BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration between:	
BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE AMERICAS, INC.,	
Claimants,	
and	Case No. ARB/16/34
REPUBLIC OF PANAMA,	
Respondent.	
	Volume 5

ORAL HEARING

Friday, August 2, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
Conference Room C 3-100
Washington, D.C.

The hearing in the above-entitled matter commenced on 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:

On behalf of ICSID:

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Secretary to the Tribunal

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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.

Are there any matters of housekeeping?

MS. GEHRING FLORES: Good morning, Mr. President, Members of the Tribunal, counsel.

I do believe the Parties have reached an agreement and would like to request from the Tribunal that we plan to start closings today at 2:00 p.m., basically providing counsel with some time to finalize their closings, a little extra time to finalize our closings and get our thoughts together before we present them. So, I guess depending on how long Claimants spend with Mr. Shopp, the Parties will have maybe a few hours before closings, if that's acceptable to the Tribunal.

PRESIDENT PHILLIPS: The Tribunal is happy with that.

MS. GEHRING FLORES: Okay.

PRESIDENT PHILLIPS: And the Tribunal has no questions to pose at this point. That's not to say that the Tribunal knows all the answers, and we may well be questioning counsel when they're making their

final closings.

MS. GEHRING FLORES: And the other, I guess, just a couple of other matters: we're not sure if Claimants have been able to upload Mr. Molino's correction or Mr. Daniel's direct presentation to the box or to the account.

And along those same lines, we note that the Secretary requested an index of all the binders that have been distributed, and Panama should be able to do that by the end of the Hearing.

PRESIDENT PHILLIPS: Thank you.

MS. HYMAN: Yes, I believe that we have those documents to upload to Box, which we will do I think by the end of the Hearing as well, and the same for the indices.

PRESIDENT PHILLIPS: Very well. Then let's proceed with Mr. Shopp.

MATTHEW D. SHOPP, RESPONDENT'S WITNESS, CALLED

SECRETARY TORRES: I don't believe the presentation is uploaded yet. The one that was used yesterday, Mr. Daniel's presentation.

MS. GEHRING FLORES: The Republic of Panama

calls Mr. Matthew Shopp.

PRESIDENT PHILLIPS: Good morning, Mr. Shopp. Do you have the witness declaration there?

THE WITNESS: I do, yes.

PRESIDENT PHILLIPS: Would you read it, please.

THE WITNESS: Of course.

I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

DIRECT EXAMINATION

BY MS. GEHRING FLORES:

Q. Good morning, Mr. Shopp.

A. Good morning.

Q. You presented two expert reports in this proceeding: one dated the 14th of September 2018, and the 17th of June is the second one, 2019; is that correct?

A. That's correct.

Q. And have they been placed before you?

A. No.

Q. Perhaps not yet. I think that's okay, as

long as you confirm that you did enter two expert reports on those respective dates.

Would you like to make any clarifications or corrections to either one of those reports?

A. There is a small correction to the second report. I'm happy to explain it. It's in footnote 127 on page 55 of my second expert report.

Thank you.

Essentially, this was a footnote that had several numbers in the footnote, talking about the maximum potential losses in Panama in the BSCR Region. What happened is they were referring to Table 6, which is on the following page, and the numbers in the footnote were transcribed from the wrong row in the subsequent table. So, if I can correct the various numbers in Footnote 127, I will do that now.

Q. Please proceed.

A. Sure.

So, Footnote 127, the first number reads 374,916. That should read 93,729.

The second number reads 102,966. That should read 25,741.

The third number in that footnote also reads 102,966. That should be replaced by 25,741.

And the fourth number in that sentence 168,985 should be replaced with 42,246. In the second sentence, starting with Claimants' maximum total losses in the BSCR Region, the first number of 5,215,693 should read 1,303,923. The second number 1,655,671 should read 413,918.

The third number also 1,655,671 should read 413,918.

And then the final number 1,904,351 should read 476,088.

And again, this was an issue of transcribing numbers from the wrong row in the preceding table. You can see all of these numbers in the Table 6.

Q. Thank you, Mr. Shopp.

You may proceed with your direct presentation.

A. Sure. Thank you.

DIRECT PRESENTATION

A. So, good morning, everyone, Members of the Tribunal. As we've said, my name is Matthew Shopp.

I'm a partner at Versant Partners, and I'm here to give a brief presentation on damages issues in this arbitration. So, thank you for your time and for having me. And, of course, if you have any questions during the course of my presentation, please don't hesitate to stop me and let me know.

So, turning to Slide 2, just a short roadmap of what I plan to address, first very briefly, a comparison of the experts' analyses and conclusions on damages.

Second, describing the rationale behind my conclusion that Claimants have not suffered damages in relation to the trademarks or the trademark licenses.

In the third section, if we were to assume that damages must exist, as Mr. Daniel seems to have done, then we would note that Mr. Daniel's calculation is significantly overstated due to a variety of different errors.

And fourth and finally, a brief discussion of the Muresa Payment and from an economic perspective what considerations could be made with regard to damages.

So, starting on Slide 4, just very briefly, you will have heard about these numbers in Mr. Daniel's presentation yesterday. But he concludes that Claimants have suffered damages in between $600,000 and $1.1 million in Panama or, in the alternative, $7.7 to $14.5 million in the BSCR Region.

And the premise of Mr. Daniel's conclusions on damages is that the value of Claimants' trademarks and licenses have been significantly reduced, roughly 60 percent reduction in value, in Panama or in the entire BSCR Region as a result of the Supreme Court Decision. And the table in the bottom left shows sort of how he arrives at these numbers.

And we think it's important to bear in mind four, what I consider to be key assumptions in Mr. Daniel's analysis, and those are listed there:

First, that damages must exist because there is, as he says, an underlying defect that remains uncured.

Second, as was discussed in Mr. Daniel's report—and I think also yesterday a bit in his testimony—that the amount of damages, the quantum of

damages, is independent of elapsed time, meaning that it does not change regardless of what happens over the passage of time.

Third, that we should assume that BSAM's damages in respect of the licenses are equal to, or identical to, the damages that BSLS and BSJ suffered in relation to the trademarks themselves.

And fourth, and finally, and what really underpins the amount of damage Mr. Daniel calculates, he assumes that BSLS's royalties and BSAM's profits definitely, certainly will be 40 to 50 percent lower in all future periods, forever, and also much riskier.

Turning the slide to Slide 5, we reach a very different conclusion on damages. Based on the data that exists, real-world data, we can observe as to what has happened since the Supreme Court Decision was issued, we conclude the Claimants have—the best estimate of Claimants' damages—that they have suffered no damage in relation to the trademarks or the trademark licenses. And we will discuss this in more detail throughout the presentation, but basically there have been no actual losses in sales, royalties,

or profits in the five years since the Supreme Court Decision.

When Claimants project forward what they expect to happen in the future, they themselves do not expect there to be any losses in sales, royalties, or profits going forward.

Data shows that there has not been a systematic or significant shift in intellectual-property risk in either Panama or the BSCR Region.

And, finally, we will talk about this more later, but what's probably the most direct evidence that there's not been damage, is that Claimants themselves on an annual basis assess the value of their intangible assets. And they are required to do so as a matter of accounting regulations. And when Claimants assess the value of these assets, they have determined that there has not been a decrease in value.

So, that's why we conclude no damages. However, if damages were to be assumed, if we were to assume that we must calculate some number under

Mr. Daniel's theory, in our view a more realistic estimate is that damages are at most, it's roughly $0.03 million or about $26,000, and that relates to BSLS in Panama only. And I've listed the corrections on the right, bottom right, of that slide next to the table, and we will go through those in more detail throughout the presentation.

So, first, in Section 2, to discuss maybe in more detail my conclusion that Claimants have not suffered any damage in relation to the trademarks or the trademark licenses.

Turning to Slide 7, we think there are two key considerations that should be kept in mind when assessing damages that may exist as a result of the Supreme Court Decision. First, is that damages can only exist if there is a decrease in cash flows—in other words, in this case, royalties or profits—and/or an increase, a measurable, perceptible increase in the risk of those cash flows. And that is something that is true for all categories of assets. Intellectual property is no different. An intellectual property asset, as with every other asset, is valued by

reference to the cash flows it will generate in the future or is expected to generate and the riskiness of those cash flows to bring them back to a lump sum present value.

So, as we show at the bottom, if there is no change in the cash flows and no measurable change in the risk comparing the scenario before and the scenario after or the "but-for" and the "actual," as we sometimes call it in arbitration, then necessarily that means that there are no damages. And that's just a conceptual point.

And the second point to keep in mind is that the Supreme Court Decision itself has no direct financial impact on the trademarks or the trademark licenses. What we mean is that actual financial losses will only occur, and can only exist, if a series of other events occur. So, for instance, if there are new "-STONE" tire brands that begin competing with BRIDGESTONE and FIRESTONE in the relevant markets. If following that, BSLS and BSAM elect not to, or cannot, oppose those new "-STONE" tire brands in the relevant markets. Then, that those

new "-STONE" tire brands somehow erode BRIDGESTONE and FIRESTONE'S market position.

And then ultimately, that may result in or could result in lower sales and profits from BRIDGESTONE and FIRESTONE tires, that would be BSAM's damage, or lower royalties paid for the FIRESTONE mark, which would be BSLS's damage.

But these are the steps that essentially would need to happen for financial losses to occur as a result of the Supreme Court Decision.

So, turning to the next slide, have any of those things happened in the past five-plus years.

Well, in short, no, they have not. There has not been an influx of new "-STONE" tire brands. Claimants have, as we understand it, continued to oppose new "-STONE" tire marks that enter the market. There have not been new "-STONE" brands that have eroded BRIDGESTONE and FIRESTONE's market position. Their market share is roughly the same as it always has been. There have not been lower sales of BRIDGESTONE and FIRESTONE tires. There is not a reduced royalty rate for BRIDGESTONE or FIRESTONE

tires. And ultimately the royalties and the profits are the same or have been unaffected entirely by the Supreme Court Decision in the past five-plus years.

So, what does that mean? Well, in our view, damages are not independent of elapsed time. The absence of any impact of the Supreme Court Decision at all for more than five years tells me that the Supreme Court Decision likely has not reduced or impaired the value of the trademarks or the trademark licenses. And based on what's happened over five years, if we're thinking about what may happen going forward, well, the most likely outcome must be that royalties and profits will never be affected. And to assume that they will be affected would be speculative because nothing has happened in five years.

Now, we can also look at what do Claimants and Mr. Daniel, for his part, think will happen going forward. Well, similarly, we see that there is a projection of increasing sales of tires in Panama. There is a projection of increasing sales and profits for the BSCR Region. And we see that following the Supreme Court Decision in 2015, Claimants renewed the

same 1 percent royalty rate. And as we understand from the contract, it will continue until at least 2025 with, I think, another automatic 10-year extension thereafter if it's not terminated.

Now, turning to the issue of risk, the Claimants' theory on risk seems to be—and it's still not entirely clear, but seems to be—that this diminished protection of the trademarks in the rights in Panama, and, I suppose, throughout the broader BSCR Region, has sharply increased risk thereby decreasing the value of all trademarks. And that's something that was discussed earlier at the Hearing, as mentioned in Mr. Daniel's second expert report. And really how do we test this theory that there's been this sharp increase in risk throughout Panama, throughout the BSCR Region, this chilling effect, so-called "chilling effect," on trademarks and trademark rights?

Well, there are resources available, there are surveys and studies and rankings that look at, well, what is the status of intellectual property protections in Panama and in the BSCR Region? And

we've looked at two of those for each relevant geography, and what the data show is that from 2014 through today, essentially, there has actually been an increase in intellectual property protection ratings for both Panama and the BSCR Region. So, this idea that all trademarks have been devalued, that there is a perception of risk having shot up and increased such that everything has become less valuable, that is a theory that is not at all borne out by the data and, in fact, is contradicted by the data that does exist.

Turning now to Slide 11, this is, I think, probably the most important slide as it relates to damages, or at least a very important slide as it relates to damages. What Mr. Daniel and Claimants have theorized is that there has been a significant unrealized loss, or another way as they put it is "impairment," in the value of the trademarks and the trademark licenses. And what this means is that, well, there is a loss, but it's invisible. We just don't see it yet because there's not been a transaction. But if there were, I think the theory would be, that if there were a transaction, if

somebody in the real world were to value these trademarks now, all would be revealed. We would know that they are, indeed, 60 percent less valuable today.

But that's simply not true. Claimants themselves, on an annual basis, as they are required to do under international and U.S. accounting standards, do a valuation of their intangible assets to test for whether or not they need to do an impairment, whether or not they need to write down the value of their assets. And this isn't something that's at their discretion, they cannot elect not to do this. They have to do this.

And the method they use to do this is identical to the method that Mr. Daniel and I have used in our exercises here. And when Claimants do these assessments from 2014 through '20, I think, '17 is the last year in which we have financials, but for the full range of financials, no impairments were identified. The company is affirmatively saying "my intangible asset, my"—I think they say—"trade names, have not decreased in value." If they had decreased in value, I would tell you about it investors, but

they have not.

ARBITRATOR GRIGERA NAÓN: Excuse me. So when you're saying "impairment," you're comparing the book value to the market value; that's what you mean.

THE WITNESS: Correct.

ARBITRATOR GRIGERA NAÓN: And if the market value is below the accounting value, then you have to—

THE WITNESS: Do a write-down.

ARBITRATOR GRIGERA NAÓN: Exactly.

THE WITNESS: Yeah, that's right.

And, of course, there have not been write-downs in any of these periods. So, this is the reason we consider no damages exist.

So, turning to the next section, Section 3, this is if we were to assume that damages exist, if we were to ignore everything that we just looked at previously and said, okay, we have to calculate something because, as Mr. Daniel puts it, there's an underlying defect which remains uncured. Well, how would we go about doing that? And in our view, the way Mr. Daniel has calculated that significantly overstates this sort of assumed damage.

So, very briefly on Slide 13, a summary of what Mr. Daniel has done. This is a very, very full slide, and it's just to show you everything. But, I know you will have heard about this yesterday. But just to recap, what Mr. Daniel essentially does is he compares the but-for value and the actual value. So, the before Supreme Court Decision and after Supreme Court Decision values of the trademarks and trademark licenses.

And the calculation starts with the but-for scenario value. And within that, he calculates cash flows as sales times the 1 percent royalty rate. And he discounts those cash flows back at one of two discount rates: The WACC, or "weighted average cost of capital," or the cost of equity. And these are his respective low and high estimates of value. And that gives him the but-for value.

Now, to do the actual scenario value, the value incorporating the effect of the Supreme Court Decision, Mr. Daniel adjusts both elements of his valuation. The cash flows are reduced 40 to 50 percent, based on a reduction in the royalty rate

to account for what he calls "non-exclusivity." And the discount rates are both adjusted upward by roughly 25 percent. So, if it was 10 percent, it becomes 12.5 percent; adjusted upwards by 25 percent to account for what he says is the higher risk associated with the so-called "non-exclusive rights."

And these two changes, the lower cash flows and the higher discount rate, result in a lower value in the actual scenario.

And moving to the—and you can see these in the bottom left table for BRIDGESTONE and FIRESTONE trademarks. There is the but-for scenario value and the actual scenario value.

And moving to the table on the right, damages are, of course, the but-for value minus the actual values. So what has been a decrease in the value of the marks.

And then in Step 4, in his second report, Mr. Daniel, as was discussed yesterday, added in BSAM, which he says was equal to the decrease in value of the trademarks.

So, again, brief recap of the methodology.

So, we consider that there are several errors in Mr. Daniel's calculations: First, we talked about how cash flows in both scenarios are based on sales revenues times the royalty rate. Well, Mr. Daniel, in our opinion, has significantly overstated the sales revenues in both Panama and the BSCR Region.

Why do we say that? Well, we say that because what he calls "Panama" and what he calls the "BSCR Region," most of the sales in his analysis are not actually sales in those markets. So, Panama, as you will see in this hopefully helpful map, a full 70 percent of what Mr. Daniel calls "Panama sales" are shipments of tires from presumably Costa Rica, the BSCR factory in Costa Rica, to the Colón Free Trade Zone where they are then exported to other countries throughout the world—so primarily, I think, Latin America, Asia, some in Europe. Whereas only 30 percent of what Mr. Daniel calls "Panama Sales" are actual sales to tire distributors, and I think ultimately consumers who are located and in the country of Panama rather than in a Free Trade Zone that's used for export purposes.

Similarly, in the so-called "BSCR Region," a full 50 percent of Mr. Daniel's sales revenues are sales to Bridgestone subsidiaries in the United States and Canada. And essentially there's a factory in Costa Rica, and half of BSCR sales are sales from that factory to other Bridgestone subsidiaries in the United States. Another 14 percent of sales are sales to elsewhere in the world that is not the BSCR Region, and that leaves roughly 36 percent of what Mr. Daniel calls "BSCR Region Sales." Only 36 percent of those are what we would say are sales in the actual BSCR Region as it's defined by Bridgestone.

And why do we think these should be excluded? Well, based on our understanding, there is not an allegation, or, I suppose, would there be an expectation that the Supreme Court Decision would lead to a change in the value of the trademarks or licenses for these markets that aren't Panama and aren't the BSCR Region. An example of that would, of course, be the sales that are made to Bridgestone subsidiaries in the United States.

And just to give you an estimate of impact,

excluding these sales reduces Mr. Daniel's damages calculation by roughly 65 percent for both the Panama and the BSCR Region. So this is a very significant issue for damages.

Second, we consider that Mr. Daniel has overstated the royalty and profit, sort of the cash-flow discount for what Claimants have termed "narrowed exclusivity." And on a theoretical or fundamental basis, one reason we think that is that what Mr. Daniel is assuming and measuring, this non-exclusivity, is seemingly more extreme than Claimants' own theory which appears to be narrowed exclusivity.

And I know there was some discussion yesterday about how to define these things. The way we understand them is that narrowed exclusivity alleged by Claimant seems to mean a reduced ability to exclude similar brands from the market, whereas the non-exclusivity assumed by Mr. Daniel, and as measured in these various royalty studies he relies upon, refers to an absolute inability to exclude identical brands from the market.

So, I had an exclusive license to produce a particular product, now someone else has the legal right to produce that exact same product, and there's nothing I can do about it. That's what "non-exclusivity" means in the context of studies Mr. Daniel relies upon.

So, not only, turning to the second point, not only is there a fundamental difference, in our view, Mr. Daniel also has overestimated the impact of non-exclusivity. So, even if we were seeking to measure non-exclusivity, the royalty reduction, in our view, is not 40 to 50 percent, as Mr. Daniel claims, but instead, can be more accurately estimated at around 25 percent. And that's based on the full range of studies of these issues rather than just picking the two highest, take an average of all four that we've found.

And again, applying a narrowed exclusivity royalty reduction, cash-flow reduction, of, at most, 25 percent, would reduce Mr. Daniel's calculation by approximately half.

The third issue is the assumption of the

certainty of lower royalties and profits. So Mr. Daniel's calculation is based on a 100 percent certainty that, in all future periods, cash flows, royalties, and profits, will be lower.

However, these lower royalties and profits, as we understand it, based on sort of Claimants' own theories are, at best, a possibility, not a certainty. This is not something that—we know from the past five years it has not happened, but even going forward, I don't know that anyone is saying it's going to happen tomorrow, so I don't know why the damages calculation would assume with 100 percent certainty that there will be this reduction in the royalty rate and then the cash flows.

So, in our view, the damages calculation should account for that possibility, that likelihood, via a probability factor. What is the likelihood that this cash-flow reduction will be realized in the future as a result of the Supreme Court Decision.

And, in our view, again based on what's happened over the past five years, the most likely outcome has to be that there is no reduction—in other

words, a 0 percent probability.

Fourth, and finally, with respect to the quantitative adjustments, there are two issues with respect to discount rates. Very briefly, Mr. Daniel, as we said, used both a weighted average cost of capital and a cost of equity in both of his valuations. We don't think that the use of a WACC is appropriate. Its—intangible assets are riskier than the average asset, and cost of equity is a better proxy.

And, second, with respect to the adjustment, this plus 25 percent adjustment to the discount rate in the "after Supreme Court Decision" scenario, we think that's fundamentally incorrect and certainly unreliable. It's double—the way that Mr. Daniel has calculated this premium is double-counting. He's essentially looking at the same potential sales and royalty reduction twice and incorporating it at two different places. There's also no evidence that there's an increased risk associated with IP in Panama or BSCR.

And finally, the method Mr. Daniel uses is an

unorthodox, convoluted, and ultimately an inaccurate methodology that variously is based on a study of counterfeit handbags, the assumption that Panama is now Pakistan, and data from roughly 25 years ago. So, just in short, we don't think it's an appropriate methodology.

