commercially exploit the License. It is for BSAM to determine how to use the marks, who to sublicense to, how to market and promote the marks, and to exercise quality control over them.

But the third characteristic is--or the third point, criterion, third, the asset must have 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 "intellectual property" rights as we've discussed obviously include an expectation of gain or profit. That's the whole point of licensing the trademark for use so that tires can be manufactured, marketed, distributed, and sold, utilizing the mark to make money.

BSAM itself commits capital and other resources to the asset, and there have been a number of examples of this in the evidence. So, one example was discussed by Mr. Kingsbury. So Mr. Kingsbury is Chief Counsel for Intellectual Property for BSAM, and as he told us in his First Witness Statement at Paragraph 9, he apparently spends about seven to ten percent of his time working for BSLS.

He also spends some time working for Bridgestone Brands, but the majority of his time is spent on BSAM's "intellectual property" rights.

BSAM does not own any trademarks itself, but they do employ Mr. Kingsbury and other lawyers to work on its "intellectual property" rights, so a commitment of resources to the asset.

Another example is BSAM's activities in relation to the asset in setting the sales and marketing strategy, and this was covered in Mr. Calderon's Witness Statement, which was not challenged, and the Respondent chose not to call him to give evidence.

But, at Paragraph 13 of his Witness Statement, he says: "BSCR and the other subsidiaries in Latin America implement regional marketing campaigns within the territories they oversee which are developed for management within BSAM in Nashville, Tennessee." In that context, also see Calderon Paragraphs 14 through 16.

Indeed, for example, BSAM helped fund a customer service hotline in Panama, and that's at Calderon Paragraph 15.

A further attribute is that the asset carries risks. A risk, of course, for example, is as to damage to the mark, damage to the brand; therefore, damage to the "intellectual property" rights of which BSAM is a licensee. So, for example, in the event that there was a quality problem with the tires that were manufactured, distributed and sold, if, for example, those tires were subject to a product recall, then, of course, there would be a risk of damage to the brand, damage to the asset, damage to the investment. And, indeed, there are a number of examples in the tire industry, generally, of just that happening in terms of product recalls.

BSAM's subsidiaries also carry out activities in relation to the asset as we described in our opening, of sales trips, marketing budgets, and so on.

The fifth question--yes.

ARBITRATOR THOMAS: Just before you go on, the way in which you put one of your propositions was I wanted to just pursue it.

You said that BSAM commits capital and other resources to the asset, and I reflected on the use of the word "to" the asset. The test in the chapeau of the definition is that consideration of the reflection--of a determination of the characteristics of the asset.

And the way in which you put it made me wonder whether or not one could say something quite different, which is that the asset is used in connection with the committing of capital to the marketing of tires.

In other words, the way you put it is that the money has been committed to the asset, whereas, I think, looking at the facts, the asset is used in relation to another activity; i.e., sales and distribution of tires.

Do you understand what I'm getting at?

MR. WILLIAMS: I do.

ARBITRATOR THOMAS: I wonder if you could comment on that.

MR. WILLIAMS: I do understand the point that you're making.

And the asset and the investment, on our case, as we've said, is the intellectual property right. It is the mark. It is the right to use Firestone and Bridgestone on tires--and that, as I've mentioned already but it's worth repeating because it's so critical--that the right to have those words, those brands on the tire dramatically increases the value of a product. An unbranded product is going to be worth a lot less than a branded one. And so, therefore, investment in developing the brand, in developing the recognition of the brand is "investment," we say, and the commitment of capital and resources in the asset in the intellectual property. It is developing the recognition and the value of that brand.

Of course, we recognize, of course, that the brand, in turn, the mark is monetized--the purpose, if you like--of owning the mark is in order that you can utilize it by putting it on a product and then to be able to sell it for much more than you would otherwise be able to sell it for.

But the investment is in the brand. It is in that recognition of the mark. That is our case.

ARBITRATOR THOMAS: Thank you.

MR. WILLIAMS: The fifth question, was a similar one, but it relates to the BRIDGESTONE trademark as opposed to the FIRESTONE mark and the licensing arrangements in relation to the BRIDGESTONE mark, and the considerations, of course, are similar, but there is one difference, that BSAM's ownership of the asset--the "intellectual property" rights--in this case is indirect because it is BSAM's wholly owned subsidiary, Bridgestone America Tire Operations LLC, which has the "intellectual property" rights, so they are indirectly owned by BSAM.

But the TPA expressly states that an investment means every asset that an investor owns or controls, directly or indirectly; and, therefore, we say that BSAM's indirect ownership of those "intellectual property" rights in relation to the BRIDGESTONE mark satisfy the requirements of the TPA in that regard. Indirect ownership falls within the definition.