And what that leaves us with is a corrected version, or at least partially corrected, as we will discuss, version of Mr. Daniel's calculation where, at a maximum, assuming 100 percent certainty, BSLS and BSAM damages in Panama are, at most, $93,729, and in the BSCR region, again, assuming a 100 percent probability, are, at most, $1.3 million.

There are, however, two additional issues. These are separate somewhat from the ones before in that they are sort of both quantitative and I think also legal issues.

And those are, first, damages in relation to the BSCR Region. As you'll know, this is an important issue because the BSCR Region is, of course, much larger than Panama and it results in higher damages. We think there are some economic reasons to either

exclude or reduce BSCR Region. There's really been no attempt to try to assess how the impact might be different in those two places. It just is assumed that the decrease in value would be the same in Panama and the broader region. And that doesn't seem correct and hasn't really been analyzed. And again, our general view that the most realistic probability is zero losses.

But then, of course, we understand and are instructed that there are also legal reasons that one might exclude BSCR Region damages, which we've listed here, but don't need to discuss.

Similarly with respect to BSAM, at the top here, this is just a, maybe, again, a recap of what Mr. Daniel did, which was in—from his first report to second report essentially doubled his numbers by adding BSAM under this assumption that BSAM's damages must be equal to BSJ and BSLS's.

There are, from a quantum perspective, from an economic perspective, we think reasons to potentially exclude or reduce this number. I think primarily that there is no real attempt to calculate

damages specific to BSAM. This is about as simplified of a method as you can get, saying that one company's damages are equal to another company's damages. And also, again, no basis to conclude that BSAM has or will suffer damages.

And also again, there are legal reasons why one might exclude BSAM, which we've listed here, but obviously are not our reasoning.

So, where does that leave us without BSCR Region, without BSAM: That would leave Panama only, Firestone damages which we've estimated as, at most, $25,741. Again, that is assuming a 100 percent probability of future loss.

So finally, very briefly, on the Muresa Payment and the economic—potential economic damages considerations in relation to that.

This is something we looked at in both of our reports, and very briefly, there are two issues. The first that we considered is BSLS's arrangement with BSJ. This is under the assumption that Claimant is obligated to mitigate its damages, and that is, of course, a legal assumption. Then the claim would be

reduced by 50 percent, at a minimum, to 2.715 million. And this is based on BSLS having made 100 percent of the payment despite having a seemingly pre-existing agreement to split trademark-related costs 50:50 with BSJ, the other defendant in the Muresa action.

And then second, this issue of the source of funds for the Muresa Payment and how—what that means with respect to whether BSLS itself has suffered an economic loss as a result of the Muresa Payment.

And as I'm sure you know, and have heard many times by now, BSAM loaned BSLS $6 million to make the Muresa Payment, and that was in July 2016. Some months before that, there was also a loan from BSJ to BSAM of roughly $150 million.

In any event, that loan that BSLS received, that $6 million, it seems that that loan would not have existed had this alleged breach, this Muresa Payment, not happened. So, in other words, BSLS would not have received this $6 million extra in the normal course. This was also a function of the alleged breach.

BSLS has not repaid the loan after three

years so that means, to date, BSLS is not, essentially, out of pocket on anything.

PRESIDENT PHILLIPS: You've run out of time.

THE WITNESS: I apologize.

PRESIDENT PHILLIPS: I have a question for you.

THE WITNESS: Certainly.

PRESIDENT PHILLIPS: One factor that affects the value of a trademark is perception of risk.

THE WITNESS: Yeah. I think—of all assets. Yeah.

PRESIDENT PHILLIPS: And to be more specific, what's being argued about in this arbitration is the question of whether and to what extent the Supreme Court Judgment would give rise to a perception of the risk that trademark protection would be inferior in Panama to what it would be elsewhere; i.e., that the Judgment would affect the protection given to trademarks in Panama, thereby reducing their value.

THE WITNESS: That is generally the theory, yes.

PRESIDENT PHILLIPS: Yes.

Now, that perception of risk would be different the day after the Judgment from what it would be today; is that not right?

I think that's what--

THE WITNESS: That's the thesis.

PRESIDENT PHILLIPS: Yes.

THE WITNESS: Yeah. That risk is, as you say, it's a perception. It's an abstract concept. And what time gives us, the passage of time, is a better understanding of this qualitative risk, this unrelated, indirect risk, what that means with respect to the business itself.

PRESIDENT PHILLIPS: Yes.

THE WITNESS: So, the benefit of time is we have a better understanding of what that risk is, how it may affect things and the likelihood that it will effect.

PRESIDENT PHILLIPS: It may show that a perception of risk was, in fact, unjustified.

THE WITNESS: Exactly, yes.

PRESIDENT PHILLIPS: Well, there's a seminal question here as to whether the Tribunal's task is to

assess the impact of the Judgment, the Supreme Court Judgment, on the value of the trademarks the day after it was given or today.

That's not a question for you. I just say this for the benefit of both Parties.

THE WITNESS: And I will say that, in our first report, I know this is an issue that I think probably crosses a bit into damages and legal, but certainly has a very strong legal dimension, is really the question is: Should damages be assessed on an ex ante basis or an ex post basis?

And in our first report, you know, we—there were various treatises on damages and methods for calculating damages in international arbitration and investor-State arbitration.

And again, not to venture into purely legal territory, the references we found seem to indicate that for non-expropriatory breaches, by and large using ex post, looking at it as of today, would be the appropriate methodology.

But, of course, as you say, there's legal aspects to it as well.

PRESIDENT PHILLIPS: Thank you.

COURT REPORTER: Can we take a pause for one minute?

PRESIDENT PHILLIPS: Yes, brief pause.

(Pause.)

PRESIDENT PHILLIPS: All right. Let's continue.

MS. KEPCHAR: Thank you, Mr. President.

CROSS-EXAMINATION

BY MS. KEPCHAR:

Q. Good morning, Mr. Shopp.

A. Good morning, Ms. Kepchar.

Q. You're not a Certified Public Accountant; correct?

A. No, I'm not.

Q. Do you have an accounting degree?

A. No, not specifically in accounting. I've studied accounting, certainly.

Q. Are you offered as an intellectual property expert?

A. I suppose I'm offered as a valuation and damages expert, but certainly related to an

intellectual property asset.

Q. And you're not offered as a legal expert?

A. No.

Q. You're not offering an opinion, Mr. Shopp, as to whether Claimants' legal rights in the trademarks decreased or increased as a result of the Supreme Court Decision, right?

A. No.

Q. Let's do start with some of the points you make in your Report. I refer you to Paragraph 19 of your First Report. That's at Tab 1 in the binder in front of you.

There, you state very definitively: "A trademark license is different from a trademark. The legal difference between a trademark license and a trademark"--

A. I'm sorry, which paragraph were you at?

Q. 19.

A. Oh, yes, sorry, I apologize. Yes, I see it.

Q. No problem.

So, my question is the legal difference between a trademark license and a trademark is a

matter of debate by the trademark legal experts in this case, is it not?

A. I'm sorry, I don't see a reference to "legal" in my paragraph. Are we on Paragraph 19?

Q. What distinction are you drawing, then?

This is the basis of your Report, you're saying a trademark license is different than a trademark. What difference are you referring to?

A. The owner of a trademark--I suppose the difference between BSLS and BSAM and the one is the licensor and one was the licensee. That's what's meant by this sentence.

Q. So, you're not drawing a legal conclusion there?

A. No, absolutely not.

Q. But you've critiqued Mr. Daniel's Report because he used a legal assumption as the basis of his Report; that the trademarks themselves should be examined. And here you're saying a trademark license is different from a trademark, and you claim in your First Report that it's the trademark licenses that should be analyzed from a valuation perspective. So,

what distinction are you drawing here?

A. I think the distinction that was discussed yesterday at some length is that Mr. Daniel, in his First Report, only focused on the licensor; that he apparently forgot that BSAM was a licensee, which I think we discussed that he--he--I thought-- said yesterday that the focus of his First Report was the value of the trademark from the licensor's perspective rather than the licensee's. That's the, as we say, kind of he forgot about BSAM, essentially.

Q. Well, I'm asking about your statement. You say a trademark license is different from a trademark. What did you mean by that?

A. That one is a--I hesitate to do this in non-legal terms. BSAM has a license to use a trademark. BSLS owns the mark and can license it out. That's what we meant by that. And that BSAM is different from BSLS in that one is on one side of a licensing transaction as the licensor, the other is on the other side as the licensee.

Q. So, you're not drawing a legal distinction between a trademark license and a trademark, correct?

A. No, absolutely not.

Q. Now, you have been here all week--right?--Mr. Shopp.

A. I was here on Monday and then sort of at various times throughout the week, not the entire time.

Q. So, would you agree that the crux of your opinion in your First Report is that, in the last five years since the Supreme Court Decision that there has been no decrease in profits or revenues earned by BSAM and no decrease in royalty revenues for BSLS?

A. No. I don't agree with that. I think that's one element of our First Report, but certainly not the--it is an important point that is a highly relevant point. It is not the only--this is a, I don't know, a 72-page expert report that addresses far more than that, but that is absolutely one of the things we considered.

Q. But didn't your analysis focus only on revenue streams and profits?

A. No. We looked at royalty rate. We looked at intellectual property risk. We looked at sort of what

had changed from an operational perspective. Were there new entrants to the market. Had there been continuing filing of oppositions to "-STONE" branded trademarks. We looked at the various assumptions in Mr. Daniel's analysis. I mean, I--

Q. Did you look at projected revenues?

A. Yes.

Q. Is it your opinion that the risk of future cost is not a factor to be considered in valuing intellectual property?

A. I'm sorry, risk of future cost?

Q. Future costs or future loss. Future loss, let's say.

A. Yes, I think risk is a factor that's considered in any valuation.

Q. How did you economically account for that risk in your analysis?

A. Well, sort of we have two analyses, you know, one in the--well, broadly speaking, we looked at intellectual property ratings in Panama to see if those had changed. I think one way to assess risk is if there is a risk that emerges five years ago and

you're trying to understand its effect, well, of course, you would look at what's happened over the past five years. Has there been any manifestation of that risk. You look at whether other people in the market who are seemingly exposed to that risk. I think as we said, every trademark holder in Panama, whether their perception of risk has increased as a result of that.

I think the issue is there's not some single metric; risk isn't a directly observable thing. You need to look at data and evidence to determine the extent, the nature, the potential impact of that risk. So, that's what we looked at, is in five years, this so-called "risk", what has it done, if anything? How is it perceived, if at all, and the answer was it has done nothing, and it wasn't perceived by anyone.

Q. On Page 13 Paragraph 4 of your First Report.

A. Yeah.

Q. You state that a loss of exclusivity would be if an unrelated third party were legally permitted to use the BRIDGESTONE/FIRESTONE brands. Do you see that?

A. I do.

Q. What's your authority for that?

A. Well, the studies that Mr. Daniel uses, Varner and E&Y, they study the difference between the royalty rates paid for licenses that are "exclusive," meaning one party has the right to use the relevant mark in its sale and production of products versus "non-exclusive" licenses, meaning that more than one party has the right to use the same mark.

So, this isn't a statement on exclusivity as a legal concept. This is a statement on exclusivity that has been studied and quantified by Mr. Daniel. When he says there is a 40 to 50 percent reduction due to non-exclusivity, what we mean--what that non-exclusivity is, is somebody else having a legal right to market/sell the identical trademark. So, when we say the impact he seeks to measure is not the same as a loss of exclusivity--meaning when he says "non-exclusivity,"--these studies measure non-exclusivity--that is this very specific meaning that someone else has the legal right to produce the same products. So, when we say a loss of exclusivity

would be if an unrelated third party were legally permitted to use the BRIDGESTONE and FIRESTONE trademarks, in the context of these studies, that's what "non-exclusivity" means.

Q. Okay. Were you here when Ms. Jacobs-Meadway testified?

A. I was not, no.

Q. Okay. Are you aware that, under Panamanian trademark law, a trademark owner can enforce its marks against marks that are not identical?

A. I'm not aware.

Q. Then how can you make an assertion in your Report as to what exclusivity means when we're talking about trademarks?

A. Because exclusivity--the context of this is the discount Mr. Daniel applies. He says non-exclusivity means cash flows are 40 to 50 percent less, so an important, a very important part of that is when these studies say "non-exclusivity," what do they mean? They don't mean reduce a reduced ability to oppose similar marks, even if that's something someone in Panama as a trademark owner might be able

to do. It means one person could legally sell the identical product, now two can. So, this has to be viewed in the context of what's the royalty rate cash flow reduction Mr. Daniel applies.

The studies he relies on are, and as I think he said, he's assuming non-exclusivity. And that means in the context of these studies, two people can sell the same marks and branded products legally and without--they're both allowed to do it. So, I don't know that the--that's what we mean when we say loss of--when we talk about loss of exclusivity in this paragraph.

PRESIDENT PHILLIPS: Could I just intervene?

THE WITNESS: Sure.

PRESIDENT PHILLIPS: In relation to the fact you say two people. It seems to me that the value of a non-exclusive license must depend upon how many other people have the same license.

THE WITNESS: It could be many, you're right.

And I think--you think about what these studies are doing, they have a dataset of royalty rates for licenses that have a designation of

"exclusive" and a designation of "non-exclusive," and it's not the only thing that these studies are studying. They look at different, other aspects, you know, geographic, time, but what they do is essentially say here's the average Royalty Rate for a particular set of companies, set of marks that are exclusive. Here's the average royalty rate for ones that are non-exclusive, meaning one or potentially more has the license to use the same product.

And all else equal, controlling for all the other factors, the average difference between an exclusive and non-exclusive is X percent.

So, you're right, it could be one, it could be two, it could be 10, but it's really what they're studying. It's a limit of what the data they have, and we don't know what that might be.

BY MS. KEPCHAR:

Q. Referring to Page 14 Paragraph 5 of your First Report, you say, in your view, the most likely outcome is this case is that the risk will not manifest, referring to the loss of exclusivity. Is that right?

A. I would say referring to lost cash flows in the future this sort of non-exclusivity, this idea that there will be actual economic harm going forward, that there will be a lower royalty rate, lower sales, lower profits. It's not--whether sort of from a legal concept exclusivity has been lost is a separate question of whether that will manifest itself in any financial or economic terms going forward. We know that it has not in the past five years.

Q. So, an important part of your analysis--I would say a critical part of your analysis--is that you haven't identified, or you claim that Claimants haven't identified, any circumstance that would result in loss in the past five years. Is that correct?

A. I don't know about "circumstance." I think not only Claimants have not identified, we haven't seen any clear indication that there has been any effect on the financial or operational performance of this business that resulted from the Supreme Court decision.

Q. So, my understanding is that you think the passage of time is very critical to the damages

analysis. Is that true?

A. Well, I think in this particular damages analysis, where what's claimed is the emergence of a risk, this abstract factor, and when we have the benefit of time, and not just a little bit of time, but over five years to assess what does it mean that that so-called "risk" emerged? Does that matter? Is it meaningful? Will it affect things? Yes, that's absolutely a highly relevant thing to look at.

Q. So, to put it another way, you're essentially saying that, if you roll dice 10 times or let's say every day for 10 years and you never roll a seven, you're less likely to roll a seven on the next roll?

A. No, because dice roll have a time independent probability. I mean, I know the possibility of rolling a seven when I roll the dice. The dice has--you know, that's an observable--that's a probability, that's not a risk. A risk is an unknown impact, something that--we're not saying are they going to roll a seven tomorrow. We're saying is this abstract risk going to manifest itself in a way that--you know, I will put it this way:

If I walked down the street for five years and I never got struck once by lightning on the way to work, I can pretty safely assume that there's not a hyper increased risk of me getting struck by lightning on the way to work. The understanding of risk that's abstract is time dependent. When you have a dice you know it has six sides, you know the risk, you know the probability. Here, it's an abstract conceptual risk that isn't one out of six odds. I mean, that's not something we know or can know, so your analogy is completely inapt, I would say.

Q. Well, you, yourself, are calculating--well, I don't think you calculated probability. I think that's an issue, but you, in your opinion, are saying the probability of loss decreases over time. What do you base that on?

A. Because time has passed with no loss, and this is not a dice that we know there is a one out of six chance every time you roll that you'll get any particular number. This is--the allegation is that there's been a shift in legal and presumably leading to market conditions that will lead to losses. If

this shift occurred five years ago and there has been--with every year that there continues to be no effect, it's reasonable to say it becomes less and less likely that there will ever be an effect of that same--of that risk that came up.

In other words, on Day 1 you might see this decision and say, "Wow, that's created a pretty big risk. I think I'm going to lose 50 percent of my cash flows tomorrow." I don't think that would be reasonable, but someone could have thought that.

After five years goes by and that never happens, you probably would look back and say, "I turned out to have been very wrong because actually nothing has happened as a result."

Q. But what you're saying is a matter of perception, correct?

This goes to Mr. President's point.

You're saying that, if nothing has happened over five years, the perception of somebody might be that risk is likely not to happen going forward. That's a matter of perception, but you're an economic expert, right? You're being offered as an economic

expert?

A. We are putting ourselves in the shoes of a willing buyer and a willing seller. I don't think you need to be an expert in perception to understand how investors would look at risk and would look at likelihood and probability.

And only an unreasonable person would look at this and say I continue to perceive that this same risk exists going forward.

Q. Well, your testimony was not a matter of perception. Just a minute ago you said the risk is less and less likely.

A. It is.

Q. That's a matter of economics, isn't it? Probabilities? "Less and less likely"?

A. I mean, it's less and less. I don't know that's it's economics or probability. It's a statement. I'm not sure I understand.

Q. You didn't calculate the likelihood of events occurring as a result of this Supreme Court case. What your testimony is is that a person perceiving that case, "Hey, well, if they're risk-acceptance,

they accept it; if they're risk-averse, they may not." Isn't that what you're doing?

A. Well, I would say, we have, to put it in your terms, calculated that it is a 0 percent occurrence over the past five years. We've looked at the Claimants' own expectations going forward in terms of sales and profits. They apparently have calculated that there is 0 percent risk of sales going down going forward. We've looked at the impairment testing that they've done in which they value their own assets. They have not placed apparently any serious weighting on this probability.

So, I think this goes to time gives us evidence, the passage of time gives us evidence of how a risk manifests, and I suppose the perception of it would evolve from the perspective of an investor, from the perspective of someone seeking to buy or sell this asset. I mean, that is the task at hand, and I don't think it's a stretch to say that based on all of these factors clearly the perception of that risk has to have changed over time.

Q. But you're speculating.

A. I would say that assuming that a risk will exist in the future when it hasn't manifested for five years, that's speculating.

Q. So, I think you're probably very risk-accepting in that view, but couldn't there be a potential buyer that is more risk-averse? They do their diligence, they see this case, they're wondering about investing in Panama. They see the risk to their trademarks in terms of the conclusion of the Supreme Court judgment, and they decide not to enter the market. Isn't that possible?

A. It may be, but to be clear, fair-market-value, which is the standard of value we're looking at here, is an impersonal standard of value. It is a hypothetical willing buyer and a hypothetical willing seller. It should represent how the market as a whole would perceive this investment.

So, while it may be the case that there is one person who is risk-averse, that is not the relevant buyer to think about from a fair-market-value perspective.

Q. But it is fair to think about Parties across

the spectrum that are risk-averse and risk-accepting, no?

A. You should think about the sort of let's call it the "average buyer" and the "average seller," I think is probably a pretty fair way to put it.

Q. And the average buyer would do some diligence into the matter, wouldn't you agree?

A. Yeah, I would think buyers do diligence, yeah.

Q. I would think so.

Turning to Paragraph 41 of your First Report.

A. I'm there.

Q. Here, you explain ex ante valuation, and you say that "ex ante valuation is valuing an asset as of the date in the past, usually the date of the alleged legal breach, and an ex post valuation as valuing the asset as of the current date regardless of the date of the breach," and I think you made that point in your presentation, right, Mr. Shopp?

A. I mentioned it, yeah. I don't think it was a focal point, but yes.

Q. And then you go on to say in Paragraph 42 at

Page 20 that an ex post valuation is more appropriate, again, underscore more appropriate, than an ex ante valuation?

A. That's correct.

Q. What's your authority for that conclusion?

A. Well, I mean, it's certainly my personal view because I think ex ante is needlessly speculative in this case, but authorities would be in Paragraph 65, there is a quote from the textbook "Calculation of Compensation and Damages in International Investment Law." In Paragraph 66 there is a quotation from the textbook "Damages in International Investment Law." And both of those say that ex post would be more appropriate in the circumstances of this case.