I should say also that, and it's important to note, that whilst Bridgestone Americas Tire Operations directly owns the intellectual property rights, and the evidence is to this effect, that it is BSAM that directs how its subsidiary is to use those rights. So, it's not as if this is a remote relationship. There is a direct, ongoing involvement by BSAM in those rights.

ARBITRATOR GRIGERA NAÓN: If I may better understand what you're saying, my understanding is that these "intellectual property" rights are owned by the Japanese parent, they are being licensed to a company called BATO, and then there is a sublicense to the Costa Rican company which, I understand, is a subsidiary of BSAM. Am I right?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: To which extent the Costa Rican sales in Panama are covered by "intellectual property" rights that I understand should be controlled or should be owned by BSAM for this to fall within the Treaty. Because we're talking, I understand, of investment in Panama and we're talking about an investment in Panama, according to your position, based on "intellectual property" rights.

My understanding is that the "intellectual property" rights are, because of the sublicense, are in the Costa Rican company, not in BSAM. So, how do we get full circle to get to your argument?

MR. WILLIAMS: The "intellectual property" rights, which are indirectly owned by BSAM, are rights in relation to the mark, which is registered in Panama, so they are rights which are specific to

Panama. So, they are, for these purposes, we say, an asset in Panama.

ARBITRATOR GRIGERA NAÓN: What is registered in Panama? Is it the trademark? Is this the License? What is registered in Panama?

MR. WILLIAMS: It is the trademark.

ARBITRATOR GRIGERA NAÓN: The BRIDGESTONE trademark?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: If I understand you correctly, then that trademark is registered by the Japanese company?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: The parent company?

MR. WILLIAMS: Yes, in the case of Bridgestone. Yes. In the case of Firestone, it's BSLS. Yes.

ARBITRATOR GRIGERA NAÓN: We are talking about Bridgestone. We understand the situation of Firestone.

So your argument is that there is a trademark registered by the Japanese parent company in Panama and there are rights by virtue of a sublicense that is owned by the Costa Rican company which, in turn, is controlled by BSAM?

MR. WILLIAMS: Yes, although the License--to be clear--to be clear, the Bridgestone License Agreement then is between BATO, Bridgestone Americas Tire Operations--and the Japanese Bridgestone corporation, and BATO is a direct subsidiary of BSAM.

It might help, actually, at this point to look at the structure chart which we handed up earlier. And you'll see there that, on the left-hand side, BATO--Bridgestone Americas Tire Operations--there is a direct subsidiary of Bridgestone Americas.

In order to follow it through, I'm keen to address the Tribunal's questions, and apologies if this is a little repetitive of what we looked at on Firestone, but I think it's very important that we cover the ground.

So, the IP rights assets, the asset is indirectly owned or controlled by BSAM, the "asset" has the characteristics of an "investment," and the asset is an asset in Panama. The asset has the characteristics of an investment in the same way as I've just described in relation to the Firestone "intellectual property" rights. In this case, it is BATO and BSAM, which commit capital and other resources to the investment. BATO ships tires, manages the manufacturing, but BATO and BSAM, of course, both have an expectation of gain from the asset and risk in the way that I outlined before. As we looked at before, BSAM receives the revenue.

ARBITRATOR GRIGERA NAÓN: Excuse me, the revenue of the sales?

MR. WILLIAMS: Yes.

ARBITRATOR GRIGERA NAÓN: Because my understanding is the royalty goes directly to the Japanese controlling Company, in the case of Bridgestone?

MR. WILLIAMS: Yes. Yes, that's right.

The eighth question that was put to me, to us was how, if at all, does BSAM distinguish its position from that of a company selling goods to a Panamanian distributor in respect of which a Panamanian trademark exists? And the nub of the point, I think, is the last phrase, in respect of which a Panamanian trademark exists because the question is in the example in the hypothetical here, who owns the trademark and who has the right to use or who has rights under that trademark?

In our case, if BSAM did not have its "intellectual property" rights to use the mark, it couldn't manufacture, it couldn't distribute, and it could not sell tires with the BRIDGESTONE mark or permit its subsidiaries to do so, and that's how sales of branded goods always work.

I mean, to take a trite example, I can't go around the corner tomorrow and open a BMW showroom, importing and selling BMW cars with BMW logos over the front of the premises. I can't do that. Why can't I do that? Because I don't have the "intellectual property" rights that permit me to use those marks in that way.

And so, in direct answer to the question, how do we distinguish BSAM from a company merely selling goods to a Panamanian distributor, the point is that

BSAM can do what it does because it holds the "intellectual property" rights that we've been looking at.

PRESIDENT PHILLIPS: Taking that example, it's not BSAM that has the showroom in Panama; it's the distributor. Isn't that right?