Q. So, let's look at that. Page 65, you quote Professor Marboe's test on assessing damages in investor-State arbitration. That's VP-3.

A. Correct.

Q. This quote that you present in your Report says: "In the event of an unlawful act, the damage caused consists in the difference between the financial situation of the injured person and the

financial situation he or she would be in if the unlawful act had not been committed, right?

A. That is what the textbook says and we've quoted, yes.

Q. And then turning to Paragraph 66, you quote a second study, Ripinsky and Williams on "Damages in International Investment Law," and that's Exhibit VP-4, and Ripinsky and Williams say essentially the same thing as Marboe, right?

A. I mean--

Q. I will point you to--

A. What they're saying her is that ex post--

Q. I'm sorry, I will point you to the language, just to make it easier.

A. Sure.

Q. They say that: "Where the aim of the compensation is to re-establish the situation which would, in all probability, have existed if that act had not been committed, information changes should logically be taken into account. Both if they are compensation increasing or compensation decreasing compared to the assessment at the time of the breach

on the basis of an ex ante information."

And these are the studies you're relying on to say that an ex post valuation is appropriate?

A. Well, these certainly do indicate that--and they both, I think, say, pretty directly that ex post is appropriate.

I think, again, from an economic perspective, if this is--it is more appropriate to look at what's happened today because Claimants are alleging a decrease in value. Obviously, that's based on some kind of expectation, or at least Mr. Daniel's assessment of what that expectation would have been at a point in time.

If that loss that is unrealized, I think as he says, it obviously can change over time.

So, to give someone compensation based on a number that will continue to evolve going forward would run the risk obviously of over- or under-compensating them, as the case may be, whereas looking at what happens, you get a better sense of, okay, we can estimate that loss with more precision, with more accuracy.

So even from a--I mean, these books do say that, but from an economic conceptual sense. It certainly is reasonable to me and seems appropriate to me that one would look at events occurring over the passage of time in this particular case.

Q. So, you disagree with the authority you cite because Ripinsky and Williams are essentially saying that, to measure damages caused by an act, like the Supreme Court judgment, you need to consider ex ante information, isn't that right?

A. No. I think you're completely misunderstanding what they're saying. It says information changes, meaning what's happened from the ex ante date to the ex post date, should logically be taken into account.

Q. Exactly.

A. Right.

The information that changes.

What happens from 2014 through today should be taken into account. That's moving from ex ante, as you do it as of 2014, ex post, as you do it as of today.

I'm saying, as Ripinsky does, that you should consider the information that evolves through today. Mr. Daniel's analysis stops at 2014. He doesn't consider what happens through today.

Marboe, the same thing. You know, I think I'll find the--yeah: "The choice of a Valuation Date as late as possible ensures that all information available until that date may and can be used."

So this is, again, you should use an ex post Valuation Date. That's exactly what these are saying.

Q. No, I think they're saying, if you read the language, you have to compare the ex ante information to the ex post information.

A. That's absolutely--I mean, I'll let the legal--I'll let the lawyers decide on the law, but that is not a--why would you compare the value of something in 2014 with the value of something in 2018? That doesn't isolate the impact of the event. You look at the value of something at the same point in time with and without the event. The question is, which point in time should you do that analysis? Should you do that when the event first happens, in

2014, saying, what's the value of my marks with the Supreme Court decision and without the Supreme Court decision. The difference between those two can be damage.

You could also say, standing today, we now know more about how the Supreme Court decision has affected our business, what is its value in the real world today, how much different would that value be today had the Supreme Court decision not occurred?

In no case is it a comparison of the value as of today, based on expectations as of today, with the value that existed as of 2014.

That is something in working on, I don't know, potentially a hundred arbitrations I've never seen. I would be highly shocked if that were ever recommended, and it's certainly not what these courts recommend.

Q. I agree with that. I think what they're saying is if there's been an act and you want to determine the impact of that act economically, you would look at the conditions prior to that act and compare them to what's happening after that act.

That's what these authorities say.

A. Immediately prior--

Q. That's what Mr. Daniel did.

A. Yeah. He did that--again, his version of that, as of 2014, immediately prior and immediately after. That's ex ante.

It's not--the time of the act is not the--is relevant only to the extent of what date do you pick, I suppose, what is your ex ante date. The goal is--there is a breach. The Supreme Court decision exists. If it affected the value of your company, or your asset in this case, by how much. So what would the value of the asset be had the Supreme Court decision not happened versus if it did happen.

You can do that assessment at any date. You can pick the date the Supreme Court decision was issued, you could pick today to say, here's what we know about what the Supreme Court decision has actually led to, but in both cases, the goal is to calculate the value with and without the effect of the Act.

And saying you would compare the value in

2014 with the value of today is wrong, and I would suggest maybe everyone read these books closely, and I hope you'll see that.

Q. But you, in your Report, didn't compare sales that should have occurred absent the Supreme Court Decision, right?

A. Well, we see expectations, and we see that those continue to grow. We see their sales have grown. I mean, that would have been analysis to consider. I think we looked at forecasts. If there is any allegation that sales otherwise would have been higher, that would have been great to know. But as I understand it, there's no claim that sales were affected by the Supreme Court decision.

Q. So, you don't know whether revenues actually would have increased but for the Supreme Court case absent--I mean, rather than staying somewhat stable over the past five years?

A. I have not heard any claim that they would have, and I think it would be complete guesswork for me to say one way or another right now.

Q. But you could have done an analysis, and you

haven't done one.

A. We did do an analysis of their sales, their expected sales. I mean, absolutely.

But, again, I encourage you to read my Report.

Q. And did the expected sales take into account--or projections take into account the Supreme Court judgment? Do you know?

A. Well, I would think as a fact that's known, they may have. I don't know. We'd have to look at each one and maybe talk to the people who prepared them.

Q. So, Page 11 at Paragraph 22, Mr. Shopp.

A. This is my First Report?

Q. Yes.

A. On Page 10, Paragraph 22. Is it one of the--

Q. Page 11, I'm sorry.

A. Yeah. Paragraph 22 is on Page 10.

Q. Oh, sorry about that.

So, you say: "The longer the period in which no risk materializes, the lower the probability of its future occurrence."

Do you see that?

A. That's right. That's because, again, this isn't a dice that we're rolling. This is something we're trying to understand in time to give us that benefit.

Q. Right, but you're opining on probability, again which is a mathematical concept.

A. Well, we can say "likelihood." Obviously, we express likelihood as a number. I mean, probability is a mathematical concept. Maybe I should have said "likelihood expressed as a numerical probability."

I mean, there's--everything has a probability of occurrence. A dice, you have a known probability of each number occurring. Any risk has, in theory, a probability of occurrence.

So, to say that--I mean, yes, it's a number.

Q. So, what analysis did you do in terms of probability that led you to this conclusion, or is it your perception, that nothing has occurred over the past five years?

A. I mean, I don't think it's a perception that nothing has occurred. Nothing has occurred over the

past five years. That certainly is relevant. Again, there is no projection that anything will occur. Again, there is an impairment test that shows that there has not been a decline in value.

So I--you know, if you think about an unknown risk, what's the probability that X is going to happen, you have no idea, it's an abstract risk, you don't understand it, you think you may have an idea of what will happen, but you don't really know. You then have the benefit of five years, maybe 10 years, maybe 20 years, that will let you assess the probability. Especially when you say it's completely certain that my royalties are going to go down by half, and then five years go by and absolutely nothing happens.

I think it's pretty obvious that there's a disconnect, and I think the longer and longer of time goes by without the manifestation of an abstract, fairly ill-defined, at least quantitatively and business-wise and operationally, a fairly ill-defined risk, this gives you definition that your understanding of the risk evolves over time and can be improved over time.

I really am struggling to see how that is controversial.

Q. So, you're asking the Tribunal to give credit to your opinion because it's obvious. You just said it's obvious that the risk will decrease.

A. I hope they'll give credit to my opinion. I hope they share my view that it is obvious.

Q. So, based on your testimony just now, you assumed that the risk has changed ex ante and ex post.

A. No. I've seen that there's been no effect which demonstrates that not necessarily that the risk has changed but that the estimate of the risk as this massive impact that's going to chop cash flows in half by 50 percent in spite the Discount Rate, there is evidence that that is not true. We have five years of evidence showing that that's not true. We have forward-looking expectations showing that that's not true.

That's not an assumption. That is evidence.

Q. But forward-looking financial projections aren't the same as a potential entrant into the Panamanian market deciding to use a mark that's very

close to BRIDGESTONE. I mean, you can't, in financial projections, take into account what third parties are going to do.

A. Of course you can. That's exactly what--I mean, how would a business project its revenues if it didn't think about the market in a competitive landscape? That's--obviously those things are considered in projections.

Q. But if a party is outside the market and wants to come in, that's a future contingency.

A. Businesses would be very stupid if they didn't think about potential new entrants in making their projections. I trust that Bridgestone and Firestone are not stupid and do think about that.

Q. Mr. Shopp, were you aware when you prepared your Reports, both of your Reports, that the Colón Free Trade Zone is part of the Republic of Panama?

A. Yes.

Q. Were you aware that Panamanian law protects Panamanian trademark rights within the Colón Free Trade Zone regardless of whether the goods are destined for other parts of Panama or re-exported to

other regions?

A. I was not aware of that specifically, no.

Q. Were you aware that a Panamanian trademark owner could seize goods in the Colón Free Trade Zone that bear an infringing mark, even if those goods were destined for another country? Were you aware of that?

A. No, not specifically.

Q. Are you aware that the BRIDGESTONE and FIRESTONE tires at issue are supplied from and re-exported to the BSCR Region through the Colón Free Trade Zone? Were you aware of that?

A. No, I don't think there's any evidence that that's the case.

The Colón Free Trade Zone is separate from the BSCR Region.

Q. In your analysis.

A. According to Bridgestone's data. I think it's VP-39. That's a spreadsheet that shows their sales by destination, and Colón Free Trade Zone is one thing, the rest of the BSCR Region is another.

Q. That's the way they view their markets. It's not--

A. No, I don't think you understand.

They list a destination country, Panama could be one; Dominican Republic could be one; the United States could be one; Colón Free Trade Zone could be one.

Colón Free Trade Zone is a market for tires--within the context of the BSCR Region, it's actually quite a small one, but in the context of Panama, it's quite a large one.

In Colón Free Trade Zone, we looked at trade stats, 97 percent of the tires from Colón Free Trade Zone are re-exported elsewhere outside of Panama. Hardly any of those go to BSCR Region countries, they, instead, go to Asia, Europe, Latin America, South America. So, this claim that Colón Free Trade Zone equals BSCR is just wrong.

Q. If you look at your Second Report, Mr. Shopp, that's Tab 2.

A. Sure.

Q. So, this Report essentially reiterates the theme that there are no quantifiable damages because, in your view, there have been no damages to date, is

that correct?

A. Not only have there been no damages--well, there have been no actual damages to date--

Q. Um-hmm.

A. --no direct. There's also, again, according to impairment testing, according to how one understands risk, no reason to think that there are any damages at all.

And that's one of two. Obviously, we also comment extensively on Mr. Daniel's calculation.

Q. And the reasoning in your Second Report is the same as in your First Report, would you agree?

A. It's evolved. We looked at, in this instance, the impairment testing was a new analysis in the Second Report.

I think--obviously, another year passes without any effect, or however long this was between reports. There may be other similar kind of additional data.

I mean, we didn't have detailed sales records, detailed Financial Statements, so--I mean, the conclusions are the same. To say that the

rationale is the same is incorrect. It's certainly evolved and then, I think, expanded.

Q. As to "impairment," you can view impairment from various perspectives, isn't that true?

A. I--

Q. So, for example, you can look at it from a tax perspective, from a legal perspective, from an accounting perspective, isn't that true?

A. If you mean that the word "impairment" can be used in a different context, sure.

I mean, what we used it as is as an accounting term that means, has the asset decreased in value compared to its book value.

Q. So, your concept is a concept that would be reflected on accounting statements of a company?

A. I mean, I don't know about my concept.

The decrease in value is the way Mr. Daniel and I have both used the term "impairment." In an accounting statement, "impairment" also means a decrease in value, so I'm not sure what you mean.

It's--accounting statement is the context, I suppose, in which we've used it.

Q. Okay.

In your First Report, you criticize Mr. Daniel's analysis because you said he should have analyzed the loss incurred by the Claimants with respect to trademark licenses, not the trademarks themselves, right?

Wasn't that one of your criticisms?

A. Yeah, that's right.

Q. So, in response to your criticism on the legal premise of his First Report, Mr. Daniel provided a Second Report in Section 4 of that Report, which is Tab 4 in your binder, and that section is entitled "Rebuttal to the Shopp Report."

That Second Report--in that Second Report, he runs his calculations based on your legal premise, that it's the trademark licenses that are the focus or that should be the focus of the analysis, not the trademarks.

So, Mr. Daniel, in his Second Report at Paragraph 17, if you could turn to that, states that he disagrees with your analysis, but in Section 18 he says: "In light of your position that he

misidentified the proper investment, he runs his analysis on the licenses as he puts it in Section 18 for the Tribunal's consideration."

So, my question is: You critique Mr. Daniel's Second Report, which uses your own legal premise, and you critique that in your Second Report, is that fair?

A. I think what we--I mean, certainly we critique broadly his analysis in our Second Report and in our First, but the critique is really, as you say, I think you put it, he runs his calculation, and that, I think, is a generous way to describe what Mr. Daniel did. He assumed that these BSAM's damages are equal to BSLS's and BSJ's.

So, that's the criticism. Not that he changes methodology. That's fine. I mean, it's difficult to understand what exactly the rationale he's now using is, but that's separate.

I think the primary criticism is saying, "Oh, you're right. I forgot BSAM, I should include that, or for the Tribunal's consideration I will include that." It just is the same as what I previously

quantified, and BSAM is now 90 percent of my damages claim.

That is the criticism, that-- that that is not a very sophisticated and, as I said, I think calling it running a calculation is pretty generous.

Q. Well, that was my term. Mr. Daniel's Report speaks for itself.

So, my last question is: Using your legal premise, that it's the trademark licenses that should be the focus of the damages analysis, Mr. Daniel's analysis resulted in even greater loss; isn't that true?

A. He doubled the number for Firestone, so in that sense it's greater.

Q. Thank you. Thank you, Mr. Shopp.

MS. KEPCHAR: I have no further questions.

REDIRECT EXAMINATION

BY MS. GEHRING FLORES:

Q. Mr. Shopp, Ms. Kepchar said that the premise of your damages analysis is that it's the trademark licenses that should be the focuses—that "should be the focus of the damages analysis," and I'm quoting

from the transcript.

Is it the trademark licenses and only the trademark licenses that should be the focus of the damages analysis? Is that your premise?

Do you agree with Ms. Kepchar?

A. I mean, I think—we have two Claimants in this case, BSLS and BSAM, and I think the premise is we should seek to assess what financial damages each of those respective Claimants has incurred.

I know—I don't know—again, I mean, obviously BSLS owns a trademark and BSAM has a license. So, in that respect those are both relevant things to consider, you know.

But insofar as my basic premise is that it's only licenses we should look at, no, that's not accurate.

Q. Thank you, Mr. Shopp.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT PHILLIPS: Could I just ask the question focusing on the territorial aspect--

THE WITNESS: Sure.

PRESIDENT PHILLIPS: —of the case.

Is it right that the value of a Panamanian trademark will depend upon the impact that the use of that trademark has on attracting sales?

THE WITNESS: That's right.

I mean, I think generally if you have a trademark in Panama, the value of that trademark would be, yeah, as you say, the ability to attract incremental sales, incremental profits as a result of having that trademark.

PRESIDENT PHILLIPS: Yes.

So, if you had in Panama some confusingly similar trademarks but the purchasers were placing their orders from the United States, the fact that there was some confusion in Panama would be irrelevant; is that right?

THE WITNESS: Well, speaking specifically to this case—and if you meant it theoretically, I'll switch to that—there aren't United States purchasers from Panama. BSAM, Bridgestone subsidiaries, purchase from BSCR in Costa Rica. So Panama, the purchasers are, I suppose, the Colón Free Trade Zone.

So, yeah, I mean, I think ultimately if

there's confusion in Panama but your buyer is not in Panama, it would be irrelevant that there is confusion in Panama. I mean, as a general concept, I think that's right.

PRESIDENT PHILLIPS: So, the value of the trademarks in Panama reflects the effect that they have on those in Panama who are making purchases of tires; is that right?

THE WITNESS: The ones who could be confused, yes, that's right.

PRESIDENT PHILLIPS: All right. Thank you very much. You're free to go.

THE WITNESS: Thank you.

(Witness steps down.)

PRESIDENT PHILLIPS: Right. So, we're now going to adjourn until 2:00.

But could I just make this point, which is the point I raised with the Witness.

It's not clear to me whether there's an issue as to the test that we have to apply in considering measure of damage, whether we focus on the value of trademarks a day after the Supreme Court decision or

whether we're looking at the position now.

I don't know whether there's an issue about that, but I hope that this will either be agreed or the issue will be clarified.

SECRETARY TORRES: Mr. President, I have one small matter of housekeeping, if you allow me.

PRESIDENT PHILLIPS: Yes.

SECRETARY TORRES: If my notes are correct, during the first day of the Hearing, when there was an application add certain materials to the record, the Tribunal allowed one of those documents, I believe it was a legal authority. I don't believe that has been added to the record yet.

MS. HYMAN: You're right, and we will add it now.

SECRETARY TORRES: Thank you.

PRESIDENT PHILLIPS: Very well. We will adjourn until 2:00.

(Whereupon, at 10:32 a.m., the hearing was adjourned until 2:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT PHILLIPS: Good afternoon. I think everybody is ready, so let us proceed.

MS. GEHRING FLORES: Mr. President, Panama would just seek an issue of clarification.

In accordance with Procedural Order Number 12, questions from the Tribunal are supposed to come out of the Tribunal's time. We note that the Tribunal does have a question to the Parties with respect to ex ante and ex post damages analysis, and we would request that the answers to that question come out of the Tribunal's time.

PRESIDENT PHILLIPS: Request granted.

MS. GEHRING FLORES: Thank you.

SECRETARY TORRES: And on my end, I would please ask both Parties to make it clear when that time should stop for the Parties and should start counting so that we're all clear on the record of when I'm stopping the time for the Parties and starting the Tribunal's time.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

MR. WILLIAMS: So, Mr. President, I will

present the first half of the Claimants' oral closing, and Ms. Kepchar will take over from me on the IP issues.

And what we're going to do here is not, you'll be pleased to know, to repeat what we said in our opening, but rather to do two things: No. 1, to highlight what we say is the material evidence that's come out this week, and No. 2, to endeavor to respond to the Tribunal's questions that have been raised as we go along, but, of course, I will do my best to respond to any other questions you may have.

So, to start on denial-of-justice standards, and, in relation to that, I think only one question was raised this week, which was the President's question as to what inferences should be drawn as to the amount of time that the Supreme Court had available to spend considering the case, the evidence and so on, and we say that the practical answer is that the Supreme Court does appear to have had a heavy workload in common with, frankly, most courts worldwide, but we say this is irrelevant for two principal reasons:

First, the dissenting judge, Judge Mitchell, had time to undertake a competent analysis, so we say it's hard to see why the other two Justices between them did not, and, indeed, they had the benefit of Justice Mitchell's dissenting judgment, but, nevertheless, went ahead to produce their own decision, which we say is incomprehensible.

Second, Panama has an obligation under the TPA not to deny justice, and it's no excuse if it fails properly to resource its own courts, if that's the case. And, in relation to that, there is the well-known line of ICSID decisions concerning excessive delay in relation to the administration of justice, and such excessive delay itself being a denial of justice. And the case that we have on the record, in that regard, is Toto Costruzioni in Lebanon which is at RLA-0220, and, in that case, Lebanon said that the Courts always take a long time to resolve cases. The Tribunal held that it was Lebanon's obligation to make sure that its domestic courts function "fairly and equitably"--that's at Paragraph 161--and was not persuaded by an argument

that Lebanon's dockets were overcharged and that that justified the delay. The Tribunal said, "although overcharged dockets may explain the fact that a decision in a civil matter was not rendered within a reasonable time, it does not excuse the delay." That's Paragraph 162.