MR. WILLIAMS: The distributor, then, who is entitled and obtains the right to use the mark pursuant to agreements, pursuant to rights that it obtains indirectly from BSAM, in our example.

Without those rights, the distributor in this case would not be able to sell BRIDGESTONE tires, would not be able to use advertising, would not be able to employ the mark BRIDGESTONE with the colors that we were looking at yesterday on the B, would not be able to do that.

So, it's intrinsic to all of these activities that you have to have the "intellectual property" rights. That's how branded merchandise works. It's the central component.

ARBITRATOR GRIGERA NAÓN: Mr. Williams, when you're saying that the benefits of the sales by the

Costa Rican company in Panama go to BSAM, am I understanding correctly, at least by way of dividends, by way of its participation in the share capital of the Costa Rican company? Or is it otherwise?

MR. WILLIAMS: We think it passes straight through. But, as a factual matter, we can--or the team can look into that and come back to you with a more authoritative answer, but our understanding is that it passed straight through to BSAM.

ARBITRATOR GRIGERA NAÓN: Which I imagine would assume some sort of arrangement or contract between the Costa Rican subsidiary and BSAM, isn't it?

MR. WILLIAMS: I think what you say sounds right, but I'm afraid, sitting here immediately now, I don't have a conclusive answer to you.

And I know much has been made of a suggestion that the Claimants are seeking the Tribunal's pity, but this is an expedited process. We've put in a Request for Arbitration, which is necessarily a very abbreviated short preliminary document. That's what it's supposed to be. We have not put in a Memorial. This is a very preliminary early stage of the arbitration; and, therefore, to marshal all of the evidence, the facts, the documents and so on is not something that we are as well advanced in as we would ordinarily be, we say, when we would be having this sort of discussion with the Tribunal.

So, really just to complete the point, of course, companies build brand recognition, build the value of the mark, develop the value of the "intellectual property" rights that they hold through promotion and marketing. Of course, the more you invest in marketing and promotion of your brand, the more consumer recognition you build and the more valuable your rights become. That is why the definition of "investment" includes expectation of gain or loss. It's obvious that an investor pays money for something, with the expectation that it is going to increase in value. That is why, for example, BSLS is happy to have non-revenue-generating License Agreements with toy and game suppliers because that's a good way to build brand recognition, and building brand recognition adds value to the trademark and the "intellectual property" rights. BSAM invests in marketing and promotion of the Bridgestone and FIRESTONE marks with the expectation that the marks will increase in value, which will, in turn, of course, allow it to exploit the fruits of the mark, the sales.

Of course, the increased value inures to the trademark owner, but rights to use the trademark allow BSAM also to enjoy the increased value from the rights that it holds during the term of the license. The fruits of that are the sales. And the Respondent has repeatedly made the point that sales cannot be an investment, but as I hope I've made clear, the investment is the "intellectual property" right.

I have done my best to address the Tribunal's questions, and I wanted briefly to run through the other objections, and I don't want to repeat what we said in openings. It seems to me that's unlikely to be helpful. But there are just some points that it seems to me are worth drawing out.

So, in relation to Objection 2--this is the one that the suggestion is that BSAM was not directly affected by the Supreme Court Judgment.

From the Transcript, the Tribunal didn't raise any questions on that, but the--so I'm not going to dwell on it, but the short point is this: The directness, which is the relevant concept to be considered in relation to this objection, directness is to be interpreted widely--that's the AES and Argentine Republic Decision. The Measure need not have been directed against BSAM's investment specifically--that's the Continental Casualty and Argentine Republic Award. And the issue is one of facts and causation. BSAM in relation to the rights that it had conferred on it under the License Agreements stands in the shoes of the trademark holder in respect of the licensed rights.

So, BSLS's investment is not disputed. It's been confirmed today that the Respondent does not dispute that BSLS's trademark rights, "intellectual property" rights, as the trademark registered holder, it is not disputed that that is an investment, and BSAM, in relation to those rights that have been conferred on it stand in the shoes of BSLS.

So, therefore, we say that, by accepting that

BSLS has an investment, it necessarily follows that it must be accepted that BSAM does, too, and that it is directly affected by the Measures taken of which we complain in this arbitration.

Objection 3 is the denial-of-benefits objection, and the issue for the Tribunal is whether BSLS has substantial business activities in the United States.

We've gone through all of the activities. The Tribunal will remember that we produced a summary table listing them.

An issue that arose in the Respondent's submissions is the word "business" and what that means in the context of "substantial business activities," and we say that the licensing of "intellectual property" rights allowing--by BSLS--allowing a premium mark to be used on tires is a commercial activity. If it's not a commercial activity, what is it?