I want now to move to the elements of the Supreme Court judgment that, we say, are problematic, and you will remember during Opening Submissions, I circulated what was Demonstrative CD-3, and we have just an updated version of that, and it's been updated in two respects only. The first is a tiny point. In Row 1, under the "expert reports" column, we've just added a couple more paragraphs where the question of Cassation Recourse was dealt with by Mr. Lee, but, more substantively, we've added an additional column where we have identified where in the Hearing testimony in the Transcript relevant evidence appears under each of these heads, which we hope may be of some assistance to the Tribunal.

So, following, then, the structure of this demonstrative, I'm going to start with, as I did in

the opening, I'm going to start with Row 1, so the Cassation Recourse. And it appears to be common ground that the Appeal Court--that is the First Superior Court--did recognize that the six categories of evidence identified by Muresa did exist in the ordinary sense of the word "exist." Rather, the dispute now appears to be whether the words "existence" and "appreciation" in the fourth and fifth grounds for the recourse, respectively, under Article 1169, ought to be interpreted in a different way from their ordinary meanings.

So, Mr. Arjona's evidence was that the ordinary meaning is to be given to both words, such that the fourth ground means what it says, that the lower court has mistakenly believed that evidence does exist, when it does not, or that evidence does not exist, when it does, and that is Transcript reference 375, Paragraphs 3 to 9.

And Mr. Arjona's evidence is that the fifth ground also means what it says, *i.e.*, if a court is aware of the existence of evidence, yet makes an error as to the weight to be given to the evidence, whether

that error is giving too much weight or too little, including none at all, then that is error of law in the appreciation of the evidence. Reference 375, Paragraph 19, and 376, Paragraph 2.

In contrast, Mr. Lee's evidence is that the words "existence" and "appreciation" in the fourth and fifth grounds are to be given a meaning other than their ordinary meanings, and Mr. Lee's argument is the only way that the Supreme Court's decision can possibly be correct, *i.e.*, he says that even though Ground 4 refers to a mistake as to the existence of evidence, nevertheless, it should be interpreted to cover circumstances where a court recognizes that a particular piece of evidence does exist, but makes a mistake in the appreciation of the evidence by putting no weight on it. None.

But we say there are four problems with Mr. Lee's argument:

First, it means that a very contorted meaning has to be put on Ground 5--that is mistake as to the appreciation of evidence--that is, he has to say that the fifth ground covers only where some weight is put

on evidence, but the wrong amount of weight. But this makes no sense. Plainly a decision to apply no weight to evidence is just as much a question of appreciation as a decision to apply a bit of weight or a lot of weight.

Second, Mr. Lee's argument would mean that a very contorted meaning also has to be put on the word "existence" in Ground 4. In short, Mr. Lee says "existence" should mean "appreciation." But that the distinction between Grounds 4 and 5 is that one means a mistake about applying no weight, and the other means a mistake about applying more weight than none. We say that this contorted meaning is most unlikely.

And perhaps most importantly, the third point is that the required effect is obtained perfectly well if Grounds 4 and 5 are simply given their ordinary meaning. There is no reason for all of this linguistic gymnastics.

And, fourth, Mr. Lee argued that his contorted interpretation was supported by “decades of cassation judgments." That's reference 573, Line 20, which he referred to as case law, but he was unable to

identify a single case to support what he was saying. Even the next morning on redirect, he did not come up with any legal authority for his argument. He said this was because cases in Panama aren't known by the names of the Parties but instead are given numbers or dates. That's at 577, Lines 10 to 17. But that's just not right. We heard Mr. Arjona refer to cases by name, he referred to the Sunbeam Case, Adid Zayed, Sunbeam Corporation, 423, Lines 3 to 5, and the Respondent, in its own submissions, has referred it Panamanian cases by reference to the names of the Parties, see for example Panama's Reply at Paragraphs 218 to 220 where they referred to the case Ganadera and Forrest for Friends.

And, equally, if one consults the Supreme Court Web site, it contains a full record of judgments of the Center for Judicial Documentation organized by name.

So, as Lord Phillips noted, although Muresa expressly relied upon the fourth ground, they seem to have been entirely ad idem with Mr. Lee, and that the fourth ground simply required evidence to be ignored;

566, Line 19. But what seems to have happened here is that Muresa mistakenly relied on Ground 4, rather than Ground 5. And because the Supreme Court can't change the ground on a Cassation Recourse--in order to hear the appeal--the Supreme Court had to allow the recourse, even though it was brought under the wrong ground, and now Mr. Lee is trying to come up with an argument to justify that, but we say that is simply implausible. We say that it is clear that no competent and honest court could have made the findings that the Supreme Court did on the Cassation Recourse.

It is notable that throughout his testimony, Mr. Lee did not accept that the Supreme Court's judgment contained a single error other than one error in relation to the Foley letter where the Supreme Court referred to the "plaintiffs" rather than to "BSLS." That was the only mistake that Mr. Lee accepted the Supreme Court had made. We say that Mr. Lee, in many cases, did not answer questions that were put to him. What he said was often rambling, contained a number of important inconsistencies, to

which I shall return. In our submission, he was not a satisfactory witness.

Turning to Row 2 of our table, which is in relation to the finding of the Supreme Court that the Opposition Proceedings were reckless. So, the Supreme Court had four bases for finding that the Opposition Proceeding by BSLS met this recklessness standard. The first basis was that BSLS and BSJ opposed Muresa's trademark application when Muresa had a legal right to market the product, and had the right of representation and distribution of the brand. But it now seems to be common ground that Muresa had this right, and the Opposition Action did not affect it. Rather, a separate injunction for improper use would have been needed to affect Muresa's use, and no such injunction was ever sought or ever ordered. See Lasso de la Vega 740, Lines 9 to 14. Therefore, we say this ground for recklessness plainly cannot stand up.

But the second ground that the Supreme Court had for finding that the opposition proceeding was reckless was that Muresa's product competes with BSLS's product, but again, it does not seem to be in

dispute that most opposition actions relate to competing products. Paragraph 9 of Article 91 of Law 35 expressly contemplates that Oppositions may be brought in relation to products that are of the same type. Mr. Molino explained this at 647, Paragraphs 1 and 2.

The third basis for the Supreme Court's finding was that BSLS had intent to cause damages.

Now, so far as one can tell, this appears to derive from the competing product point, and there is no evidence of intent to cause harm as opposed to an attempt to protect a registered trademark.

And the last basis for the Supreme Court's finding was that the opposition was without legal basis. Now, the Respondent in this Hearing made an argument that the opposition was without merit because no evidence of actual confusion was given. Now, the Supreme Court certainly never identified that as a problem, but, in any event, this is addressed in the testimony of Edwin Molino, who confirms that actual confusion in Panama is typically assessed by the Court without expert or other evidence. That's at 652,

Paragraphs 16 to 20.

Further, it's to be noted that the test under Article 91 of Law 35 is liable to confuse, rather than actual confusion. Importantly, it was conceded by Ms. Lasso de la Vega that the opposition did not completely lack merit. That's at 768, Line 2. For her part, Ms. Jacobson said that she hadn't read the record of the litigation--819, Line 16--and was unable to opine on Panamanian law, 821, Lines 15 to 16.

And Mr. Lee accepted that he was in no position to express any view on this or any other IP question; 452, Lines 6 to 11.

Therefore, we say that none of the four bases for the Supreme Court's finding that the opposition proceedings were reckless have any basis.

There is a further point on this, which is an important point. Mr. Lee attempted to argue that the opposition court's finding of evident good faith by BSLS was consistent with the finding of reckless conduct of litigation under Article 217. I asked him this: "So, is your evidence, Mr. Lee, that a court could both make a finding under 1071 in relation to

the conduct of a Claimant and, therefore, order the unsuccessful party not to pay the costs of the successful party, and, at the same time, make a finding that the Party was liable under Article 217? Is that, in principle, possible?" His answer was: "Yes, of course it is." And that's at 460, Lines 3 to 10.

So, Mr. Lee's testimony was that a court could find simultaneously for the Claimant to have shown evident good faith in pursuing its claims and hence under Article 1071 should not pay the winner's costs, and, at the same time, that same court could find that the same Claimant in the same case had acted recklessly and in bad faith in pursuing those same claims, and hence is liable under Article 217. But the test for procedural recklessness under Article 217 is stated at Page 16 of the Supreme Court judgment by reference to a quote from the jurist Fábrega, who makes it clear that Article 217, in short, requires malicious bad faith.

With respect, Mr. Lee's argument that a court can find a party exhibited both evident good faith and

malicious bad faith in the conduct of the same litigation, is absurd. But the point gives rise to a really important fundamental issue: Obviously, an Article 217 claim usually would follow on from litigation in which the first court has not made a finding of evident good faith in respect of the Claimant. In those circumstances, if the second court finds liability under Article 217, there is no inconsistency between the two judgments. But what has happened here is that the opposition court found evident good faith by BSLS.

Next, Muresa commenced its tort claim against BSLS, but did not plead Article 217 until the Cassation Recourse stage. The Supreme Court granted the recourse. And that had the effect that the lower judgments in the tort action were quashed. But the recourse did not have the effect that the opposition court's decision on evident good faith was quashed because that was in a different proceeding. Therefore, when the Supreme Court went on to decide that BSLS had acted recklessly and with malicious bad faith in the opposition, that sits alongside the still

extant opposition court's judgment to the opposite effect. This is utterly, legally incoherent.

We say that no honest and competent court could have made the decisions that the Supreme Court did.

PRESIDENT PHILLIPS: Do I infer that you are no longer running res judicata as a legal argument as opposed to the arguments you've just advanced?

MR. WILLIAMS: Mr. President, in truth, I think that that is not an argument that we will press. We have not pressed it during this Hearing.

And, indeed, what I have just outlined, it seems to me, makes a res judicata argument rather academic.

PRESIDENT PHILLIPS: Thank you.

MR. WILLIAMS: Let me turn, then, to Row 3 of my table.

So, Row 3 is the famous "Foley letter" that we've all looked at far too many times.

So, the Supreme Court's finding that the Foley letter was reckless in support of the finding of liability under Article 217, we say, is obviously

wrong on numerous grounds. I'm going to start with the issues around--the procedural issues, if you like, around admissibility jurisdiction and the formalities.

So, the letter was not in evidence in accordance with law, and in any event, BSLS had no opportunity to respond to it for these reasons. It is clear that what happened was that the letter was not mentioned at all by Muresa in its tort complaint, and it was not submitted in the evidence-taking stage, as required by Article 1265 of the Judicial Code, but much later on in the litigation it was attached to L.V. International's coadyuvante intervention petition. But it is common ground that it did not become evidence just because of that; See Lee 497, Lines 18 to 21 and 497, Lines 4 to 11.

And after Muresa received the letter from L.V., then it was, as Mr. Lee put it, "casually introduced," 532, Line 15, attached to Muresa's quantum experts reports. But because the letter was not submitted in the evidence-taking stage, BSLS objected as to its admissibility. Now, the Respondent argues that BSLS might have applied to the judge to be

able put in responsive evidence, but, of course, BSLS did not do that because it was objecting as to admissibility.

And whilst Mr. Lee's evidence on the point was inconsistent, he appeared ultimately to accept that BSLS could not put in new evidence at the appeals stage other than in response to new evidence from Muresa, but Muresa did not put in any new evidence. And that's at 551, Lines 12 to 18.

So, what's the net effect of all of this? The net effect was that the letter did not comply with the requirements of the evidence-taking stage. For example, as Mr. Molino testified, 706, Lines 2 to 21. Because the letter was sent abroad in a foreign language, someone must have authenticated that evidence under the rules of the U.S. system, had the apostil placed, and then forwarded the letter to Panama. That did not happen. And in practice, BSLS had no opportunity to put in responsive evidence, for example, witness evidence from Foley as to who they were acting for, which is a fundamental breach of due process, we say.

The finding that the letter was reckless and contrary to Article 217 is wrong on numerous grounds. The letter was sent in the U.S. between U.S. attorneys. There was no analysis as to the basis on which it was said that the Panamanian Court even had jurisdiction. There was no explanation in the Supreme Court judgment as to why Panamanian law should apply to the sending of the letter. Neither Mr. Lee, 605, Lines 6 to 7, Ms. Lasso de la Vega, 753, Lines 3 to 7, nor Ms. Jacobson, 933, Line 4, and 934, Line 18 had any coherent explanation of this.

And the Supreme Court made a fundamental error in finding that the letter was sent by attorneys for BSLS, when even Muresa had told the Court in its Cassation Recourse that it was sent by attorneys for BSF Brands. And, indeed, the Supreme Court itself had quoted what Muresa had said on that earlier in its judgment, but, nevertheless, seems to have somehow, we don't know how, but somehow concluded that Foley were attorneys for BSLS.

Now, Mr. Lee in his oral testimony initially said that he was not in a position to express any view

as to the Supreme Court's findings on the Foley letter. That's at 510, Lines 8 to 13. But he then changed his mind. Mr. Lee tried to make an argument that the reference to "Bridgestone/Firestone" objecting must mean that Foley were representing every company in the Bridgestone group. That's 581, Line 6 and 583, Line 16. But he accepted that this was only an assumption, 587, Line 5. And that if it is a fact that is a controversial fact, it needs to be proven, 587, Lines 21 to 22. Therefore, even if it was thought that the letter somehow suggested it was sent on behalf of other Bridgestone companies, proof would be needed that Foley was acting on their behalf in order for their letter to be any basis for an attribution of liability to BSLS.

PRESIDENT PHILLIPS: Was it not Bridgestone's case at the outset when opposing registration of the RIVERSTONE mark, that Muresa should have been aware of the U.S. proceedings?

MR. WILLIAMS: Yes, Mr. President, but that is a far cry from a suggestion that Foley, the U.S. law firm, were acting for BSLS, we say.

ARBITRATOR THOMAS: Can I direct you to Exhibit R-0124.

MR. WILLIAMS: R?

ARBITRATOR THOMAS: 0124.

MR. WILLIAMS: Could you bring that up on the screen?

ARBITRATOR THOMAS: I will read you the relevant passages because it relates to the question that the President has just asked.

MR. WILLIAMS: Yes.

ARBITRATOR THOMAS: As I understand it, it's the closing argument in the opposition proceeding by Mr. Aldana, and I believe that he is counsel for the Bridgestone entities. And, in the second page, it said--the Report says: "Indeed as shown by evidence, plaintiff," that's the plaintiff in the Opposition Proceedings, "through its U.S. subsidiaries, filed an Opposition Complaint, et cetera, against the RIVERSTONE mark." And in the next paragraph it said: "Undoubtedly, the aforementioned precedent," the finding of the trademark office in the United States, "shows that the prior use rights held by plaintiffs

are not unknown to L.V. International, and based on what L.V. International, Inc. alleged, they should also be known by defendant Muresa Intertrade S.A. by virtue of their presumed relationship."

Now, this is a submission only in respect of the two points which I think I would like to hear you on.

The first point is that the counsel for the plaintiff in the opposition proceedings is saying that the plaintiff, through its U.S. subsidiaries, caused the U.S. proceeding to be initiated. So, this raises a question about the position that only BSF Brands et al. is involved in that proceeding. But, secondly, it's also being suggested by counsel for the plaintiff that Muresa should be fixed with knowledge of the outcome of the U.S. proceeding by virtue of its relationship with L.V. International.

You need not answer it right now, you're free to reflect on it, but I would like to understand what is to be made of this, given that this question of the corporate relationship on both sides, Bridgestone and L.V. International, is raised by counsel for

Bridgestone Licensing Services.

MR. WILLIAMS: If I may, can I come back to that at the end of our opening?

ARBITRATOR THOMAS: Sure.

MR. WILLIAMS: Because I'm afraid I didn't have the document in front of me.

ARBITRATOR THOMAS: I would prefer you to have an opportunity to read the document and then make a considered position.

MR. WILLIAMS: Thank you.

So, in relation to the Foley letter, it references Bridgestone/Firestone, which was said to object to use. But, in fact, a reference to Bridgestone/Firestone is objectively more likely to be a reference to the names of Foley's clients in the U.S. litigation. Foley's clients were Bridgestone/Firestone North American Tire and BSF Brands to Bridgestone/Firestone brands. So reference to Bridgestone/Firestone, we say, objectively read, is much more likely to be a reference to Foley's clients in the litigation than somehow the entire group of companies within the Bridgestone group.

And we say that the Supreme Court's finding as to what the letter said are also, in several other respects, obviously wrong, so the letter says that the plaintiffs' legal representatives stated in an intimidating manner that opposition proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand, but the letter doesn't say that. It says that Bridgestone/Firestone objects to registration outside the U.S. of the RIVERSTONE mark for tires.

And the letter also says--they also added without any legal basis, at least under Panamanian law, that the plaintiffs should abstain from selling the product, but the letter didn't say that. It specifically did not make any demand as to the use of the RIVERSTONE mark outside the U.S. but says Bridgestone/Firestone objects to the use of RIVERSTONE for tires.

Now, Mr. Lee's justification for these errors was: "When one understands a document, there's no need not to transcribe it literally"--that's at 595, Lines 16 through 16--and: "Judges don't need to read

the text of the letter, they simply need to apply maximum experience, draw on one's own experience or knowledge that one has picked up in day-to-day life." That's at 598, Lines 15 to 18. But none of these explanations, we say, are plausible, or somehow rectify the Supreme Court's obvious errors.

And, of course, the last point we would make on the letter is it's not reckless. Of course it's not reckless we say. And as Ms. Jacobs-Meadway said: "It is a Demand Letter with respect to the United States, and it is not a Demand Letter with respect to any other jurisdiction. It's a Reservation of Rights Letter." That's at 897, Lines 17 to 20. Again, we say, no honest and competent court could have made the decisions the Supreme Court did.

My next row is Row 4, which is the suggestion the finding by the Supreme Court that the withdrawal of the appeal in the Opposition Action was reckless. And on that, Mr. Lee says that: "Withdrawal of the appeal was reckless because any Panamanian lawyer that thought he had a meritorious claim would appeal it, regardless of what the First Instance Judgment said."

That's at 471, Line 9 and 471 Line 2.

Therefore, it seems that Mr. Lee argues that this goes to the original opposition being without merit, but--well, we say that argument itself is implausible, but it's academic because, as we've already established, the opposition action was not without merit.

Further, Mr. Lee accepted that withdrawal of the appeal would not have caused any prejudice of cost to Muresa because the appeal was withdrawn before there was any work for them to do, and Mr. Lee said: "That's a matter of fact," and that's at 477, Lines 10 to 16.

And again, we say no competent or honest court could have found that the withdrawal of the appeal was reckless.

So, moving on to Lines 5 and 6 of my table, "Causation and Loss," I can deal with briefly because--

PRESIDENT PHILLIPS: Just before you do.

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: Did the Supreme Court

say the withdrawal was reckless, or is one interpretation the fact that the appeal was withdrawn indicated that no or insufficient thought had been given to whether there was merit in the original objection to registration?

MR. WILLIAMS: Mr. President, I suppose it is possible that the judgment could be read in that way. We read it as a suggestion that withdrawal of the appeal itself was a reckless act, and my understanding is that Panama has been engaging with the Supreme Court judgment on that basis.

But I agree, I suppose it is possible that the judgment could be read in that way. But if it is read in that way, for the reasons that I indicated, we say that the opposition action did have merit.

Now, causation and loss, we say there has been no testimony that really goes to this issue, and certainly nothing that undermines anything that I said in our opening about causation. We say that the reality is that there are numerous leaps of logic required for the Supreme Court to find that alleged reckless behavior by BSLS and BSJ caused any harm at

all to Muresa.

Damages--I suppose in conclusion I should say and repeat the mantra that all of the decisions which I have outlined individually, but also looked at collectively, we say, are ones that no competent and honest court could have made. So, we say, therefore, that the relevant standard in the TPA has been breached.

And then turning to damages.

So, as a result of denial of justice, BSLS, of course, was held jointly and severally liable to pay Muresa and TGFL the sum of $5.4 million. And BSLS paid that amount in full on 19 August 2016, but the Respondent still maintains that BSLS didn't really pay the sum because we are told it was just given the money through some kind of sham loan from BSAM, that this means it did not really incur a loss. That, I think, is the Respondent's argument.

But Mr. Kingsbury has explained that BSLS did pay the whole judgment debt, and he explained why, and that's at 267, Line 10, 268, Line 2.

And the reasons Mr. Kingsbury gave are

entirely reasonable, we say. If Panama wrongfully imposes joint and several liability, it can hardly complain when BSLS pays the full amount when Muresa threatens enforcement action. BSAM loaned BSLS the money for this, 268, Lines 8 to 14. The evidence on the record is that it is a real loan for which interest is paid--271, Line 16; 272, Line 3--that the debt rolls over each year--269, Lines 16 to 19--and will do so until the conclusion of this arbitration regardless of the outcome. That's 271, Lines 6 to 7.