Now, BSLS sells those rights--that's one activity--it licenses its rights--and it also monitors infringements and takes steps to defend its mark. It takes those steps typically through using external law firms, but that does not mean that BSLS is not undertaking substantial business activities because it hires law firms to take those steps. It's activities of licensing marks and monitoring infringements and taking action in relation to infringements, we say, amount to "substantial business activities."

It is irrelevant, we say, that BSLS sells its rights to other group companies. That, we say, does not mean that it is selling the rights to itself, which is I think a suggestion that was made earlier. That would be to ignore corporate identity.

BSLS's Licensing directly facilitates the manufacture, distribution and sale of branded tires by other Bridgestone group companies. The Respondent argues that "substantial" is to be assessed by reference somehow to the whole group, so the suggestion made by the Respondent is you've got to look at what BSLS does, the activities of selling and Licensing marks and monitoring infringement and so on. You've got to look at that by reference to the activities of the Bridgestone group as a whole.

No authority was offered for that suggestion.

PRESIDENT PHILLIPS: I'm not sure that that was what was suggested. I think what was suggested was that you have to look at Bridgestone Licensing divorced from the group.

MR. WILLIAMS: Perhaps I had misunderstood. That was my understanding. The example was given of a mom and pop outfit, and it was suggested that perhaps you could take a different view of a mom and pop outfit as to what was substantial as opposed to activities undertaken by a company within the Bridgestone group; and I had understood that to mean, therefore, that a different standard applies if you were looking at activities within a member of the Bridgestone group, because it's a very large international group of companies as opposed to another company. Perhaps I got the point wrong, but anyway, that was my understanding of the point.

And to the extent that that point is being advanced, we would say that no authority is offered for that proposition, and that the activities that we have outlined in relation to BSLS are, on their face, objectively "substantial business activities."

ARBITRATOR THOMAS: Can I ask you about that?

MR. WILLIAMS: Yes, of course.

ARBITRATOR THOMAS: This is a fascinating case.

If I look at Paragraph 2 of Article 10.12, which is the one with which the Tribunal is concerned, does the group issue take on an additional element of complexity if a person of a non-party, i.e., Japan, controls the group--in other words--

I'm going to try to set this in context.

There is a case, a well-known case, where Fireman's Fund Insurance Company incorporated in California was acquired by Allianz of Germany. Fireman’s brought a claim against Mexico. There was no question about a connection to the United States. It was not only incorporated in the United States, but it had conducted substantial business activities in the United States. What this case seems to present more acutely is the fact that the activities with which we're concerned for BSLS are--appears on the evidence that Mr. Debevoise had put to us, engaged and in relation to the other members of the group controlled by the Japanese party, which can have no standing to bring a claim under the Treaty.

And so, there is an unusual--to my experience, there is an unusual connection here between the group owned by Japan and the entity which is now being--which is now asserting the claim and, frankly I don't know what to make out of that, but I just wanted to see if you could give me some sense on that because we have this "no substantial business activities in the territory of the other party"; in other words, in the territory of the United States. The Company in question is part of a group controlled by--owned and controlled by a Japanese corporation.

What does the Tribunal make of the extent of its interactions with other members of that group as opposed to entities not connected to the group? I think that's what I'm trying to get to. I would like your assistance on that.

MR. WILLIAMS: So, as I read Subparagraph (ii), there is a criterion that the enterprise has no "substantial business activities in the territory of the other party," and persons of a non-party or denying party own or control the enterprise. So, it appears that in that respect, there are two elements, both of which must be satisfied. Much of the argument, I think, at this Hearing has been directed towards the first of those aspects.

Now--and of course there is no dispute, of course, that Bridgestone Corporation in Japan is the ultimate parent company--of course, there is no denying that--and so, therefore, there is a relationship of ownership, direct or indirect, with the ultimate parent company.

Now, it may be that we don't need to go in there because of that relationship of ownership. But, as to whether there is control, that is a more complicated question, and that is clearly a fact-sensitive question. It would involve looking at corporate identity, it would involve looking at operations of the Board. That seems to me to be something which the Tribunal today is not equipped to take a view on, and would involve a significant factual inquiry.

But it may be that we don't need to go there because it is accepted that the ultimate parent company is a Japanese entity and is, therefore, a person of a non-party for the purposes of this Clause.

I don't know whether that answers your question.

I should also say that I entirely agree. I think this case, whilst being serious, does involve interesting and novel issues. We've discussed joint and several liability. It is also one of very few cases which have considered intellectual property in this context as well, and so, therefore, there inevitably are aspects of this case where there is less by way of immediate direct authority than there may be in other circumstances where claims have been brought.

ARBITRATOR THOMAS: I'll just leave it at that. It's something for me to reflect upon, and I think probably the whole of the Tribunal hears my sentiment.

Thank you.

MR. WILLIAMS: A point was made this morning--I think, Mr. President, you raised it--which was the point that--well, at one point a substantial amount of money was loaned to BSLS, and the question was raised what was that for, and the answer is that it was--$31 million was the sum--that it was used to buy the trademarks from BSAM.

There was also another point that was raised this morning, which was a suggestion that BSLS had or has no Directors in the U.S., and that is not right. BSLS has always a U.S. Director, a Director who is in the U.S., based in the U.S., and that is Mr. Akiyama, and you will see that at C-79.

Mr. Debevoise, yesterday, spent quite a lot of time with Mr. Kingsbury looking through BSLS's Tax Returns, and Mr. Kingsbury was not able to help with a number of those questions because he's not responsible for BSLS's finances, but also because the definitions and words used in a tax context have a very specific meaning not related always to the ordinary meaning of the word. Tax and finance, as he said, are outside his areas of expertise, and there are numerous references in the Transcript which I probably don't need to trouble the Tribunal with; the Tribunal will recall.

But I think a point that Mr. Debevoise was looking to extract from the testimony yesterday was that Mr. Kingsbury accepted that the only source of revenue was said to be passive income, and that's Day 3, Page 456, Lines 9 to 12. And Mr. Kingsbury said: "Yes, royalties, I guess, are defined as passive income." And, of course, Mr. Debevoise is looking to make a point there that, well, that shows that BSLS doesn't do anything, just the money rolls in and BSLS puts its feet up.

But the point is, in my submission, that this is misleading because in IRS Tax Returns in the U.S. context, "passive income" has a very particular meaning. It's not a phrase which might be said to have a colloquial meaning of you don't earn the money, the money just comes in, "passive." It doesn't mean that. It has a very specific meaning under U.S. Tax Law. Now, of course, Mr. Kingsbury, not being a tax expert, did not know that, was referred to the Tax Return and accepted what the Tax Return said.

Now, there isn't evidence before the

Tribunal--it's not on the record--as to what definition the IRS gives "passive income," as a term, and the Tribunal's made clear that we can't supplement the record at this stage, for obvious reasons. But I think it's right that I note that this is a term of art.

And I suppose ultimately the point is this, that the meaning of "substantial business activities" is not a question of the tax treatment of those activities. It is a question of fact, that the Tribunal has seen the evidence on this question and, in my submission, that evidence amply shows substantial business activities.

PRESIDENT PHILLIPS: Well, what of the submission that "substantial business activities" must be money-making activities? In my example of an oil company which has one company who's solely responsible for pollution prevention, that company would presumably have to charge the parent for the services it was providing, but it wouldn't be there to make money. It would be there to prevent pollution for the benefit of the group.

MR. WILLIAMS: The Respondent, I believe, did not present authority for the suggestion that it must necessarily be money-making.

In our case, as we've seen, BSLS sells rights--I mean, of course, yeah, these are not very large amounts of money, but nevertheless it sells rights, and it conducts the activity of monitoring infringements and taking action to defend its mark.

Now, it is money-making in that it licenses its mark, and it receives payment, a small payment. But, by monitoring infringements and taking action to prevent infringements, what it is doing is protecting and enhancing the value of its trademark. In my submission, this is sufficient to be "substantial business activities."

Objection 4 is abuse of process, and there appears to be agreement that the test for abuse of process is an objective one, but nevertheless, there still seems to be some difficulty in clearly articulating what the test should be. There was reference this morning to the Philip Morris Case, and a suggestion that it must require restructuring of an investment, which was the authority that was referred to, the paragraph that was referred to from Philip Morris. But it was accepted that, I believe, that this is not a case of restructuring an investment. The investment, the "intellectual property" rights, have not been restructured.

So, it's still not clear to me what in precise terms the test is said to be. But the bottom line, and the Tribunal was taken through a lot of chronology, a lot of suggestion that the sequence of events and the delay tell their own story and show that this was an abuse. But at no time has the Respondent addressed the very short point that we make, which is that, in the two years where it is being said that somehow Bridgestone was cooking up these claims or restructuring its investment or whatever the suggestion is, in those two years, BSLS and Bridgestone Japan were in the Panamanian courts trying to overturn the Supreme Court Decision. That's what they were doing in those two years. It was only when all of the local options were exhausted that BSLS paid.

But that was--that is the really significant point, we say, in terms of timing. There is nothing suspicious, there is no abuse here. The evidence that we heard yesterday from Mr. Kingsbury is that BSLS obtained finance to pay some of the damages award, but it didn't obtain that finance from Bridgestone Corporation. Mr. Kingsbury made clear: The finance was obtained from Bridgestone Americas. And Bridgestone Americas, of course, has, as we've seen, the "intellectual property" rights that are conferred on it under the relevant Licensing Agreements, including for Panama. It obviously has an interest in protecting those rights. It has a natural commercial interest in protecting its "intellectual property" rights from enforcement action.