The assertion that this is a sham loan is unsupported by evidence. We say it does not matter in any event how BSLS was put in funds to pay, and the President has made observations on that that we would support. That's at 228, Line 19, 229, Line 4.

Next, Panama argues that BSLS has failed to mitigate its loss because it has not enforced a right to contribution from BSJ. The starting point is that there is no evidence that BSLS had any such right.

The Respondent argues that the January 2010 Agreement at C-3018 gives such a right, but the document only has to be read to see that it is limited

to a sharing of the disbursement cost of all trademark actions. That's at Clause 1. And if there is any uncertainty as to what it means, it's resolved by Clause 3 that refers to a sharing of fees due under the invoices from law firms, investigation companies, et cetera.

So, this is clearly, we say, not an agreement under which BSLS has a right of contribution from BSJ in respect of damages liability.

Now, the Respondent relies on the 2016 BSLS Board Resolution, which is at R-0095, and that is said to change the effect of the 2010 agreement because one of the recitals says that BSLS will pay the damages, despite the 2010 Agreement.

Now, that might have been infelicitous wording, but a board resolution by BSLS cannot operate to vary the effect of a prior agreement. And the Respondent has offered no explanation as to the basis in law on which the resolution changes an earlier agreement, or indeed, whether the analysis as to any such variation arises under U.S. or Japanese law. There is simply no evidence before the Tribunal as to

that matter.

Therefore, we say, there is no contractual basis for contribution, or basis that might arise outside contract in the way I've described. But as to whether otherwise a contribution outside contract might be applicable, presumably, that's a question of Japanese law--BSJ being the entity from which the contribution would be sought--or possibly U.S. or possibly Panamanian law, but again, there's no evidence on the record to support any such non-contractual right. And BSLS and BSJ are not aware that any such right exists.

But even assuming there were to be a right of contribution, which, of course, we don't accept, but even assuming that there was, the Tribunal asked at the last hearing whether there is any public international law authority as to whether BSLS's right to recover the 5.4 should be reduced to reflect that right. We've looked at this, and we could not identify any sources of international law on this point. And likewise, the TPA is silent on this point.

And we say, in these circumstances, one has

to come back to the simple question of whether BSLS has acted reasonably.

Having been found jointly and severally liable, then for all of the reasons given by Mr. Kingsbury, we say it was reasonable for BSLS to pay the 5.4 million. That BSLS and BSJ agreed that BSLS should pay the 5.4, and then be entitled to retain all the proceeds of the present arbitration, if any, was a matter for them. But in the circumstances, it was not unreasonable.

And in the context of a group of companies with a common parent, it would make little practical sense for a contribution to be sought between group companies since ultimately the parent would suffer the same loss.

So, we say that BSLS should be awarded the full 5.4 million in accordance with the Factory at Chorzów--very good--in accordance with that.

That's all I had to say, and Ms. Kepchar take over from me.

MS. KEPCHAR: Mr. President, Members of the Tribunal, I'm speaking to the damages claim in

addition to the $5.4 million in Claimants' damages claim. In addition to the compensation for $5.4 million, Claimants do seek damages for the impact of the Supreme Court's decision on Claimants' "intellectual property" rights in the marks at issue in this case.

Ms. Jacobs-Meadway and Mr. Daniel together provide the evidentiary support for this part of the Claim. Ms. Jacobs-Meadway provides the legal foundation, and Mr. Daniel then incorporates this evidence in his foundational assumptions which are the starting point for Mr. Daniel's damages calculations. This evidence, together, establishes damage to Claimants' trademark rights resulting from the Supreme Court decision, as well as the quantum of that damage.

Ms. Jacobs-Meadway's evidence provided the legal basis for Claimants' position that the Supreme Court's arbitrary and capricious decision, a decision without precedent anywhere in the world, had real consequences to the trademark's intangible rights at issue. That's Ms. Jacobs-Meadway's Report First, Paragraphs 46 to 49 and 53 to 59.

Ms. Jacobs-Meadway testified before this Tribunal that there's also a legal interest to the extent that anything that damaged the ability or the cost of policing the mark, which may discourage the licensor from pursuing aggressively a third-party user, has the capacity to impact adversely on the market position and the scope of rights that the licensee has contracted to enjoy.

PRESIDENT PHILLIPS: Did Ms. Jacobs-Meadway say that the effect of the judgment was that the license right should be treated as non-exclusive rather than exclusive rights?

MS. KEPCHAR: I don't recall that she does, Mr. President.

PRESIDENT PHILLIPS: Well, at the moment, I just don't know where that premise came from. I put it to Mr. Daniel, was that his conclusion from her evidence, and he didn't accept that.

Where does that come from? Why should we make that finding?

MS. KEPCHAR: The Tribunal has heard evidence on the subject of exclusive and non-exclusive rights

in two different contexts, I think, Mr. President. The first context being the real-world conditions confronting a trademark owner. Are the relevant markets for BRIDGESTONE and FIRESTONE products devoid of any confusingly similar remarks? I would say that's a purely exclusive marketplace situation for that trademark owner.

And if that's the case, its trademark rights are exclusive as a matter of fact. Once competitors begin to enter into that market, the trademarks lose exclusivity and the rights diminish or whittled away further as the number of competitors that enter the market under confusingly similar marks increase.

PRESIDENT PHILLIPS: Isn't it correct that Mr. Daniel's calculations were based on tables which compared the value of an exclusive license with the value of a non-exclusive license?

MS. KEPCHAR: Yes.

His damages analysis also refers to exclusive and non-exclusive trademark rights in the licensing context, but, importantly, Mr. President, in a different context and for a different purpose.

Mr. Daniel used studies that compare royalty rates in exclusive and non-exclusive trademark licenses as a reasonable, and the closest possible, proxy to the loss of market exclusivity de facto that Ms. Jacobs-Meadway discusses in her evidence.

And I think as the evidence came forward, I think both Parties were using the terms "exclusive" and "non-exclusive" with maybe less precision than they deserve because they were used in these two different contexts, I think, requiring two different constructions based on those contexts.

The Tribunal also asked during this proceeding, how do you value goodwill?--that's at Page 915, Lines 19 to 22--and Ms. Jacobs-Meadway explained that there is an accounting definition, which is the price differential, once you've taken into account the value of hard assets, and anything over and above that on the purchase price is goodwill. That's 916, Lines 2 through 6.

And she goes to say that if the company is not for sale, then there are a variety of factors to take into account when trying to value the goodwill.

Ms. Jacobs-Meadway gave the example of Coca-Cola where the trademark is so valuable that even if all the physical assets of the company were destroyed overnight, there would still be significant value if all that was left was the trademark registration.

Indeed, the Tribunal has already, in its Decision on Expedited Objections, reached conclusions that find ample support in Ms. Jacobs-Meadway's expert evidence, the Tribunal previously stating: "Once the necessary consents were given, and subject to the law of Panama, which is considered below, the FIRESTONE trademark license conferred on BSAM the valuable right to sell tires bearing the FIRESTONE mark in Panama."

The Tribunal went on: "In practice, that right was granted to BSAM exclusively. The exercise of that right would inevitably result in BSAM benefiting from the goodwill that attached to the mark, notwithstanding that the FIRESTONE trademark license provided that BSLS would retain the title to the goodwill." And that was the Decision on Expedited Objections at Page 184.

With respect to Ms. Jacobson's evidence, we

say that her evidence is so constrained in scope and focus as to be actually irrelevant to the issues at hand. Ms. Jacobson's evidence assumed merely that the Supreme Court judgment is valid, and that Panama has the right as a sovereign nation to implement its laws as it sees fit. Ms. Jacobson informed the Tribunal that the decision hearkens to international trademark principles, but she stops short of --saying that-- testing the results of the case against those principles. Therefore, Ms. Jacobson's evidence is not helpful in deciding this case, we submit.

As noted, Ms. Jacobs-Meadway's evidence was the legal foundation for Claimants' damages calculations. Mr. Daniel accepted the legal premise that the Supreme Court injured Claimants' trademarks as it is the trademarks that symbolize the goodwill that is shared by the licensor and the licensee.

Mr. Daniel then calculated the damage that occurred when the Supreme Court judgment issued using a but-for analysis comparing ex ante and ex post economic conditions. Mr. Daniel conducted a second analysis that is based on an alternative legal

premises that is advanced by Panama that the proper investment for valuation purposes is the trademark licenses, not the trademarks themselves.

Ms. Jacobs-Meadway's evidence is that damage to the mark also damages the licensee, which conclusion supports Mr. Daniel's First Report calculations.

I wish to underscore that as to Mr. Daniel's ex ante and ex post approach, Ms. Jacobs-Meadway's evidence supports the conclusion that the injury created by the judgment was risk: Risk of increased costs, and the chilling effect on enforcement by the Bridgestone Parties, among others.

Mr. Daniel's analysis in his First Report is the best approach, we submit, and he has conducted that analysis for Panama individually and then for the BSCR Region.

Mr. Shopp contends that the trademark impairment should be determined as of today rather than in 2014 when the Judgment issued, and the Tribunal itself asked whether there is a question for it to decide as to the test that it has to apply in

considering the measure of damages, and whether it should focus on the value of trademarks the day after the Supreme Court decision or whether we are looking at the position today.

In our submission, the relevant standard for the Tribunal in determining damages in this claim, whether for the $5.4 million loss or the loss in addition to that, is the standard set out in the case of Factory at Chorzów at CLA-0086 in the record; namely, that BSLS and BSAM are entitled to full compensation in order to wipe out the consequences of the illegal act.

Notably, tribunals in other cases have frequently considered whether an ex post or ex ante approach is more appropriate, and the thrust of the authority is that tribunals have a discretion as to which approach is applicable in order to do justice to the wronged party.

In many cases, the investor would benefit from an ex post approach. As Mr. Shopp said this morning, the benefit of the ex post approach is said to be that there is more information available to you

today than there was on the day after the judgment.

But our position is, first, choosing today's date is just arbitrary. And second, nothing has changed since the day of the judgment. The judgment is still there--it's searchable by potential buyers, potential licensees--and whether that risk actualizes depends on whether there is a new entrant into the market which is something that we just can't predict. Lightning can strike tomorrow.

For that reason, if the ex post approach is considered more appropriate, in our submission, it would be the same framework and methodology as that offered in Mr. Daniel's Reports, but we would simply move those calculations forward by five years.

So, based on the evidence of record, Claimants are seeking damages for the damage to the trademark rights of Claimants in the amount of $985,568 for Panama, and $12,812,952 for the BSCR Region.

Thank you, Mr. President.

MR. WILLIAMS: So, I shall try to answer Mr. Thomas's question.

So I have been able to look at the document, and I think you asked me two questions.

So, the first question was the impact of the line that the plaintiff, through its United States subsidiaries, files an opposition complaint. And, firstly, this is just not right because the opposition complaint was filed by BSF Brands. It was not filed by BSJ or BSLS. I mean, I think that's clear as a matter of record.

And this doesn't change who Foley was acting for. Foley were acting for BSF Brands, and Foley say in their letter that they make their representations on behalf of their clients. Their clients are BSF Brands. So, we say that what is stated here, in the opposition action, has no bearing on the Foley letter.

The second point you raised concerned the suggestion that Muresa could be expected to know the outcome of the U.S. opposition proceedings. And again, we say this is irrelevant. Knowing about the outcome of the U.S. opposition is irrelevant to who sent the letter and to whom.

The fact is that the letter was not sent to

Muresa. We know the letter was sent to L.V. International's lawyers in the U.S. Clearly, if BSLS/BSJ were wishing to send messages to Muresa, they would have corresponded with Muresa. I mean, that would have been the straightforward and simple and obvious thing to do. If that's what they wanted to do, if they wanted to communicate messages or what has been said are "demands" to Muresa in Panama, they would have done so, but they did not.

And we say that, in a sense, one needs to stand back from this and just look at the reality of it. This is a letter sent between U.S. attorneys, arising out of U.S. opposition proceedings, and the facts are clear that the first time that Muresa ever raised the question, or ever raised anything to do with the Foley letter, ever mentioned the Foley Letter, was well into the tort damages after L.V. had petitioned to intervene and had attached their copy of the Foley Letter. It's very clear from, I think it was our Demonstrative Number 5, as to how that occurred in the chronology, and then very shortly after the L.V. intervention petition attaching that

letter, Muresa then raised the point for the very first time. They've never mentioned it ever before.

I think one has to be real, I think, for the evidential record, strongly suggests that that was the first time that Muresa knew anything at all about the Foley Letter because, after all, if they had known about it earlier, and if it was so important, of course they would have raised it in their tort damages claim, but they did not.

So, we say, it's important to look at this with a sense of what we would say is reality.

ARBITRATOR THOMAS: Thank you.

MR. WILLIAMS: And I think that between Ms. Kepchar and myself, that that concludes for what we had for our Closing Submissions.

PRESIDENT PHILLIPS: Thank you very much.

MS. GEHRING FLORES: If we could have just one moment to set up.

PRESIDENT PHILLIPS: We will have a five-minute break.

(Brief recess.)

PRESIDENT PHILLIPS: Very well.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

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

Now, on Monday, I began by recalling that we shouldn't be here — that this case was plainly baseless, and no more than an appeal. The Claimants, however, insisted that they didn't "br[ing] this case lightly." They styled themselves as crusaders on an important investor-State mission, asserting that they "had no choice but to pursue arbitration under the U.S.-Panama Trade Promotion Agreement."

But the reality, as you know, is that the Claimants did have a choice. What they didn't have was a right to assert a claim.

Now, Claimants have long conceded that "under the TPA, Claimants must show both breach by the Respondent and loss incurred by the Claimant in order to submit a claim to arbitration." The statement is at paragraph 62 of the Claimants' Rejoinder on Expedited Objections, which they submitted two years ago — almost to the day.

And in the meantime, Claimants have failed

entirely to establish either of these elements, and what's worse is it's been clear all along that they never could. We flagged this for you two years ago when we all convened in Washington during the Hearing on Expedited Objections. At the time, I was giving examples of what it would mean for there to be an objection under Article 10.20.4 of the TPA, and I adverted to the claims that were in existence at the time, which were: expropriation, a claim for national treatment, and a denial of justice.

I explained that, for starters, Bridgestone Americas lacked standing to assert a claim for denial of justice. I also explained that the expropriation claim failed—

PRESIDENT PHILLIPS: Are you coming back to that point?

MS. SILBERMAN: Yes, we will do so.

I also explained that the expropriation claim failed as a matter of law, and we pointed out that the national-treatment claim had problems as well. The Claimants couldn't even identify the most basic element. There was not even a comparator to undertake

the analysis. The denial of justice theory failed as well, in a textbook example. It was an appeal; it didn't amount to a denial of justice claim.

Now, we spoke to the Claimants about this, inviting them offline to withdraw their claims, which would have saved the expense of this lengthy, protracted proceeding. But the Claimants generally declined and moved ahead with their Memorial, which — as we later observed — failed to advance a single cognizable claim.

We again invited the Claimants—

ARBITRATOR GRIGERA NAÓN: Excuse me to interrupt you.

MS. SILBERMAN: Yes.

ARBITRATOR GRIGERA NAÓN: Denial of justice is an open textual expression. What do you mean by that?

Denial of justice seems to be a denial of an open textual expression. What do you specifically mean by that, because different people understand different things.

MS. SILBERMAN: Sure. And I believe both

Parties have stated that there is no basic definition of what a denial of justice entails. There are, however, many tests that one can use to determine whether a denial of justice does not exist. For example, a simple mistake of local law doesn't amount to a denial of justice, which is a corollary to the Articles on State Responsibility, which state that a violation of domestic law isn't automatically a violation of international law.

It's also well accepted that an appeal isn't something that you can bring under the cause of action for a denial of justice. And that, in essence, is what the Claimants are doing here. The chart that they compiled for you in the opening statement that they then marched through with all of the witnesses on examination, and that they updated and showed you today: all of those are arguments that came from the Cassation Proceeding.

ARBITRATOR GRIGERA NAÓN: You're telling me what it is not. What is it?

MS. SILBERMAN: So, I can give you examples. It's sort of like unfair competition or fair and

equitable treatment, where it's very difficult to define in the abstract what it is, and that's why tribunals tend to evaluate it on a case-by-case basis.

So, for example, the Claimants alluded to this earlier. If there is an undue delay in the administration of justice such that a party can despair of the hope of ever obtaining an answer on the case, that's one of the examples that has been given of a denial of justice.

There also was the case of ATA versus Jordan.

ARBITRATOR GRIGERA NAÓN: I know those examples. I thought you were going to give us a notion on the basis of which you are making your case.

MS. SILBERMAN: Of what specifically a denial of justice is?

ARBITRATOR GRIGERA NAÓN: That there is or there is no denial of justice. Which is the notion of denial of justice on the basis of which you say there is no denial of justice here. Which is the conceptual—which is the concept of denial of justice that you are using?

MS. SILBERMAN: Ah. So, the basis on which I

say there is no denial of justice and had alluded to it earlier during the Expedited Objections Hearing is that what the Claimants are doing is an appeal.

PRESIDENT PHILLIPS: Could I go back to the locus standi point which we find at page 5 of your presentation.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: As I understand it, there's an exception to the principle where you have a parent company and its subsidiary inasmuch as a parent can claim for damage suffered by denial of justice when the party to the proceedings was a subsidiary; is that correct?

MS. SILBERMAN: That is what the Arif Tribunal stated. And yes, that's what Mr. Paulsson stated as well.

PRESIDENT PHILLIPS: Is there any jurisprudence in relation to the position of a Licensor and a Licensee of a trademark?

MS. SILBERMAN: In investor-State arbitration, not that I'm aware of. And going back to the basic concept of a denial of justice, to the

extent that the idea is that there is a massive egregious violation of due process.

PRESIDENT PHILLIPS: Well, that's the nature of the animal.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: But I'm dealing with locus standi.

MS. SILBERMAN: Yes. What follows from that conclusion — that definition of a denial of justice — as an egregious failing in due process is that you must be a part of the process, or have tried to have been a part of the process. If you were not a party, or someone who tries to be, then no process is due to you.

So, this is one of the reasons why we say there is no standing for Bridgestone Americas, and why the United States has said there would be no standing as well: because the party was not itself a part of the process.

PRESIDENT PHILLIPS: Might I suggest to you that there may be merit in recognizing a second exception in the case of a licensor and a licensee of

a trademark, because the evidence we've heard is it's for the licensor who has the legal right to protect the rights of the licensee by bringing legal proceedings, so that if the licensor, to protect the rights of the licensee brings legal proceedings and suffers a denial of justice, doesn't it seem on principle right that the licensee should be entitled to say that "I have not received fair and equitable treatment because of the way my protector has been treated"?

MS. SILBERMAN: Well, so, I think the issue, Mr. President, is with the cause of action: denial of justice or if there is a question of an expropriation, a question of perhaps arbitrary treatment, that would be something different entirely. Panama has not stated that, in that scenario, a licensee would not be able to bring an arbitrariness claim.

The problem with the claim for denial of justice is that it is inherently a procedural issue. So, for example, in Panama, it is the requirement that the licensor be the one to police the mark to participate in these proceedings. But we've heard

testimony that the licensee can participate as well. And if the licensee doesn't participate but it had the opportunity to do so, it waived its right to claim a procedural violation. It may say "I have been harmed," or "there was some event that caused me damage," but it's not a denial of justice. "You don't have standing to claim a procedural problem in a proceeding in which you don't participate" —is the essence of why this standing issue arises in a denial of justice context but not perhaps in the context of an expropriation or some other claim.

PRESIDENT PHILLIPS: That seems a very technical argument, if I may say so, which disregards the reality of the position where you have a relationship which requires, if you like, a parent to take legal proceedings for the benefit of a child.

MS. SILBERMAN: Well, denial of justice in the first place is a very specific cause of action that arose out of customary international law. The requirement was that a party needed to go through and exhaust all of the local remedies: this has existed for many, many years.

And, in a sense, that could be said to be a technical argument, but that is historically the way that this has evolved and the way that customary international law evolves.

The TPA's standard is the customary international law standard, which, as the United States explained on Monday, is something that develops out of long-standing State practice and opinio juris. And this is the way that States have always conceived of that principle, of a procedural issue where you must exhaust local remedies. If you don't participate or try to invoke those remedies in the first place, you don't get to assert this particular claim, for denial of justice.

As I mentioned, in theory, there could be other claims under the TPA. But in this case, the Claimants haven't asserted any of those claims. So, this is why the issue has become so important for BSAM: because of the customary-international-law standard and because of the cause of action invoked.

ARBITRATOR THOMAS: Can I make sure I understand the last point?

MS. SILBERMAN: Sure.

ARBITRATOR THOMAS: Do you concede that in respect of the other substantive obligations that are set out in the TPA, that BSAM would have standing to plead a breach of any of those obligations? Is it your point that, because of the specific nature of a denial of justice cause of action, in respect of that only, you're saying that BSAM doesn't have a right of standing?

MS. SILBERMAN: Yes, there are many other forms in which a judicial decision could contravene a bilateral investment treaty or the investment chapter of a free trade agreement. Depending, of course, on the particular language.

But if a Supreme Court just decided, you know, there are no longer patent protections at all, that, in theory, could amount to the expropriation of a patent. But you don't get to assert a procedural claim for the process in the Supreme Court if you weren't a part of that process. That's just where it goes too far. You may be able to say "this decision/this law/this regulation expropriated my

investment." But you don't get to say that "I was denied an opportunity to present evidence" in a proceeding in which you never attempted to be a party.

PRESIDENT PHILLIPS: Well, why can't you say "I haven't had fair and equitable treatment because you've denied justice to my licensor who was there to protect my interests"?

MS. SILBERMAN: Because this is inherently a personal right.

So, for example, if my mother was involved in a court proceeding and she didn't get to present evidence, what claim would I have to be able to say that I was denied due process? Even if it were a claim, let's say, about some family matter — a family estate. Just because I stood to inherit that estate, or benefit from it, wouldn't necessarily mean that I have a procedural claim if I didn't attempt to participate in the process. It's a waiver issue — especially in circumstances where Claimants' own witness testified — Ms. Audrey Williams in the first Expedited Objections Hearing — that the party has an opportunity to participate. If you don't use it, you

waive the right to assert the procedural claim, and that is the claim that's being asserted here.

So, let's turn quickly to that issue, after noting that this really is the only claim that remains. The expropriation claim has gone, the national treatment claim has gone, the MFN claim that arose in the Memorial has gone, and all we are left with now is the denial-of-justice claim, which fails for several reasons, which we will turn to.

Now, just closing out the issue of denial of justice and standing: I wanted to pointed out that the Claimants have conceded that, "[o]n the basis of Arif, if BSAM was bringing a self-standing claim under customary international law, then the fact that it was not a party to the Muresa litigation would mean that it did not have standing." This is also what the United States said to you on Monday.

Now, also on Monday, the Claimants tried to give you a caveat. They stated, "well, but BSAM is claiming for breach of the FET standard under the TPA." And the problem with this argument is that, as the U.S. stated, and as Panama had stated earlier, the

fair and equitable treatment obligation in the TPA is the customary international law standard. This is clear from the text of the TPA itself.

So, the first paragraph of Article 10.5 states: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

And then paragraph 2 goes on: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment. The concept of 'fair and equitable treatment' does not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights."

Now, on Monday, Ms. Hyman drew your attention to the text of subparagraph (a), arguing that it added to the minimum standard of treatment. And the text of that paragraph states: "'Fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due

process embodied in the principle legal systems of the world."

As Ms. Hyman an observed on pages 41 and 42 of the transcript: "This language appears in most of the U.S. Free Trade Agreements." And those agreements — and more specifically their analogues to Article 10.5 — can only be interpreted as requiring the customary international law standard. This is not just my conclusion, it follows both from the text, and it's also a matter of historical fact.

As Claimants surely must know, in the early days of the NAFTA, certain tribunals purported to ascribe autonomous meaning to Article 1105, which is the NAFTA corollary to Article 10.5 in our TPA. And following the issuance of the decision in Pope & Talbot, the Free Trade Commission issued its famous note in 2001 — the binding interpretation that stated that Article 1105 prescribed the minimum standard of treatment under customary international law. And since then, the same clarification has appeared in the text of most (if not all) of the U.S. Free Trade Agreements, including DR-CAFTA and the Panama TPA. And

Claimants haven't pointed to any past tribunal that has interpreted those treaties in the way that Claimants urge here. And that means that the customary international law standard applies, and that — by Claimants' own admission — Bridgestone Americas has no standing.

Now, in any event, the denial of justice claim fails. The claim appears to have shifted a bit over the course of this Hearing, and Claimants seem to have abandoned the theories that they earlier advanced. On Monday, for example, Mr. Williams stated: "Res judicata is not a point that I would take as a first level argument before this Tribunal." I believe he conceded earlier that Claimants are no longer pursuing it. Mr. Williams also advised that, despite the amount of ink that was spilled in the Claimants' pleadings on this issue of "consistency," this no longer is Claimants' primary case.

Now, for the sake of good order, we hope that the Claimants will clarify what exactly their merits claims are. As you'll recall, the agreement is that the Parties are going to submit their post-hearing

briefs simultaneously. But, given the way that things have shaken out in this Hearing, it's not entirely clear to us what still remains and what is out. We will show you our understanding of the four theories that remain. But to the extent that we've misunderstood, I hope the Claimants will clarify so that we have the appropriate target for purposes of post hearing briefs.

PRESIDENT PHILLIPS: Just before you leave 12, do you accept that the Supreme Court did, in fact, found liability under Article 217?

MS. SILBERMAN: I believe the Court found liability under both Article 217 and--of the Judicial Code and 1644 of the Civil Code.

PRESIDENT PHILLIPS: Yes.

MS. SILBERMAN: Yes.

Now, Claimants' first theory is that a denial of justice occurred because "no court in the history of the world has ever found that an existing trademark owner should be penalized for merely filing an opposition application." The idea here, essentially, is that this is unprecedented, so it must be a denial

of justice.

But, as a threshold matter, this isn't what the Supreme Court found. That's clear on the face of the Decision itself. And even if it had been unprecedented, that fact alone cannot amount per se to a denial of justice — especially because that conclusion, in essence, would grind to a halt any common law system. If the courts couldn't make precedent, what part of the common law system would remain?

Now, Claimants' second theory is that a denial of justice occurred because "either the judges who issued the Supreme Court Judgment were incompetent and did not know Panamanian law or how to apply it, or they were dishonest, and there was bribery and corruption involved."

Now, on Monday, Claimants made this allegation quite quickly — almost as if it were a casual statement about the weather or traffic. But can you imagine writing these words? Can you imagine saying them? That's what the Claimants are asking you to do. This is the standard that they pointed you to

on Monday. This is the standard that they said applied. And they said that you had to make one of these findings, but it didn't matter which one.

Can you imagine saying it? Can you imagine the uproar if a Panamanian lawyer had said this about the jurists of the Claimants' attorneys' home States? It is a serious, pejorative, and damning accusation, and there must be evidence to support it, but there is none. In fact, even the Claimants' own expert was unwilling to agree with them here.

On Tuesday, Mr. Arjona refused to accept the premise that the endorsement of the Muresa Judgment rendered a Justice incompetent or dishonest. I posed the question to him, and he responded that the premise was "totally inappropriate." That text is not on the slide, but it's on Page 419 of the transcript.

Now, in addition, regarding corruption, Mr. Arjona stated that "it would have been terribly irresponsible of me to make an affirmation to the Tribunal on a matter in which I have no element to rely on."

And this wasn't for lack of seeing the

Claimants' case. As you'll recall, he stated that he reviewed the Memorial; he adverted to the alleged statement by the Panamanian Ambassador; and in one of his expert statements, he confirmed that he had reviewed the Restricted Information. Despite having seen all of that, Mr. Arjona himself saw no basis for alleging corruption.

So, that brings us to the Claimants' third theory, which is that "BSLS did not have a proper opportunity or, indeed, any opportunity, we say, to respond to the Demand Letter." And this assertion is false. I walked you through the chronology on Monday, and the point was then confirmed when the Claimants spent several hours cross-examining Mr. Lee on just the witness and expert testimony from the First Instance Proceeding as it related to the Demand Letter. For the sake of completeness, let's just discuss this again now.

Yes?

ARBITRATOR GRIGERA NAÓN: Could we go back to Slide 14 for a second, please.

Could you go back to Slide 14 for a second.

MS. SILBERMAN: Yes.

ARBITRATOR GRIGERA NAÓN: Isn't it that what your opposing Party is saying is simply setting forth the standard of denial of justice? Either the judges who issued the Supreme Court Judgment were incompetent and did not know Panamanian Law, or they were dishonest and there was bribery there? They're setting the standard.

MS. SILBERMAN: They're asserting that this is true.

ARBITRATOR GRIGERA NAÓN: But would you agree—whether it is true or not, that's something that we have to evaluate—but would you agree that this is the standard?

MS. SILBERMAN: It's an element of the standard, I suppose, with the caveat that denial of justice is inherently a procedural issue. As Professor Paulsson had explained both in his book and his expert report, you need to have a complete systemic failure in the administration of justice. One of the ways he says that that can occur is if there is bribery or corruption in the process, or if the decision is so

manifestly incompetent that reasonable minds couldn't disagree — and that it has to have been something terrible, basically.

So, yes, that is an element of the standard with that background in mind. But again, what the Claimants are asking you is to affirmatively find that this occurred. In the line that I don't have on the screen from transcript 46, they go on to expressly state the Tribunal can find either one of these, but it's happened.

ARBITRATOR GRIGERA NAÓN: But isn't it that your opposing Party is saying, rightly or wrongly, that there are a number of procedural provisions in the Panamanian procedural legislation that have been infringed by the Supreme Court? Isn't that precisely— doesn't that allegation precisely fit within this system?

MS. SILBERMAN: Not in this particular case, and let me explain why.

So, the arguments that the Claimants are advancing in respect of these procedural issues are precisely the same arguments that the Bridgestone

Litigants had raised during the underlying proceeding — in some instances multiple times. And once a party has had an opportunity to be heard on that issue, if the courts reject the procedural argument, that's something that's a matter of discretion.

So, for example, in the ICSID context, if there is an annulment claim and one of the parties asserts that the tribunal should have approved a particular document production request: document production is something within the discretion of the tribunal. So, just because the claimant then raises that argument again on annulment doesn't mean that the annulment committee all of a sudden can decide that issue if it disagrees. It's the same thing here. It's an appeal of a procedural issue, what they're doing.

ARBITRATOR GRIGERA NAÓN: So, in your opinion, it will suffice that there is a procedural issue before the Supreme Court. That procedural issue has been—the other party—the party opposing to the party which raised the procedural issue had the opportunity to be heard, irrespective of whether the

decision of the court of law was proper or not procedurally, there is no denial of justice, just because the other party had the opportunity to be heard? That's your position?

MS. SILBERMAN: Again, it depends on the gradation, I suppose, but if it's something about the admission of a particular document, that is inherently within the authority of the courts to determine. And once the parties present their arguments on that issue, there are only so many levels of appeal that you can go through. The system is what—

ARBITRATOR GRIGERA NAÓN: Here there is no appeal. We are before the Supreme Court.

MS. SILBERMAN: Well, so some of these arguments were made before the Appellate Court as well. These arguments about the Article 877 and 871, I think 856, some of those came up before the Appellate Court. And I would like to confer with my notes, but in addition, they may have come up during the closing of the First Instance Proceeding.

So there was an opportunity to make objections on these procedural grounds; a court heard

them. There was an opportunity to appeal. There was an opportunity to present the arguments on appeal once Muresa and Tire Group were the ones to initiate an appellate proceeding. And then there was an opportunity to address them before the Supreme Court as well.

And so, once you have gone through the system, an international tribunal needs to defer to the local courts on this issue. Otherwise, there would be chaos as arbitrators who aren't from that particular country — who, under the ICSID Convention, don't even need to be attorneys — could potentially be overturning the highest courts in the land or multiple levels of courts in the land of a sovereign State. This is why you can't appeal, and why in this particular case the appeal just doesn't at all come close to the level of a denial of justice.

So, let's move ahead to Slide 17 and talk about the Demand Letter. One of the arguments that the Claimants have focused on in particular over the course of this Hearing is the idea that the Demand Letter was not introduced during the evidentiary

phase.

PRESIDENT PHILLIPS: I'm sorry that we are keeping interrupting you, but that's what this is all about.

MS. SILBERMAN: Definitely.

PRESIDENT PHILLIPS: Can you deal with the seminal question, which I know has been concerning at least one of my colleagues, which is how is the Demand Letter relevant, first of all, to a claim under Article 217. And secondly, if you say there was an alternative claim, to a claim under the Panamanian Law of tort?

MS. SILBERMAN: With your permission, Mr. President, I believe the answer to that will be addressed in the chronology that I'm about to go through. And to the extent that it isn't, I'm happy to answer any additional questions.

PRESIDENT PHILLIPS: Very well.

MS. SILBERMAN: Excellent.

So, just to start by giving you some background, in Panama, the evidentiary phase is broken into two parts. And first, the parties present

evidence or propose evidence for admission, including documents, witness testimony, expert reports, et cetera. And, at bottom, this part of the evidentiary phase involves exchanges of lists.

So, each party identifies the list of affirmative evidence that it would like to submit; the list of counter-evidence,; and the list of objections that it presents to the other side's affirmative evidence and counter-evidence.

But, during this phase — which I believe is the phase that the Claimants are talking about — the witness testimony isn't actually submitted and the expert reports aren't actually adduced. It's just a list of names that are going to eventually come testify.

And all of that takes place — the actual testimony — during the submission of evidence phase as described in paragraph 55 of Mr. Lee's second report.

Now, if I understand it correctly, the Claimants' principal argument is that when Muresa and Tire Group first submitted their list of affirmative evidence, the Demand Letter wasn't on the list — and

that's true. But what was on the list was a set of witnesses, including the president of L.V. International, Mr. Jorge Luque, and there also was a list of questions that were going to be proposed to the experts.

Now, the Bridgestone Litigants had an opportunity to propose counter-evidence to this. And they proposed counter-witnesses--or counter-statements, I suppose — prior witness statements from certain of the witnesses from Muresa and Tire Group. They proposed counter-documents for some things but not for others.

They also had and exercised an opportunity to object to all of this evidence — and those documents are Exhibits C-191 and Exhibit C-192.

Now, in the end, the First Instance Court, exercising its discretion, authorized the witnesses to testify and approved the appointment of experts. You will find that in Exhibit R-106. And after that happened, the witnesses testified, and I walked you through some of this on Monday. At first, they were saying that Muresa and Tire Group had cut down on

sales out of fear, essentially, that the Bridgestone group would come after them. There also were—there also was some testimony of fears being alleged by customers, that the Bridgestone group would come after them as well.

And here's where the Demand Letter came up, because the Bridgestone Litigants started asking every single witness: ”Well, do you have a document that shows that the Bridgestone Litigants required you to do this?” “Do you have a document?” “Where is the document? I'm not going to believe your theory. I'm not going to believe causation. I'm not going believe that you were afraid unless I see a document.”

And so, there were questions of six or seven different witnesses: “Do you have a document,” “do you have a document,” “do you have a document,” “do you have a document?”

And then, on the day that the president of L.V. International was scheduled to appear, he was asked about the Demand Letter, and he testified about it. He testified that he had shared the letter with Muresa and, I believe, Tire Group, and the Bridgestone

Litigants asked questions about it on cross-examination as well.

So, the reason why this came up is because the Bridgestone Litigants considered it important.

So, to give you an example, the other day Mr. Williams sat and questioned and questioned and questioned and questioned Mr. Lee about a citation to a brand-new theory that the Claimants hadn't focused on in their pleadings: "Can you provide a citation?" "What's the leading case?" "Why don't you have the leading case?" "You can't give me any citation?" "What's the citation?" And he adverted to it again today in his closing.

Now, I didn't ask Mr. Lee about it on redirect because, in this proceeding, the time for submitting documentary evidence has passed. If you would like to see these citations, Mr. Lee can provide them to you. We will see if the Claimants have an objection or not. But what happened was the Bridgestone Litigants thought this was relevant, and so it was a response.

PRESIDENT PHILLIPS: But why didn't Muresa

think it was relevant? By the time we get to the Supreme Court, it's the kind of foundation stone of Bridgestone's liability.

I would have expected, if this was—or one of the fundamental reasons for cutting back on selling RIVERSTONE tires, it would have featured in the pleading at the outset.

MS. SILBERMAN: Well, so, I haven't spoken to anyone at Muresa. What I have done is read the 5500 pages of the record, and I can apply my own experience to the question, and suggest: that cases evolve.

Initially, there are sort of "notice pleadings," as Mr. Lee was explaining — there are just a basic identification of generally what has happened. And then, in these proceedings, the evidence comes out. This is when the evidence is happening. The legal arguments don't come up until months afterwards, the "alegatos." I think in the exhibit it's titled "closing arguments," but this is really the "argument."

And the Claimants spent much of their time over the past couple of days focusing on the issue of

the existence of evidence versus the appreciation of evidence and the meaning of the word "ignore." That's not something that came up in their pleadings. I don't remember seeing it in the Request for Arbitration, if it were there, in the Memorial, in the Reply. And now we're at the final hearing, and this is the huge piece of their case.

Things evolve as the parties slowly start to present their arguments. And this came out, and it came out during the evidentiary phase.

So, after this happens — after the witness testifies as to the Demand Letter and the Bridgestone Litigants cross-examine him — then we move to the expert reports. So, we're still in the evidence-gathering phase.

The experts go out and they meet with Muresa and Tire Group. All three experts go and interview them to answer the questionnaire that they had been given to assess damages. And they ask what the cause was for the reduction in sales, and Muresa and Tire Group explain, "We were scared. We were scared that something was going to happen, that tires were going

to be seized, that someone was going to come after us." And the experts pushed them and say, "Why? Why were you scared? Can you show my any document?"

They produce the Demand Letter, and two of the experts, the Muresa and Tire Group expert and also the court-appointed expert, append this document, the Demand Letter, to their expert reports, which they are permitted to do as officers of the court. And then the Bridgestone Litigants have an opportunity to examine all of the experts on this. The issue is then discussed during the legal arguments, the alegatos.

And the Claimants, as you saw the other day, during the redirect of Mr. Lee, even conceded in their Request for Arbitration that, by the time this got to appeal, the Demand Letter wasn't a new document; they said there was no new evidence.

So, in the meantime, there was also sort of a parallel track — which was that L.V. International had submitted a Coadyuvante Petition. And, appended to that Petition was another copy of the Demand Letter.

Now, the Bridgestone Litigants had an opportunity to object. They don't seem to have done

so, and the court also seems not to have decided on this issue during the First Instance Proceeding. So this was one of the first issues that Muresa and Tire Group raised on appeal.

In their request for appeal, they noted that the First Instance Court had not decided the Coadyuvante Petition. So, the Appellate Court says to the First Instance Court: "please go back and decide this." The First Instance Court says, "well, the time when it came in, it was too late, so we're denying it." L.V. International appeals — attempts to intervene in the Appellate Proceeding — and the Appellate Court says, "no, coadyuvantes can be admitted at any stage of the proceeding, including in an appellate proceeding."

And prior to that ruling, the Bridgestone Litigants had objected. So, this is in Exhibit R-103. They challenged: "the form and substance of each piece of evidence submitted with the third-party Coadyuvante Application . . . ." As I mentioned, Exhibit R-103.

Then, the Appellate Court overturns the First

Instance Court — accepts the Coadyuvante Petition, stating expressly that the Petition had contained pertinent evidence. That's at Exhibit R-101, page 2.

And then, following this—and Professor Thomas, this may go to your question from the other day—following this, there is a court order that expressly orders the insertion of the Coadyuvante Petition (of the whole coadyuvante record) into the physical file, the "expediente," of the broader proceeding. So, the evidence is physically inserted into the file — the folder; it is there.

Now, the parties then proceed to discuss the Demand Letter during the rest of the Appellate Proceeding and during the Cassation Request as well. But at no point did the Bridgestone Litigants ever object to certain of the versions of the Demand Letter that were submitted.

So, for example, they didn't object to the copy of the Demand Letter--the admission of the copy of the Demand Letter that had been appended to the court-appointed expert's report. They never requested the First Instance Court to exercise its ex officio

powers to allow new witnesses or to allow counter-evidence. They never made that request of the Appellate Court. They never made that request of the Supreme Court, even though as we've discussed, that option was available. They never even tried.

They made arguments as to relevance, they made arguments about the admission of some of the versions, but ultimately those arguments weren't upheld.

So, that should take care of the Demand Letter.

And I suppose before I turn away: Mr. President, during the pre-hearing call, we had decided to table an issue, which was the question of the Core Bundle, and whether it might be useful to the Tribunal to provide any documents at the Hearing or after the Hearing.

To the extent that it would be useful, we would be happy to compile for you just a collection of the documents from the Panamanian proceedings in chronological order. These are the exhibits, not the 5500 pages, if it would be helpful to read them in

chron order.