And BSLS, doing what the Panamanian Court had ordered it to do, we say, simply cannot be an abuse.

PRESIDENT PHILLIPS: It is a bit odd, isn't it, if you have a parent company and a subsidiary who are held jointly liable. Subsidiary hasn't got enough funds to discharge the whole of the judgment debt. So, instead of saying to the parent, "Well, you pay your share," it goes to another subsidiary and borrows the money to do so.

MR. WILLIAMS: Well, if you look at which Parties had which interests in Panama. So, BSLS had the interests in Panama, it had "intellectual property" rights in Panama, it had the registered trademark, I agree, so did Bridgestone Corporation, but BSLS is specifically, as we have seen, tasked and responsible for trademarks. That is its realm of responsibility within the Bridgestone group.

So, for it to have taken the step of protecting the trademarks and the "intellectual property" rights by discharging a judgment debt, which it had been ordered to pay, it seems to me, is not that surprising, and it was funded, as we have seen, by way of debt from Bridgestone Americas, which, of course, directly did have those interests and activities in Panama that we have been discussing.

But Mr. Kingsbury was frank yesterday, wasn't he?

ARBITRATOR THOMAS: May I ask a question.

Would you agree with the proposition that

Bridgestone Japan, directly or indirectly, had every legal interest at stake in Panama that BSLS had and more, in the sense that Bridgestone is the owner of the BRIDGESTONE mark?

If we look at the case, the proceeding in Panama, the one party that has--there are two marks in question. One mark is owned by the Japanese corporation, one by BSLS, but ultimately indirectly owned by the Japanese corporation. Following on the Chairman's comment, it's interesting that the Party that owns one of the two marks doesn't effect the payment. It's -- the entire payment of damages is made by a party that is responsible -- owns a mark and is responsible for the licensing of marks that doesn't actually own the other one that was at issue.

MR. WILLIAMS: Of course, you're right, that we've got two owners of two different trademarks here, BSLS and Bridgestone Corporation, and they could have paid half-half, I guess, in principle.

Agreed, that, I guess, is possible that could have been what happened, but Bridgestone BSLS, as I've said, it is specifically tasked. Its role is to protect intellectual property, and that's its function. It licenses intellectual property. And it acts to identify infringement and to try to clamp down on infringement. That's really its function within the Bridgestone group.

And so, therefore, whilst of course Bridgestone Corporation, in principle, of course, could have paid the whole lot it could have done, or in any different combination of proportions, I don't think it's that surprising that the entity that is specifically tasked with protecting intellectual property in that way would consider that paying a judgment debt in the Americas is very surprising. It seems to me that it is not terrifically surprising.

And, in a sense, it would be a bit odd, just as a matter of practicality for them to split it up, so for Bridgestone Corporation to pay half and BSLS to have paid half. It would involve two payments rather than one.

Now, we don't have witnesses from Bridgestone Corporation, from the various people who Mr. Kingsbury referred to who were involved in discussions. We don't have those people here, and again, I am going to pray in aid this preliminary expedited procedure, that had this exercise been undertaken in the usual way rather than on an expedited basis, had all of the arguments been teased out more fully in written submissions, then of course there would have been an opportunity to the Claimants to present fuller evidence. As it is, we say, this exercise, this hearing, these applications that the Respondent has made, are not intended to be a mini trial. As it is, of course, we've had a hearing spread over four days, we've had two witnesses, we've had cross-examination--you know, there has been a significant factual inquiry, but nevertheless the Claimant has not had the sort of opportunity that ordinarily you would have.

And so, therefore, it's not surprising, we say, that a full evidentiary record covering all of the matters that we're discussing is not available to the Tribunal, but we would suggest that the Claimants can't be criticized for that. The Claimants have gone to considerable effort to assist the Tribunal by putting forward the evidence that they have.

PRESIDENT PHILLIPS: Do you accept that, if we were to reach the stage of considering quantum, there might then be scope for an inquiry as to whether the entirety of the payment made by Licensing was one in respect of which it had or still has a legal right to seek contribution from the joint wrongdoer, if that's the right word, i.e., its parent when one comes to quantum?

MR. WILLIAMS: When we come to quantum, it seems to me that that is a legitimate area for inquiry, in order to assess what is the loss that has been suffered by that Claimant entity. That seems to me to be a legitimate area to look at. Have we looked at it yet? No.

And, frankly, Mr. President, it was your suggestion that triggered it in my mind, and I have to admit I had not thought of that point before. It's a good point and something that I think merits looking into, and that's something that we will do.