PRESIDENT PHILLIPS: We will consider that and let you know, but I don't believe you've dealt with the question I put to you a while ago--

MS. SILBERMAN: (Nods): Why is it important.

PRESIDENT PHILLIPS: —as to the relevance of the Demand Letter (a) to a claim brought under Article 217 and (b) to a claim brought under the Panamanian Law of Tort.

MS. SILBERMAN: So, the reason why the Letter was relevant is because the Court was trying to determine procedural temerity, recklessness, negligence, bad faith. And what had happened was the Bridgestone Litigants had initiated an opposition proceeding in Panama, and the question was sort of: why, how did this happen? Was it initiated in good faith?

And the Supreme Court ultimately examined this question and concluded that if you look at the Demand Letter, it shows that the Bridgestone Litigants weren't doing their homework.

The other day, there was a question about

whether the Bridgestone Litigants knew that this would get to Muresa — or whether they knew. But the issue with recklessness, at least in the United States, is whether you care to look.

The Bridgestone Litigants didn't care. They didn't check before they sent out this letter. They didn't bother to do a country-by-country analysis, or figure out whether it was permissible to be using the RIVERSTONE mark in various countries. We talked about this on the first day when I pointed out the mark had been registered in various countries but there was no attempt made to carve out those countries and say, "well, we only object to the use in the other countries where you don't have a registered trademark already."

The letter expressly states "without doing a country-by-country analysis," our position is that you don't get to use this anywhere in the world, and you are acting at your peril if you do.

Now, the question of whether the Letter is just a letter between BFS Brands and L.V. International and you stop there: there are a couple

of problems with that.

One is that the Letter itself says Bridgestone/Firestone, which is a trade name that many of the Bridgestone companies were using, and this is made clear in the U.S. Opposition Proceeding.

Do you have that document?

So, this is Exhibit C-10, which is one of BFS Brands and Bridgestone/Firestone North American Tire LLC's submissions in the U.S. Opposition Proceeding, and it states: "Opposers use trade names and corporate identifiers"—so "Opposers" were the Bridgestone entities—"use trade names and corporate identifiers dominated by the name Bridgestone/Firestone. Such Bridgestone/Firestone name and identifier has been in use since long prior to any date on which Applicant may rely in this proceeding. In this regard, the ultimate parent company of Opposers is Bridgestone Corporation, and the mark and name 'BRIDGESTONE' is often used with the mark and name 'FIRESTONE' to create a unitary impression conveyed by a composite of the two marks and names 'BRIDGESTONE' and 'FIRESTONE.'"

Now, if you look at the Letter itself, it also is opposing the use of the RIVERSTONE mark everywhere in the world. And those particular Bridgestone entities didn't have the right to use the BRIDGESTONE and FIRESTONE trademarks everywhere in the world.

So it's too superficial — or facile — a conclusion to state, "oh, no, no, this was only BRIDGESTONE--BFS Brands and no one else. And that's assuming that you understand and know the ins and outs of the Bridgestone group. To the layperson who doesn't know all of the issues of corporate members and what each of the entities does, you see Bridgestone/Firestone, and you might think it is the entire group and not one particular entity.

So, the Court took that into account as well other circumstances, like the fact that RIVERSTONE tires had been sold to the tune of millions of dollars in Panama for a very long time, that--which was important because any entity that wishes to police its trademark should be monitoring for use and bringing infringement claims. And the Bridgestone group, and

the Claimants in this case, have stated that that was occurring.

The Court took into account the fact that there was an appeal that was withdrawn. And, as you mentioned earlier, Mr. President, it wasn't a stand-alone fact, it was more of a gloss: that, "listen," the Court said, "the Bridgestone Litigants spent so much time and energy pursuing this claim, this Opposition Claim, only to then withdraw it the appellate phase." And as Mr. Lee stated, that is very unusual in Panama. When people have a strong case, they tend to continue going with the claim, but the Bridgestone Litigants didn't. And the Court didn't say that expressly was reckless. It said, and that gave us reason to question the good faith.

So, what the Court was trying to do was figure out the surrounding circumstances of the Opposition Proceeding, and all of these factors played into that particular finding, which was relevant for recklessness or temerity, and also general negligence.

PRESIDENT PHILLIPS: Thank you. You've answered my question as far as Article 217 is

concerned.

MS. SILBERMAN: Okay.

PRESIDENT PHILLIPS: Is it your case that there was an independent cause of action in tort that arose from the writing of this letter in the United States?

MS. SILBERMAN: I just want to make sure I understand your question.

Is the question: is there an independent finding—is there a possibility of tort in the United States or—

PRESIDENT PHILLIPS: No.

MS. SILBERMAN: Okay.

PRESIDENT PHILLIPS: No.

The claim—

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: —was brought in Panama under Panamanian Law. The claim was clearly advanced by the time it reached the Supreme Court in reliance on Article 217, which was an abuse of process claim.

MS. SILBERMAN: Right.

PRESIDENT PHILLIPS: Was there an alternative

basis for the claim under Panamanian Law—damages caused by making wild threats, for instance?

MS. SILBERMAN: So, the way I understand it is that the causes of action under Panamanian Law—and we've called it "tort" because we are translating both into English and sort of into common law—but technically, the claim is for extra-contractual liability, which--because there is no common law system of torts. So, it's extra-contractual liability that can arise either under the Civil Code, Article 1644, which is the general negligence provision, or — as the Bridgestone Litigants alleged, when they both submitted their first Answers in the proceedings — under Article 217 of the Judicial Code, which relates more specifically to procedural misconduct.

So, the concepts share certain commonalities because the question is still, did you cross some line--or did person A cross some line in their dealings with person B that would give rise to liability in a civil context?

And it would seem to me that if you have

found that someone is reckless, which is a much higher standard, then you would also be finding that they had met the lower standard as well. Recklessness is sometimes defined as "gross negligence." So, it would be subsumed within that context.

ARBITRATOR GRIGERA NAÓN: I think the President is really looking at what the Supreme Court seems to have said. And since my mother language is not English, and since you're fluent in Spanish, allow me.

This is the Supreme Court Decision, Page 19 of the Spanish version. It goes through to Page 20, if you want to have a look at it, but I'm going to read it. We don't have the benefit of a translation but maybe that can be put back—

COURT REPORTER: I thought we do.

ARBITRATOR GRIGERA NAÓN: Oh, we do. Terrific.

SECRETARY TORRES: Yeah, there are interpreters. What we don't have is court reporters in Spanish, but they are Interpreters if you want to put the—

ARBITRATOR GRIGERA NAÓN: If they want to be on, that's fine.

Okay. So, I'm going to read from this part of the Decision (in Spanish): "This is so because, as stated by the Appellants in this cassation remedy, upon observing the notes of page 2622 to 2628 and pages 2955 to 2958, where the legal representatives of the Plaintiffs, in an intimidating manner, indicated that they were going to bring in various countries opposition proceedings against the registration of RIVERSTONE trademark. And adding without legal basis, at least under Panamanian Law, that the Plaintiffs should abstain from selling that product commercially. This is an attitude that is evidently reckless and intimidating." That's the tort.

MS. SILBERMAN: Yes.

ARBITRATOR GRIGERA NAÓN: Now, they're saying under Panamanian Law, but they're not saying why. Because the letter circulated between non-Panamanians in the USA, didn't circulate in Panama, as far as I know, at least on the basis of the record. And what we are trying to understand here is to which extent,

whatever was done procedurally by the Supreme Court, implies infringing some notion of due process.

So do you have any answer to this or any idea? That's the issue.

MS. SILBERMAN: So, first, as I mentioned earlier, the president of L.V. International came to testify during the First Instance Proceeding, and he testified—and I can find the document for you—that he had shared this letter with Muresa, and I believe Tire Group as well, but I would need to check that point. I think the exhibits are C-147 and 148. Yes. C-147, Pages 1 and 2. So, there is evidence that this was circulated within the sort of "RIVERSTONE side."

And as Ms. Lasso de la Vega testified yesterday, it seems only natural that the letter would be circulated within that group of companies because Muresa was the owner of the trademark. So, the other entities were a distributor, was L.V. International, and Tire Group was a manufacturer.

So, if you are the distributor of the RIVERSTONE brand and you get this letter, it seems only natural that it would be shared with the actual

owner of the trademark.

And I don't know the exact relationship between all of the people that were part of these various entities, but they all have similar last names, Luque (in Spanish) lo que sea, which suggests that they were close, related, maybe family members. And so it would be natural that that would be shared, especially when there is this threat about use all around the world.

ARBITRATOR GRIGERA NAÓN: If that is so, it's amazing that, in the grounds for this vague and opaque statement, nothing like that was raised by the Supreme Court as a basis of foundation for this.

MS. SILBERMAN: Well—so, if you go back and look at the cassation pleadings, what the Court is saying here, this statement that there was intimidating manner—I'm just pulling up the relevant part again. It says: "By examining the letter that is in these parts of the record in which the legal representative of the Plaintiffs"—and there was a question about this earlier. I believe it was a reference to the plaintiffs in the Opposition

Proceeding.

So, by sending this note, "in an intimidating manner, indicating that they were going to oppose the trademark in various countries, and stating without legal basis, at least within Panamanian Law, that the Claimants should abstain from the commercial sale of the product, this plainly represents--this represents an attitude that is plainly intimidating and reckless."

The letter itself didn't care where in the world RIVERSTONE was being used. It's--the letter stated: "you cannot use it anywhere. We don't care. We are not going to undertake an analysis of who owns it, of whether they have a right to be using it."

And if that is the attitude, then it does seem to be valid to say that that was reckless, and that that message could be interpreted by anyone who is using the mark as a threat to go after them. If the letter itself doesn't care who uses the mark, who owns the mark, who has rights to use the mark, then I can see how that's reckless.

ARBITRATOR GRIGERA NAÓN: Okay.

PRESIDENT PHILLIPS: Right. I think it's time for a break. Perhaps you would like to know how much time you've got left.

MS. SILBERMAN: Yes. I think much of that, I'm hoping, was questions, so I just have saved enough time for the team. I suppose we will see.

SECRETARY TORRES: Yes. So, by my count, you've used 22 minutes of Respondent's time, and we've used 35 minutes on questions from the Tribunal to Respondent.

PRESIDENT PHILLIPS: So, you've got about 40 minutes—38 minutes of your own time. It may be there'll be more of the Tribunal's time, too.

MS. SILBERMAN: Perfect. Thank you.

PRESIDENT PHILLIPS: So, we'll come back at quarter past 4:00.

(Brief recess.)

MS. SILBERMAN: Thank you, Mr. President.

On the question that we were just discussing, I wanted to flag that there is some additional evidence from the record on this issue.

So, for example, in the Panamanian Opposition

Proceeding, the record from which was then incorporated by the Bridgestone Litigants into the Tort Proceeding, it shows that Bridgestone Licensing had brought up the U.S. Opposition Proceeding. So, this is--so, this is mentioned, for example, in Exhibit R-124, and also in the very first Answer. In the Answer that is submitted by Bridgestone Licensing, which submitted its Answer approximately a year before Bridgestone Japan, it raised the issue of the U.S. Opposition Proceeding. That is Exhibit R-45. There is then on the list of evidence a request to introduce the record from the U.S. Opposition Proceeding, and there is--in the record of the Panamanian Opposition Proceeding, which as mentioned goes into the record of the Civil Proceeding, there is this sort of hearing on the evidence where the Bridgestone Litigants assert that Muresa should know or should have known about the Opposition Proceeding in the United States, and the Opposition Plaintiffs' — meaning Bridgestone Licensing and Bridgestone Japan's —superior rights, priority rights, because of the outcome in the U.S. Opposition Proceeding. So that's Exhibit R-124. And

it ties the U.S. Opposition Proceeding which, on its face, was supposedly only L.V. International and BFS Brands, it ties it to Muresa, and it ties it to the Bridgestone Litigants.

ARBITRATOR GRIGERA NAÓN: I understand all that. So the short answer to my question is: It's irrelevant whether sending this letter in the U.S.A. and to other jurisdiction is or is not a tort under the laws of those jurisdictions. But that, for some reason, it is a tort under Panamanian Law. That's the short answer to my question.

MS. SILBERMAN: I suppose in order for there to be a finding of tort, someone would need to bring the claim first. A court just doesn't go out and pronounce that has been a violation of common law tort. And I will show you in just a few minutes—you asked this question the other day—have there been cases in the U.S. that have addressed this type of issue? There have been those cases. In this particular instance, there wasn't a finding because no claim was asserted in the U.S., at least to my knowledge—

ARBITRATOR GRIGERA NAÓN: But that's not the issue, but that's okay. Go ahead.

MS. SILBERMAN: So, let's turn to the Claimants' fourth theory of denial of justice, which is that the Supreme Court Judgment "is simply impossible to understand." This is something of a motif in the Claimants' opening. You saw this statement, or statements like it, on pages 56, 57, 72, 73, 78, 81, 90, and on and on of the transcript. And the argument seems to be about this chart that the Claimants presented you with, and that table may have had some arguments that you hadn't seen before.

Importantly, though, every single item on the Claimants' demonstrative comes from the Bridgestone Litigants' pleadings in the Civil Proceeding. Many of them come, as I showed you the other day, from the admissibility submission in the Cassation Proceeding, and also from the pleading on the merits in the Cassation Proceeding as well, to the extent that those issues hadn't been raised previously.

So, although the Claimants themselves hadn't focused much on those arguments in this proceeding, it

seems as though when they needed additional inspiration to move forward with denial of justice — now that the res judicata piece has gone away and the consistency theory has gone away — they turn to the pleadings from the Tort Proceeding, and the most recent ones were the cassation pleadings, so they culled from there.

So, this list includes, for example, the argument that it is "impossible" to understand how the Supreme Court could have concluded that the Appellate Court ignored evidence. This is an argument that they raised and lost. Then there is also the issue of the argument that ignoring evidence was a different ground for cassation. This is something that came up in the admissibility phase of the Cassation Proceeding, was the subject of a separate decision by the Supreme Court—a unanimous decision by the Supreme Court—and it's something that the Claimants, until we got to this Hearing, never asserted a treaty claim about.

They were very clear in their pleadings that the only measure at issue was the Final Judgment in the Cassation Proceeding, and now we're hearing these

claims about arguments that were decided in the earlier admissibility decision as well.

And then we also heard arguments about the issue of the withdrawal of the appeal. This came out in opening, it came out during closing, and it came out in the discussion with the experts as well. All of this is an appeal.

And it's a pretty brutal appeal at that. The other day, the Claimants subjected Mr. Lee to an inquisition. It was a 5.5-hour cross during the course of which Mr. Lee was patient; he was respectful; he explained the law in his country. And I didn't have headphones on, and those may have muffled the sound, but from where I was sitting, it was getting heated. Claimants' counsel sounded as though they were shouting.

And in his closing, Mr. Williams asserted that Mr. Lee was "not a satisfactory witness." But he responded to all of the questions. He remained patient, he remained kind, and he's not someone to sneer at. He's not someone who deserves your scorn. He is a former Supreme Court Justice of Panama, who

sat here under very tough conditions, where essentially Claimants' counsel was berating him to explain why the Bridgestone Litigants were wrong. That's not something that justices typically are subjected to, and it's something that shouldn't occur. We don't have appeals, and we shouldn't have appeals like this one.

Now, the Supreme Court Decision, it is possible to understand. It just seems as though the Bridgestone Litigants, or BSLS, or even BSAM, refuse to accept it. So, let me put it in the terms of the Bridgestone Code of Conduct.

The basic principle is that: "Third parties have intellectual property rights, too, and we must always be careful to respect them." And, in practical terms, that means, among other things, doing due diligence before just asserting that someone else shouldn't be doing something. It also involves bearing in mind that, as the Claimants' expert advised, "there are consequences to an improvident letter." And just because you can do something — or just because the law doesn't prohibit you from doing

something — doesn't mean that you should do it. There are still certain rules of decorum, and this is long-standing conventional wisdom. It's common sense and long-confirmed law.

For example, in the United States, which is Claimants' home State, the leading treatise on trademarks lists the following examples of unfair competition: "Filing a groundless lawsuit or administrative challenge as an aggressive competitive weapon . . . .. Sending cease and desist letters . . . charging patent infringement without having a reasonable basis for a belief that there was infringement." I believe the treatise also goes on to mention cease and desist letters in the copyright context as well.

And there is no question that this was aggressive. Mr. Kingsbury testified before the U.S. Trade Representative that this was an "extremely aggressive policy of going after '-STONE' marks." That's at VP-005. And this, by the way, appears to have been the first time that this very aggressive— extremely aggressive policy was rolled out. The

RIVERSTONE brand bore the brunt of this.

So, in short, the Judgment is a reflection of the principle that there simply is "no right, however well-established, which could not . . . [be] abused," depending on the circumstances. It is very important that a country's courts remain flexible and free to draw the line between the proper exercise and the abuse of right.

Now, with all of that stated and with Claimants' merits claims refuted, I return to the question that I posed on Monday and again today: Why are we here?

Mr. Kingsbury asserted that, because of the Supreme Court Judgment, the Bridgestone group must now "take a closer look at whether we enforce or not." You will find this on page 275 of the transcript. And with respect, it's not an acceptable justification for hauling a sovereign State into an international proceeding. A party must always conduct due diligence whenever it exercises legal rights.

Why are we here? Claimants' counsel suggested that the motivating concern was that people

would use the Supreme Court Judgment to build a factual narrative that the Bridgestone Litigants are bullies who use the legal system as a weapon. But if that's the concern, then I really cannot understand why we're here, because bringing a baseless claim as a means of pressuring the Government doesn't seem like an appropriate way to try to clear one's name.

So, with that, Mr. President and Members of the Tribunal, I will turn the floor over to Ms. Gehring Flores, who will explain to you the many problems with the Claimants' theory of injury.

MS. GEHRING FLORES: Thank you, Mr. President, Members of the Tribunal, counsel.

During this Hearing, Claimants and their experts have seriously undermined their claim, whether by demonstrating that this claim is no more than an appeal or by presenting an internally inconsistent and wholly unsupported theory of damages. As you know, Claimants have articulated two claims of injury.

The first is the claim for the full amount of the Muresa Damages Award. The fundamental problem with this claim is that the Claimant seeking relief

for this injury, Bridgestone Licensing, has not demonstrated that it itself incurred this injury.

Mr. President, you and I had a helpful discussion on this subject the other day, and I hope to follow up on that today. I certainly don't want to mischaracterize your questions, but I understand that the concern is that it might not matter whether or not Bridgestone Licensing actually paid or suffered a loss by paying the Muresa Damages Award and whether it used its own funds or someone else's funds.

The question, to put it in its simplest form, is: So what? So what if funds from Bridgestone Americas were used to pay the Muresa Damages Award? The answer is equally simple: the law governing this arbitration.

We are here pursuant to the terms of the U.S.-Panama TPA. In that instrument, the United States and Panama both set forth their consent to the arbitration of investment disputes. That consent is necessarily limited. Neither State consented to open itself up to any claim by any private entity or, indeed, any claim submitted by one party on behalf of

the other. In this respect, the jurisdictional requirement that a Claimant submit a claim that it has incurred loss is no different than any other jurisdictional requirement in the Treaty in that it must be assessed with respect to each Claimant and each Claimant alone.

Consider, for example, the requirement of an investment at TPA Article 10.29. When a State raises an objection that a claimant does not have an investment within the meaning of a treaty, a tribunal will consider the alleged investment held by that claimant alone. In this case, as the Tribunal will recall, Panama raised just such an objection with respect to Bridgestone Americas. When the Tribunal assessed the nature of Bridgestone Americas' investment, it did not consider the assets held by Bridgestone Corporation, which is Bridgestone Americas' parent company, nor did it take into account the assets held by Bridgestone Licensing, which is Bridgestone Americas' sister company. The Tribunal looked at Bridgestone Licensing--and Bridgestone Licensing alone.

The same is true for the requirement of nationality, and that's found at TPA Article 10.29 as well. It is the individual claimant entity and not any of its family members that must meet that requirement, that very important requirement. Again, the same is true with respect to injury, here. Admittedly, that may seem a bit strange as a matter of domestic law, but the Treaty, the governing law in this investment arbitration, is extremely clear in this regard. Each Claimant must have incurred an injury on its own.

So, what are the facts here? Bridgestone Licensing transferred the full amount of the Muresa Damages Award to the Muresa plaintiffs. It did so using funds that were sent to it by Bridgestone Americas. In other words, it was a pass-through mechanism--nothing more. Bridgestone's financial data is illustrated on the chart on your screens.