Turning to Objection 5, which is the objection that loss can be recovered outside the host

State, and the objection is that if there is a measure taken by a third-party State and that's not something with can properly be the subject for claim under this Treaty--well, as, I think, the Claimants have made clear, as I've attempted to make clear, the Claimants do not claim for loss arising out of measures adopted by other States. The claims that are asserted are for loss and damage which the Claimants have suffered by reason of measures taken by Panama, and that is, we say, a factual question.

And further, even were, for the sake of argument, the Tribunal persuaded that there were aspects of the claim for loss in excess of the judgment sum, which involved loss outside Panama and which, therefore, the Tribunal was minded not to permit, of course, for the reasons we've discussed we do not accept that, but were the Tribunal to take that view, nevertheless there are aspects of this claim--Paragraphs 55 and 58 of the factors which are identified--which do not relate to matters outside Panama, so those would, in any event, remain.

And, lastly, there is what we say is a new objection, which is an objection that the Tribunal does not have jurisdiction, and Panama has not submitted itself to arbitration in relation to what is called the "hypothetical" or "hypotheticals."

Now, the suggestion was made early this morning that this is not a new point and that this has been alleged all along, and within the original objections. But with respect, we say that that's not quite right. The points raised in the objection--and it might be worth looking at Paragraph 48 of the objection, that the points raised in the objection were in relation to hypothetical actions of other States; that is how it is put.

So, it goes, then, to the point on actions by the States, perhaps hypothetical actions by other States is how it is put. But it is not an objection to what is called "hypothetical actions other than by third States," if that's the way it's put. It's now expanded to, as the Respondents seek to knock out other aspects of the Claimants' claims, on the footing that they're said to be hypothetical, regardless of whether they are hypothetical actions of other States.

Now, that is a new objection, we say, and it is out of time because, as we have seen, for the expedited regime, there is a time limit, objections must be raised within that time limit; and, in any event, we say, is a factual question. It's a question of causation. It is also not a question, we say, of competence.

Now, to just make a couple of final observations, the Claimants maintain the points that they raised at the outset on Sunday, that a number of these objections are not properly objections as to competence, and that those objections or those challenges to the objections remain.

And I raise this with some hesitation because I know the President has expressed reservations or has indicated that he's not typically persuaded by issues of burden of proof, so I will touch on it lightly, but the point remains, we say, that, for the purposes of an Expedited Preliminary Objection Application, which is what we're dealing with here, and were it to be the case that the Tribunal concludes that these are objections properly on grounds of competence, such that the Tribunal considers that it has to decide those objections, and in our submission, the question of burden of proof is an important one because, if the Respondent has not discharged its burden of proof, then the Decision must be that the objections fail.

It's if the Respondent has discharged its burden of proof, in those circumstances that the decision that the Tribunal could make would be that the objections succeed, but a lot depends on that burden of proof, and it's a function of this being an expedited preliminary process, we say.

Mr. President, Members of the Tribunal, unless I can help you with other points, those are the Claimants' submissions.

PRESIDENT PHILLIPS: Thank you very much.

Now, as I understand it, the United States does not wish to make any submissions at this point?

MR. BLANCK: (Off microphone) That's correct, Mr. President. We do not wish to make a statement.

PRESIDENT PHILLIPS: Could I just say this: There's been quite a lot of debate on a topic which may not be one on which there's much authority, which is the meaning of "substantial business activities," and if the United States were minded to contribute anything in relation to that question, certainly subject, of course, to giving the Parties the opportunity to deal with it, the Tribunal would welcome such assistance.

MR. BLANCK: Thank you, Mr. President.

Let me take that back to others in my office.

MR. DEBEVOISE: Lord Phillips, Mr. President, if you are going to invite the United States to do that at this point, I think it would be appropriate if the Parties would be given an opportunity to comment on whatever gets submitted.

And I would also like to suggest that perhaps there might be some sense in suggesting that the United States make that decision on its own without any--

PRESIDENT PHILLIPS: Encouragement?

MR. DEBEVOISE: Encouragement, yes.

PRESIDENT PHILLIPS: Very well. I certainly intended to imply that the Parties would have an opportunity not just to consider, but to make submissions in relation to anything the United States wished to add.

MS. GEHRING FLORES: Mr. President, excuse me. I just wanted to clarify one item. There was a lot of time spent on the Costa Rica Bridgestone/BATO Sublicensing Agreement. And as we noted in our Reply at Paragraph 38 and our objections at Paragraph 15, that specific agreement you should really look to the date of that Agreement. It's January 2015, so it postdates the Supreme Court Decision of May 2014.

PRESIDENT PHILLIPS: Thank you.

Now, there are one or two other matters. I understand there is one document that crept into the record yesterday. Is that 127?

SECRETARY TORRES: Yeah, Mr. President. Claimants seem to have added to the electronic file sharing site a document labeled "Exhibit C-127," and it's not clear what that is and what the Parties intended with that document.

MR. WILLIAMS: I believe--but I can be corrected--that it was a Panamanian law which the Respondent asked us to put in prior to the cross-examination of Ms. Williams.

MS. GEHRING FLORES: Yes, that's correct. It's Panamanian Law 35 of 1996.

We had just noted that Ms. Williams had quoted it in her statement and it was cited and referenced elsewhere in the pleadings, and we asked that for the full reference of the Tribunal and the Parties that the actual law be submitted as an exhibit, along with any translation that existed.

So, we definitely agreed to the submission of that.

PRESIDENT PHILLIPS: Thank you very much.

MR. DEBEVOISE: Yes, and it's not only Law 35, but it's also the 2012 law, which amended Law 35, so that you have the current version, and you might find it of interest that, amidst the conversation about Chapter Fifteen of the TPA, that the Amendment in 2012 was precisely to bring Panama in compliance with Chapter Fifteen of the TPA, including elimination of a provision that previously had required that trademark licenses be registered in order to be effective.

And the footnote that was referenced today, I think I would only say that you should read the entirety of the sentence that was quoted to you because I don't believe that the Licenses they have stand up to the attributes that were presented to you and so forth. I don't think it qualifies under that footnote.

PRESIDENT PHILLIPS: Thank you.

Now, there, I think, is only one other matter I was going to raise, and the fact that I raise it should certainly not be treated as an invitation, and that's Post-Hearing Briefs.

MR. WILLIAMS: My instructions are that the Claimants would want to put in Post-Hearing Briefs.

MR. DEBEVOISE: Mr.--

(Tribunal conferring.)

MR. DEBEVOISE: We would really leave that to the discretion of the Tribunal, whatever would be of most assistance to you. We don't see a burning need for them at the moment, but you will know better than we whether that would be of assistance or not.

It does strike me that, if the U.S. decides to submit something, you may hear from us again anyway.

PRESIDENT PHILLIPS: Yes.

(Tribunal conferring.)

PRESIDENT PHILLIPS: Well, we shall permit Post-Hearing Briefs to the extent that they do not exceed 20 pages and that they give specific references to the record for any submissions that they make.

MR. WILLIAMS: Thank you, Mr. President.

MR. DEBEVOISE: Mr. President, might we clarify, are they to be simultaneously submitted, or seriatim?

(Tribunal conferring.)

PRESIDENT PHILLIPS: We would request, please, the United States to indicate within seven days whether they wished to make any further contribution. If their answer is that they do not, then Post-Hearing Briefs within 14 days of their giving that indication.

If they indicate that they do wish to make a further contribution, could they do that within 14 days of their indication, and then there will be a further 14 days to be added from the receipt of their observations for the submission of Post-Hearing Briefs. And submissions on costs will be--or time for submissions on costs will be adjusted accordingly.

MR. DEBEVOISE: Mr. President, could we also ask you to specify the desired format because we seemed to have observed that they use single-spaced and we use double-spaced.

(Tribunal conferring.)

PRESIDENT PHILLIPS: We can manage single-spaced, so 20 pages of single-spaced.

MR. DEBEVOISE: And one final request, at the end of all of this, should you be minded to dismiss the case and enter an award in favor of Panama, we would explicitly request that any cost award be made joint and several. Panama has, unfortunately, twice been the recipient of cost awards when cases were brought against us, and twice we have confronted a judgment-proof claimant. We have even had to go to Bankruptcy Court and gotten a very small recovery. And this is a matter which Panama has raised at the level of the Administrative Council of ICSID itself as a potential amendment for going forward for security for costs.

But I would just ask, given the circumstances of this case and what we've seen about one of the Claimants that any award were to be entered be joint and several against them both. Thank you.

PRESIDENT PHILLIPS: Very well, your observations are noted.

MR. WILLIAMS: I'm sorry?

On that issue which, of course, on our side, we don't expect to be relevant, but should they be relevant in that unlikely event, then it seems to me that the nature of the costs Award would need to be considered in light of the specific nature of the Tribunal's decision because, some of the objections here are raised against one defendant or--sorry, one Claimant or the other. So, my point is only that, actually, it's complicated, and I just wanted to flag that point.

PRESIDENT PHILLIPS: Flagging is noted.

Could I thank the Court Reporter for the fantastic job that he has done, and also thank Luisa for the great assistance that she has provided for all of us.

Yet more assistance.

(Tribunal conferring.)

PRESIDENT PHILLIPS: One more matter, Post-Hearing Briefs should be based upon the record and upon nothing else.

So, I declare the Hearing closed.

(Whereupon, at 12:32 p.m., the Hearing was concluded.)

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