The Parties actually agree on the relevant standard for damages. Under the standard articulated in the Chorzów Factory Decision, reparation must put the Party in the position that it would have been but

for the alleged breach. The alleged breach here is the Supreme Court Decision. Therefore, Bridgestone Licensing must claim that it would have had $5.4 million but for the Supreme Court Decision.

The question we must ask ourselves is: But for the order of damages of the Supreme Court, was Bridgestone Licensing put in a worse financial position?

First, the financial data speaks for itself. Bridgestone Licensing is not in a worse financial position.

And, second, even if one were to consider Bridgestone Licensing has been worse off due to the so-called "loan" for the full amount of the Muresa Damages Award, the Supreme Court damages award was not the cause of that inter-company transfer.

So, what was the cause? Claimants have confirmed what we suspected before: Bridgestone group funneled the funds through Bridgestone Licensing for the purposes of securing jurisdiction under the TPA. Claimants have insisted that there was nothing wrong in doing so. The TPA, according to the Claimants, is

no more than an insurance policy. I reiterate again: On behalf of one of the sovereign States that signed this Treaty, the TPA is not and cannot be an insurance policy, and Maffezini, which is located at Respondent's Legal Authority 74, and its progeny have made that quite clear.

But, in any event, let's briefly suspend reality and descend into a world in which Claimants can treat and use this bilateral treaty as an insurance policy. Even insurance policies are not to be considered interchangeable and flexible at anyone's discretion.

Claimants have conceded that they could have--in fact, Bridgestone considered whether to split the Muresa Damages Award between Bridgestone Corporation and Bridgestone Licensing. These two companies previously memorialized that very arrangement in a 2010 Agreement that they would split 50:50 all of the costs of their conduct.

Now, I just want everyone to remember that Claimants falsely denied the existence of this Agreement. We didn't get it until Sunday, until maybe

five days ago.

So, let's consider that context. And as you'll see, the descriptions and the characterizations by counsel of these documents tend to change, and they have been changing just over the past few days. In any event, the 2010 Agreement is on the record as Exhibit C-318, but, as Mr. Kingsbury conceded, the companies decided not to comply with the terms of that agreement. Instead, they adopted a new agreement two years after the Muresa Damages Award was issued, whereby Bridgestone Licensing would assume the full amount of the Muresa Damages Award, and we know why--now we know--and that 2016 Agreement is on the record as Exhibit R-95.

Now, I urge you to look at the actual language of the 2016 Agreement. That way you will understand what the parties understood the 2010 Agreement to mean contemporaneously, at the time, not a post hoc justification by counsel.

And just recall: Claimants submitted the 2016 document to us as the 2016 Resolution, or that's what we called it, when we put it on the record, when

we found it in their document production. We called it a "resolution." They later said--and then we asked for the actual 2016 Agreement. What did counsel say? "Oh, no, no, no, no, no. The 2016 Resolution is the Agreement." Just moments ago you heard from counsel that "No, no, no, this is a resolution" now because "resolutions can't change the terms of an agreement."

Consider the duplicity. This is in the context of a document where Claimants falsely denied the existence.

Claimants' only response to this evidence has been that this was a genuine loan; but, as the Tribunal pointed out, the repayment date on the purported loan agreement wasn't complied with. Instead, the loan has been and will be rolled over. Why? Because it's contingent on the outcome of this arbitration, a fact that was again conceded by Claimants. So, according to Claimants, it's a real loan. It's a real loan as long as you ignore the inconvenient fact that the terms of the loan agreement are not, and never were, considered to be binding by either of the parties to the loan. Yeah, that's a

real loan.

For these reasons, Bridgestone Licensing cannot recover the Muresa Damages Award because the claim is precluded by the explicit terms of the governing law. In any event, Bridgestone Licensing failed to mitigate its alleged loss and, therefore, could at most recover only half of the amount.

I will now turn to the second claim for injury: Claimants' joint claim for some other loss.

If we were hoping for clarity from the submission of Claimants and their experts, we were sorely disappointed. The Hearing has provided Claimants and their experts the opportunity to accumulate even more contradictions about the most basic elements of their theory of injury. Given our time constraints, I will touch on only a few of these fundamental tensions in Claimants' theory.

The first question is: What is the injury? Let's start at the beginning.

What is the direct impact of the Supreme Court Judgment? Claimants' U.S. IP expert testified in no uncertain terms that the effect of the Judgment

was to make it unlawful to pursue — unlawful to pursue — an opposition against a mark in use in Panama. When asked about the statement on your screen during her testimony before you, she doubled down and insisted that her U.S. experience qualifies her to make this determination about what a judgment in tort meant for the legal regime in Panama. Unfortunately, she failed to consult with her fellow expert Mr. Molino, Claimants' Panamanian IP expert. You may recall that I asked Mr. Molino a series of questions about the current trademark legal regime in Panama. I asked if companies and other entities are today still registering trademarks in Panama.

Not surprisingly, the answer was "yes."

I asked Mr. Molino if he continues to bring oppositions on behalf of his clients?

The answer was: "Yes," business is good.

I asked whether some of those oppositions are against marks that are already in use in the market.

The answer was "yes."

"Yes." This means that directly contrary to Ms. Jacobs-Meadway's claim, it is not unlawful to

bring opposition proceedings against marks that are already in use.

Finally, I finally asked Mr. Molino whether the trademark owners who bring these opposition proceedings always lose?

The answer was "no." Mr. Molino himself wins sometimes.

So, it doesn't sound like it's now unlawful to bring those claims in Panama, does it? So much for that pillar of Claimants' injury claim.

The next question is equally foundational — the question as to whether the alleged damage has already been incurred or has the potential to be incurred.

In this regard, I will recall that the Treaty language is specific about the need to demonstrate existing, rather than future, loss. The United States also affirmed that speculative injury does not fall within the jurisdictional requirements set forth in the TPA.

Now, Claimants stated at the outset of this Hearing that they would demonstrate the present

existence of loss. Yet, during her testimony, their trademark expert was very clear that her opinion is that there is the potential for damage to the value of the trademarks.

According to counsel, the heart of that damage is a "chilling effect." That's the phrase that we've heard time and time again.

So, what exactly is being chilled? What conduct is Bridgestone so afraid to take? Counsel would have you believe that Bridgestone is suddenly too fearful to bring trademark opposition proceedings and enforce its rights such that confusingly similar products will flood the market.

Unfortunately, for Claimants, Mr. Kingsbury said the opposite. He admitted that Bridgestone has succeeded in a number of opposition proceedings in Panama since the issuance of the Supreme Court Decision. Mr. Kingsbury then acknowledged that "prudent trademark owners" typically conduct due diligence before taking opposition or infringement actions. The same was affirmed by Ms. Jacobs-Meadway.

Mr. Kingsbury then explicitly described the

impact of the Supreme Court Judgment on the Bridgestone group in practice. He stated, and I quote: "We have to take a closer look at whether we enforce or not."

They will have to "take a look." They have to decide whether their claims have merit before they pursue them. Although this may be a groundbreaking strategy for the Bridgestone group, it is not injury.

There is one final issue with respect to Claimants' alleged injury, and it emerged during this Hearing. The question is: If there has been this sea change in Panamanian trademark law or practice, then wouldn't the alleged impact affect not only Bridgestone Corporation and Bridgestone Licensing, but also all trademark owners in Panama?

Counsel for Claimants' responded in the affirmative. Under the Claimants' theory, the Judgment would, indeed, impact all trademark owners in Panama. Yet again, Claimants apparently failed to consult their own experts.

I asked Mr. Molino: "Do you believe that all trademarks in Panama have been devalued due to the

2014 Supreme Court Decision?"

"No."

With that in mind, we need not even proceed to the question of quantum, but if we were to do so, we would find an equally ill-founded set of submissions to consider.

And now I will consider the question of the President with respect to ex post and ex ante damages analysis.

So before I turn to Mr. Daniel's submissions on damages, I would like to address the question posed by the President this morning.

Mr. President, as I understand it, you had asked about the appropriate standard to apply when assessing value, and specifically whether to apply the ex ante or ex post approach.

This question has been addressed by international tribunals as well as in the two treatises cited by Mr. Shopp earlier today. The simple answer is that the ex ante approach is used in the context of expropriation claims because the ex ante approach values the asset immediately before the

expropriation.

By contrast, the ex post approach considers information about the value of the subject enterprise or asset after the breach in question. This ex post approach is appropriate for other non-expropriation claims.

As stated in the Marboe treatise, which is on the record as Exhibit VP-3: "The choice of a Valuation Date as late as possible ensures that all information available until that date may and can be used in order to arrive as closely as possible at full reparation."

That section includes cites to investment case law, including the Amco Asia versus Indonesia Award.

Similarly, the Ripinsky treatise, which is on record as Exhibit VP-0004, confirms that: "Under the non-expropriatory case analysis," as in here, "where the aim of compensation is to re-establish the situation which would in all probability have existed if that act had not been committed, information changes should logically be taken into account."

That general aim of re-establishing the situation that would have existed but for the breach is set forth in the Chorzów Factory Judgment at Exhibit CLA-86.

The same is true in this case, which does not involve an expropriation claim. Claimants dropped that one.

We have real-world data about the performance of the FIRESTONE trademark and BSAM's Licenses in Panama since the issuance of the Judgment over five years ago. It's logical and necessary to include such data in any serious and comprehensive damages analysis.

Oh, and I just wanted to note for the Tribunal as well: Mr. Daniel asserted that the approach--which approach the Tribunal uses, whether it's ex ante or ex post, is not relevant for at least his damages analysis. In Paragraph 43 of his Second Report, he states: "Based on the foregoing, if the Tribunal determines that the Claimants have sustained damages through diminished value of the Subject Trademarks attributable to the Supreme Court Decision,

utilizing ex ante and ex post frameworks would result in the same damages conclusion because the underlying defect remains uncured. And this, I presume, is what Mr. Daniel means when he says that his damages analysis is "independent of elapsed time."

In their opening presentation, Claimants perfectly summarized the mission on which Mr. Daniel embarked when he submitted his two Expert Reports. Counsel noted that Panama's expert considered the real-world financial data demonstrating the performance of Bridgestone in recent years.

Seeing no change, Mr. Shopp concluded that there was no evidence of injury. But Mr. Daniel was not content with that answer, so he set out to find and quantify an injury pulled not from evidence but from counsel's instructions. Mr. Daniel eventually conceded as much after questioning from the Tribunal.

Specifically, he assumed that, overnight, after the Supreme Court Judgment, Bridgestone suddenly had non-exclusive rights. Unfortunately, Mr. Daniel was unable to define "non-exclusive rights," which more than calls into question the analysis that flowed

from this assumption. Indeed, he could not even affirm whether Bridgestone's rights in Panama are non-exclusive.

Now, counsel for Claimants just stated that Ms. Jacobs-Meadway is the legal basis for Mr. Daniel's damages analysis. Ms. Jacobs-Meadway does not state that the injury is non-exclusivity. Mr. Daniel says that non-exclusivity is the basis for his Damages Report. And, in fact, you'll find at the Transcript, at Page 1004, Mr. Daniel says that if you don't find non-exclusivity, if this Tribunal doesn't find non-exclusivity, then his damages analysis is useless. You throw it out. So, I believe counsel just conceded that they no longer have a damages case.

Why did I ask him about it in the first place? If you don't know what the injury is, if we don't know what "non-exclusivity" means, then we don't know how to test his hypothesis. How exactly will trademarks become non-exclusive because of the Supreme Court Decision in Panama?

But more importantly, how do Claimants' trademarks become non-exclusive in the BSCR Region?

How do trademarks become non-exclusive because of the Panamanian Supreme Court Decision in the United States and Canada, which are two of the many countries in the BSCR Region? I ask you that. The concept is ludicrous.

In any event, Mr. Daniel, as you know, ended up altering the approach from his first--in his Second Report from his First Report. We went through this. In doing so, he doubled his damages, because [A] equals 2[B], and therefore, the trademark value to the Licensor is the same as the value to the Licensee. Claimants' case on injury and quantum has simply fallen apart.

Ms. Kepchar earlier said that lightning can strike tomorrow. In Claimants' case, it's always tomorrow. This reminds me of Lewis Carroll's "Through The Looking Glass": “Jam tomorrow, jam yesterday, never jam today.” It's always "tomorrow" in Claimants' world. Their damages case is insupportable, and it makes absolutely no sense.

I cede the floor to my colleague, Mr. Whitney Debevoise.

MR. DEBEVOISE: Good afternoon, Members of the Tribunal. I think that you have heard from my colleagues that there really is nothing left in this case, but I thought I might perhaps be of a little additional assistance on the question that Mr. Grigera Naón asked concerning what is the standard.

It's unfortunate that Claimants didn't want to cross-examine Professor Paulsson, and the Tribunal decided not to invite him as well, but I would commend to you the Report that he wrote. And it might be worth recalling one or two of the passages in his Report and some of the citations in particular included in the Report.

He said in his Report that: "The obligation under international law is to have a system of a certain kind, thus focusing the inquiry for a denial of justice on a systemic failure rather than a specific decision or judicial act. It is a prerequisite of State responsibility arising under international law that there be finality under domestic law."

There are three instances in Panama: trial

court, intermediate appellate court and the Supreme Court. Your job is not to be the fourth instance. That's an important principle of international law. The principle of judicial finality requires the exhaustion of all local remedies, and is a substantive element of the delict of denial of justice. That addresses the question of what is BSAM doing in this case. It did not participate below. It could not have been denied justice.

And that is a natural corollary of another important point that Mr. Paulsson made in his Report, which is that denial of justice is always procedural, and there is no place for substantive denial of justice.

Of the successful denial of justice claims in investor-State proceedings, the majority have been for either violation of access to a judicial process or violation of access to justice within a judicial process; i.e., due-process violations that have been apparent on their face.

And what we saw in this case was an initial submission by Claimants complaining about violation of

Article XYZ and NYZ and ABC of the code of evidence. They had plenty of opportunity to deal with all of those issues, as I think we have demonstrated to you. Repeated efforts to raise those same issues. Was there any refusal by the courts of Panama to entertain those? No. They were all addressed.

And there was a lot of effort by the Claimants to fuzz the different phases of the proceedings in Panama and when you could put in evidence and what can come in on an expert report and so forth.

But have you heard one word this week from Claimants denying that this Letter exists, that it's not authentic, that it's not real? This is an international tribunal. If they had that complaint, we would have heard it a long time ago. That Letter was very real, and it was threatening.

And that goes to another question that was asked by Mr. Grigera Naón, which is: what is the applicable law?

This case, which is being objected to by Claimants, was a tort proceeding in the courts of

Panama. The standard choice-of-law rule for torts is that the law of the place of the tort governs. The law of the place where the proceeding is brought here is Panama, and it was Panamanian law, and it was entirely up to the courts of Panama to make a decision about whether the perception by Muresa that this Letter was threatening and intimidating was reasonable or not. And that's what they did, and that cannot be questioned now in an international tribunal.

So, I hope that those points are helpful to you on some of the questions that had been out there.

I know at one point Lord Phillips indicated that an argument we were advancing was very technical, but, unfortunately, we are in a treaty regime, and we have to be very technical.

I think it's worth recalling: what was the origin of denial of justice? In the old days, countries had absolute immunity, and investors traveled the world entirely at their own peril, save for one avenue, which was the possibility of diplomatic protection. If a country did something untoward to them, they had to convince their own

government to bring a claim against the other country.

Now we have a treaty regime which is the modern manifestation of that system, but the countries that enter into these treaties do so only in a very limited way. That's why their reading has to be technical because we have to remember that the treaties are reciprocal, and what's sauce for the goose is sauce for the gander.

PRESIDENT PHILLIPS: Those, I'm afraid, must be your last words.

MR. DEBEVOISE: All right. Thank you.

PROCEDURAL DISCUSSION

PRESIDENT PHILLIPS: Very well.

Now, then, let's just make quite sure that we are all ad idem as to what is going to happen.

Post-Hearing briefs will be delivered by the 25th of September.

Statements of Costs by the 16th of October, and we invite the Parties to submit Statement of Costs which simply deal with figures. We are not inviting argument as to how costs should be apportioned.

MR. WILLIAMS: Mr. President, I had a

question as to what level of detail in terms of costs would assist the Tribunal.

At the Expedited Objections phase, I think the Parties took a different view as to the level of detail in terms of figures that would assist you. And I would find it very helpful, if you would, if you could provide some guidance.

PRESIDENT PHILLIPS: Well, for myself, I'm not in a position to give you guidance in detail at this moment and, indeed, I'm not aware of precisely the nature of the dispute between the Parties.

MR. WILLIAMS: There's no dispute. There's no dispute. It's just all I want to do is to make sure that you have the level of detail that would be useful to you.

I mean, it may be something that you don't need to assist us with now, but if you are able to reflect on the submissions that each Party put in last time and just give us a steer as to which approach you would find most helpful this time.

I raise this only because if a more detailed approach is needed, that actually tends to generate

quite a lot of work, and I'm just interested in efficiency.

PRESIDENT PHILLIPS: I'm all for that.

And to be honest, having taken the decision in principle that we were going to defer considering costs, I suspect that none of us looked very closely at the figures that were presented last time.

So we will have a look at them and give an indication if we don't think that the approach that has been adopted is satisfactory.

MR. WILLIAMS: I'm very grateful.

PRESIDENT PHILLIPS: The Ambassador, when he comes to give evidence, is to be furnished with the record in the form of a USB. This was unless the Parties otherwise agree. I don't imagine they have reached an agreement to the contrary, that he should be burdened with 5,000 pages. No.

Transcript. The United States has requested Transcripts--

(Tribunal conferring.)

PRESIDENT PHILLIPS: It's suggested that the Parties may want to agree that a certain amount of

physical material be put before the Ambassador if they so agree. The Tribunal is likely to be happy with that.

MR. WILLIAMS: From our side, I think that's eminently a good idea, and so we will give serious thought to that and cooperate with the Respondent in order to produce what I think will be a fairly short bundle.

MS. GEHRING FLORES: I guess we do plan on having counsel in Panama with the Ambassador, so perhaps if you could provide us--I'm not exactly sure how you want to agree to provide us with his examination bundle. If it's limited enough, I'm sure that we could probably deal with it electronically. If you would prefer not to disclose the examination bundle to the Ambassador well in advance, that might be an issue. I'm not exactly sure if you're planning on going to Panama to examine the Ambassador.

MR. WILLIAMS: I think the short answer is that we will discuss this with you without taking up the Tribunal's time, but I'm sure that both sides, in the spirit of cooperation, would want to come up with

a way of resolving this in an efficient way.

MS. GEHRING FLORES: Absolutely.

SECRETARY TORRES: Lord Phillips, I'm sorry, may I suggest that we sort of establish a date by which you could let the Tribunal know what the Agreement is so that we all are clear on what's going to happen on that day of the VC, what to plan for?

MS. GEHRING FLORES: Is a week's time sufficient for Claimants? It's up to you.

MR. WILLIAMS: I'm on holiday next week.

MS. GEHRING FLORES: Understood.

MR. WILLIAMS: I think, if we may--I mean, I fully understand the need to resolve this well in advance. If we may, can we propose a time that we give more than adequate opportunity, then, to organize the logistics after today's hearing?

PRESIDENT PHILLIPS: I think that's fair enough.

The Tribunal, I think, will wish to have copies of any bundles you've agreed before the Hearing.

I should just record that redacted

Transcripts will not, as I understand it, be available until the 30th of August, and the United States will have to await receiving their Transcripts until they are available in that form.

Finally, we were offered a single chronological bundle of the--an emasculated bundle of the Tort Proceedings. For myself, I would welcome that.

Yes, my colleagues would as well. Thank you very much.

MS. GEHRING FLORES: We're happy to provide that, Mr. President.

PRESIDENT PHILLIPS: So, really it remains to thank everybody for their assistance in this Hearing.

SECRETARY TORRES: Mr. President?

PRESIDENT PHILLIPS: Yes? Something else remains? What's that?

SECRETARY TORRES: No, I just wanted to explain the issue of the United States clearly because I don't think I have stated it in the record.

The United States inquired whether they could have access to the Transcripts of the Hearing, and I

think I've raised the question with the Tribunal. I think because the Procedural Order states that the Parties will agree on redactions to the Transcript by August 30th, my later instruction from the Tribunal would be to respond to the United States, which I will do, that they will have access to the Transcript right after those redactions are done.

So that's what I will respond to the United States.

PRESIDENT PHILLIPS: Right. Well, all I was going to say is very many thanks to those who have been recording and translating, who have done, I would say, a most magnificent job.

MS. GEHRING FLORES: Thank you.

(Whereupon, at 5:05 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